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## COMMISSION IN COURT SESSION—Unions—Application for Orders under Section 72A—

2024 WAIRC 00057

APPLICATION PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2024 WAIRC 00057
<b>CORAM</b>	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
<b>HEARD</b>	:	ON THE PAPERS
<b>DELIVERED</b>	:	WEDNESDAY, 7 FEBRUARY 2024
<b>FILE NO.</b>	:	CICS 5 OF 2023
<b>BETWEEN</b>	:	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Applicant AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS Respondent LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) Intervenor
<b>FILE NO.</b>	:	CICS 8 OF 2023
<b>BETWEEN</b>	:	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS Applicant AND WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Respondent LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) Intervenor
<b>FILE NO.</b>	:	CICS 9 OF 2023
<b>BETWEEN</b>	:	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL

## AND SERVICES UNION OF EMPLOYEES

Applicant

AND

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

Respondent

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

Intervenor

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Catchwords	:	Industrial law (WA) - applications pursuant to s 72A - coverage of employee organisations - local government – application for intervention by peak body granted – application to vary order and directions for programming - Applications granted
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 27(1)(k) <i>Local Government Act 1995</i> (WA)
Result	:	Orders and directions issued

**Representation:**

<b>Applicant</b>	Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
<b>Respondent</b>	Mr J Nicholas of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
<b>Intervenor</b>	Mr K Trainer as agent on behalf of Local Government, Racing and Cemeteries Employees Union (WA)
<b>Proposed Intervenor</b>	Mr D White of counsel on behalf of the Western Australian Local Government Association

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**Case(s) referred to in reasons:**

*R v Ludeke; Ex parte Customs Officers Association of Australia*, Fourth Division (1985) 155 CLR 513

Re Applications by The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers and The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch (1999) 79 WAIG 2998

*Reasons for Decision***COMMISSION IN COURT SESSION:**

1 There are two matters before the Commission in Court Session. The first is an application filed by the Western Australian Local Government Association under s 27(1)(k) of the *Industrial Relations Act 1979* (WA) for leave to intervene in the proceedings. The second matter is the exercise by the Western Australian Municipal, Administrative, Clerical and Services Union of Employees of the liberty to apply under par (7) of the order and directions made by the Commission in Court Session on 20 December 2023.

**Intervention application**

- 2 We turn to deal with the intervention application first. The WALGA is a body corporate established under the *Local Government Act 1995* (WA). It is and has been the peak representative body for local government entities since its establishment in December 2001. It advocates for, and represents some 139 local governments and seven regional councils across the State. As a part of its representative function on behalf of local government entities, the WALGA engages in industrial relations policy, legislative reform and advocacy on behalf of members, in employee relations and industrial relations matters.
- 3 Further, whilst the WALGA is not an organisation registered under Part II Division 4 of the *Act*, it has taken and takes part in high level engagement with the State Government and other parties, on behalf of the local government sector in relation to industrial relations and related matters.
- 4 The application made by the WALGA to seek leave to intervene in these proceedings, encompasses the matters to which we have just referred, but in addition, the WALGA also refers to proceedings in the course of 2023 before the Commission, in which it has taken part on behalf of local government employers with a recognised interest in doing so. The WALGA contended in its grounds for application for leave to intervene, that the current proceedings will have significant implications for its members in the State industrial relations system. Accordingly, it submitted that the WALGA has, consistent with the objects of the *Act* in s 6, a sufficient interest to be granted leave to intervene.
- 5 The application for leave to intervene is not opposed by the other parties to the proceedings or the LGRCEU, as intervenor.
- 6 The Commission may, on application, permit a person leave to intervene, on terms as it thinks fit, if the Commission is of the opinion that the person has a sufficient interest in the matter. The relevant principles applicable to a person's application for leave to intervene are well settled. As discussed in *R v Ludeke; Ex parte Customs Officers Association of Australia*, Fourth

*Division* (1985) 155 CLR 513, a direct but also an indirect interest may be sufficient to warrant the grant of leave to intervene (per Gibbs CJ at 421; Mason J at 422-423). In the circumstances, we are satisfied that WALGA should be granted leave to intervene in these proceedings.

#### Variation to order and directions

- 7 The second issue relates to a variation to the order and directions issued by the Commission in Court Session on 20 December 2023. The relevant directions for present purposes, require the WASU and the LGRCEU to file documents they intend to rely upon in support of the applications and outlines of any evidence of persons they intend to call as witnesses, by 9 February 2024.
  - 8 By an email of 1 February 2024, the solicitors for the WASU sought, in accordance with the liberty to apply in par (7) of the order and directions, a variation to their terms. A draft minute of proposed orders and directions submitted by the WASU, raised two things. First, assuming that the WALGA is granted leave to intervene in the proceedings, it is proposed that it file a response to the applications by no later than 16 February 2024. Second, that the present date of 9 February 2024, for the WASU and the LGRCEU (and the WALGA if granted leave to intervene) to file documents and outlines of evidence, be extended to no later than 15 March 2024.
  - 9 The LGRCEU does not object to the proposed varied directions and nor does the WALGA, if granted leave to intervene.
  - 10 The WASU submitted that the application for the WALGA to have a reasonable time to file responses to the applications and that the WASU and the LGRCEU have a further reasonable time to consider the WALGA responses before filing their documents and outlines of evidence, was meritorious. It was contended that the responses filed by the WALGA may have an effect on the evidence that the WASU and the LGRCEU may seek to lead at the hearing of the applications.
  - 11 It was further submitted that the amended timetable will not prejudice the CFMEUW. The WASU contended that if the WALGA is granted leave to intervene, as the directions currently stand, it would have to be given time to file documents and outlines of evidence, after the current date of 9 February 2024. The CFMEUW will be able to file responsive material some time later. Accordingly, aligning the filing of documents and outlines of evidence for the WASU, the LGRCEU and the WALGA at this stage of the proceedings, will not lead to any material delay nor impose any prejudice on the CFMEUW, according to the WASU.
  - 12 Furthermore, the WASU contended that staff absences over the Christmas and New Year period have impacted the WASU's capacity to prepare its evidentiary material.
  - 13 The CFMEUW opposed the WASU request on a number of bases. First, it referred to the proceedings before the Commission in Court Session in November 2023, in which it was foreshadowed that an amendment to application CICS 5 of 2023 brought by the WASU would cause delay and increase the time taken to deal with the proceedings. Second, it was submitted that the Christmas and New Year period was considered by the Commission in the order and directions made on 20 December 2023. Third, the prejudice identified by the CFMEUW at the hearing to consider the WASU amendment application has now materialised. Finally, it was contended that the evidentiary case advanced by the WASU and the LGRCEU can be filed regardless of the WALGA position.
  - 14 For these reasons, the CFMEUW contended that the proposed variations to the order and directions of 20 December 2023 should be refused.
  - 15 We do not consider that the Christmas and New Year holiday period is a sufficient basis to seek a variation to the 20 December 2023 order and directions, given there was due allowance made for this when they issued. However, the grant of leave to intervene to the WALGA, and its participation in the proceedings on behalf of local government employers does, in our view, constitute a ground upon which there ought to be reconsideration of the timetable concerning the filing of documents and outlines of evidence, as set out in the current order and directions.
  - 16 We think it would be both prudent and helpful for the WALGA to file its response to the applications before the parties and the LGRCEU file their documents and outlines of evidence. The attitudes of employers is a relevant consideration in the exercise of the Commission's discretion under s 72A of the *Act: Re Applications by The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers and The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch* (1999) 79 WAIG 2998.
  - 17 We consider that it would assist the conduct of the proceedings for the WASU and the LGRCEU to file their materials in light of the position to be stated by the WALGA in relation to the applications. Similarly, being granted leave to intervene, the WALGA should also be required to file its documents and outlines of evidence at the same time as the WASU and the LGRCEU. As we have already mentioned, the CFMEUW will then have the opportunity to answer the cases of the WASU and the intervenors.
  - 18 Accordingly, we are of the view that the timetable set out in the order and directions of 20 December 2023 should be varied in accordance with the liberty to apply, in the terms of the minute provided by the WASU and the LGRCEU, with the exception that the filing date for materials will be 13 March 2024, and the applications will be listed for a further directions hearing on 15 March 2024 at 9.15am. Furthermore, the Commission in Court Session also foreshadows that it will shortly request from the parties and intervenors, an estimate of the time that the proceedings will take to hear, with a view to settling tentative listing dates.
  - 19 Minute of proposed orders and directions now issue.
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2024 WAIRC 00062

**APPLICATION PURSUANT TO S 72A**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES**APPLICANT**

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

**RESPONDENT**

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

**INTERVENOR****FILE NO/S**

CICS 5 OF 2023

**PARTIES**

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

**APPLICANT**

-v-

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES**RESPONDENT**

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

**INTERVENOR****FILE NO/S**

CICS 8 OF 2023

**PARTIES**WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES**APPLICANT**

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

**RESPONDENT**

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

**INTERVENOR****FILE NO/S**

CICS 9 OF 2023

**CORAM**CHIEF COMMISSIONER S J KENNER  
SENIOR COMMISSIONER R COSENTINO  
COMMISSIONER T EMMANUEL**DATE**

FRIDAY, 9 FEBRUARY 2024

**CITATION NO.**

2024 WAIRC 00062

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<b>Result</b>	Orders and directions issued
<b>Representation</b>	
<b>Applicant</b>	Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
<b>Respondent</b>	Mr J Nicholas of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
<b>Intervenor</b>	Mr K Trainer as agent on behalf of Local Government, Racing and Cemeteries Employees Union (WA)
<b>Proposed Intervenor</b>	Mr D White of counsel on behalf of the Western Australian Local Government Association

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*Orders and Directions*

HAVING heard Mr C Fogliani of counsel on behalf of the WASU and Mr J Nicholas of counsel on behalf of the CFMEUW and Mr K Trainer as agent on behalf of the LGRCEU, and Mr D White of counsel on behalf of the WALGA, the Commission in Court Session pursuant to the powers conferred on it by the *Industrial Relations Act 1979 (WA)*, hereby –

- (1) ORDERS that the WALGA be and is hereby granted leave to intervene in applications CICS 5 of 2023, CICS 8 of 2023 and CICS 9 of 2023.
- (2) DIRECTS that on or before 16 February 2024, the WALGA file a response in applications CICS 5 of 2023, CICS 8 of 2023 and CICS 9 of 2023.
- (3) DIRECTS that pars (5) and (6) of the Commission's order and directions dated 20 December 2023 be and are hereby revoked and that on or before 13 March 2024, the WASU, the LGRCEU, and the WALGA are to file:
  - (a) any documents they intend to rely upon in support of applications CICS 5 of 2023, CICS 8 of 2023 and CICS 9 of 2023; and
  - (b) an outline of evidence for each witness whom they intend to call to give evidence in support of applications CICS 5 of 2023, CICS 8 of 2023 and CICS 9 of 2023, such outlines of evidence to comply with Practice Note 9 of 2021.
- (4) DIRECTS that the matters be listed for a further directions hearing on 15 March 2024 at 9.15AM.
- (5) DIRECTS that the parties, the LGRCEU and the WALGA have liberty to apply.

(Sgd.) S J KENNER,  
Chief Commissioner,

By the Commission in Court Session.

[L.S.]

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## COMMISSION IN COURT SESSION—Awards/Agreements—Variation of—

2023 WAIRC 00811

**REVIEW OF RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD SCOPE CLAUSE PURSUANT TO S 37D OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

COMMISSION'S OWN MOTION

**APPLICANT**

-v-

(NOT APPLICABLE)

**RESPONDENT**

**CORAM**

COMMISSION IN COURT SESSION

CHIEF COMMISSIONER S J KENNER

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

**DATE**

THURSDAY, 12 OCTOBER 2023

**FILE NO/S**

CICS 5 OF 2022

**CITATION NO.**

2023 WAIRC 00811

**Result**

Order issued

**Representation**

Ms A Kothapalli and Ms M Williams on behalf of the Hon. Minister for Industrial Relations

Dr T Dymond on behalf of UnionsWA

Ms S Lyon on behalf of the Western Australian Local Government Association

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*Order*

HAVING heard from Ms A Kothapalli and Ms M Williams on behalf of the Hon. Minister for Industrial Relations, Dr T Dymond on behalf of UnionsWA and Ms S Lyon on behalf of the Western Australian Local Government Association, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979 (WA)*, hereby orders –

THAT the *Restaurant, Tearoom and Catering Workers' Award* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the date of this order.

(Sgd.) S J KENNER,  
Chief Commissioner,

By the Commission in Court Session.

[L.S.]

#### SCHEDULE

1. Delete Clause 3 **Area** and substitute with a new Clause 3 **Area** as follows:

##### 3. - AREA

- (1) This Award has effect throughout Western Australia.
- (2) This Award has effect with respect to employers who are connected to the State of Western Australia and their employees while performing work covered by this Award.

Note: for a non-exhaustive list of indicators of when an employer may be connected to the State of Western Australia, see s 3(2) of the *Industrial Relations Act 1979*. Indicators include but are not limited to, whether the employer is:

- domiciled or resident in, or has a place of business in, the State; or
- registered, incorporated, or established under a law of the State; or
- the holder of a licence, lease, tenement, permit, or other authority, granted under a law of the State or by a public authority.

2. Delete Clause 4 **Scope** and substitute with new a Clause 4 **Scope** as follows:

##### 4. - SCOPE

- (1) This Award applies to all employers (including catering employers) in the restaurant and catering industry, as defined in Clause 6. - Definitions of this Award, and their employees employed in the classifications specified in Clause 21. - Wages of this Award.

- (2) This Award also applies to:

- (a) employers that supply labour on an on-hire basis to host employers in the restaurant and catering industry in respect of on-hire employees employed in the classifications mentioned in this Award, and those on hire employees, while engaged in the performance of work covered by this Award; and
- (b) employers that provide group training services for apprentices and/or trainees in the restaurant and catering industry in respect of apprentices and/or trainees working in one or more of the classifications mentioned in this Award, and those apprentices and/or trainees, while engaged by a host employer in the performance of work covered by this Award.

- (3) This Award does not apply employers and employees who are covered by the following awards:

- (a) Fast Food Outlets Award 1990.
- (b) Club Workers' Award.
- (c) Hotel and Tavern Workers' Award.
- (d) Motel, Hostel, Service Flats and Boarding House Workers' Award.
- (e) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977.

- (4) This Award does not to employers and employees who are subject to the national industrial relations system.

3. Delete subclauses (1) and (2) of Clause (6) **Definitions** and substitute with new subclauses (1) and (2) as follows:

- (1) The restaurant and catering industry means:

- (a) any restaurant, café, coffee shop, tearoom, dining or meal room, cafeteria, canteen, takeaway or fast food establishment (excluding those establishments covered by the Fast Food Outlets Award 1990); and
- (b) any place, building, stand, stall, tent, vehicle or boat or part of such, in or from which food and/or drinks are sold or served for consumption on the premises, including any establishment or place where food is prepared and/or cooked to be sold or served for consumption elsewhere; and
- (c) the provision of catering services where meals and/or light refreshments and/or drinks are served and provided in any building or place for weddings, parties, dances, social functions, theatres, festivals, fairs, exhibition buildings, cultural centres, convention centres, entertainment centres, racecourses, showgrounds, sporting grounds, and the like.

- (2) Catering Employer means any employer whose primary business is to provide catering and ancillary services for any social, commercial, industrial or other purpose or function.

## AWARDS/AGREEMENTS AND ORDERS—Variation of—

2024 WAIRC 00038

### REVIEW OF CLAUSE 7 AND SCHEDULES B AND F OF THE ABORIGINAL COMMUNITIES AND ORGANISATIONS WESTERN AUSTRALIAN INTERIM AWARD 2011 PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2024 WAIRC 00038
<b>CORAM</b>	:	SENIOR COMMISSIONER R COSENTINO
<b>HEARD ON THE PAPERS</b>	:	WRITTEN SUBMISSIONS: FRIDAY, 8 DECEMBER 2023, THURSDAY, 21 DECEMBER 2023, FRIDAY, 12 JANUARY 2024
<b>DELIVERED</b>	:	THURSDAY, 25 JANUARY 2024
<b>FILE NO.</b>	:	APPL 24 OF 2023
<b>BETWEEN</b>	:	COMMISSION'S OWN MOTION
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

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CatchWords	:	Industrial Law (WA) – Aboriginal Communities and Organisations Western Australian Interim Award 2011 – Commission's Own Motion – s 40B – Annual salary rates below the minimum – Whether award provisions are obsolete or in need of updating – Enterprise Flexibility – Minimum rates adjustment – Statement of Principles – Updates to named parties – Discriminatory definitions removed – Award varied
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Fair Work Act 2009</i> (Cth) <i>Equal Opportunity Act 1984</i> (WA) <i>Aboriginal Councils and Associations Act 1976</i> (Cth) <i>Associations Incorporations Act 2015</i> (WA) <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)
Result	:	Award varied

**Representation:**

Hon. Minister for Industrial Relations

Western Australian Municipal, Administrative, Clerical and Services Union of Employees

**Case(s) referred to in reasons:***City of Cockburn v Western Australia Municipal, Administrative, Clerical and Services Union of Employees (WASU) & Ors* [2023] WAIRC 00787*Commission's Own Motion v (Not Applicable)* [2023] WAIRC 00337*Commission's Own Motion v (Not Applicable)* [2023] WAIRC 00836*Commission's Own Motion v (Not Applicable)* [2024] WAIRC 00013*Commission's Own Motion v Dardanup Butchering Co & Ors* [2004] WAIRC 12690; (2004) 84 WAIG 2739*Commission's Own Motion v (Not Applicable)* [2004] WAIRC 11661; (2004) 84 WAIG 1531*Trades and Labor Council of Western Australia v The Confederation of Western Australian Industry (Inc) & Ors* (1989) 69 WAIG 2913*Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Aboriginal Alcohol and Drug Services (AADS) Inc & Ors* [2011] WAIRC 00228; (2011) 91 WAIG 476*Reasons for Decision*

1 The Commission, of its own motion, initiated this matter for variation of the *Aboriginal Communities and Organisations Western Australian Interim Award 2011* under s 40B of the *Industrial Relations Act 1979* (WA). Section 40B allows the Commission to vary an award for any of the following relevant purposes:

- (a) to ensure that the award does not contain wages that are less than the minimum award wage as ordered by the Commission under s 50A;

- (b) to ensure that the award does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984* (WA);
  - (c) to ensure that the award does not contain provisions that are obsolete or need updating; and
  - (d) to ensure that the award is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises.
- 2 The Commission provided notice of its intention to vary the Award, to UnionsWA, the Chamber of Commerce and Industry, the Australian Resources and Energy Employer Association, the Minister for Industrial Relations and each of the parties to the Award for the purpose of giving those parties an opportunity to be heard in relation to the proposed variations.
- 3 The notice identified three clauses affected by the Commission's proposed variations:
- (a) Clause 7: Enterprise Flexibility Provisions;
  - (b) Schedule B: Annual Salaries; and
  - (c) Schedule F: Named parties to this award.
- 4 I made an order on 26 June 2023 amending the application to include additional proposed variations to clauses 19 and 32, which referred to an employee's spouse. The Minister brought to the Commission's attention the fact that the current provisions define 'spouse' to include a 'de facto spouse' but only where the 'spouse' is a person of the opposite sex of the employee.
- 5 None of the employer parties to the Award sought to be heard or participate in the proceedings. The matter was programmed to be determined on the papers. The Commission received written submissions on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU), being the union party to the Award, and the Minister.
- 6 In broad terms, WASU and the Minister agree that the relevant clauses ought to be varied under s 40B:
- (a) That that Clause 7 - Enterprise Flexibility should be removed as being contrary to the principles summarised in *City of Cockburn v Western Australia Municipal, Administrative, Clerical and Services Union of Employees (WASU) & Ors* [2023] WAIRC 00787 and applied in *Commission's Own Motion v (Not Applicable)* [2023] WAIRC 00836;
  - (b) That Schedule B should be varied to remove salary rates which are below the minimum rates set under s 50A;
  - (c) That Schedule F should be updated to remove parties that no longer exist and to correct party names;
  - (d) That discriminatory definitions of 'spouse' or 'de facto' should be removed.
- 7 The only substantive issue for me to decide is what variations should be made to the rates of pay in Schedule B to achieve the purposes of s 40B. WASU argued that the Commission should not only increase the Level 1 salaries below the statutory minimum, but also increase all rates in the Award to establish increases in pay for the steps within each classification level.

#### Wages that are less than the minimum award wage

- 8 A copy of the Award's current wages schedule is annexed as Schedule 1 to these reasons.
- 9 The rates of pay it specifies for Level 1 (First Year to Fourth Year) are below the statutory minimum award rate, which is \$863.40 per week or \$45,020 per annum: *Commission's Own Motion v (Not Applicable)* [2023] WAIRC 00337.
- 10 Having identified this, the Commission must vary the Award to ensure that rates of pay are not below the statutory minimum: *Commission's Own Motion v Dardanup Butchering Co & Ors* [2004] WAIRC 12690; (2004) 84 WAIG 2739 at [171].
- 11 WASU argues that the Level 1, First Year rate should be \$47,00 per annum, which is above the statutory minimum rate. It draws on the nature of the work that falls within the Level 1 classification, saying that such work can be physically demanding and require the employee to exercise a degree of skill and expertise, such that the rate of pay should be higher than the State Minimum Wage.
- 12 WASU relies on the following statement of the Commission in Court Session (CICS) in *Dardanup Butchering Co & Ors* in support of its claim for rates of pay to be set above the statutory minimum rate:
- [172] It is clear from the opening words of s.40B(1) that the Commission has had conferred upon it wide powers to amend. These powers can be exercised at any time and more than once in relation to any award. Section 40B(1)(a) does not simply provide that the Commission at any time may vary an award to ensure that the award does not contain wages that are less than the minimum award wage as ordered by the Commission under section 51. The power to amend under each subparagraph of s.40B(1) is wide as the opening words provide that the Commission may vary an award "for any one or more of the following purposes..." Consequently, providing the Commission by order, varies an award for one or more of the purposes set out in (a) to (e) of s.40B(1) the Commission acts within power.
- 13 The point the CICS made in this extract is that the power under s 40B is wide. It says nothing about how the Commission should approach the exercise of its power for a purpose, or the purposes, in s 40B(1)(a) to (e).
- 14 Specifically in relation to the minimum award rate purpose in s 40B(1)(a), the CICS observed that the role of the Commission is 'relatively straightforward': [175]. It endorsed the parties' consensus approach that where rates of pay in an award are less than the award minimum wage; the Commission should direct parties to confer, arbitrate where necessary on an expeditious process of Minimum Rates Adjustments, the use of the work value principle, and other processes, to attain the level of the award minimum wage: [180]. The process is directed at 'fixing the wages that are still below the s 51 minimum': [6].



- 15 Minimum Rates Adjustment was introduced as part of the State Wage Decision of 8 September 1989: *Trades and Labor Council of Western Australia v The Confederation of Western Australian Industry (Inc) & Ors* (1989) 69 WAIG 2913. The principle was stated at 2927 as follows:

**2. Minimum Rates Adjustment**

Minimum rates adjustments allowable in the State Wage Decision of 8 September, 1989 shall be in accordance with the following:

- (i) the appropriate adjustments in any award will be applied in not less than 4 instalments which will become payable at 6 monthly intervals;
  - (ii) in appropriate cases longer phasing-in arrangements may be approved or awarded and/or parties may agree that part of a supplementary payment should be based on service;
  - (iii) the first instalment of these adjustments will not be available in any award prior to 1 January 1990 or 3 months after the variation of the particular award to implement the first stage structural efficiency adjustments, whichever is the later;
  - (iv) the second and subsequent instalments of these adjustments will not be automatic and applications to vary the relevant awards will be necessary; and
  - (v) acceptance of absorption of these adjustments to the extent of equivalent overaward payments is a prerequisite to their being applied in any award.
- 16 By 2004, when the CICS decided *Dardanup Butchering Co & Ors*, the Statement of Principles contained in the State Wage Case General Order [2004] WAIRC 11661; (2004) 84 WAIG 1531 referred to Minimum Rates Adjustments in Principles 2 and 8:

**STATEMENT OF PRINCIPLES – June 2004**

...

**2. When an Award or relevant Agreement may be varied or another Award made without the claim being regarded as above or below the Safety Net:**

In the following circumstances an award or relevant agreement may, on application, be varied or another award made without the application being regarded as a claim for wages and/or conditions above or below the award safety net:

...

- (f) to adjust wages for arbitrated safety net adjustments in accordance with Principle 8.

...

**8. Arbitrated Safety Net Adjustments**

Where the minimum rates adjustment process in an award has been completed, the Commission may consider an application for the base rate, supplementary payment and arbitrated safety net adjustments to be combined so that the award specifies only the total minimum rate for each classification.

By consent of all parties to an award, where the minimum rates adjustment has been completed, award rates may be expressed as hourly rates as well as weekly. In the absence of consent, a claim that award rates be so expressed may be determined by arbitration.

The arbitrated safety net adjustment arising from the decision in Matter No. 570 of 2004 is \$19.00 per week...

- 17 The current Statement of Principles still refers to Minimum Rates Adjustment in Principles 3 and 4.2.
- 18 The current work value principle is set out in Principle 7 of the Statement of Principles. Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification: *Commission's Own Motion v (Not Applicable)* [2023] WAIRC 00337.
- 19 The upshot is that the CICS in *Dardanup Butchering Co & Ors* contemplated any adjustment to wages made under s 40B(1)(a) should be approached by applying the Statement of Principles. There can be no doubt that the Commission is bound to follow the Statement of Principles when varying the wages in the Award.
- 20 WASU's submission that the work of Level 1 employees warrants a rate of pay exceeding the statutory minimum does not fall within the Statement of Principles. It does not reflect a case for varying the wages based on work value changes. WASU has not attempted to demonstrate that the nature of the work, its level of skill or, level of responsibility or conditions under which work is performed has changed since the Award was made in 2011.
- 21 Principle 3 enables the Commission to vary an award to adjust wages for total minimum rates 'pursuant to Principle 4.2'. Principle 4.2, under the heading Previous State Wage Increases, provides 'Minimum rates adjustments may also be progressed under this Principle'.
- 22 I accept that this allows me to vary the rates of pay in the Award to align rates that are under the statutory minimum rate with the statutory minimum rate. However, I can find no support for otherwise increasing the rates of pay in the manner WASU has sought.

### The Award's Pay Structure

- 23 WASU points out that the wage structure in Schedule B has a level/step format. Under that format, at the end of each year of continuous service in a position at an appointed level, the employee automatically progresses to the next step or year within the level.
- 24 However, the rates of pay for each step/year within each level are the same, except for:
- (a) Level 1 Fifth Year, which is \$899 per annum higher than the rate of pay for Level 1 First Year to Fourth Year;
  - (b) Level 5, Fourth Year, which is \$715 per annum higher than Level 5, Third Year; and
  - (c) Level 10 where rates for each First Year, Second Year and Third Year increase incrementally.
- 25 WASU says this means that the steps have no practical significance and, as such, are redundant and in need of updating.
- 26 In order to update the steps, WASU argues for the creation of new pay rates for each of steps 2 to 4 in each level, which are incrementally higher than the pay rate for step 1. And in order to maintain relativities between levels, the rates of pay for step 1 in each level from level 2 must also be increased. WASU's proposal would significantly increase rates of pay, particularly at the higher levels.
- 27 The rates of pay WASU seeks are based on the relativities established by the *Aboriginal Communities and Organisations (Western Australia) Award 1996*, which WASU says is the historical source of the Award's classification structure. The 1996 instrument is an award made by the Australian Industrial Relations Commission before the federal award system became based on the Constitution's corporations' power: A1893, Print N3902.
- 28 The Award was made on WASU's application in A 1 of 2011. In WASU's application, the Award it sought to be made contained the current level/step structure, with no differences in the rates of pay for each step within each level, except for the three exceptions set out above at paragraph [24].
- 29 This appears to be a deliberate choice. Clause 15.2 of the Award deals with annual increments. It distinguishes between existing employees as at 27 March 2011 and employees who commence employment after 27 March 2011:

#### 15.2 Annual Increments

15.2.1 In this clause:

- (1) 'existing employee' means an employee who was employed by an employer on or before 27 March 2011.
- (2) 'new employee' means an employee who commences employment with any employer after 27 March 2011.

15.2.2 Existing employees are entitled to advance by annual increments to the maximum of the appropriate classification level. The following conditions apply:

- (1) The employee has given satisfactory service over the last 12 months; and
- (2) The employee has acquired any new and / or improved skills that are required for the employee's position.
- (3) New employees are entitled to payment at the first year rate of the appropriate classification level. An employer and individual employees may agree to allow the employee to advance by annual increments to the maximum of the appropriate classification level.

- 30 In effect, only existing employees as at 27 March 2011 were entitled to receive a rate of pay other than the First Year rate of pay. The intention was to remove the practical significance of the steps/annual increments, for all new employees from 27 March 2011 onwards. Grandfathering of increments also appeared in the *Aboriginal Communities and Organisations (Western Australia) Award 2001*, being the federal pre-reform Fair Work Australia consolidated award: [AP814193].
- 31 I cannot, therefore, accept the argument that the absence of pay increases within each level is unintentional or a distortion.
- 32 In any event, Principle 6.8 of the Statement of Principles says:

New service increments may only be awarded to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant parts of Principle 7 [Work Value Changes].

- 33 Again, WASU has not attempted to establish work value changes since the Award was made in 2011. I do not consider it open to me to increase the rates for the increments as WASU has sought.
- 34 I do consider the steps at levels 2, 3, 4, 6, 7, 8 and 9 and are obsolete as they do not affect any changed terms or conditions. The appropriate variation is to remove the obsolete provisions.

### Enterprise Flexibility Clause

- 35 The Award's current Clause 7 Enterprise Flexibility is the same type as the clause I considered in APPL 27 of 2023: *Commission's Own Motion v (Not Applicable)* [2024] WAIRC 00013. It purports to allow a single employer covered by the Award and its employees, either individually or as a group, to reach an agreement with the effect of varying the Award's obligations. Although the clause contemplates an application to the Commission in relation to any such variation or agreement, nothing in the Act's provisions enables such agreements to be approved, registered or otherwise endorsed by the Commission. In other words, those kinds of deals are not within the Act's scheme.
- 36 It is uncontentious that the clause is contrary to the scheme of the Act and invalid. It should, therefore, be deleted.

**Named Parties**

- 37 WASU proposes that it be added to Schedule F. WASU was party to the proceedings which gave rise to the Award: *Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Aboriginal Alcohol and Drug Services (AADS) Inc & Ors* [2011] WAIRC 00228; (2011) 91 WAIG 476. It is, therefore, deemed to be a party to the Award under s 38(1a) of the Act. Section 38(1) required that it be listed as a named party to the Award. It is appropriate that it be added to Schedule F.
- 38 The following party names contain errors:
- (a) Kulumburu Aboriginal Association: no organisation with this name is currently registered, nor has it ever been registered. On 1 July 1981, Kalumburu Aboriginal Corporation was registered under the *Aboriginal Councils and Associations Act 1976* (Cth). The organisation with this name remains registered with the Office of the Registrar of Indigenous Corporations.
  - (b) Warburton Community Incorporated: the registered name of this organisation at the time the Award was made was Warburton Community Inc. That remains its current name.
  - (c) Yamatji Regional Council: no organisation with this name is currently registered, nor has it ever been registered. At the time the Award was made, the following entities were registered:
    - (i) Yamatji Marlpa Aboriginal Corporation: was a registered Indigenous Corporation being registered under the *Aboriginal Councils and Associations Act 1976* (Cth) in 1994.
    - (ii) Regional Yamatji Murni Wangga Aboriginal Corporation: was registered, but notice of its proposed deregistration was published before the Award was made on 11 January 2011, and it was deregistered shortly thereafter on 2 April 2011.
- 39 It is reasonable to infer that Yamatji Marlpa Aboriginal Corporation was the intended party to the Award when it was made, and the correct name.
- 40 The following party no longer exists:
- (a) Kullarri Regional Council: no organisation with this name is currently registered, nor has it ever been registered. Kullarri Regional CDEP Incorporated was registered under the *Associations Incorporations Act 2015* (WA) in 2009. It was deregistered on 6 October 2016.
- 41 The following named parties have changed names:
- (a) The Aboriginal Alcohol and Drug Service (Inc): upon registration with the Office of the Registrar of Indigenous Corporations, this association changed its name to Wungening Aboriginal Corporation.
  - (b) Goldfields Land Council Aboriginal Corporation: this organisation, registered on 13 April 1985, changed its name in 2003 and again on 1 March 2023. It is now known as Goldfields Aboriginal Community Services Aboriginal Corporation.
- 42 The Award's scope clause, clause 4, defines the scope by reference to the 'Aboriginal Communities and Organisations industry' and to each employer in that industry, and each employee eligible for membership of WASU employed in the Award's classifications. The list of employer names in Schedule F does no more than create a rebuttable presumption that those employers are engaged in the industry referred to in the scope clause.
- 43 Schedule F does not directly affect the scope of the Award. It is not an operative provision. Its practical significance is that the entities listed are parties to the Award pursuant to s 38 of the Act. They are, therefore, entitled to be served with applications made under Part II, Division 2A of the Act and to participate in proceedings initiated by such applications. Additionally, the named parties are presumed to operate within the Aboriginal Communities and Organisations industry.
- 44 The upshot is that there is no good reason for retaining a named employer in the Award who is deregistered. Its inclusion is obsolete. Further, it is desirable to update the names of those corporations who remain registered, but have changed names.
- 45 Schedule F should be amended to reflect the correct and current names of these organisations and to delete Kullarri Regional Council accordingly.
- 46 WASU proposed that the following employers be added to Schedule F:
- (a) Kullarri Regional Communities Indigenous Corporation. This organisation was registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) on 6 October 2016.
  - (b) Yamatji Southern Regional Corporation Limited. This company was incorporated in January 2020 as an Australian Public Company limited by guarantee.
- 47 I do not consider variation under s 40B is the appropriate vehicle to add new parties to an award. Section 38(2) of the Act makes specific provision for an application to add parties to an award.
- 48 In any event, no evidence has been presented to the Commission to establish that these entities are employers, that they operate in the Aboriginal Communities and Organisations industry, or that they employ employees who are covered by the Award. Without knowing that these entities have an interest in the Award, I am not satisfied that they ought to be added to Schedule F, having regard to the practical significance of being named a party as set out above.

**Disposition and Orders**

- 49 In accordance with my reasons, I propose to order that the *Aboriginal Communities and Organisations Western Australian Interim Award 2011* be varied as follows:
1. Clause 6 Definitions:
    - (a) Renumber subclauses 6.9 to 6.11 as 6.10 to 6.12.

- (b) Insert a new definition of 'Partner' as follows:  
 6.9 **Partner** means a spouse or de facto partner.
2. Clause 7 Enterprise Flexibility: Delete this clause in its entirety.
3. Clause 19 Allowances:
- (a) Delete subclause 19.1.1 in its entirety and insert in lieu thereof the following:  
 19.1.1 In this clause:  
 (1) **Dependant** in relation to an employee means:  
 (a) a partner; or  
 (b) if there is no partner, a child under 18 years of age who lives in Western Australia and who relies on the employee for their main financial support; or  
 (c) if there is no partner, any relative of the employee who lives in Western Australia and who relies on the employee for their main financial support  
 who does not receive a district allowance or location allowance of any kind.  
 (2) **Partial dependant** in relation to an employee means:  
 (a) a partner; or  
 (b) if there is no partner, a child under 18 years of age who lives in Western Australia and who relies on the employee for their main financial support; or  
 (c) if there is no partner, any relative of the employee who lives in Western Australia and who relies on the employee for their main financial support  
 who receives a district allowance or location allowance of any kind under an award, agreement or any other provision regulating their employment, and that allowance is less than the applicable allowance for an employee without dependants under this award.
- (b) Delete subclause 19.2 Adjustment of District Allowance Rates in its entirety.
- (c) Delete subclause 19.3.2 in its entirety and insert in lieu thereof the following:  
 19.3.2 In this subclause, immediate dependants means:  
 any child, adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or partner of the employee, who relies on the employee for their main financial support; and  
 a partner of the employee.
- (d) Delete subclause 19.3.6 in its entirety and insert in lieu thereof the following:  
 19.3.6 If a couple are employed by the same employer, only one relocation allowance is payable.
- (e) Delete subclause 19.4.2 in its entirety and insert in lieu thereof the following:  
 19.4.2 In this subclause, immediate dependants means:  
 (1) any child, adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or partner of the employee, who relies on the employee for their main financial support; and  
 (2) a partner of the employee.
- (f) Delete subclause 19.4.5 in its entirety and insert in lieu thereof the following:  
 19.4.5 If a couple are employed by the same employer, only one removal allowance is payable.
4. Delete subclause 32.1.4 in its entirety and insert in lieu thereof the following:  
 32.1.4 **Immediate family** includes:  
 (1) a partner (including a former partner); and  
 (2) a child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or the employee's partner.
5. Clause 34 Parental Leave: Delete this clause in its entirety and insert in lieu thereof the following:  
 Parental leave is provided for in accordance with Division 5 of Part 2-2 of the *Fair Work Act 2009* (Cth) and the *Minimum Conditions of Employment Act 1993* (WA).
6. Schedule B Annual Salaries: Delete this schedule in its entirety and insert in lieu thereof the following:

SCHEDULE B – ANNUAL SALARIES

Year of Service	Rate Per Year (\$)
<b>Level 1</b>	
First year	45020
Second year	45020
Third year	45020
Fourth year	45020

Fifth year	45372
<b>Level 2 (100% Base Rate)</b>	51244
<b>Level 3</b>	55275
<b>Level 4</b>	60136
<b>Level 5</b>	
First year	64168
Second year	64168
Third year	64168
Fourth year	64883
<b>Level 6</b>	69585
<b>Level 7 - Management Band A</b>	75137
<b>Level 8 - Management Band B</b>	80271
<b>Level 9 - Executive Band A</b>	86239
<b>Level 10 - Executive Band B</b>	
First year	94846
Second year	97265
Third year	104275

## 7. Schedule F Named parties to this award:

Delete this schedule in its entirety and insert in lieu thereof the following:

## SCHEDULE F - NAMED PARTIES TO THIS AWARD

**Union Party**

Western Australian Municipal, Administrative, Clerical and Services Union of Employees

**Employer Parties****Perth Region**

Wungening Aboriginal Corporation

Derbarl Yerrigan Health Service

Swan Valley Nyungah Community Aboriginal Corporation

**Albany Region**

Southern Aboriginal Corporation

**Port Hedland Region**

Bloodwood Tree Association

Onslow Women's Group Corporation

**Geraldton / Carnarvon Region**

Yamatji Marlpa Aboriginal Corporation

**Kalgoorlie Region**

Bay of Isles Aboriginal Community Inc.

Goldfields Aboriginal Community Services Aboriginal Corporation

**Western Desert Region**

Ngaanyatjarra Council (Aboriginal Corporation)

Warburton Community Incorporated

**Kununurra Region**

Kalumburu Aboriginal Corporation

**Derby Region**

Winun Ngari Aboriginal Corporation

## SCHEDULE - AWARD'S CURRENT WAGES

## SCHEDULE B - ANNUAL SALARIES

Year of Service	Rate Per Year (\$)
<b>Level 1</b>	
First year	45020
Second year	45020
Third year	45020

Fourth year	45020
Fifth year	45372
<b>Level 2 (100% Base Rate)</b>	
First year	51244
<b>Level 3</b>	
First year	55275
<b>Level 4</b>	
First year	60136
<b>Level 5</b>	
First year	64168
Second year	64168
Third year	64168
Fourth year	64883
<b>Level 6</b>	
First year	69585
<b>Level 7 - Management Band A</b>	
First year	75137
<b>Level 8 - Management Band B</b>	
First year	80271
<b>Level 9 - Executive Band A</b>	
First year	86239
<b>Level 10 - Executive Band B</b>	
First year	94846
Second year	97265
Third year	104275

2024 WAIRC 00049

**REVIEW OF CLAUSE 7 AND SCHEDULES B AND F OF THE ABORIGINAL COMMUNITIES AND ORGANISATIONS WESTERN AUSTRALIAN INTERIM AWARD 2011 PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
COMMISSION'S OWN MOTION

PARTIES

APPLICANT

-v-  
(NOT APPLICABLE)

RESPONDENT

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** THURSDAY, 1 FEBRUARY 2024  
**FILE NO/S** APPL 24 OF 2023  
**CITATION NO.** 2024 WAIRC 00049

**Result** Award varied

*Order*

HAVING received written submissions filed on behalf of Hon. Minister of Industrial Relations and Western Australian Municipal, Administrative, Clerical and Services Union of Employees;

AND for the reasons stated in the published reasons for decision;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT the *Aboriginal Communities and Organisations Western Australian Interim Award 2011* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the date of this order.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

## SCHEDULE

1. Clause 6 Definitions:
  - (a) Renumber subclauses 6.9 to 6.11 as 6.10 to 6.12.
  - (b) Insert a new definition of 'Partner' as follows:
    - 6.9 **Partner** means a spouse or de facto partner.
2. Clause 7 Enterprise Flexibility: Delete this clause in its entirety.
3. Clause 19 Allowances:
  - (a) Delete subclause 19.1.1 in its entirety and insert in lieu thereof the following:
    - 19.1.1 In this clause:
      - (1) **Dependant** in relation to an employee means:
        - (a) a partner; or
        - (b) if there is no partner, a child under 18 years of age who lives in Western Australia and who relies on the employee for their main financial support; or
        - (c) if there is no partner, any relative of the employee who lives in Western Australia and who relies on the employee for their main financial support  
who does not receive a district allowance or location allowance of any kind.
      - (2) **Partial dependant** in relation to an employee means:
        - (a) a partner; or
        - (b) if there is no partner, a child under 18 years of age who lives in Western Australia and who relies on the employee for their main financial support; or
        - (c) if there is no partner, any relative of the employee who lives in Western Australia and who relies on the employee for their main financial support  
who receives a district allowance or location allowance of any kind under an award, agreement or any other provision regulating their employment, and that allowance is less than the applicable allowance for an employee without dependants under this award.
  - (b) Delete subclause 19.2 Adjustment of District Allowance Rates in its entirety.
  - (c) Delete subclause 19.3.2 in its entirety and insert in lieu thereof the following:
    - 19.3.2 In this subclause, immediate dependants means:
      - any child, adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or partner of the employee, who relies on the employee for their main financial support; and
      - a partner of the employee.
  - (d) Delete subclause 19.3.6 in its entirety and insert in lieu thereof the following:
    - 19.3.6 If a couple are employed by the same employer, only one relocation allowance is payable.
  - (e) Delete subclause 19.4.2 in its entirety and insert in lieu thereof the following:
    - 19.4.2 In this subclause, immediate dependants means:
      - (1) any child, adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or partner of the employee, who relies on the employee for their main financial support; and
      - (2) a partner of the employee.
  - (f) Delete subclause 19.4.5 in its entirety and insert in lieu thereof the following:
    - 19.4.5 If a couple are employed by the same employer, only one removal allowance is payable.
4. Delete subclause 32.1.4 in its entirety and insert in lieu thereof the following:
  - 32.1.4 **Immediate family** includes:
    - (1) a partner (including a former partner); and
    - (2) a child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or the employee's partner.
5. Clause 34 Parental Leave: Delete this clause in its entirety and insert in lieu thereof the following:
 

Parental leave is provided for in accordance with Division 5 of Part 2-2 of the *Fair Work Act 2009* (Cth) and the *Minimum Conditions of Employment Act 1993* (WA).

6. Schedule B Annual Salaries: Delete this schedule in its entirety and insert in lieu thereof the following:

SCHEDULE B – ANNUAL SALARIES

Year of Service	Rate Per Year (\$)
<b>Level 1</b>	
First year	45041
Second year	45041
Third year	45041
Fourth year	45041
Fifth year	45372
<b>Level 2 (100% Base Rate)</b>	51244
<b>Level 3</b>	55275
<b>Level 4</b>	60136
<b>Level 5</b>	
First year	64168
Second year	64168
Third year	64168
Fourth year	64883
<b>Level 6</b>	69585
<b>Level 7 - Management Band A</b>	75137
<b>Level 8 - Management Band B</b>	80271
<b>Level 9 - Executive Band A</b>	86239
<b>Level 10 - Executive Band B</b>	
First year	94846
Second year	97265
Third year	104275

7. Schedule F Named parties to this award:

Delete this schedule in its entirety and insert in lieu thereof the following:

SCHEDULE F - NAMED PARTIES TO THIS AWARD

**Union Party**

Western Australian Municipal, Administrative, Clerical and Services Union of Employees

**Employer Parties**

**Perth Region**

Wungening Aboriginal Corporation

Derbarl Yerrigan Health Service

Swan Valley Nyungah Community Aboriginal Corporation

**Albany Region**

Southern Aboriginal Corporation

**Port Hedland Region**

Bloodwood Tree Association

Onslow Women's Group Corporation

**Geraldton / Carnarvon Region**

Yamatji Marlpa Aboriginal Corporation

**Kalgoorlie Region**

Bay of Isles Aboriginal Community Inc.

Goldfields Aboriginal Community Services Aboriginal Corporation

**Western Desert Region**

Ngaanyatjarra Council (Aboriginal Corporation)

Warburton Community Incorporated

**Kununurra Region**



Kalumburu Aboriginal Corporation  
**Derby Region**  
 Winun Ngari Aboriginal Corporation

2024 WAIRC 00065

**CRISIS ASSISTANCE, SUPPORTED HOUSING INDUSTRY - WESTERN AUSTRALIAN INTERIM AWARD 2011**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

WUNGENING ABORIGINAL CORPORATION

**APPLICANT**

-v-

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
 UNION OF EMPLOYEES AND OTHERS

**RESPONDENTS**

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** MONDAY, 12 FEBRUARY 2024  
**FILE NO/S** APPL 82 OF 2023  
**CITATION NO.** 2024 WAIRC 00065

**Result** Award varied  
**Representation** (on the papers)  
**Applicant** SJF Work Advice Pty Ltd  
**First Respondent** Western Australian Municipal, Administrative, Clerical and Services Union of Employees

*Order*

WHEREAS on 8 December 2023, Wungening Aboriginal Corporation filed an application seeking to vary clause 31 of the *Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011* pursuant to s 40 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the application sought to delete reference to the Aboriginal Alcohol and Drug Service (AADS) Inc in clause 31 'Named Parties to the Award', and substitute Wungening Aboriginal Corporation;

AND WHEREAS the grounds for the application were that the AADS changed its name to Wungening Aboriginal Corporation in 2017;

AND WHEREAS all parties to the Award were served with a copy of the application;

AND WHEREAS on 14 December 2023; the Western Australian Municipal, Administrative, Clerical and Services Union of Employees filed a response to the application advising it does not oppose the variations to clause 31 of the Award;

AND WHEREAS no party has opposed the application;

AND WHEREAS on 3 January 2024; further submissions were received by Wungening Aboriginal Corporation;

AND being satisfied that the applicant is a party to the Award, having standing to make the application;

AND further being satisfied that:

- (a) the Award is not one that is for a limited duration, s 40(3) of the Act is inapplicable and no barrier to the amendments sought;
- (b) the amendments proposed do not affect any substantive change to the scope of the Award or its area of operation. The application therefore does not attract the requirements of s 29A for publication of the proposed amendments or service on the s 29A parties; and
- (c) it is appropriate to make the orders sought;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Act, hereby orders –

1. THAT the *Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011* be varied at clause 31 'Named Parties to the Award' by deleting 'Aboriginal Alcohol and Drug Service (AADS) (Inc) employed at the Refuge Service known as "Wooree Miya"' and substituting 'Wungening Aboriginal Corporation'.
2. THAT the variations in order 1 shall have effect from the date of this order.

(Sgd.) R COSENTINO,  
 Senior Commissioner.

[L.S.]

2024 WAIRC 00013

**REVIEW OF CLAUSES 7, 8 AND 16 OF THE MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021  
PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2024 WAIRC 00013  
**CORAM** : SENIOR COMMISSIONER R COSENTINO  
**HEARD ON THE PAPERS** : WRITTEN SUBMISSIONS FILED: FRIDAY, 8 DECEMBER 2023;  
 THURSDAY, 21 DECEMBER 2023; FRIDAY, 22 DECEMBER 2023  
**DELIVERED** : TUESDAY, 16 JANUARY 2024  
**FILE NO.** : APPL 27 OF 2023  
**BETWEEN** : COMMISSION'S OWN MOTION  
 Applicant  
 AND  
 (NOT APPLICABLE)  
 Respondent

**CatchWords** : Industrial Law (WA) – *Municipal Employees (Western Australia) Award 2021* – Commission's Own Motion – s 40B – Whether award provisions are obsolete or in need of updating – Method of payment provisions ambiguous or confusing – Annual leave provisions – Inconsistency with *Minimum Conditions of Employment Act 1993* – Award varied

**Legislation** : *Minimum Conditions of Employment Act 1993* (WA)

**Result** : Award varied

**Representation:**

Western Australian Municipal, Administrative, Clerical and Services Union of Employees

Western Australian Local Government Association

Local Government, Racing and Cemeteries Employees Union (WA)

**Case(s) referred to in reasons:**

*Australasian Society of Engineers, Moulders and Foundry Workers, Industrial Union of Workers, Western Australian Branch v John Lysaght (Australia) Ltd* (1982) 62 WAIG 1345

*Commission's Own Motion v (Not Applicable)* [2023] WAIRC 00837

*Reasons for Decision*

- 1 These reasons deal with a few loose ends that remained in my earlier reasons handed down on 26 October 2023 in this matter: *Commission's Own Motion v (Not Applicable)* [2023] WAIRC 00837. In those reasons, I declined to vary the *Municipal Employees (Western Australia) Award 2021* 'facilitative provisions' contained in clause 18.4 'Payment of Wages' and clause 23 'Annual Leave' on the basis that the clauses were invalid. However, I observed that those provisions may be obsolete and in need of updating pursuant to s 40B of the *Industrial Relations Act 1979* (WA) for reasons other than those which were argued at the original hearing.
- 2 The parties were invited to provide the Commission with any proposals for variation of these two clauses, if the parties agreed the clauses were in need of updating. These matters were programmed to be dealt with on the papers.

**Clause 18 'Payment of Wages'**

- 3 The current text of clause 18 is set out in [2023] WAIRC 00837 at paragraph [17].
- 4 In [2023] WAIRC 00837 at paragraphs [25]-[30], after setting out some of the history of the origins of the clause, I observed that it was possible that aspects of the clause were unintentionally carried over from previous agreements, and that the provisions may be obsolete.
- 5 The Western Australian Local Government Association (**WALGA**) proposes that clause 18 be varied by:
  - (a) in clause 18.1, deleting reference to pro-rata payments when less than the full week is worked, and specifying that clause 18.1 is subject to clause 18.2;
  - (b) at the end of clause 18.2, adding the words 'and in accordance with the [*Minimum Conditions of Employment Act 1993*]'; and
  - (c) deleting clauses 18.3, 18.4 and 18.5 entirely.

- 6 All other parties support the addition of the words WALGA proposed for clause 18.2, and the deletion of clause 18.5. But there are various views about the balance of WALGA's proposals.
- 7 As to clause 18.1, the Hon. **Minister** for Industrial Relations supports WALGA's proposed variation which the Minister notes does not substantively alter the clause's operation.
- 8 Western Australian Municipal, Administrative, Clerical and Services Union of Employees (**WASU**) supports the deletion of the reference to pro-rata payments but says that the proposed addition of words specifying the clause is subject to clause 18.2 is superfluous and confusing because the obligation in clause 18.1 is absolute and not subject to any exceptions.
- 9 I agree. It is inappropriate to describe clause 18.1 as being subject to clause 18.2. Clause 18.2 simply does not condition clause 18.1 in any way.
- 10 Local Government, Racing and Cemeteries Employees Union (WA) (**LGRCEU**) submits that WALGA's proposed variation is outside the scope of what the Commission is to determine in these proceedings, not arising directly or indirectly from the issues concerning clause 18.4. It also says that the reference to pro-rata payments is not obsolete because there are employees who, for various reasons, work less than a full week.
- 11 One difficulty with LGRCEU's position is that the words it contends should be retained include the reference to clause 18.2, which, as I have said, is inappropriate. Clause 18.2 does not assist in clarifying how an employee working less than a full week is to be paid.
- 12 The second difficulty is that the requirement to pay pro-rata where less than a full week is worked appears to conflict with clause 20 'Hours of Duty', which allows ordinary hours to be averaged over work cycles of 14, 21 and 28 days.
- 13 The LGRCEU submits that no other provision of the Award deals with payment where less than a full week is worked. However, clause 12.1 expressly provides that a part-time employee shall be paid the appropriate hourly rate of pay for each hour worked. Clause 18.9 provides a method for calculating the appropriate hourly rate of pay. Clause 13.1 provides for a casual employee to be paid the ordinary hourly rate with the addition of 20%.
- 14 I consider it appropriate to update clause 18.1. The second sentence of clause 18.1 appears to be intended to refer to provisions which previously did appear, but no longer appear, in the Award. Their retention is confusing. I would, therefore, vary the award by deleting all of the second sentence of clause 18.1.
- 15 As for clause 18.3, LGRCEU and the Minister both agree clause 18.3 is 'somewhat obsolete' and probably ought to be deleted. However, WASU does not support the deletion of clause 18.3. It says:
- Clause 18.3 is an important obligation within the Award. It prohibits employers from being more than two days late in paying an employee their monetary entitlements. An employer that is more than two days late in paying an employee would be at risk of being sued in the Industrial Magistrates Court for contravening clause 18.3 of the Award for the quantum of the underpayment (if it is still outstanding) plus pecuniary penalties.
- Removing clause 18.3 from the Award would have the effect of potentially encouraging rogue and unscrupulous employers to consistently pay employees late without any meaningful deterrent or consequence. The Award provides the employees, the unions, and the industrial inspector with an avenue to stamp out any such conduct by seeking orders from an Industrial Magistrate. As such, the obligation should be maintained within the Award.
- 16 I accept that the intended purpose of clause 18.3 is to prohibit late payment of wages. The language used is anachronistic and not easy to understand. The requirement contained in clause 18.3 should be retained, but the clause reworded.
- 17 As for clause 18.4, WASU neither supports nor objects to the proposed deletion of clause 18.4.
- 18 The Minister submits that clause 18.4 in its current form no longer makes sense, given the removal of the words describing the averaging system. The Minister says that removing the clause in its entirety would remove the ambiguity. Alternatively, the ambiguity could be removed by adding provisions that explain the averaging system. The Minister offered a third alternative, which is to include a provision modelled on clause 4.6.2 of the *Metal Trades (General) Award* as follows:
- 18.4 Wages shall be paid as follows:-
- 18.4.1 Actual 38 ordinary hours
- In the case of an employee who works 38 ordinary hours each week, wages shall be paid weekly or fortnightly according to the actual ordinary hours worked each week or fortnight.
- 18.4.2 Average of 38 ordinary hours
- In the case of an employee who works an average of 38 ordinary hours each week during a particular work cycle, wages shall be paid weekly or fortnightly according to a weekly average of ordinary hours worked even though more or less than 38 ordinary hours may be worked in any particular week of the work cycle.
- 19 This wording might be an appropriate substitute for a former version of clause 18.2. But it does not deal with the same topic that the current clause 18.4 is directed at. The current clause 18.4 deals with how absences from duty, other than on paid leave, impact on wages where an employee works an average of 38 ordinary hours each week during a work cycle that includes a rostered day off.
- 20 LGRCEU submits that clause 18.4 is not obsolete. It says that employers are regularly required to deal with time deductions for absences from duty where the employee works on a RDO system. It says that the current clause 18.4 provides a method by which absences are to be treated in terms of calculating wage entitlements within an RDO roster system, and therefore it still has work to do and should be retained.

- 21 Clause 18.4 refers to not accruing ‘credits’ when an employee is absent from work. The Award does not define or describe ‘credits’ anywhere else in a relevant sense. In the 1982 version of the *Metal Trades Award*, credits were described in the Special Note explaining the averaging system:

...

...An explanation of the averaging system of paying wages is set out below:

- (i) Clause 3.—Implementation of the 38 Hour Week in subclause (1) paragraph (c) and (d) provides that in implementing a 38-hour week the ordinary hours of an employee may be arranged so that he is entitled to a day off, on a fixed day or rostered day basis, during each work cycle. It is in these circumstances that the averaging system would apply.

...

- (iii) ... In effect, under the averaging system, the employee accrues a "credit" each day he works actual ordinary hours in excess of the daily average which would otherwise be seven hours 36 minutes. This "credit" is carried forward so that in the week of the cycle that he works on only four days, his actual pay would be for an average of 38 ordinary hours even though, that week, he works a total of 32 ordinary hours.

Consequently, for each day an employee works eight ordinary hours he accrues a "credit" of 24 minutes (0.4 hours). The maximum "credit" the employee may accrue under this system is 0.4 hours on 19 days; that is, a total of seven hours 36 minutes.

- (iv) As provided in subclause (3) of this clause, an employee will not accrue a "Credit" for each day he is absent from duty other than on annual leave, long service, holidays prescribed under this award, paid sick leave, worker's compensation or bereavement leave.

...

*Australasian Society of Engineers, Moulders and Foundry Workers, Industrial Union of Workers, Western Australian Branch v John Lysaght (Australia) Ltd* (1982) 62 WAIG 1345 at (1349).

- 22 This shows that the text of clause 18.4 originated from and is directed to the circumstances where averaging was necessary as a result of the implementation of the 38 hour week. Given the decades that have since passed, it is reasonable to assume that employers in the Local Government sector have well and truly implemented the 38 hour week, and that it is observed pursuant to the ‘Hours of Work’ clause which permits averaging over various work cycles, which of course may include rostered days off.
- 23 LGRCEU has not demonstrated that any employer observes a 38 hour week by the accrual of credits for each day an employee works eight ordinary hours. I am satisfied that the concept of ‘credits’ is ambiguous, obsolete, and liable to confuse.
- 24 However, I accept LGRCEU’s submission that it is desirable to clarify that wages should be reduced when the average hours are not worked due to absences from duty other than for paid leave. I would therefore be minded to adopt the Minister’s proposed clause, with minor amendments and the addition of a further clause 18.4.3 as follows:

Where an employee is paid in accordance with clause 18.4.2, the average weekly pay will be reduced by the ordinary hourly rate for each hour the employee is absent from duty other than on paid leave.

#### Clause 23 ‘Annual Leave’

- 25 In [2023] WAIRC 00837 at paragraph [41], I expressed the provisional view that the current wording of clause 23 was inconsistent with the *Minimum Conditions of Employment Act 1993* (WA) (MCEA). It purports to limit the circumstances where annual leave can be taken outside of 12 months of the date upon which the leave accrued due. Section 25(1) of the MCEA, prohibits an employer from refusing an employee taking, at any time suitable to the employee, any annual leave that accrued more than 12 months before that time.
- 26 WALGA and WASU both proposed that clause 23.6 be replaced with the following words, which align with the corresponding provision in the *Local Government Officers’ (Western Australia) Award 2021 (LGO Award)*:

Annual leave shall be given and taken in such period or periods and at such a time or at such times mutually convenient to the employer and the employee and in accordance with the *Minimum Conditions of Employment Act 1993* (WA).

- 27 The Minister supported this proposal.
- 28 LGRCEU, however, advised it had reservations about this proposed wording. It said that ‘there is a risk that, in practice, those who are applying the terms of the clause may not resort to the terms of the MCEA and apply the [proposed wording] as though the taking of all annual leave requires the agreement of both the employer and the employee’.
- 29 It proposed that the clause either replicate the relevant provisions of the MCEA, or that it be worded as follows:

...Subject to the provisions of the Minimum Conditions of Employment Act 1993 (WA)...

...Annual leave shall be given and taken in such period or periods and at such a time or at such times mutually convenient to the employer and the employee...

...The employee is to give the employer at least two weeks’ notice of the period during which the employee intends to take [their] leave...

- 30 The parties agree about the intent of proposed amendments. While there is some appeal in the idea of consistency with the LGO Award, I prefer the LGRCEU’s proposed wording being clearer than the wording proposed by WASU and WALGA.

**Dispensation and Orders**

31 Accordingly, pursuant to s 40B, I propose to make orders as follows:

- (a) That the Award be varied by:
- (i) Deleting clauses 18.1 to 18.5 and inserting in substitution the following clauses:
- 18.1 Each employee shall be paid the appropriate rate shown in clause 16 'Wages' of this award.
- 18.2 Wages shall be paid at the discretion of the employer on either a weekly or fortnightly basis and in accordance with the *Minimum Conditions of Employment Act 1993* (WA).
- 18.3 Wages must be paid within 2 days from the last day of the pay period.
- 18.4 Wages shall be paid as follows:
- 18.4.1 Actual 38 ordinary hours  
In the case of an employee whose hours of duty are 38 ordinary hours each week, wages shall be paid weekly or fortnightly according to the actual ordinary hours worked each week or fortnight.
- 18.4.2 Average of 38 ordinary hours  
In the case of an employee whose hours of duty are an average of 38 ordinary hours each week during a particular work cycle, wages shall be paid weekly or fortnightly according to a weekly average of ordinary hours of duty even though more or less than 38 ordinary hours may be worked in any particular week of the work cycle.
- 18.4.3 Where an employee is paid in accordance with clause 18.4.2, the average weekly pay will be reduced by the ordinary hourly rate for each hour the employee is absent from duty other than on paid leave.
- 18.5 [deleted]
- (ii) Deleting the words 'Except as provided in 18.4' in clause 18.9.
- (iii) Deleting clause 23.6 and inserting the following clause in substitution:  
Subject to the provisions of the *Minimum Conditions of Employment Act 1993* (WA), annual leave shall be given and taken in such period or periods and at such a time or at such times mutually convenient to the employer and the employee.

2024 WAIRC 00037

**REVIEW OF CLAUSES 7, 8 AND 16 OF THE MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021  
PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

COMMISSION'S OWN MOTION

**APPLICANT**

-v-

(NOT APPLICABLE)

**RESPONDENT**

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** THURSDAY, 25 JANUARY 2024  
**FILE NO/S** APPL 27 OF 2023  
**CITATION NO.** 2024 WAIRC 00037

**Result** Award varied

*Order*

HAVING received written submission filed on behalf of the Hon. Minister for Industrial Relations, Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Western Australian Local Government Association and Local Government, Racing and Cemeteries Employees Union (WA);

AND for the reasons stated in the published reasons for decision;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT the *Municipal Employees (Western Australia) Award 2021* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the date of this order.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

## SCHEDULE

1. Delete clauses 18.1 to 18.5 and inserting in substitution the following clauses:
  - 18.1 Each employee shall be paid the appropriate rate shown in clause 16 'Wages' of this award.
  - 18.2 Wages shall be paid at the discretion of the employer on either a weekly or fortnightly basis and in accordance with the *Minimum Conditions of Employment Act 1993* (WA).
  - 18.3 Wages must be paid within 2 days from the last day of the pay period.
  - 18.4 Wages shall be paid as follows:
    - 18.4.1 Actual 38 ordinary hours  
In the case of an employee whose hours of duty are 38 ordinary hours each week, wages shall be paid weekly or fortnightly according to the actual ordinary hours worked each week or fortnight.
    - 18.4.2 Average of 38 ordinary hours  
In the case of an employee whose hours of duty are an average of 38 ordinary hours each week during a particular work cycle, wages shall be paid weekly or fortnightly according to a weekly average of ordinary hours of duty even though more or less than 38 ordinary hours may be worked in any particular week of the work cycle.
    - 18.4.3 Where an employee is paid in accordance with clause 18.4.2, the average weekly pay will be reduced by the ordinary hourly rate for each hour the employee is absent from duty other than on paid leave.
  - 18.5 [deleted]
2. Delete the words 'Except as provided in 18.4' in clause 18.9.
3. Delete clause 23.6 and inserting the following clause in substitution:  
Subject to the provisions of the *Minimum Conditions of Employment Act 1993* (WA), annual leave shall be given and taken in such period or periods and at such a time or at such times mutually convenient to the employer and the employee.

2024 WAIRC 00022

**TRANSPORT WORKERS (GENERAL) AWARD NO. 10 OF 1961**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2024 WAIRC 00022

**CORAM** : SENIOR COMMISSIONER R COSENTINO

**HEARD ON THE PAPERS** : WRITTEN SUBMISSIONS: TUESDAY, 10 OCTOBER 2023, TUESDAY, 5 DECEMBER 2023, WEDNESDAY, 3 JANUARY 2024, THURSDAY, 4 JANUARY 2024

**DELIVERED** : THURSDAY, 18 JANUARY 2024

**FILE NO.** : APPL 73 OF 2023

**BETWEEN** : TRANSPORT WORKERS UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIA BRANCH  
Applicant  
AND  
BAKING INDUSTRY EMPLOYERS ASSOCIATION OF WESTERN AUSTRALIA (INC)  
Respondent

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**CatchWords** : Industrial Law (WA) – Award variation – Transport Workers (General) Award No 10 of 1961 – Consolidation of awards – Breadcarters (Country) Award 1976 – Breadcarters' (Metropolitan) Award – Transport industry – Bread Carters – Preservation of favourable conditions

**Legislation** : *Industrial Relations Act 1979* (WA)  
*Bread Act 1903* (WA)  
*Bread Act 1982* (WA)  
*Acts Amendment and Repeal (Competition Policy) Act 2003* (WA)

**Result** : Award varied

**Representation:**

Applicant	:	Transport Workers Union of Australia, Industrial Union of Workers, Western Australia Branch
Respondent	:	Baking Industry Employers Association of Western Australia (INC)

**Case(s) referred to in reasons:**

*Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Bread Manufacturers' (Perth and Suburbs) Industrial Union of Employers of Western Australia (1997) 57 WAIG 1724*

*Reasons for Decision*

- 1 The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (**TWU**) applied to vary the *Transport Workers (General) Award No 10 of 1961* to consolidate the General Award with two other state transport workers awards.
- 2 The application was prompted by the Commission having, of its own motion under s 37D of the *Industrial Relations Act 1979 (WA)*, commenced CICS 20 of 2022 to review the General Award's scope. The parties who have to date participated in CICS 20 of 2022 supported the General Award's scope being extended to mirror the scope of the *Road Transport and Distribution Award 2020 (Modern Award)*, including coverage of bread and bakery product cartage and/or distribution. Employees who are employed by employers engaged in bread distribution are currently covered by either the *Breadcarters (Country) Award 1976* or the *Breadcarters' (Metropolitan) Award (Breadcarters Awards)*.
- 3 It is anticipated that, if the General Award's scope is extended as outlined above, the two Breadcarters Awards can then be cancelled.
- 4 The classification structure and corresponding rates of pay for each of the General Award, and Breadcarters Awards are broadly aligned. However, there are some differences in terms and conditions, particularly in relation to hours of work and penalty rates. These differences are historical. They relate to the regulation of the hours and days when bread could be baked and sold, and the holidays observed in the industry, under the *Bread Act 1903 (WA)*: see *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Bread Manufacturers' (Perth and Suburbs) Industrial Union of Employers of Western Australia (1997) 57 WAIG 1724*.
- 5 The *Bread Act 1903* was repealed by the *Bread Act 1982 (WA)* on 1 March 1983.
- 6 The *Bread Act 1982* continued to regulate the hours of delivery of bread: s 8. However, unlike the *Bread Act 1903*, it did not contain geographical distinctions, or different regimes for regulating hours of work or holidays for metropolitan and country areas. Arguably, at least since 1982, the rationale for different awards for metropolitan and country bread distribution was removed.
- 7 The *Bread Act 1982* was repealed by the *Acts Amendment and Repeal (Competition Policy) Act 2003 (WA)*: s 3(1). With that repeal, any bread manufacturing industry-specific considerations and rationale for separate terms and conditions of employment were further diminished, if not totally removed.
- 8 The consolidation of the awards is achieved by deleting the exclusion of 'bread carters' from the General Award's scope with the addition of the word 'Bread' before the industry heading 'Cake, Biscuit and Pastry Manufacturing and Selling' in clause 12.1 'Named Respondents to Award'.
- 9 The TWU also proposes variations to the General Award, to preserve the conditions of the Breadcarters Awards which are more favourable than the General Award provisions, namely ordinary hours of work in clause 3.1, shift allowance in clause 5.1.7 and meal and rest breaks in clause 5.6. This is to ensure that employees covered by those other awards are not disadvantaged by the award consolidation.
- 10 The proposed variations also include a saving provision because some junior rates and allowances in the Breadcarters Awards are currently slightly higher than those in the General Award.
- 11 Consolidation will mean that employees currently covered by the Breadcarters Awards will benefit from conditions of the General Award which are absent from the Breadcarters Awards, such as:
  - (a) casual loading of 24% rather than 20%;
  - (b) bereavement leave for casual employees;
  - (c) a right to conversion to permanency for casual employees;
  - (d) the period in which an employee can be paid minimum wages for learning a round is reduced from 10 days to one week;
  - (e) higher public holiday penalty rates; and
  - (f) access to a number of allowances not provided for in the Breadcarters awards such as a refrigeration allowance, and a self-loading equipment allowance.
- 12 The TWU advised the Commission that there are likely only a small number of bakers and/or bread delivery businesses that are likely to be covered by the state industrial relations system.
- 13 Nevertheless, the TWU submitted that the consolidation of the awards would be beneficial because:
  - (a) there will be fewer state awards that cover workers in the Transport Industry in the State industrial relations system;

- (b) the award consolidation will likely make things easier for employers and employees to find the applicable terms and conditions of employment; and
- (c) the variations will be of particular benefit to businesses that are involved in the carting of bread and those who cart other products.
- 14 Section 40 of the Act empowers the Commission to vary an award.
- 15 The TWU is a party bound by the General Award and, therefore, has standing to bring the application: s 40(2) of the Act.
- 16 As the application is made outside the term specified in the General Award, s 40(3) of the Act is no barrier to the variations sought.
- 17 The amendments proposed affect a substantive change to the scope of the General Award. The application, therefore, attracts the requirements of s 29A of the Act for publication of the proposed amendments and service on the s 29A parties. A notice of the application was published in the Industrial Gazette on 27 December 2023: (2023) 103 WAIG 1965 and on the Commission's website and served on the s 29A parties accordingly.
- 18 The application was served on 44 named respondents to the General Award. The remaining 164 named respondents were identified as being either deregistered, deceased or reasonably believed to be dissolved or wound up.
- 19 The application was also served on the Baking Industry **Employers Association** of Western Australia Inc, being the only named respondent to the *Breadcarters' (Metropolitan) Award*. The Commission has ascertained that none of the six named respondents to the *Breadcarters (Country) Award* are current active businesses.
- 20 The Employers Association advised the Commission it did not oppose the variations sought by the TWU. No other respondent or party sought to be heard or filed any response to the application.
- 21 The application, being unopposed, was determined on the papers.
- 22 It is appropriate that the terms and conditions of employment of transport workers engaged in the distribution of bread have conditions aligned with transport workers generally. There is no reason not to extend these conditions to those employees.
- 23 I am therefore satisfied that it is appropriate to make the variations sought.
- 24 An order will issue in the following terms:
- (a) THAT the *Transport Workers (General) Award No 10 of 1961* be varied in accordance with the following schedule and that the variations shall have effect from 1 February 2024.

SCHEDULE

**1. Clause 1.2 - Arrangement: Insert the following as a new clause after clause 1.8:**

1.9 NO REDUCTION

**2. Clause 1.3 - Scope: Delete this clause in its entirety and insert in lieu thereof the following:**

1.3. – SCOPE

This Award shall apply to all employees following the vocations referred to in the Classifications Clause 4.3 who are eligible for membership in the applicant Union and who are employed in the industries referred to in Clause 12.1. Provided that this Award shall not apply to employees engaged in the timber industry within the South West Land Division nor to employees whose duties involve them in delivering goods or materials solely beyond the West Australian State border.

**3. Clause 1.6 - Definitions: Insert the following new definitions after subclause 1.6.14:**

- 1.6.15 "Bread Carter" shall mean an employee appointed as such who may be required to perform incidental and peripheral work of a general nature in addition to the following specific duties:
- 1.6.15.1 delivery and conveying of bread and associated products.
- 1.6.15.2 loading and packing of vehicle.
- 1.6.15.3 maintain the vehicle in a clean condition and carry out minor maintenance/checking to maintain the vehicle in a roadworthy condition.
- 1.6.15.4 collect crates.
- 1.6.15.5 maintain the paperwork associated with the load and sales.
- 1.6.15.6 merchandise products by delivery and replenishing of stock in retail outlets.
- 1.6.16 "Country Bread Carter" shall mean a bread carter who operates in the area of Western Australia outside the radius of 45 kilometres from the G.P.O, Perth.
- 1.6.17 "Loader" (in connection with bread carting) shall mean and include a worker engaged in the sorting, packing, wrapping, slicing, or loading of bread.

**4. Insert the following as a new clause after clause 1.8:**

1.9. – NO REDUCTION

- 1.9.1 Despite the provisions of this award, a Bread Carter (including a casual Bread Carter) who was employed at 31 January 2024 under either the:
- *Breadcarters' (Metropolitan) Award* or
  - *Breadcarters (Country) Award 1976*



and who continues to be employed after that date with the same employer under this award, must not be paid less than they would have been paid for the same work under the provisions of the former award as it stood at 31 January 2024.

**5. Clause 3.1 - Hours:**

**(a) Renumber subclause 3.1.7 as subclause 3.1.10:**

3.1.10 Liberty to apply is reserved to either party to amend this clause for the purpose of making provision for shift employees.

**(b) Insert the following as a new subclause 3.1.7:**

3.1.7 The ordinary hours of work of a Bread Carter shall consist of work performed over a period of eight consecutive hours on each working day unless agreed between the employer and the majority of employees in the workplace, and shall be worked:

3.1.7.1 For a Country Bread Carter, from Monday to Saturday inclusive.

3.1.7.2 For a metropolitan Bread Carter, five consecutive days from Monday to Friday inclusive.

**(c) Insert the following as a new subclause 3.1.8:**

3.1.8 Any time worked by a Bread Carter after eight hours on any one day will be overtime and shall be paid for at the rate of time and one half for the first two hours and double time thereafter.

**(d) Insert the following as a new subclause 3.1.9:**

3.1.9 All time worked by a Country Bread Carter in excess of ten hours on a double delivery day or in excess of twelve hours on a treble or quadruple delivery day shall stand alone and be deemed overtime and shall be paid at the rate of double time.

**6. Clause 4.3 - Classifications: Delete subclause 4.3.2 in its entirety and insert in lieu thereof the following:**

4.3.2 Grade 2  
Driver, rigid vehicle to 4.5 tonnes GVM (Gross Vehicle Mass)  
Employee riding a motorcycle in the course of employment  
Night Washer  
Driver of tow motor  
Loader in charge of automatic slicing and wrapping machine

**7. Clause 5.1 - Shift Work: Insert the following as new subclauses after 5.1.4:**

5.1.7.5 Loaders who are required to commence working before 4.00 a.m. on any day shall be paid for each day so worked, an extra 30 per cent.

5.1.7.6 Loaders who are required to commence work between 4.01 a.m. and 7.00 a.m. on any day shall be paid an extra 15 per cent for each day so worked.

5.1.7.7 Bread Carters who are required to commence working before 7.00 a.m. on any day shall be paid an extra 15 per cent for each day so worked.

5.1.7.8 The early start premiums provided by subclauses 5.1.7.5 to 5.1.7.7 are not payable on overtime hours worked.

**8. Clause 5.6 - Meals:**

**(a) Delete the clause title 'Meals' and insert in lieu thereof the following:**

5.6. – MEAL AND REST BREAKS

**(b) Insert the following as new subclauses after 5.6.5:**

5.6.6 An employee engaged in the bread carting industry shall be entitled to a rest period of ten minutes, after eight hours of work in any shift and a further rest period of ten minutes for every two hours worked thereafter in that shift.

5.6.7 Such rest periods shall count as part of the time worked and shall be taken at a time to suit the convenience of the employer and the employee either before or after the entitlement accrues.

**9. Clause 12 - Named Parties: Delete the address '3rd Floor, Labour Centre 82 Beaufort Street PERTH WA 6000' that appears under the union's name.**

**10. Clause 12.1 - Respondents to the Award: Add the word 'Bread' before the words 'Cake, Biscuit and Pastry Manufacturing and/or Selling:'.**

2024 WAIRC 00047

**TRANSPORT WORKERS (GENERAL) AWARD NO. 10 OF 1961**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**TRANSPORT WORKERS UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,  
WESTERN AUSTRALIA BRANCH**APPLICANT**

-v-

BAKING INDUSTRY EMPLOYERS ASSOCIATION OF WESTERN AUSTRALIA (INC)

**RESPONDENT****CORAM**

SENIOR COMMISSIONER R COSENTINO

**DATE**

WEDNESDAY, 31 JANUARY 2024

**FILE NO/S**

APPL 73 OF 2023

**CITATION NO.**

2024 WAIRC 00047

<b>Result</b>	Award varied
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Transport Workers Union of Australia, Industrial Union of Workers, Western Australia Branch
<b>Respondent</b>	Baking Industry Employers Association of Western Australia (INC)

*Order*

WHEREAS the Transport Workers Union of Australia, Industrial Union of Workers, Western Australia Branch applied on 10 October 2023 to vary the *Transport Workers (General) Award No 10 of 1961* pursuant to s 40 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS for the reasons set out in [2024] WAIRC 00022, the Commission is satisfied that the requirements for varying the Award are met, and that it is appropriate to make the variations as set out in the reasons for decision;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Act, hereby orders –

THAT the *Transport Workers (General) Award No 10 of 1961* be varied in accordance with the following schedule and that the variations shall have effect from 1 February 2024.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

## SCHEDULE

**1. Clause 1.2 - Arrangement: Insert the following as a new clause after clause 1.8:**

1.9 NO REDUCTION

**2. Clause 1.3 - Scope: Delete this clause in its entirety and insert in lieu thereof the following:**1.3. – SCOPE

This Award shall apply to all employees following the vocations referred to in the Classifications Clause 4.3 who are eligible for membership in the applicant Union and who are employed in the industries referred to in Clause 12.1. Provided that this Award shall not apply to employees engaged in the timber industry within the South West Land Division nor to employees whose duties involve them in delivering goods or materials solely beyond the West Australian State border.

**3. Clause 1.6 - Definitions: Insert the following new definitions after subclause 1.6.14:**

1.6.15 “Bread Carter” shall mean an employee appointed as such who may be required to perform incidental and peripheral work of a general nature in addition to the following specific duties:

1.6.15.1 delivery and conveying of bread and associated products.

1.6.15.2 loading and packing of vehicle.

1.6.15.3 maintain the vehicle in a clean condition and carry out minor maintenance/checking to maintain the vehicle in a roadworthy condition.

1.6.15.4 collect crates.

1.6.15.5 maintain the paperwork associated with the load and sales.

1.6.15.6 merchandise products by delivery and replenishing of stock in retail outlets.

1.6.16 “Country Bread Carter” shall mean a bread carter who operates in the area of Western Australia outside the radius of 45 kilometres from the G.P.O, Perth.

1.6.17 “Loader” (in connection with bread carting) shall mean and include a worker engaged in the sorting, packing, wrapping, slicing, or loading of bread.

**4. Insert the following as a new clause after clause 1.8:**

1.9. – NO REDUCTION

- 1.9.1 Despite the provisions of this award, a Bread Carter (including a casual Bread Carter) who was employed at 31 January 2024 under either the:
- *Breadcarters' (Metropolitan) Award* or
  - *Breadcarters (Country) Award 1976*
- and who continues to be employed after that date with the same employer under this award, must not be paid less than they would have been paid for the same work under the provisions of the former award as it stood at 31 January 2024.

**5. Clause 3.1 - Hours:**

**(a) Renumber subclause 3.1.7 as subclause 3.1.10:**

- 3.1.10 Liberty to apply is reserved to either party to amend this clause for the purpose of making provision for shift employees.

**(b) Insert the following as a new subclause 3.1.7:**

- 3.1.7 The ordinary hours of work of a Bread Carter shall consist of work performed over a period of eight consecutive hours on each working day unless agreed between the employer and the majority of employees in the workplace, and shall be worked:

3.1.7.1 For a Country Bread Carter, from Monday to Saturday inclusive.

3.1.7.2 For a metropolitan Bread Carter, five consecutive days from Monday to Friday inclusive.

**(c) Insert the following as a new subclause 3.1.8:**

- 3.1.8 Any time worked by a Bread Carter after eight hours on any one day will be overtime and shall be paid for at the rate of time and one half for the first two hours and double time thereafter.

**(d) Insert the following as a new subclause 3.1.9:**

- 3.1.9 All time worked by a Country Bread Carter in excess of ten hours on a double delivery day or in excess of twelve hours on a treble or quadruple delivery day shall stand alone and be deemed overtime and shall be paid at the rate of double time.

**6. Clause 4.3 - Classifications: Delete subclause 4.3.2 in its entirety and insert in lieu thereof the following:**

- 4.3.2 Grade 2  
 Driver, rigid vehicle to 4.5 tonnes GVM (Gross Vehicle Mass)  
 Employee riding a motorcycle in the course of employment  
 Night Washer  
 Driver of tow motor  
 Loader in charge of automatic slicing and wrapping machine

**7. Clause 5.1 - Shift Work: Insert the following as new subclauses after 5.1.4:**

- 5.1.7.5 Loaders who are required to commence working before 4.00 a.m. on any day shall be paid for each day so worked, an extra 30 per cent.
- 5.1.7.6 Loaders who are required to commence work between 4.01 a.m. and 7.00 a.m. on any day shall be paid an extra 15 per cent for each day so worked.
- 5.1.7.7 Bread Carters who are required to commence working before 7.00 a.m. on any day shall be paid an extra 15 per cent for each day so worked.
- 5.1.7.8 The early start premiums provided by subclauses 5.1.7.5 to 5.1.7.7 are not payable on overtime hours worked.

**8. Clause 5.6 - Meals:**

**(a) Delete the clause title 'Meals' and insert in lieu thereof the following:**

5.6. – MEAL AND REST BREAKS

**(b) Insert the following as new subclauses after 5.6.5:**

- 5.6.6 An employee engaged in the bread carting industry shall be entitled to a rest period of ten minutes, after eight hours of work in any shift and a further rest period of ten minutes for every two hours worked thereafter in that shift.
- 5.6.7 Such rest periods shall count as part of the time worked and shall be taken at a time to suit the convenience of the employer and the employee either before or after the entitlement accrues.

**9. Clause 12 - Named Parties: Delete the address '3rd Floor, Labour Centre 82 Beaufort Street PERTH WA 6000' that appears under the union's name.**

**10. Clause 12.1 - Respondents to the Award: Add the word 'Bread' before the words 'Cake, Biscuit and Pastry Manufacturing and/or Selling:'.**

**INDUSTRIAL MAGISTRATE—Claims before—**

2024 WAIRC 00061

**INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA**

<b>CITATION</b>	:	<b>2024 WAIRC 00061</b>	
<b>CORAM</b>	:	INDUSTRIAL MAGISTRATE D. SCADDAN	
<b>HEARD</b>	:	THURSDAY, 1 FEBRUARY 2024	
<b>DELIVERED</b>	:	FRIDAY, 9 FEBRUARY 2024	
<b>FILE NO.</b>	:	M 79 OF 2023	
<b>BETWEEN</b>	:	BRIAN EDWARD RAVENSCROFT, DEPARTMENT OF ENERGY, MINES, INDUSTRY REGULATION AND SAFETY	<b>CLAIMANT</b>
		AND	
		ALI DEMIRCI	<b>RESPONDENT</b>

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<b>CatchWords</b>	:	INDUSTRIAL LAW – Assessment of pecuniary penalties for contravention of section 102(1)(a) of <i>Industrial Relations Act 1979</i> (WA) - Failure to comply with notice to produce records – Order for employment records
<b>Legislation</b>	:	<i>Industrial Relations Act 1979</i> (WA) <i>Industrial Magistrate’s Court (General Jurisdiction) Regulations 2005</i> (WA)
<b>Instrument</b>	:	<i>Restaurant, Tearoom and Catering Workers’ Award 1979</i>
<b>Case(s) referred to in reasons:</b>	:	<i>Callan v Smith</i> [2021] WAIRC 00216; 101 WAIG 1155 <i>Australian Building and Construction Commissioner v Pattinson</i> [2022] HCA 13; 274 CLR 450 <i>Briginshaw v Briginshaw</i> [1938] HCA 34; 60 CLR 336 <i>Sammut v AVM Holdings Pty Ltd</i> [No2] [2012] WASC 27 <i>NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission</i> [1996] FCA 1134; 71 FCR 285. <i>Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)</i> [2017] FCA 557 <i>Kelly v Fitzpatrick</i> [2007] FCA 1080; 166 IR 14 <i>Mason v Harrington Corporation Pty Ltd</i> [2007] FMCA 7 <i>Trade Practices Commission v CSR Limited</i> [1990] FCA 762, (1991) ATPR 41-076 <i>Rojas v Esselte Australia Pty Ltd (No 2)</i> [2008] FCA 1585; 177 IR 306 <i>The Commonwealth v Director, Fair Work Building Inspectorate</i> [2015] HCA 46; 258 CLR 482 <i>Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith</i> [2008] FCAFC 8; 165 FCR 560
<b>Result</b>	:	Civil penalty paid, and other orders made
<b>Representation:</b>		
Claimant	:	Ms M. Christie (of counsel) as instructed by the Department of Energy, Mines, Industry Regulation and Safety
Respondent	:	Ms R. Reid (of counsel) as instructed by Appius Lawyers

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**REASONS FOR DECISION****Background**

- On 5 July 2023, the claimant, an Industrial Inspector employed by the then Department of Mines, Industry, Regulation and Safety (the Department), commenced a claim pursuant to s 83E of the *Industrial Relations Act 1979* (WA) (IR Act) in respect of two alleged contraventions of s 102(1)(a) of the IR Act.
- The respondent is in charge of and operates a business in partnership with others which trades as ‘The Kebab Place’ at the Alexander Heights Shopping Centre with ABN 33 538 189 774 (the Business). As the name suggests, the Business is a

takeaway and café providing, amongst other things, kebabs, and other food. The Business has employees who are employed by the partnership (the Employer).

- 3 The claimant issued two notices to produce employment records pursuant to s 98(3)(e) of the IR Act as part of a proactive compliance inspection to ascertain whether the Employer was compliant with the relevant industrial award, the *Restaurant, Tearoom and Catering Workers' Award 1979* (the Award).
- 4 Following a pre-trial conference, the claimant discontinued part of the claim with the resultant allegation confined to the respondent's failure to comply with a second notice to produce records issued pursuant to s 98(3)(e) of the IR Act, personally served on the respondent on 5 December 2022 (NTP2).
- 5 The claimant alleged the respondent failed to comply with NTP2 by failing to provide to the Department the specified employment records relating to the period of 1 July 2022 to 21 November 2022 by 12 December 2022 or at all. This failure contravenes s 102(1)(a) of the IR Act.
- 6 The respondent admits he did not comply with NTP2 by 12 December 2022 and in failing to do so, admits he contravened s 102(1)(a) of the IR Act. The respondent says he instructed the Business's accountant to provide the specified employment records and he believed the instruction would be followed.

#### **Penalty and Orders Sought**

- 7 The claimant now seeks the following:
  - 7.1 pursuant to s 83E(1)(b) of the IR Act, the respondent pays to the claimant a penalty not exceeding \$13,000 for the contravention of s 102(1)(a) of the IR Act;
  - 7.2 pursuant to s 83E(11) of the IR Act, the respondent pays to the claimant disbursements incurred by the claimant in relation to the proceedings;
  - 7.3 pursuant to s 83E(2) of the IR Act, an order requiring the respondent to provide to the claimant 'employment records'<sup>1</sup> for all employees employed at The Kebab Place at any time during the relevant period (whether or not the employees are still employed at The Kebab Place at the end of the period), within 14 days of the end of each of the following periods:
    - (i) 1 July 2023 to 30 September 2023;
    - (ii) 1 October 2023 to 31 December 2023;
    - (iii) 1 January 2024 to 31 March 2024; and
    - (iv) 1 April 2024 to 30 June 2024.
- 8 The respondent admits he is liable to pay a penalty and disbursements to the claimant and to provide employment records but seeks an extension of time to provide to the claimant the employment records sought.
- 9 Schedule I of these reasons outline the jurisdiction, standard of proof, practice, and procedure of the Court in determining this case.
- 10 Schedule II of these reasons outline the provisions of the IR Act and principles relevant in determining an appropriate civil penalty (if any) for the respondent's contravention.

#### **The Claimant's Submission on Penalty**

- 11 The claimant submits the IR Act:

[R]equires employers to keep time and wages records and make those available for inspection to ensure that employees are paid their entitlements. The failure to produce employment records when requested by industrial inspectors makes it difficult or even impossible to determine whether an employer has complied with their obligations under the Act and the relevant award and prevents industrial inspectors from carrying out investigations and taking any appropriate enforcement action on behalf of employees. (footnotes omitted)
- 12 The primary purpose of a civil penalty is to promote the public interest in compliance with the law, which is achieved by imposing a penalty that is sufficiently high to ensure both specific and general deterrence.
- 13 In respect of specific deterrence, the claimant submits the respondent has not previously contravened a civil penalty provision under the IR Act. However, the claimant further submits the respondent did not comply with NTP2 until 31 October 2023, some 10 months after the time frame for production in NTP2 and four months after the commencement of these proceedings. While the respondent may have instructed the Business's accountant to provide the employment records, the respondent has a duty to ensure the employment records were produced and could not discharge this duty in the manner he did so. The respondent must have been aware upon the commencement of these proceedings that the employment records had not been provided, and compliance with NTP2 did not occur in a timely manner.
- 14 In respect of general deterrence, the claimant submits cafés and restaurants are identified as having higher likelihood of systemic and deliberate underpayment of wages and entitlements, as well as non-compliance with employment obligations. The issuance of NTP2 was part of a proactive compliance campaign by the Department in those sectors, and any penalty should emphasise the importance of cooperating with industrial inspectors and deter other employers from not complying with similar requirements under the IR Act.
- 15 The claimant accepts the starting point for any penalty is at the lower end of the scale but says the penalty ought to be meaningful to address specific and general deterrence.

**The Respondent's Submission on Penalty**

- 16 The respondent submits that with his partners C Demirci, K Karakuyu and D Karakuyu the Business began trading on 15 July 2020. In October 2022, the original partnership in the Business changed to comprise the respondent, C Demirci, N Karakuyu and A Dogan. The Business is a small, family-owned, and operated kebab business trading as a dine in/take-away service opening seven days a week from 9.30 am to 9.30 pm. The Business generally employs approximately five employees, due to a downturn.
- 17 The respondent submits he delivered NTP2 to the Business accountant with instructions to provide the documents as requested, with the reasonable belief his instructions would be followed. As a person with limited ability in English, he relied significantly on his accountant to organise and oversee the administrative side of the Business. However, he accepts that it was ultimately his responsibility to ensure this was done.
- 18 The respondent accepts that neither he, nor his partners, followed up with the Business accountant to ensure the requested documents had been provided. The respondent says they have never been served with such a request and he did not understand the intention of the request and associated potential consequences of failing to provide the documents in a timely manner. Once the respondent became aware (by virtue of the commencement of these proceedings) that the documents had not been provided to the Department, he immediately contacted the Business accountant and was advised to seek legal advice, which he did on 13 July 2023. The respondent gave instructions for the respondent's solicitor to provide a copy of NTP2, together with the required documents sought, to the Business accountant on 7 August 2023. On 31 August 2023, the respondent contacted the respondent's solicitor to ascertain whether the Business accountant had provided the requested documents. It was confirmed the Business accountant had not, and a further request for the documents was made on 1 September 2023.
- 19 Between 7 September 2023 and 12 October 2023, the respondent says he provided as many documents as he could to his solicitor's office, in preparation for complete delivery to the claimant's solicitor. On 13 October 2023, the respondent's solicitor received a wages statement prepared by the Business accountant, detailing only employees for one requested period, being 1 October 2022 to 31 December 2022. A further request by the respondent's solicitor was made to produce a wages statement for the periods 1 July 2022 to 30 September 2022; 1 October 2022 to 31 December 2022; 1 January 2023 to 31 March 2023; and 1 April 2023 to 30 June 2023. After seeking legal advice, together with conferral with the claimant's solicitors at the Pre-Trial Conference on 17 October 2023, it was agreed the claimant would discontinue part of the claim, and the respondent would thereafter admit to contravening NTP2. Pursuant to orders made by the Registrar at the Pre-Trial Conference on 17 October 2023, all the available collated documents were provided to the claimant's solicitor on 30 October 2023.
- 20 In respect of his personal circumstances, the respondent submits he is 48 years of age and immigrated to Australia from Turkey in 1998. He became an Australian citizen in 2001. English is the respondent's second language, and he describes his verbal, written and comprehension skills as poor. The respondent is in good physical health but has suffered anxiety and depression associated with these legal proceedings. The respondent is married with three children. He works long hours, six days per week.
- 21 The respondent accepts the Business is in a high-risk sector for non-compliance with the various industrial laws. He also accepts the contravention continued for approximately 10 months, potentially characterising the contravention in the low-moderate range.
- 22 However, the respondent takes the contravention seriously and he did not fully appreciate the obligations to comply with NTP2. To date, the respondent has not received any complaints from employees concerning underpayment of wages or non-compliance with entitlements.
- 23 The respondent is remorseful,<sup>2</sup> and he is better informed of his obligations and the important role of the Department in ensuring compliance by employers to protect entitlements of employees.
- 24 The respondent's failure to comply with NTP2 was not a deliberate attempt to avoid or obstruct the claimant, nor was it a wilful defiance of the law. It was borne of an undue reliance on another, but he takes full responsibility for his omission.
- 25 The respondent is otherwise of good character and relies upon two character references provided to the court.
- 26 The respondent has personal debts of a home mortgage of \$734,824 and to the Australian Taxation Office of \$19,796.
- 27 In all the circumstances, the respondent says notwithstanding the general principles associated with the imposition of a civil penalty, specific deterrence is less important where it is unlikely the respondent will contravene the IR Act again, his willingness to comply with court orders (as it relates to the provision of employment records sought) and this is the first such contravention. The respondent further says that any penalty ought not to be financially crushing to a small family operated business.

**Determination**

- 28 The following considerations are significant in assessing the penalty in this case:
- Nature and extent of conduct and the circumstances in which it occurred**
- 29 There is one contravention of failing to provide employment records required by NTP2. Compliance with NTP2 did not occur until 31 October 2023, some 10 months after it was served on the respondent and approximately four months after these proceedings were commenced.
- 30 The respondent accepts his culpability with respect to the failure to provide the employment records, but notably this is not a case where the respondent did nothing and the employment records were provided after the discontinuance of part of the claimant's claim. The respondent's failure was in not following up on his instructions to the Business accountant to provide the

employment records and the associated delay in providing the employment records, noting the respondent accepts it was his duty to comply with NTP2.

- 31 The effect of non-compliance or delay in compliance is that it deprives the claimant of an opportunity to identify if any employees have been underpaid wages or entitlements, and to take swift remedial action.

**Nature and extent of any loss or damage sustained**

- 32 No loss or damage has been identified referable to the claimant or any employee, although the contravention deprives the claimant of a timely opportunity to ascertain whether the respondent was compliant with any industrial law obligations.

**Similar conduct**

- 33 There is no indication the respondent has previously contravened a civil penalty provision under the IR Act.

**One course of conduct?**

- 34 There is one contravention. This factor is neutral.

**The size of the business enterprise involved**

- 35 The Business is a small family run dine-in/take away kebab business. The Full Bench of the Western Australian Industrial Relations Commission in *Callan v Smith* [2021] WAIRC 00216; 101 WAIG 1155 found that the size of the business should not weigh in favour of diminishing a penalty that would otherwise be assessed. However, as noted in *Pattinson (Australian Building and Construction Commissioner v Pattinson)* [2022] HCA 13; 274 CLR 450):

[I]n some cases, the circumstances of the contravenor may be more significant in terms of the extent of the necessity for deterrence than the circumstances of the contravention. In this regard, it is simply undeniable that, all other things being equal, a greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy than will be necessary to persuade a poorly resourced contravenor that its unlawful policy preference is not sustainable [60].

**Deliberateness of contraventions**

- 36 While the respondent did not comply with NTP2 in a timely manner, as already noted this is not a case where he did nothing. Again, as already stated, the respondent's failure was, in part, associated with his reliance upon a third party and failing to ensure he or others followed up on the instructions given to a third party. The respondent now professes to have a better understanding of the obligation for compliance.

**Corrective action, contrition, and co-operation**

- 37 The respondent complied with NTP2 in late October 2023, after the commencement of proceedings. The respondent has expressed remorse for the contravention. The respondent has participated in these proceedings in a timely manner and made appropriate admissions to the contravention.
- 38 The respondent has expressed a willingness to comply with future orders of the court as it relates to the provision of employment records sought by the claimant.

**Specific and general deterrence**

- 39 Considering the above, considerations of punishment and specific deterrence are somewhat less important in this case than the need to deter other employers from not complying with notices to produce issued by the Department, undermining the functions of industrial inspectors in ensuring compliance with industrial laws, and identifying contraventions in a timely manner.
- 40 The contravention in all the circumstances is properly categorised in the low range.

**Financial position of the respondent**

- 41 The respondent has financial obligations, including a mortgage and a debt to the Australian Taxation Office, however, he has capacity to pay a penalty.

**Civil Penalty Order**

- 42 For these reasons a penalty fixed in the sum of \$2,500 is a penalty of what is reasonably necessary to deter further contraventions of a like kind by primarily other employers but also to a lesser extent by the respondent.
- 43 Pursuant to s 83F(2) of the IR Act, payment of the civil penalty of \$2,500 is to be to the Treasurer.

**Other Orders**

- 44 As set out in paragraph [7.3], the claimant seeks an order for the provision of employment records, with the particular records identified in Schedule III.
- 45 The respondent requests further time for the compliance.
- 46 Having regard to the nature and extent of the employment records sought, I accept the respondent may require some further time to provide the specified records to the claimant, although I note the respondent has had notice of their provision by virtue of the orders sought.
- 47 Accordingly, pursuant to s 83E(2) of the IR Act, the respondent is to provide to the claimant employment records for all employees employed at The Kebab Place at any time during the relevant period (whether or not the employees are still employed at The Kebab Place at the end of the period), for each of the following periods within 30 days of the date of this order:

- (i) 1 July 2023 to 30 September 2023; and
- (ii) 1 October 2023 to 31 December 2023.

48 Further, pursuant to s 83E(2) of the IR Act, the respondent is to provide to the claimant employment records for all employees employed at The Kebab Place at any time during the relevant period (whether or not the employees are still employed at The Kebab Place at the end of the period), for each of the following periods within 21 days of the final date of the period sought:

- (i) 1 January 2024 to 31 March 2024; and
- (ii) 1 April 2024 to 30 June 2024.

49 The specified employment records for each period are contained in Schedule III of these reasons.

#### Costs

50 The respondent is to pay the claimant's disbursements fixed in the amount of \$143.

#### D. SCADDAN

#### INDUSTRIAL MAGISTRATE

### Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA)

#### Jurisdiction

- [1] The Industrial Magistrates Court (WA) (IMC or 'the Court'), has the jurisdiction conferred by the IR Act and other legislation. Section 83E of the IR Act confers jurisdiction on the IMC to impose a pecuniary penalty if a person contravenes a civil penalty provision.
- [2] Section 102(3) of the IR Act provides that s 102(1) of the IR Act is a civil penalty provision.

#### Burden and standard of proof

- [3] The standard of proof to be applied in determining whether there has been a contravention of a civil penalty provision is the standard observed in civil proceedings: s 83E(8) of the IR Act.
- [4] In the context of an allegation of the breach of a civil penalty provision of the IR Act it is also relevant to recall the observation of Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336:
 

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences (362).
- [5] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

#### Practice and Procedure of the Industrial Magistrates Court

- [6] The procedure of the IMC is contained in s 81CA(5)(7a) and (8) of the IR Act and in the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (IMC Regulations).
- [7] Relevantly, the IMC is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: reg 35(4) of the IMC Regulations.
- [8] In *Sammut v AVM Holdings Pty Ltd [No2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation:
  - 40 The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence. (citations omitted)

### Schedule II Pecuniary Penalty Orders under the IR Act

#### Pecuniary Penalty Orders

- [1] Section 83E(1) of the IR Act provides the IMC may make an order imposing a pecuniary penalty on a person if the person contravenes a civil penalty provision.
- [2] Section 83E(1)(a) of the IR Act provides the maximum penalty in the case of a body corporate and relevant to a contravention which is not a serious contravention, the maximum penalty is \$65,000. If the contravention is a serious contravention, the maximum penalty is \$650,000.
- [3] Section 83E(1)(b) of the IR Act provides the maximum penalty in the case of an individual and relevant to a contravention which is not a serious contravention, the maximum penalty is \$13,000. If the contravention is a serious contravention, the maximum penalty is \$130,000.
- [4] Except as provided in subsections (6a) and (7A), an application for an order under s 83E may be made by: (a) a person directly affected by the contravention or, if that person is a represented person, the person's representative; (b) an organisation or



association of which a person who comes within paragraph (a) is a member; (c) the Registrar or deputy registrar; or (d) an industrial inspector.

- [5] In *Pattinson*, the plurality confirmed that civil penalties ‘are not retributive, but rather are protective of the public interest in that they aim to secure compliance by deterring repeat contraventions’ [40]. However, ‘insistence upon the deterrent quality of a penalty should be balanced by insistence that it “not be so high as to be oppressive”’ [40], citing *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285.
- [6] While the civil penalty referred to in *Pattinson* was under s 546 of the *Fair Work Act 2009* (Cth), the principles in the decision are clearly applicable to civil penalties under the IR Act (noting the absence of the word ‘appropriate’ in s 83E of the IR Act) and have been applied in other State jurisdictions to civil penalties in industrial and other laws.
- [7] The purpose served by civil penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 at [388] in the following terms:

In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose. (citations omitted)

- [8] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 at [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty’ which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 [24]:

The nature and extent of the conduct which led to the breaches.

The circumstances in which that conduct took place.

The nature and extent of any loss or damage sustained as a result of the breaches.

Whether there had been similar previous conduct by the respondent.

Whether the breaches were properly distinct or arose out of the one course of conduct.

The size of the business enterprise involved.

Whether or not the breaches were deliberate.

Whether senior management was involved in the breaches.

Whether the party committing the breach had exhibited contrition.

Whether the party committing the breach had taken corrective action.

Whether the party committing the breach had cooperated with the enforcement authorities.

The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and

The need for specific and general deterrence.

- [9] Similar principles have been identified in *Trade Practices Commission v CSR Limited* [1990] FCA 762 [42]; (1991) ATPR 41-076; *Rojas v Esselte Australia Pty Ltd (No 2)* [2008] FCA 1585 [64]; 177 IR 306; and *Callan v Smith*.

- [10] The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.’ (Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 [91]; 165 FCR 560).

- [11] Although these factors provide useful guidance, the task of assessing the appropriate penalty is not an exact science: *The Commonwealth v Director, Fair Work Building Inspectorate* [2015] HCA 46 [47]; 258 CLR 482. The Court must ultimately fix a penalty that pays appropriate regard to the contraventions that have occurred: *Pattinson* at [19]. A court empowered (by s 546) to impose an [appropriate] penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions [of the Act]: *Pattinson* at [48].

- [12] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 [47] – [52]; 165 FCR 560.

#### Costs

- [13] In proceedings under s 83E of the IR Act, costs must not be given to any party to the proceedings for the services of a legal practitioner or agent unless: (a) the IMC finds that the other party has committed a serious contravention; or (b) in the IMC’s opinion, the proceedings have been frivolously or vexatiously instituted or defended (as relevant): s 83E(12) of the IR Act.

#### Payment of Costs and Penalties

- [14] Where the IMC by an order under s 83E of the IR Act imposes a penalty or costs, the IMC must state in the order: (a) the name of the person liable to pay the penalty or costs; and (b) the name of the person to whom the penalty is, or costs are, payable: s 83F(1) of the IR Act.

[15] An IMC imposing a penalty by order under s 83E of the IR Act may order that the amount of the penalty, or part of that amount, be paid to: (a) a person directly affected by the conduct to which the contravention relates; (b) the applicant; or (c) the Treasurer: s 83F(2) of the IR Act.

[16] In making an order for payment to a person directly affected by the conduct to which the contravention relates, the court must consider any other compensation that the person has received or is likely to receive in respect of the conduct concerned: s 83F(3) of the IR Act.

### Schedule III Employment Records Sought

#### “Employment Records” means the following:

[1] A list of all employees employed at The Kebab Place including:

- a) Full name;
- b) Date of birth for any employees under 21 years of age;
- c) Mobile phone number; and
- d) Email address.

[2] For each employee employed at The Kebab Place:

- a) The date they commenced employment with the business;
- b) Employment status (full time, part time or casual);
- c) Employee’s classification and job description;
- d) Records of all hours worked (including work performed on weekends), such as time and wages records, timecards or rosters detailing –
  - Total hours worked each week;
  - The start and finish times of the employees each day; and
  - Meal breaks taken;
- e) The gross and net amounts paid for each pay period during the period under review, and all deductions and the reasons for them;
- f) Pay records for each pay period, such as payroll reports or payslips;
- g) Bank records detailing the payment of wages to employees via electronic funds transfer (EFT); and
- h) The records of all annual and sick leave taken (amounts and when taken) and any periods of unpaid leave.

<sup>1</sup> “Employment Records” includes records referred to in Schedule III of these reasons.

<sup>2</sup> Respondent’s letter of apology.

2024 WAIRC 00064

### INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

<b>CITATION</b>	:	2024 WAIRC 00064	
<b>CORAM</b>	:	INDUSTRIAL MAGISTRATE B. COLEMAN	
<b>HEARD</b>	:	ON THE PAPERS	
<b>DELIVERED</b>	:	FRIDAY, 9 FEBRUARY 2024	
<b>FILE NO.</b>	:	M 76 AND M 91 OF 2022	
<b>BETWEEN</b>	:	CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION	<b>CLAIMANT</b>
		AND	
		QUBE PORTS PTY LTD	<b>RESPONDENT</b>

<b>CatchWords</b>	:	Long Service Leave entitlement pursuant to an Industrial Instrument; Classification of employment; Changes to classifications throughout employment history; Calculation of actual entitlement; Interpretation of Industrial Instrument.
<b>Legislation</b>	:	<i>Fair Work Act 2009</i> (Cth)
<b>Instrument</b>	:	<i>Qube Ports Pty Ltd - Port of Port Hedland Enterprise Agreement 2020</i> <i>Stevedoring Industry (Long Service Leave) Award 1992</i>

**Case(s) referred**

<b>to in reasons:</b>	:	<i>Kucks v CSR Ltd</i> [1996] IRCA 141; 66 IR 182 <i>Re Harrison; Ex parte Hames</i> [2015] WASC 247 <i>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd</i> [2013] FCA 638 <i>Fedec v The Minister for Corrective Services</i> (2017) 97 WAIG 1595 <i>Civil Service Association of Western Australia Incorporated v Commissioner, Western Australia Police Department</i> [2019] WAIRC 00142
<b>Result</b>	:	Claim (in relation to long service leave) dismissed
<b>Representation:</b>		
Claimant	:	Ms S. Sayed (of counsel) as instructed by the Construction, Forestry, Maritime, Mining and Energy Union
Respondent	:	Mr N. Ellery (of counsel) as instructed by Corrs Chambers Westgarth

**REASONS FOR DECISION**

- 1 The respondent employer, Qube Ports Pty Ltd, admits all contraventions of claims M 76 and 91 of 2022 aside from the long service leave portion of claim M 91 of 2022.
- 2 The Court has granted leave for the disputed portion of the claim to be heard and determined on the papers.
- 3 Ms Macdonald ceased her employment as a port worker with Qube Ports on 3 December 2021.
- 4 She argues that her employer has breached sections 50 and 323 of the *Fair Work Act 2009* (Cth) (**the Act**), because she was underpaid her long service leave entitlements upon cessation. Ms Macdonald claims that she should have been paid an entitlement pursuant to the *Qube Ports Pty Ltd - Port of Port Hedland Enterprise Agreement 2020* (**the 2020 Agreement**) for the period from 13 August 2008 to 31 May 2010. Ms Macdonald is incorrect.
- 5 The three issues are as follows:
  - a) What were Ms Macdonald's employment classifications throughout her working history with the employer?
  - b) Did each employment classification give rise to a long service leave entitlement pursuant to the 2020 Agreement?
  - c) What was Ms Macdonald's total long service leave entitlement pursuant to the 2020 Agreement?
- 6 Whether Ms Macdonald was underpaid her long service leave requires a thorough examination of the 2020 Agreement.<sup>1</sup>
- 7 The principles for interpreting industrial agreements are well settled. The task involves different considerations when compared to the interpretation of legislation. The objective intention of the parties must be determined by considering the text of the instrument, which begins by considering the ordinary meaning of its words. However, a literal or pedantic interpretation should be avoided where that would produce a result that is inconsistent with the apparent intention of those that drafted it. Regard must be had to the context and purpose of the provision being construed, bearing in mind that the drafters were likely focused on practicality and the relevant industrial relations environment. Context may appear from the text of the whole instrument, its arrangement, and/or the position of the provision within the instrument. If the plain meaning is clear, the Court will have no need to refer to extrinsic materials.<sup>2</sup>
- 8 An employee's entitlement to long service leave pursuant to the 2020 Agreement arises by reference to cl 45.1, which incorporates the *Stevedoring Industry (Long Service Leave) Award 1992* (**the LSL Award**).<sup>3</sup>
- 9 An employee is only entitled to long service leave in accordance with the 2020 Agreement if the requirements of the LSL Award are satisfied.

**What were Ms Macdonald's employment classifications throughout her working history with the employer?**

- 10 Ms Macdonald's employment status changed four times throughout her work history with the employer. Contrary to her belief, she was not a variable salary employee from 13 August 2008.<sup>4</sup>
- 11 Ms Macdonald commenced full-time employment with the employer on 13 August 2008 in the role of Administration Coordinator. She ceased in this role on 30 November 2008 (**Period 1**).<sup>5</sup>
- 12 On 1 December 2008, Ms Macdonald's employment classification changed to a supplementary employee: she remained in this role until 31 May 2010 (**Period 2**).<sup>6</sup>
- 13 On 1 June 2010, Ms Macdonald commenced on a new contract of employment and was employed as a guaranteed wage employee until 24 July 2011 (**Period 3**).<sup>7</sup>
- 14 On 25 July 2011, her employment classification changed to a variable salary employee. She remained in that role until her termination on 4 November 2021 (**Period 4**).<sup>8</sup>

**Did each employment classification give rise to a long service leave entitlement pursuant to the 2020 Agreement?**

- 15 The 2020 Agreement at cl 45 sets out long service leave entitlements for 'Employees' in accordance with the LSL Award.
- 16 Employee is defined at cl 2.1(g) as:

... a *stevedoring employee* who works in the classifications set out in clause 11.1 and Schedule 2 of this Agreement and is employed at the Port of Port Hedland. (Emphasis added)

- 17 The definition in the 2020 Agreement is consistent with the LSL Award, since the Award applies to ‘stevedoring employees’.<sup>9</sup>
- 18 By reference to the various instruments, a stevedoring employee is a person eligible to be a member of a union party to the *Stevedoring Industry Award 1991* and who is employed by an employer bound by that award for the purpose of being engaged in stevedoring operations.<sup>10</sup>
- 19 The definition of ‘stevedoring operations’ in the 1991 Award is extensive. In summary, such operations relate to:
- a) the loading or unloading of cargo and other goods from ships,
  - b) receipt, delivery, storage, handling or preparation of such cargo,
  - c) clerical functions in connection with stevedoring operations,
  - d) maintenance, construction or repair work,
  - e) watching guarding and protection duties in connection with operational activities,
  - f) supervision, direction, checking and instruction of stevedoring employees, and
  - g) general functions and duties in connection with ships, cargo, vehicles and buildings at a wharf.<sup>11</sup>
- 20 Therefore, to be eligible for long service leave in accordance with cl 45.1 of the 2020 Agreement, the following conditions must be satisfied:
- i) A person needs to fall within the definition of ‘Employee’ pursuant to the Agreement; **and**
  - ii) an employee needs to be employed for the purposes of being engaged in stevedoring operations; **and**
  - iii) the employee must work in one of the job classifications set out in Schedule 2.

*Period 1*

- 21 When Ms Macdonald commenced employment in August 2008, her job description was ‘Administration Coordinator’.<sup>12</sup>
- 22 No evidence has been presented which sets out the particular functions of that role. It is possible that the position falls within the definition of being engaged in stevedoring operations pursuant to the definition set out in the LSL Award, since stevedoring operations include clerical functions, however, there is a third requirement that must be satisfied for an employee to fall within the ambit of cl 45: the job classification must be listed in Schedule 2.
- 23 In the absence of any evidence related to the functions of her role (other than the job title), the job description of ‘Administration Coordinator’ does not fit within the job classifications set out in Schedule 2 of the 2020 Agreement.
- 24 Ms Macdonald may have been eligible for long service leave pursuant to extraneous legislation or other industrial instruments, however, she was not entitled to long service leave pursuant to the 2020 Agreement for the period from 13 August to 30 November 2008.<sup>13</sup>

*Period 2*

- 25 On 1 December 2008, Ms Macdonald’s employment classification changed to ‘Supplementary Employee’. No evidence has been presented which sets out the particular functions of that role, doubtless, the work included stevedoring operations.
- 26 Whether a supplementary employee is entitled to long service leave pursuant to cl 45 is the primary argument between the parties.
- 27 Ms Macdonald argues that supplementary employees are included in the ‘cohort of Employee’ pursuant to cl 2.1(s) and cl 8 of the 2020 Agreement, therefore, she is entitled to the benefit of cl 45.<sup>14</sup>
- 28 However, such an argument fails to consider the 2020 Agreement as a whole and the objective intention of the parties who drafted it.
- 29 A review of the 2020 Agreement reveals six categories of employees, summarised as follows:<sup>15</sup>
- a) Full Time Salaried Employee (FSE);
  - b) Provisional Full Time Salaried Employee (PFSE);
  - c) Variable Salary Employee (VSE);
  - d) Provisional Variable Salary Employee (PVSE);
  - e) Guaranteed Wage Employee (GWE);
  - f) Supplementary Employee (SE).
- 30 Each class of employee is granted different entitlements depending upon their classification, however, there is an important distinction between a supplementary employee and all of the other categories: a supplementary employee is not entitled to a minimum annual salary.<sup>16</sup>
- 31 Further, ‘Supplementary Employee’ has a distinct definition within the 2020 Agreement, rather than falling within the general definition of Employee. All other employee categories fall within the general definition:

**Employee** means a *stevedoring Employee* who works in the classifications set out in clause 11.1 and *Schedule 2* of this Agreement and is employed at the Port of Port Hedland. (emphasis added)<sup>17</sup>

**Supplementary Employee** means an Employee who is a non-permanent casually engaged person *to supplement* the use of *other Employees* in accordance with clause 9.8 of this Agreement. (emphasis added)<sup>18</sup>

- 32 This is a very important distinction, since the general definition of ‘Employee’ guarantees that the conditions of cl 45 are satisfied (in other words, if an employee fits within the general definition of ‘Employee’, then they will automatically be eligible for long service leave pursuant to the 2020 Agreement).
- 33 That then begs the question, why has such a distinction been made? When drafting the 2020 Agreement, what was the intention of the parties when defining the two types of employee?
- 34 Having considered the 2020 Agreement in its entirety, it is clear on a plain reading of the document that supplementary employees are treated differently to all other classes. Supplementary employees are utilised to ‘supplement’ or ‘add to’ the existing employee structure when there are gaps that require more stevedoring workers. Supplementary workers are employed on a casual basis and are not prevented from working elsewhere.<sup>19</sup>
- 35 As stated earlier, supplementary workers are not entitled to a minimum annual salary and are instead remunerated by a composite hourly rate, which includes the casual loading.<sup>20</sup> Supplementary workers are paid at the highest hourly rate compared to the other categories of employee, which is consistent with casual workers in other industries. The reason for the higher rate is because historically, casual workers have not been eligible for entitlements such as paid annual leave, paid parental leave, sick leave or long service leave, unless stipulated in an industrial agreement or specifically set out in legislation.
- 36 Unlike the other categories of employee, there is no entitlement in the 2020 Agreement to annual or personal leave for a supplementary employee,<sup>21</sup> nor is there any entitlement to be paid for a public holiday not worked, or a closed port day.<sup>22</sup>
- 37 Supplementary employees are paid a pro rata meal allowance based upon the hours worked,<sup>23</sup> and are allocated less clothing than the other categories of employee.<sup>24</sup>
- 38 Any calculation for claims for worker’s compensation for supplementary employees is based upon an average of the hours worked over a period of three months<sup>25</sup> and supplementary employees are not factored in when calculating the percentage of the workforce for Union Leave.<sup>26</sup>
- 39 Throughout the 2020 Agreement, there is a scale for the allocation of work to categories of employee, for which supplementary employees are at the lowest end.<sup>27</sup> Similarly, the selection criteria for the allocation of permanent positions expressly prioritises all other categories of employee over supplementary employees.<sup>28</sup>
- 40 There is no specific reference to supplementary employees in relation to termination of employment within the body of the 2020 Agreement<sup>29</sup> and supplementary employees are specifically excluded from redundancy.<sup>30</sup>
- 41 Finally, the clause related to rates of pay and expenses whilst undertaking training makes it clear that supplementary workers are considered to be casual workers, by specific reference to the word ‘casual’ when describing the entitlements of supplementary workers pursuant to that clause.<sup>31</sup>
- 42 Reflecting on the whole of the 2020 Agreement, it is clear that the drafters intended there to be a distinction between supplementary employees and all other classes of employee. That intention is reinforced by reference to cl 13. Supplementary workers are employed and trained by the employer as casual workers to supplement gaps in the existing workforce, with the objective that when vacancies become available, such workers will be offered promotion to GWE and beyond.
- 43 The 2020 Agreement specifically declares that the employer is committed to maximising the utilisation of its employees over and above the use of contractors and labour hire.<sup>32</sup> It is for this reason that the 2020 Agreement creates the category of ‘supplementary employee’, so that the employer can train and retain skilled casual workers within the company that will ultimately progress to permanent employees, depending upon the economic conditions related to stevedoring work.
- 44 When drafting the 2020 Agreement, the parties chose to create a separate definition for supplementary employees to create a clear delineation between permanent employees and casual employees.
- 45 Returning then to the primary argument as to whether supplementary employees are entitled to long service leave pursuant to cl 45 of the 2020 Agreement: cl 45.1 does not specifically exclude supplementary employees. Reading the clause as a whole, a reference is made to supplementary employees at cl 45.8, though there are particular reasons for this.
- 46 Clause 45.8 states:
- Any irregularly engaged Employees (VSEs, PVSEs, GWEs or *Supplementary Employees*) appointed to a FSE or PFSE will preserve his/her leave accrued prior to the appointment. (emphasis added)
- 47 The purpose of this clause is to preserve long service leave entitlements that have accrued prior to being appointed to a permanent position. The insertion of the words ‘supplementary employee’ into this sub-clause does not purport to extend any long service leave entitlements to that class of employee. The sub-clause specifically relates to the preservation of long service leave ‘already accrued’, however, it is possible for a supplementary worker to have previously accrued long service leave whilst working as another category of employee.
- 48 By way of example, when cl 13.2 is triggered due to negative economic conditions, a VSE or GWE may elect to downgrade to a Supplementary Employee position whilst those negative circumstances prevail.<sup>33</sup> The employee reverts to his or her previous category of employee when the negative economic conditions have resolved. In such circumstances, the employee would be entitled to preserve his or her long service leave that had accrued prior to downgrading to a supplementary employee.
- 49 The omission of cl 45.8 from the long service leave clause would result in the VSE or GWE losing their accrued entitlements when self-electing to downgrade during negative economic conditions: such a consequence would be grossly unfair.

50 Given the clear distinction between the defined terms ‘Employee’ and ‘Supplementary Employee’ within cl 2.1(g) (the latter being classified as a casual, non-permanent worker), cl 45.1 does not extend long service leave entitlements to supplementary employees: to do so would require the following words to be ‘read in’ to the clause:

An Employee [or **Supplementary Employee**] will be entitled to long service leave in accordance with the Stevedoring Industry (Long Service Leave) Award 1992, except as varied herein.

51 It follows then that Ms Macdonald was not entitled to the accrual of long service leave entitlements pursuant to the 2020 Agreement for the period from 1 December 2008 to 30 May 2010.

*Period 3*

52 It is accepted by the parties that Ms Macdonald was entitled to the accrual of long service leave entitlements pursuant to the 2020 Agreement whilst employed as a GWE for the period from 1 June 2010 to 24 July 2011.<sup>34</sup>

*Period 4*

53 It appears that it is also not in dispute that Ms Macdonald was entitled to the accrual of long service leave entitlements pursuant to the 2020 Agreement whilst employed as a VSE from 25 July 2011 to 4 November 2021.<sup>35</sup>

**What was Ms Macdonald’s total long service leave entitlement pursuant to the 2020 Agreement?**

54 Ms Macdonald’s total long service leave entitlement pursuant to the 2020 Agreement was as follows:

Period	Date range	Accrued entitlement	Calculation
1	13 August to 30 November 2008	Nil	Not applicable
2	1 December 2008 to 31 May 2010	Nil	Not applicable
3	1 June 2010 to 24 July 2011	419 days (less 2.8 unpaid weeks or 19.6 days) = 399.4 days or 1.09 weeks <sup>36</sup>	1.09 weeks x 0.87 = 0.94 weeks <sup>37</sup>
4	25 July 2011 to 4 November 2021	342 days, or 0.93 weeks, from 25/7/2011 to 30/06/2012 3414 days, or 9.35 weeks, from 1/7/2012 to 4/11/2021 (less 41.6 unpaid weeks or 291.2 days) = 3122.8 days or 8.5 weeks <sup>38</sup>	0.93 weeks x 0.87 = 0.80 weeks <sup>39</sup> 8.5 weeks x 1.3 = 11.05 weeks <sup>40</sup>

55 The total monetary amount of long service leave payable to Ms Macdonald pursuant to the 2020 Agreement is as follows:

Period 1:	Nil		
Period 2:	Nil		
Period 3:	0.94 weeks x (\$46.06 <sup>41</sup> x 35 hours <sup>42</sup> )	=	\$1,513.40
Period 4:	0.80 weeks x (\$46.06 x 35 hours)	=	\$1,289.68
	11.05 weeks x (\$55.69 <sup>43</sup> x 35 hours)	=	\$21,538.10
<b>TOTAL:</b>			<b>\$24,341.18</b>

56 The employer paid Ms Macdonald \$26,391.02 for accrued long service leave.<sup>44</sup> Ms Macdonald therefore received a payment that equated to more than her accrued entitlement.<sup>45</sup>

**Result**

57 Upon the correct interpretation of cl 45 of the Agreement, Ms Macdonald was not entitled to the accrual of long service leave whilst employed as an administrative coordinator, nor as a supplementary employee.

58 The employer has therefore not breached clauses 45.4 and 20.9 of the 2020 Agreement, nor sections 50 or 323 of the Act.

59 The long service leave portion of the claims is dismissed.

**B. COLEMAN**

**INDUSTRIAL MAGISTRATE**

<sup>1</sup> Ms Macdonald was subject to two industrial agreements throughout her working history with the employer: *Qube Ports Pty Ltd – Port of Hedland Enterprise Agreement 2016 (the 2016 Agreement)* and *Qube Ports Pty Ltd – Port of Port Hedland Enterprise Agreement 2020*. The 2020 Agreement supercedes the 2016 Agreement, however, the Long Service Leave clause is identical in each agreement, save and except for changes to paragraph numbering.

<sup>2</sup> *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 per Madgwick J; *Re Harrison; Ex parte Hames* [2015] WASC 247 at [50] - [51] per Beech J; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638 at [53]; *Fedec v The Minister for Corrective Services* (2017) 97 WAIG 1595 at [21] - [23]; *Civil Service Association of Western Australia Incorporated v Commissioner, Western Australia Police Department* [2019] WAIRC 00142 at [10] - [11] per Kenner SC.

<sup>3</sup> See cl 44.1 of the 2016 Agreement and cl 45.1 of the 2020 Agreement.

<sup>4</sup> Paragraph 5 of the witness statement of Rebecca Macdonald dated 4 August 2023.

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- <sup>5</sup> Paragraph 16 and annexure 4 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>6</sup> Paragraph 17 and annexure 5 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>7</sup> Paragraph 18 and annexure 6 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>8</sup> Paragraph 19 and annexure 7 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>9</sup> The LSL Award defines 'Employee' in cl 3 as a stevedoring employee as defined in the *Stevedoring Industry Award 1991 (the 1991 Award)* or the *Stevedoring Industry (The Port Waratah Stevedoring Co Pty Ltd) Award 1992* and who is employed as a stevedoring employee grade 1 to 6 inclusive under those awards. Clause 4(b) of the LSL Award excludes employees that fall within cl 53 of the 1991 Award or cl 48 of the *Stevedoring Industry (The Port Waratah Stevedoring Co Pty Ltd) Award 1992*.
- <sup>10</sup> Clause 7(p) of the 1991 Award.
- <sup>11</sup> Summarised from cl 7(q) of the 1991 Award.
- <sup>12</sup> See paragraph 16 and annexure 4 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>13</sup> A close examination of the evidence reveals that Ms Macdonald was paid by the employer for long service leave accrued during this period: paragraphs 21 to 23 and annexures 8 and 9 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>14</sup> Paragraphs 12 to 15 of the Claimant's Outline of Submissions in Reply dated 20 September 2023.
- <sup>15</sup> Clause 9 of the 2020 Agreement.
- <sup>16</sup> Clause 9.1 to 9.8 of the 2020 Agreement set out the terms of engagement and the minimum salaries for the various classes of employee.
- <sup>17</sup> Clause 2.1(g) of the 2020 Agreement.
- <sup>18</sup> Clause 2.1(s) of the 2020 Agreement.
- <sup>19</sup> Clause 8.4 of the 2020 Agreement.
- <sup>20</sup> Clause 9.8.3 and cl 11.3 of the 2020 Agreement.
- <sup>21</sup> Clause 34 and cl 35 of the 2020 Agreement make no reference to 'supplementary employee'.
- <sup>22</sup> Clause 33.3.2(e) and cl 33.3.4(e) of the 2020 Agreement.
- <sup>23</sup> Clause 11.5 of the 2020 Agreement.
- <sup>24</sup> Clause 16.6 of the 2020 Agreement.
- <sup>25</sup> Clause 52.2 of the 2020 Agreement.
- <sup>26</sup> Clause 55.4 of the 2020 Agreement.
- <sup>27</sup> See for example cl 10.2 and cl 33.3.8(a)(v) of the 2020 Agreement.
- <sup>28</sup> Clause 16.2 of the 2020 Agreement.
- <sup>29</sup> Clause 20 of the 2020 Agreement makes no reference to supplementary employees.
- <sup>30</sup> Clause 9.8.1(d) and cl 21.1.3 of the 2020 Agreement.
- <sup>31</sup> Clause 46.7(b) of the 2020 Agreement.
- <sup>32</sup> Clause 18 of the 2020 Agreement.
- <sup>33</sup> Clause 13.3.3, Step 3 of the 2020 Agreement.
- <sup>34</sup> Paragraph 25 of the Respondent's Outline of Submissions dated 1 September 2023 and paragraph 20 of the Claimant's Submissions in Reply dated 20 September 2023.
- <sup>35</sup> Paragraph 5 of the Statement of Agreed Facts filed 15 February 2023.
- <sup>36</sup> The evidence reveals that the employer reduced the long service leave calculation for this period by 2.8 unpaid weeks: see annexure 8 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>37</sup> Pursuant to cl 45.3 of the 2020 Agreement, long service leave that has been accrued prior to 1 July 2012 is accrued at the rate of 0.87 weeks per year of completed service.
- <sup>38</sup> The evidence reveals that the employer reduced the long service leave calculation for this period by 41.6 unpaid weeks: see annexure 8 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>39</sup> Pursuant to cl 45.3 of the 2020 Agreement, long service leave that has been accrued prior to 1 July 2012 is accrued at the rate of 0.87 weeks per year of completed service.
- <sup>40</sup> Pursuant to cl 45.2 of the 2020 Agreement, long service leave that has accrued from 1 July 2012 is accrued at the rate of 1.3 weeks per year of completed service.
- <sup>41</sup> Pursuant to cl 45.6(d) of the 2020 Agreement, long service leave accrued prior to 1 July 2012 is paid at the average graded rate as specified in cl 11, plus a loading of 27.5%. Ms Macdonald's average graded rate was Grade 3 at 36.13 per hour and the 27.5% loading is \$9.93, therefore the hourly payable rate for long service leave accrued prior to 1 July 2012 is \$46.06.
- <sup>42</sup> Pursuant to cl 11.4 of the 2020 Agreement, the composite hourly rate is based on a 35 hour week over a 12 month period.
- <sup>43</sup> Pursuant to cl 45.6(e) of the 2020 Agreement, long service leave accrued from 1 July 2012 onwards will be paid at the composite hourly rate as specified in cl 11. The composite hourly rate applicable to Ms Macdonald was the Grade 2 rate of \$55.69.
- <sup>44</sup> Paragraph 22 and annexure 9 of the witness statement of Olga De Oliveira dated 1 September 2023.
- <sup>45</sup> This anomaly is very likely due to the fact that Ms Macdonald accrued long service leave by way of other legislation or another industrial instrument while employed full time during Period 1.
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2024 WAIRC 00040

## INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2024 WAIRC 00040  
 CORAM : INDUSTRIAL MAGISTRATE T. KUCERA  
 HEARD : MONDAY, 18 DECEMBER 2023  
 DELIVERED : MONDAY, 29 JANUARY 2024  
 FILE NO. : M 97 OF 2023  
 BETWEEN : SHOP DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION

CLAIMANT

AND

BALJIT KAUR PTY LTD

RESPONDENT

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**CatchWords** : Assessment of pecuniary penalty to be imposed pursuant to s 546(3) *Fair Work Act 2009* - Determination of appropriate penalty - Where default judgment was entered against the respondent for a substantial underpayment - Where the respondent has not participated in proceedings - Pecuniary penalty for award contraventions - Single course of conduct - Consideration of the principles in determining penalty in *Callan v Smith* [2021] WAIRC 00216 - Application of s 557 *Fair Work Act 2009* - Penalty to be paid to claimant - Order for interest to be paid - s 547 *Fair Work Act 2009*

**Legislation** : *Fair Work Act 2009* (Cth)  
*Corporations Act 2001* (Cth)  
*Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA)

**Instrument** : *Vehicle Repair Services and Retail Award 2020*

**Case(s) referred to in reasons:** : *Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) 13 ATPR 41-076  
*Callan v Smith* [2021] WAIRC 00216; 101 WAIG 1155  
*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450  
*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560  
*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* [2018] FCA 1563  
*Commissioner of Taxation v Arnold (No 2)* [2015] FCA 34; 100 ATR 529  
*Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244; 242 FCR 492  
*Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; 239 FCR 336  
*Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170; 171 FCR 357  
*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216  
*United Voice WA v Director General Department of Education* 2012 WAIRC 00778; 92 WAIG 1655

**Result** : Penalty issued and ancillary orders made

**Representation:**

Claimant : Mr K. Sneddon (of counsel), as instructed by the Shop Distributive & Allied Employees Association

Respondent : No appearance

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## REASONS FOR DECISION

- For reasons that follow, I have decided to impose a substantial fine for the failure by an employer to pay one of its staff members, the minimum rates of pay that apply under the terms of an award.
- The company, Baljit Kaur Pty Ltd (**respondent**) which operates the Vibe Service Station in Bridgetown, underpaid one of its console operators, Estelle Rowcliffe Carlson (**Ms Rowcliffe Carlson**) over a one-year period, the total sum of **\$25,907.44**.
- When averaged over the period, this equates to an underpayment of approximately \$200 per fortnight. In the context of a working family's household budget and pressures from increases in the cost of living, this is a large sum of money.
- What places the respondent's conduct into the contemptuous category of behavior, is the respondent's complete failure to respond to the proceedings that were commenced by the Shop Distributive and Allied Employees Association (**claimant**).



- 5 The respondent was given no less than three opportunities to appear in Court to explain why it had underpaid Ms Rowcliffe Carlson.
- 6 In the lead up to the most recent Court dates, the Court's Registry staff went to extensive lengths to ensure the respondent was made aware that it was being given an opportunity to appear in Court and be heard on whether it should be fined for failing to pay correct rates of pay to its employee and if so, the level of the fine, and who it should be paid to.
- 7 Despite being given an opportunity to file a response and present a plea in mitigation, the respondent failed to file any papers or appear in court. Moreover, the respondent ignored attempts the Court and the claimant made to alert the respondent to the proceedings, orders the Court issued, and notices to appear.
- 8 In my reasons, I have set out the steps the Court and the claimant took to make the respondent aware of the proceedings, the orders the Court issued in this matter, and the dates to appear in Court. I also provide reasons for the ancillary orders that I have made in addition to the penalty to be imposed.

#### **Proceedings issued against the respondent**

- 9 On 9 August 2023, the claimant filed an Originating Claim which set out the particulars of the allegations against the respondent (**claim**). As an attachment, the claimant provided a detailed spreadsheet showing the amount claimed in underpayments per fortnight, from 25 January 2021 until the fortnight ending 23 February 2023.
- 10 For the entire period the subject of the claim, the respondent paid Ms Rowcliffe Carlson \$22 an hour for work she performed in ordinary hours and \$33 an hour on public holidays, rates which the claimant alleged were less than the hourly rates that appear under cl 27.3 of the *Vehicle Repair, Services and Retail Award 2020 (award)*.
- 11 By way of example, the claimant alleged that during the fortnightly pay period commencing on 25 January 2021, the award required Ms Rowcliffe Carlson to be paid, \$28.38 an hour for work during ordinary hours as a casual roadhouse attendant.
- 12 As a further example, the claimant alleged the award rate the respondent should have paid Ms Rowcliffe Carlson on the 2021 Labour Day public holiday, was \$37.03 per hour.
- 13 The claimant alleged that even after the hourly rates of pay under the award increased, the respondent continued to pay Ms Rowcliffe Carlson \$22 an hour for work she performed in ordinary hours and \$33 an hour on public holidays.

#### **Conduct of the proceedings and orders issued by the Court**

- 14 On 10 August 2023, Kevin Sneddon (**Mr Sneddon**) the solicitor for the claimant, posted the claim by registered mail to the respondent's registered office. Following this, Mr Sneddon affirmed and filed a *Form 5.1 – Affidavit of Service* with the Court.
- 15 A Current Company Extract Mr Sneddon obtained from the Australian Securities and Investment's Commission (**ASIC**) notes the following:
- i. the respondent's registered address is recorded as South-Central Accounting and Tax Pty Ltd, Unit 8 35 Biscayne Way Jandakot WA 6164 (**registered address**);
  - ii. the respondent's principal place of business is 375 Bussell Highway Busselton WA 6280, at which the Vibe Busselton – Broadwater Service Station is located (**business address**); and
  - iii. the respondent's Secretary and Director is Gurpal Singh (**Mr Singh**), whose recorded address is 24C Brandon Way Lynwood WA 6147 (**Lynwood address**).
- 16 Despite the claimant having complied with the service requirements that apply under the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005 (IMC Regs)*, the respondent did not file a response to the claim. The IMC Regs required a response to be filed within 21 days of the claim being served.
- 17 On 26 September 2023, the claimant's solicitor filed a *Form 6 – Application* for a default judgment, together with a supporting *Form 7 – Affidavit (application)*.
- 18 By its application the claimant sought the following:
- i. An order the respondent pay the sum of \$25,907.44 to Ms Rowcliffe Carlson (**judgment sum**);
  - ii. The respondent pay interest on the judgment sum;
  - iii. The respondent pay a civil penalty in respect of the contraventions; and
  - iv. An order that any civil penalty imposed be paid to the claimant.
- 19 The return date on the application provided by the Court was Tuesday, 24 October 2023.
- 20 On 28 September 2023, the claimant's solicitor filed a *Form 5.1 – Affidavit of Service* on a Company which confirmed he served the application by mailing it to the respondent at its registered address in accordance with s 109X of the *Corporations Act 2001 (Cth)*.

#### **First Court Date**

- 21 The application was heard on 24 October 2023. The respondent did not appear at the hearing, so I opted to deal with the application ex-parte under reg 8(2) of the IMC Regs. I then made the following orders.

It is hereby ordered that:

1. Pursuant to regulation 8(2) of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* that default judgment is entered against the respondent.
2. Pursuant to the preceding Order 1, the Respondent shall pay Estelle Rowcliffe Carlson the sum of **\$25,907.44**.

3. The claimant's Application in this matter is otherwise adjourned for further submissions on the balance of relief sought in the claimant's *Form 1.1 – Originating Claim* to Monday 20 November 2023.

- 22 During the hearing, Mr Sneddon indicated he would file an outline of submissions on penalty ahead of the next court date. I also suggested the claimant take steps to personally serve a copy of the Court's orders upon Mr Singh.
- 23 On 15 November 2023, Mr Sneddon filed his Submissions on Penalty. In addition, he also filed a further *Form 7 – Affidavit* in which he deposed to the steps he had taken to engage AAC Process Servers to personally serve Mr Singh.
- 24 In his affidavit, Mr Sneddon stated that AAC Process Servers had reported they had twice attempted to serve Mr Singh at the Lynwood address.
- 25 AAC Process servers subsequently advised after speaking to the people who now reside at the Lynwood address that Mr Singh no longer resides there or owns the property. The current residents confirmed that they have owned the property for approximately three years.

#### Second Court Date

- 26 On 20 November 2023 the Court reconvened for the hearing for the balance of the relief sought by the application. Mr Sneddon appeared together with Sarah Haynes (**Ms Haynes**), an industrial officer who works for the claimant. No one appeared for the respondent.
- 27 By this stage, the 14 days the respondent had under reg 41 of the IMC Regs to make an application to set aside the default judgment made in the previous hearing had passed.
- 28 During the hearing I made the following further orders:

It is hereby ordered that:

1. The claimant is to file a *Form 29 – Multipurpose Form* containing as much contact information for Gurpal Singh, who is the respondent's named director and company secretary, including his mobile phone number, his email addresses, home/residential and business addresses and the email addresses for each business, by **Friday, 24 November 2023**.
  2. The claimant is to file *Form 7 – Affidavit* attaching copies of emails and other correspondence showing the steps both it and the employee took to raise the alleged underpayments with the respondent and any response it received from the respondent by **Friday, 24 November 2023**.
  3. The claim is adjourned for further hearing to **18 December 2023**.
  4. There be liberty to apply.
- 29 I issued these orders to secure as much up to date contact information for the respondent as possible. This was so Registry staff would be able to take their own steps to contact the respondent to alert him to the application.
- 30 More specifically, I wanted Registry staff to make Mr Singh aware of the Court's orders against the respondent. This was to ensure the respondent would be made aware that it was being given an opportunity to be heard on the balance of the relief sought by the application, including the imposition of a civil penalty.

#### Correspondence to the respondent

- 31 On 21 November 2023, the Clerk of the Industrial Magistrates Court (**Clerk of the IMC**) sent a letter to the respondent at its registered address, enclosing a copy of the Orders I issued during the hearing on 20 November 2023.
- 32 In her letter to the respondent, the Clerk of the IMC also advised the next hearing would be held on Monday 18 December 2023 at 9:15am.
- 33 On 23 November 2023 Mr Sneddon filed a Form 29 which provided current contact information for Mr Singh, including an email address and a mobile phone number. On 24 November 2023 the claimant filed an affidavit from Ms Haynes in which she deposed to the steps the claimant took from 17 November 2022, to raise the alleged underpayments with Mr Singh (**Haynes' Affidavit**).
- 34 In addition to the correspondence the claimant has sent to the respondent regarding the alleged underpayments, Ms Haynes' Affidavit provides details of a recent conversation Ms Haynes had with Ms Rowcliffe Carlson, in which Ms Rowcliffe Carlson confirmed the personal contact details she provided for Mr Singh are the ones she uses to communicate with him.

#### Letter from the Clerk of the IMC

- 35 On 28 November 2023 the Clerk of the IMC sent a letter, addressed to Mr Singh at the respondent's business address attaching copies of the Orders the Court made on 24 October and 20 November 2023. A copy of this letter is attached as an appendix to these reasons.
- 36 On the same date, the Clerk of the IMC also sent a letter in the same terms attaching copies of the Orders the Court made on 24 October and 20 November 2023 to the Vibe Service Station in Bridgetown where Ms Rowcliffe Carlson works.
- 37 An inspection of the Court file will show that Registry staff have attempted to contact Mr Singh by telephone, sent an email attaching the letter referred to in the preceding paragraph [35] and sent him text messages to alert him to the Court's orders and the further hearing date of 18 December 2023.
- 38 The respondent did not respond to any of the communications I have referred to or contact the Court's Registry staff.
- 39 On 15 December 2023, the letter the Clerk of the IMC sent to the respondent's registered address on 21 November 2023 was returned to the Registry marked 'return to sender'.

**Third Court date**

40 On 18 December 2023 the Court reconvened to hear the application. Mr Sneddon appeared together with Ms Haynes. No one appeared for the respondent.

41 During the hearing I indicated that I would reserve my reasons for decision on penalty. I also made the following further orders:

It is hereby ordered that:

1. The claimant is to file and serve a statement on the effects of the contraventions upon the claimant's affected member, together with a *Form 29 – Multipurpose Form*, by close of business **22 December 2023**.
2. The claimant is to file and serve a short outline of submissions on the quantum of interest payable, together with a *Form 29 – Multipurpose Form*, by close of business **22 December 2023**.

42 On 20 December 2023 Ms Haynes filed a statement on the *Effect of Contravention on the Affected Worker (Haynes' Statement)* and Mr Sneddon filed *Submissions on Interest Payable*.

43 Having received these materials in support of the claim, I now turn to the penalty to be imposed and the balance of the relief sought by the application.

**Law on determining penalty.**

44 The primary purpose of pecuniary penalties under a statute such as the IR Act, is to secure compliance with the provisions of the statutory regime: see *Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) 13 ATPR 41-076.<sup>1</sup>

45 As the High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 (*Pattinson*) said at [66]:

... the financial disincentive involved in the imposition of a pecuniary penalty will encourage compliance with the law by ensuring that contraventions are viewed by the contravener and others as an economically irrational choice.

46 Noting the purpose of pecuniary penalties is to secure compliance with the provisions of a statutory regime, the question the Court is next required to turn its mind to, is setting a pecuniary penalty to a level that will have the effect of deterring a contravener from engaging in the same or similar conduct.

47 The factors which inform an assessment of a civil penalty with an appropriate deterrent value were described by the High Court in *Pattinson* at [18]. The considerations described were consistent with and much the same as those set out in *Callan v Smith* [2021] WAIRC 00216; 101 WAIG 1155 (*Callan v Smith*).

48 In *Callan v Smith*, a full bench of the Western Australian Industrial Relations Commission observed that when determining penalty, the Court is required to have regard to a non-exhaustive range of considerations for the purposes of deciding, if particular conduct, calls for the imposition of a penalty, and if it does, the amount of a penalty.<sup>2</sup>

49 The following considerations were set out in *Callan v Smith* at [90], which include but are not limited to:

- (a) the nature and extent of the conduct which led to the breaches;
- (b) the circumstances in which that conduct took place;
- (c) the nature and extent of any loss or damage sustained as a result of the breaches;
- (d) whether there had been similar previous conduct by the respondent;
- (e) whether the breaches are properly distinct or arose out of the one course of conduct;
- (f) the size of the business enterprise involved;
- (g) whether or not the breaches were deliberate;
- (h) whether senior management was involved in the breaches;
- (i) whether the party committing the breach had exhibited contrition;
- (j) whether the party committing the breach had taken corrective action;
- (k) whether the party committing the breach had cooperated with the enforcement authorities;
- (l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- (m) the need for specific and general deterrence.

50 Citing the decision in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560, the Full Bench in *Callan v Smith* at [91] observed the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.

51 A further consideration is the maximum penalty identified in the statute for the contravention. As Flick J stated in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* [2018] FCA 1563 (*The BKH Contractors Case*) at [19]:

In undertaking the task of assessing and quantifying the penalties to be imposed, the maximum penalty prescribed by the Commonwealth legislature for a specific contravention serves as a "yardstick" against which the assessment of penalties is generally to proceed.

52 The High Court in *Pattinson* noted the list of considerations when determining penalty is not a rigid catalogue of matters for attention. Relevantly at [19] the majority concluded:

It is important, however, not to regard the list of possible relevant considerations as a “rigid catalogue of matters for attention” as if it were a legal checklist. The court’s task remains to determine what is an “appropriate” penalty in the circumstances of the particular case. (footnotes omitted)

- 53 For the present case, *Callan v Smith* is instructive as it involved a matter where, although the employer respondent had not previously been involved in contravening behaviour, it had (as here) engaged in multiple contraventions (282) over a long period of time.
- 54 The level of the underpayment and the nature of the contraventions in *Callan v Smith* (matters that I will address in this case), were also serious and intentional.
- 55 To address the matters to be considered when determining penalty, I have relied upon Ms Haynes’ Affidavit, and Statement.

#### Submissions on penalty

- 56 At paragraph [15] of his Submissions on Penalty, Mr Sneddon submitted the maximum penalty under the *Fair Work Act 2009* (Cth) (FW Act) should be imposed for the following reasons extracted below:

- 15.1 The Respondent has steadfastly refused to engage with either their employee, the Claimant or the Court. The Respondent has shown disdain to all other parties involved in this matter and shown no recognition that they understand their industrial obligations.
- 15.2 The Claimant has attempted to involve the Respondent via registered post, email and process servers, each time using addresses provided to the Australian Securities and Investment Commission or an email address known to be used by a Director of the Respondent. A presumption should be made that the disdain shown by the Respondent is deliberate.
- 15.3 The Respondent has not rectified the breach and to date has not paid the Court ordered amount.
- 15.4 Whether the actual contraventions were deliberate or not, the outcome is the same for the worker. The underpayments occurred between June of 2022 and June of 2023 and the worker was denied her minimum legal entitlement during this entire period.
- 15.5 Although accepted as a single contravention of the FW [A]ct, the breaches were considerable and sustained and affected a worker on bare Award wages.
- 15.6 The Respondent has given no indication that this behavior will not be repeated, indeed their approach suggests that they consider their industrial obligations as nothing more than an inconvenience to be bent to suit their own circumstances. In these circumstances there is a strong and important role for specific deterrence in penalty assessment and imposition.
- 15.7 If deterrence is the sole purpose of the penalty regime, and we say it is, then any penalties imposed on the Respondent must have that effect, they must have an impact. As was noted by Humphreys J, “there must be sufficient sting in the tail to ensure that both the respondent and those who might otherwise be involved in like contraventions consider the financial benefits that might accrue from contraventions as compared to the risk of pecuniary penalties” (*Australian Manufacturing Workers’ Union v United Lift Services Pty Ltd (No 2)* [2023] FedCFamC2G 614). If there is no ‘sting’ then any penalty imposed fails in its role to deter, particularly with a party that has shown no contrition and no recognition of their obligations.
- 15.8 A failure to sanction contraventions adequately, de facto punishes all those who do the right thing. Unfair advantages gained by failing to properly adhere to minimum working conditions cannot be rewarded, and court ordered penalties must act as a sufficient disincentive more broadly; anything less does not serve the public interest. Both specific and general deterrence is required.

- 57 In addition to his submissions on penalty, Mr Sneddon submitted that it was appropriate the Court order that any penalty be paid to the claimant under s 546(3) of the FW Act. To this end he relied upon the decision of Mortimer J in *Milardovic v Vemco Servies Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244, 242 FCR 492 (*Milardovic*), citing *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; 239 FCR 336 (*Sayed*) and *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170; 171 FCR 357 (*Plancor*).
- 58 In the absence of any appearance or submissions from the respondent it is very hard not to accept the claimant’s submissions on penalty.
- 59 It is not as though the respondent was not given an opportunity to be heard on this question. As I indicated during the hearing on 18 December 2023, the Court has gone to quite extensive lengths to give the respondent an opportunity to be heard in this matter, over and above what would ordinarily be required under the IMC Regs.
- 60 Although I consider the steps the Court has taken in this case were warranted to ensure the matter was dealt with justly, this approach should not be viewed as the norm to be adopted in cases of this type.

#### Nature and extent of the respondent’s conduct

- 61 I accept that the award applies in the present case. I also find that the hourly rates of pay Ms Rowcliffe Carlson received during the relevant period were less than the minimum rates of pay that applied under the award. The breaches of the award for which the claimant is seeking a penalty to be imposed are not minor or technical. They involve a substantial total underpayment over an extended period.
- 62 There was nothing put to me to suggest the respondent has previously underpaid its employees. On this basis, I am prepared to conclude this is the first time the respondent has engaged in contravening conduct.
- 63 This is also not a matter where the respondent self-reported the matter or through its own efforts, discovered that it was underpaying Ms Rowcliffe Carlson. This matter came about because of inquiries Ms Rowcliffe Carlson raised with her union, the claimant in this case.

- 64 Haynes' Affidavit shows the steps the claimant took to bring Ms Rowcliffe Carlson's underpayment of wages claim to the respondent's attention.
- 65 Initially the claimant tried to raise this matter with the respondent by a phone call. The respondent did not answer the phone or respond to voice messages. The claimant then emailed the respondent on 17 November 2022.
- 66 On 3 February 2023 the claimant sent the respondent a further letter to make the respondent aware that it was not paying correct rates of pay to Ms Rowcliffe Carlson.
- 67 Despite the claimant raising these matters in the ways described, the respondent failed to communicate with the claimant at all, about the alleged underpayments.
- 68 Ms Rowcliffe Carlson reported to the claimant on or around 9 March 2023 that Mr Singh had received the correspondence from the claimant and that he was 'looking into it'. She reported that Mr Singh had offered to pay her correct rates of pay as a part-time employee in line with the award.
- 69 Despite resolving the immediate issue, the respondent did nothing then and has done nothing since to rectify any underpayments, a point to which I will return when addressing whether the conduct was deliberate.
- 70 The lack of action on the part the respondent to rectify the underpayments is what prompted the claimant to issue proceedings in pursuit of the claim.

**The circumstances in which the conduct took place and the nature and extent of any loss**

- 71 Haynes' Statement provides evidence of the tough financial circumstances faced by Ms Rowcliffe Carlson and her family, which could have been mitigated if the respondent had paid her correctly, as required under the award.
- 72 Ms Rowcliffe Carlson is 50 years old. She lives with her husband on a 43-acre rural property near Busselton. Her husband services and repairs windmills. Ms Rowcliffe Carlson does the books for her husband's business. Their combined disposable income after paying tax and business costs was approximately \$77,000.
- 73 Ms Rowcliffe Carlson has six children, five of whom are now adults, with one daughter who is 15 years old, and currently lives with her at home. Ms Rowcliffe Carlson's daughter has been attending Manjimup High School. Ms Rowcliffe Carlson estimates she spends approximately 2.5 hours a day driving, which includes getting herself to work in Bridgetown and her daughter to and from school.
- 74 In 2024, Ms Rowcliffe Carlson's 15-year-old daughter is transferring to Albany Senior High School. While Ms Rowcliffe Carlson might not have to drive her daughter to school in Manjimup anymore she will instead be required to meet the cost of boarding fees.
- 75 Due to the current lack of affordable rental accommodation, one of Ms Rowcliffe Carlson's adult children has moved into her home with her husband, two children and three dogs. As a result, Ms Rowcliffe Carlson has six other people living with her, all under the same roof.
- 76 The home Ms Rowcliffe Carlson's family lives in has two bathrooms and two toilets, however one toilet is not functioning. Ms Rowcliffe Carlson is intending to prioritise some maintenance around the home, including fixing her second toilet if she can recover the money the respondent has been ordered to pay. These are hardly excessive or unreasonable expectations.
- 77 Ms Rowcliffe Carlson is also hoping to allocate some of this money to fixing fences and the like. There is a mortgage on the property and the interest rates that apply to the loan have gone up in line with recent interest rate rises.
- 78 As I have indicated, the amount of the underpayment is significant. If Ms Rowcliffe Carlson had been paid correctly, the amount by which she was underpaid would have assisted Ms Rowcliffe Carlson and her family in dealing with the financial challenges I have set out.

**Whether the breaches are properly distinct or arose out of the one course of conduct**

- 79 This matter was brought to the Court on the basis that it involved a single course of conduct, albeit one that stretched over a period of more than a year.
- 80 During the hearing on 20 November 2023, Mr Sneddon submitted, and I accept, that this is a case to which s 557 of the FW Act (Course of Conduct) applies. As a result, the maximum penalty the Court can impose is the sum of \$82,500.
- 81 I note however that the course of conduct under consideration involves no less than 55 contraventions, committed over a 12-month period.

**The size of the business involved**

- 82 Despite the respondent's failure to respond to or appear in the proceedings, based on the information the claimant has provided, it is reasonable to conclude the Vibe Bridgetown Service Station is one outlet, in a chain of Vibe service stations.
- 83 At the hearing on 20 November 2023, Mr Sneddon submitted the respondent operates five Vibe service stations, each of which are in the South-West of Western Australia. This point was later confirmed in Haynes' Affidavit.
- 84 Although the capacity of a respondent to pay a fine is a matter the Court may have regard to, when determining a penalty, there are two reasons in the present case as to why I do not intend to pay much regard to it as a factor to be considered.
- 85 Firstly, as the Federal Court held in *Commissioner of Taxation v Arnold (No 2)* [2015] FCA 34 at [200] - [203], the financial position of the person against whom an order is made may be relevant, but in most cases, it will not carry great weight in the assessment of a penalty.<sup>3</sup>
- 86 Secondly, the respondent did not appear in Court and make any submissions as to why the size of its business or its capacity to pay, should be considered when determining a penalty in this case.
- 87 If the respondent has the financial means to operate five Vibe service stations, then it is open to the Court to find it has the financial capacity to pay its employees properly and to meet the costs of any fines when it does not.

**Whether or not the breaches were deliberate**

- 88 No one appeared in Court for the respondent to argue whether the contraventions were inadvertent or otherwise. The contraventions were not a 'one off'. As I have noted, the contraventions occurred fortnightly over a period of some 12 months.
- 89 It is difficult to accept this case is a result of the respondent's inadvertence. There is a pattern of conduct here which suggests the respondent takes the view that there are requirements to properly run a business which it does not have to follow.
- 90 The respondent's failure to keep details of its registered address and the contact address for its director and secretary up to date with ASIC is evidence of this. In these circumstances, it is not surprising the respondent has also failed to pay correct rates of pay as required under the award.
- 91 It is also difficult to view the contraventions as inadvertent or even careless in the face of evidence the respondent ignored the efforts the claimant took to raise the alleged contraventions with the respondent, as described in Haynes' Affidavit.
- 92 Compounding this view is the respondent's failure to respond to the communications from the Registry staff advising the respondent of the orders the Court had issued, and providing notice of the hearing.
- 93 Rather, I take the view from the way the respondent has conducted itself, from the amount and length of time it underpaid Ms Rowcliffe Carlson, by the respondent's failure to acknowledge the proceedings and by not turning up to Court, that the respondent's conduct was intentional.

**Whether senior management engaged in the contraventions**

- 94 Whilst no one appeared in Court for the respondent, from the company search the claimant's counsel submitted it is clear Mr Singh is the respondent's sole director. It also appears that Mr Singh is the key decision maker for the respondent.
- 95 It is apparent from Haynes' Affidavit, that Mr Singh or 'Binny' as he is also known, is the person who 'calls the shots' within Ms Rowcliffe Carlson's workplace. He is the person who she communicates with regarding working hours, pay and the like. It is reasonable to find that Mr Singh is the person with the authority to deal with this matter, which would include rectifying any underpayment.
- 96 It is my view, and I find, that even if Vibe Bridgetown as a single service station could be viewed objectively as a 'small business', its senior manager was involved in the contravening conduct, including the decision to ignore communications from the claimant and the Court.
- 97 I therefore find that senior management was involved in and made decisions which resulted not only in the contravening conduct, but the respondent's approach to the claim.

**Whether the party committing the breach has exhibited contrition**

- 98 By its failure to respond to the proceedings, to appear in Court, and by not admitting the contraventions it cannot be said the respondent has exhibited contrition. Compounding this view, is the fact the respondent has not taken any steps to rectify the underpayment, a point to which I will return.
- 99 To demonstrate remorse or contrition, the respondent would have had to have expressed regret for the underpayment.
- 100 The respondent would have also had to confirm the contravening conduct will not happen again and to have provided some indication as to the steps it would be taking to ensure the contravening behaviour would be prevented from recurring. This has not happened either.

**Whether the party committing the breach has taken corrective action**

- 101 There are two aspects that need to be weighed with this consideration. The first is whether the respondent has rectified the underpayment. The second is whether the contravening conduct is continuing.
- 102 On the date I reserved my decision, Mr Sneddon advised the respondent had not taken steps to rectify the underpayment and so the payment pursuant to the default judgment of **\$25,907.44** to Ms Rowcliffe Carlson remained outstanding.
- 103 On the issue of whether the conduct is continuing, Mr Sneddon, during his appearance in Court on 20 November 2023, advised the respondent is now paying Ms Rowcliffe Carlson the correct award rates of pay. This was also confirmed in Haynes' Affidavit.
- 104 While I view advice from the claimant that Ms Rowcliffe Carlson is now being paid correctly in the respondent's favour, the respondent's failure to rectify the underpayment and to appear in Court and provide anything by way of explanation, does not cancel out the respondent's recently reported compliance with the award.
- 105 Until the underpayment is rectified in full, particularly where the respondent did not put anything before the Court as to when Ms Rowcliffe Carlson will be paid, I take the view the respondent has only partially taken corrective action.
- 106 I find the respondent's lack of action in this regard concerning. Firstly, there was nothing before the Court to suggest the respondent will not engage in similar conduct into the future. Second, it is also of relevance to the question of deterrence to which I will return.
- 107 I am concerned while the underpayment remains outstanding, particularly where the respondent has not bothered to turn up to Court, this conduct could be repeated.

**Whether the party committing the breach had cooperated with the enforcement authorities**

- 108 Although the claimant in this matter is not a publicly funded 'enforcement authority', as an industrial organisation registered under the FW Act with responsibility to represent the industrial interests of its members, it has a legitimate industrial interest in ensuring the minimum rates that are payable under an award are being paid.
- 109 Unions have a legitimate role to play in raising underpayment of wages claims and ensuring employers pay correct rates of pay under awards and industrial agreements. For this reason, the respondent's complete failure to respond to the attempts the

claimant's officials made to raise the underpayments claim with the respondent by telephone, email, etc, counts against the respondent in this regard.

110 The respondent's failure to appear in Court, despite the efforts Registry staff took to notify the respondent to appear in Court, and to alert the respondent to the content of the orders the Court has issued, also counts against the respondent on this consideration.

111 In summary, it can hardly be said the respondent has co-operated in a way that shines a positive light on the respondent.

**The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements**

112 This consideration weighs heavily in favour of a substantial fine being imposed. This matter has not only necessitated the commencement of proceedings but no less than three Court dates, none of which the respondent has bothered to attend.

113 It frankly should not have been so hard for the claimant to recover wages for a member who has been underpaid by their employer.

**The need for specific and general deterrence**

114 As I indicated in the preceding paragraph [107], I hold concerns the respondent has engaged in conduct that could be repeated. The respondent has done nothing to convince me otherwise.

115 For this reason and having regard to the seriousness of its contravening conduct, it is my view that a penalty must be set that will deter this respondent from repeating or engaging in similar contravening conduct.

116 Turning then to the issue of general deterrence and the authorities I have referred to, a fine must be set sufficiently high that it will not only deter this respondent from engaging in further contravening conduct, but others involved in or contemplating taking a similar path, from doing the same.

117 The fine cannot be set so low that it will be viewed by the respondent or others as an acceptable cost of doing business.

**Fine to be imposed**

118 For the reasons advanced in the preceding paragraphs, it is my view the quantum of the fine the respondent will be ordered to pay is the sum of **\$55,000** which is the equivalent of 2/3 of the maximum penalty.

119 The discount on the maximum penalty is being made on two grounds. First, the respondent is now reportedly paying Ms Rowcliffe Carlson the correct hourly rate of pay under the award for the part-time role she is employed in.

120 Second, the respondent has not previously engaged in contravening behavior of this type.

121 On the evidence before me, there is nothing else by way of mitigation that can be viewed in the respondent's favor. If the respondent had bothered to turn up to Court and taken an active part in the proceedings, I may have been persuaded a lower fine was justified. As this did not happen, the respondent is the architect of its own penalty.

122 The respondent's conduct in this matter was not only disrespectful to the Court but it is even more contemptuous towards Ms Rowcliffe Carlson who it underpaid.

123 A penalty at the higher end is, in my view, justified having regard to the circumstances of this case.

**Payment of the penalty to the claimant**

124 In its original application, the claimant sought an order that any penalty be paid to the claimant under s 546(3) of the FW Act which relevantly provides:

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- (a) the Commonwealth; or
- (b) a particular organization; or
- (c) a particular person.

125 In relation to this, I have determined that a portion of the penalty should be paid to Ms Rowcliffe Carlson, with the balance to be paid to the claimant.

In *Milardovic*, Her Honour Mortimer J (as she then was) at [40] - [44] made the following observations regarding her discretion to order the payment of a penalty to the complainant. She noted:

40 Were I free to do so, I would, in the exercise of the Court's discretion under s 546(3), order that the penalty be payable to the Commonwealth rather than to Mr Milardovic. However that course is not open to me following the Full Court's decision in *Sayed v Construction, Forestry, Mining and Energy Union* (2016) 239 FCR 336. The Full Court's decision requires the Court to make an order that Vemco pay the penalty the Court has imposed on it to Mr Milardovic.

41 That the Full Court's decision in *Sayed* requires me to make such an order arises from several aspects of the Full Court's reasons. First, at [72] their Honours identified "a certain symmetry between the person or entity authorised to prosecute an enforcement proceeding and the person or entity to whom the penalty, if imposed, might be paid".

42 [A]t [101] the Full Court [in *Sayed*] held:

[T]he power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. We accept that there may be cases ... where the penalty, or a part of the penalty, should be paid to another person in the circumstances described by Gray J in *Plancor* at [44].

43 The reference to Gray J in *Plancor* is a reference to the following passage of his Honour's reasons ... at [44]:

[T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons... in upholding the integrity of awards and agreements the subject of penal

proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the Gibbs (*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216) ... exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.

- 44 Subject then to the “Gibbs exception” ... the Full Court’s decision in *Sayed* is authority for the proposition that where a proceeding is brought by an applicant on his or her own behalf, the discretion in s 546(3) is to be exercised to make any penalty the Court orders payable to that applicant. Aside from the identity of the person who brings the proceedings, and taking into account the “Gibbs exception”, the Full Court’s judgment does not appear to provide for any other basis upon which a penalty should be made payable to another person or entity set out in s 546(3).

126 Similarly, Magistrate Cicchini in *United Voice WA v Director General, Department of Education* 2012 WAIRC 00778; 92 WAIG 1655 determined that it was appropriate to order a penalty to be paid to a union that had expended the time and resources to enforce an industrial agreement on behalf its members commenting at [15]:

I accept that the claimant has been vigilant in ensuring compliance with the [a]greement. It is important that parties who police compliance with industrial agreements be rewarded for their efforts. There can be no doubt that in this instance the claimant has expended considerable resources and time in bringing the claim. The payment of penalties to it will, in part, ameliorate its costs and the harm done. I propose to order that the penalties imposed be paid by the respondent to the claimant.

127 I respectfully adopt the reasoning of their Honors in the authorities referred to and apply it in this case.

128 As a result of the respondent’s failure to respond to communications from the claimant, the claimant has had to commit significant resources to recovering the underpayment. These resources could have been used more constructively if the respondent had responded differently in this matter.

129 For the purposes of ameliorating the effects the underpayments have had on Ms Rowcliffe Carlson and her family during these tough economic times, I will also make an order under s 546(3) of the FW Act, that in addition to the payment of the judgment sum plus interest, Ms Rowcliffe Carlson is to be paid a portion of the fine to be imposed.

#### Order to pay interest

130 Section 547(2) of the FW Act relevantly provides that upon application, a court must make an order to pay interest unless good cause is shown to the contrary.

131 Noting the length of time Ms Rowcliffe Carlson was underpaid and after discovering the underpayment, she had to patiently await the outcome of these proceedings, in which her employer has made no opposing submissions.

132 For this further reason, I do not have a difficulty making an order that interest be paid on pursuant to of the FW Act.

133 Referring to the relevant Federal Court Practice Note on calculating interest on judgment, which includes information on the rate of interest to be applied at the time of judgment, Mr Sneddon submitted a sum equivalent to 8.1% of the judgment sum should be paid.

134 Applying this rate to the judgment sum, I find that the amount of interest the respondent should be ordered to pay is an amount of **\$2099.00**.

#### Declaration and orders to be made

1. The Court declares the respondent has contravened the award by underpaying its employee Ms Rowcliffe Carlson the sum of **\$25,907.44**.
2. The Court orders the respondent to pay a fine fixed in the sum of **\$55,000**.
3. The Court orders the fine referred to in the preceding order (2) is to be paid pursuant to s 546(3) of *the Fair Work Act 2009* (Cth) as follows:
  - i. **\$20,000** is to be paid to Ms Rowcliffe Carlson; and
  - ii. **\$35,000** is to be paid to the claimant.
4. The Court orders the respondent pay Ms Rowcliffe Carlson the further sum of **\$2099.00** being an order for interest pursuant to s 547 of *the Fair Work Act 2009* (Cth) on the judgment sum of **\$25,907.44** which the Court ordered the respondent to pay on 24 November 2023.

#### T. KUCERA

#### INDUSTRIAL MAGISTRATE

<sup>1</sup> French J in *Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) 13 ATPR 41-076, which was cited with approval in *Callan v Smith* [2021] WAIRC 00216; 101 WAIG 1155 at [30].

<sup>2</sup> *Callan v Smith* at [90].

<sup>3</sup> Also see *Callan v Smith* at [109].



## APPENDIX



## INDUSTRIAL MAGISTRATES COURT

Level 17, 111 St. Georges Terrace, Perth Western Australia 6000  
Postal Address: Locked Bag No. 1, Cloisters Square, Perth WA 6850  
Phone: (08) 9420 4467 | Fax General: (08) 9420 4500  
Free call: 1800 624 263 (from landlines) | Free fax: 1800 804 987  
Internet: www.imc.wa.gov.au

Our Ref: M 97 of 2023

Enquiries: Clerk to the Industrial Magistrates Court

Date: 28 November 2023

Dear Mr Singh,

**CLAIM NO. M 97 OF 2023**

**SHOP DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION -v- BALJIT KAUR PTY LTD**

I refer to the abovementioned application, which the Shop Distributive & Allied Employees Association (**claimant**) filed in the Western Australian Industrial Magistrates Court (**Court**) on 9 August 2023 (**underpayments claim**).

The underpayments claim has been issued against Baljit Kaur Pty Ltd (**respondent**). The Court has been advised the respondent operates the “Vibe Bridgetown” service station, which is located at 169 Hampton Street, Bridgetown (**Vibe Bridgetown**).

The records held by the Australian Securities and Investments Commission (**ASIC**) show that you are the respondent’s Director / Company Secretary, which in the usual course, are senior operational decision-making roles in businesses registered as companies.

In addition to this, the claimant has advised that you hold yourself out as the owner of four “Vibe” service stations, one of which includes Vibe Bridgetown.

Noting the seniority of your position with the respondent, the Court urges you to read the contents of this letter carefully.  
**Particulars of the underpayments claim and orders sought against the respondent**

In the underpayments claim, the claimant alleges the respondent has, in breach of the *Vehicle Repair Services and Retail Award 2020* (**award**), in the period 25 January 2021 to 19 February 2023, underpaid its employee Estelle Rowcliffe Carlson (**Rowcliffe Carlson**) the sum of **\$25,907.44 (unpaid wages)**.

In addition to an order requiring the respondent pay the unpaid wages to Ms Rowcliffe Carlson, the claimant seeks the following further orders against the respondent:

- An order requiring the respondent to pay interest on the unpaid wages under section 547 of the Fair Work Act 2009 (**FW Act**);
- An order requiring the respondent pay a pecuniary penalty (which means a fine) to the claimant under sections 539(2) and 545 of the FW Act.

The claimant advises that although it appears Ms Rowcliffe Carlson is now receiving the correct rates of pay as provided for under the award, the respondent has not taken any steps to pay her the unpaid wages.

**Respondent’s non-appearance and default judgement**

On 17 August 2023, the claimant served the underpayments claim by posting it to the respondent’s registered office; South Central Accounting & Tax Pty Ltd – Unit 8, 35 Biscayne Way, Jandakot.

Despite the claimant serving the underpayments claim in the manner required under the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (**regulations**) and pursuant to section 109X of the *Corporations Act 2001*, the respondent failed to file a response in accordance with the regulations.

Following the respondent’s failure to file a response, the claimant on 26 September 2023, made an application to the Court to issue orders in the underpayments claim (**application for orders**). This application for orders was listed for hearing on Tuesday 24 October 2023 (**first hearing**).

During the first hearing, the claimant applied for the issuance of a default judgment in the sum of **\$25,907.44** which the Court granted (**default judgement**). A copy of this and the other orders the Court made at the first hearing are attached for your information (**Court’s initial orders**).

Except for the default judgement, under the Court’s initial orders, the application for orders was adjourned to a further hearing on Monday 20 November 2023 (**second hearing**).

**Second initial hearing**

As directed, the Court held a second initial hearing in relation to the underpayments claim on Monday 20 November 2023. Regrettably, no one appeared for the respondent.

For the second hearing, the claimant provided evidence of the steps it had taken to personally serve the Courts’s initial orders. To this end, the claimant provided an affidavit in which it’s counsel explained how he had engaged the services of a process server, who had unsuccessfully attempted to serve the Court’s initial orders at the home address that ASIC has on record, as your place of residence.

From the information the process server provided on its attempts to serve the Court’s initial orders, it is clear you do not live at this address.

In addition to the provision of this evidence, the claimant who had had filed submissions in support of its application, was ready to proceed with its argument for the imposition of a pecuniary penalty.

Although the Court was within its rights to deal with and make final orders in relation to the underpayments claim at both the first and second hearings, it has determined the more appropriate course is to provide the respondent with a further opportunity to appear in Court and be heard on the claimant’s application for orders.

In relation to this, a copy of the orders the Industrial Magistrate issued during the second hearing are also attached for your information. You will see a third hearing in the underpayments claim is to be held on **Monday 18 December 2023**. **The hearing will commence at 9.15 am.**

**Further hearing on 18 December 2023**

At the further hearing to be held on **Monday 18 December 2023**, the Court will, in addition to the unpaid wages you have already been ordered to pay, decide whether you should also be ordered to pay a fine.

For the avoidance of any doubt, you are being given an opportunity to appear in Court on this date and be heard on whether a penalty should be imposed for the respondent’s contraventions of the award and if fine is to be ordered, how much.

Please be aware that if you or a representative for the respondent fails to appear in Court on this date, the Industrial Magistrate may make final orders in the respondent’s absence, which could include an order requiring the respondent to pay to the claimant the **maximum pecuniary penalty**.

The underpayment of an employee’s wages in breach of an award and the FW Act is a **serious matter**. The maximum pecuniary penalty the Court may impose in the circumstances of this case is a fine of **\$82 500.00**.

Please do not hesitate to contact the Court should you have any queries in relation to any matter raised by this letter on (08) 9420 4467 or by email, to [registry@wairc.wa.gov.au](mailto:registry@wairc.wa.gov.au).

Yours sincerely  
CLERK OF THE INDUSTRIAL MAGISTRATES COURT

Enc.

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**UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—**

**2024 WAIRC 00069**

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

DARREN BARRETT

**APPLICANT**

-v-

JAMES DAR HOLDINGS PTY LTD

**RESPONDENT**

**CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

WEDNESDAY, 14 FEBRUARY 2024

**FILE NO/S**

U 78 OF 2023

**CITATION NO.**

2024 WAIRC 00069

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**Result** Application discontinued

**Representation**

**Applicant** Mr D Barrett

**Respondent** Mr J Dar

---

*Order*

WHEREAS this is an application under s 29(1)(c) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 23 January 2024 the Commission convened a conference and the matter settled between the parties;

AND WHEREAS 24 January 2023, the applicant submitted a *Form 1A – Multipurpose Form*, to discontinue, however Registry were unable to accept the form for filing as it was deficient;

AND WHEREAS on 9 February 2024, the Commission wrote to the parties proposing that an Order would issue to discontinue this matter on 14 February 2024 unless an objection was raised prior to this time;

AND WHEREAS on 14 January 2024, no objection was received by either party;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application U 78 of 2023 is discontinued.

[L.S.]

(Sgd.) T B WALKINGTON,  
Commissioner.

2024 WAIRC 00021

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

HELEN HARMER

**APPLICANT**

-v-

SUSAN MARIA LE TESSIER

**RESPONDENT**

**CORAM**

COMMISSIONER C TSANG

**DATE**

THURSDAY, 18 JANUARY 2024

**FILE NO/S**

B 56 OF 2023

**CITATION NO.**

2024 WAIRC 00021

**Result**

Order issued

**Representation****Applicant**

Ms H Harmer (on her own behalf)

**Respondent**

Ms S Le Tessier (on her own behalf)

*Order*

WHEREAS on 17 August 2023 the applicant filed a *Form 3 – Contractual Benefit Claim*, and on 12 September 2023 the respondent filed a *Form 3A – Employer Response to Contractual Benefit Claim*;

AND WHEREAS by Directions issued on 18 October 2023 and Notices of Hearing issued on 7 November 2023, the matter was set down for a 3-day hearing on 17 to 19 June 2024;

AND WHEREAS on 12 January 2024 the applicant sought leave to discontinue the matter, and on 15 January 2024 the respondent advised that she does not oppose the discontinuance of the matter;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT matter B 56 of 2023 be, and by this order is, discontinued by leave.

[L.S.]

(Sgd.) C TSANG,  
Commissioner.

2024 WAIRC 00020

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

HELEN HARMER

**APPLICANT**

-v-

SUSAN MARIA LE TESSIER

**RESPONDENT****CORAM**

COMMISSIONER C TSANG

**DATE**

THURSDAY, 18 JANUARY 2024

**FILE NO/S**

U 56 OF 2023

**CITATION NO.**

2024 WAIRC 00020

**Result**

Order issued

**Representation****Applicant**

Ms H Harmer (on her own behalf)

**Respondent**

Ms S Le Tessier (on her own behalf)

*Order*

WHEREAS on 16 August 2023 the applicant filed a *Form 2 – Unfair Dismissal Application*, and on 12 September 2023 the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application*;

AND WHEREAS by Directions issued on 18 October 2023 and Notices of Hearing issued on 7 November 2023, the matter was set down for a 9-day hearing on 25 to 28 March 2024, 11 to 12 April 2024 and 15 to 17 April 2024;

AND WHEREAS on 12 January 2024 the applicant sought leave to discontinue the matter, and on 15 January 2024 the respondent advised that she does not oppose the discontinuance of the matter;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, and by consent, hereby orders –

THAT matter U 56 of 2023 be, and by this order is, discontinued by leave.

[L.S.]

(Sgd.) C TSANG,  
Commissioner.

2024 WAIRC 00023

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MICHAEL HYDER

**APPLICANT**

-v-

DEPARTMENT OF PRIMARY INDUSTRY AND REGIONAL DEVELOPMENT WESTERN AUSTRALIA

**RESPONDENT****CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

FRIDAY, 19 JANUARY 2024

**FILE NO/S**

U 19 OF 2023

**CITATION NO.**

2024 WAIRC 00023

**Result**

Application Dismissed

**Representation****Applicant**

Mr M Hyder

**Respondent**

Ms L Brick

*Order*

WHEREAS this is an application under s 29(1)(c) of the *Industrial Relations Act 1979* (WA);  
 AND WHEREAS on 17 April 2023 the applicant filed a *Form 2 – Unfair Dismissal Application*;  
 AND WHEREAS on 9 May 2023, the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application*;  
 AND WHEREAS on 16 May 2023 a conciliation conference was convened between the parties;  
 AND WHEREAS on 19 December 2023 the Commission wrote to the applicant informing that given the length of time since the last correspondence was received unless a party objected, this matter would be closed on 9 January 2024;  
 NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application U 19 of 2023 is dismissed.

[L.S.]

(Sgd.) T B WALKINGTON,  
 Commissioner.

## UNIONS—Matters dealt with under Section 66

2024 WAIRC 00014

### ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

PETER MCGEE

**APPLICANT**

-v-

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

**RESPONDENT**

**CORAM**

CHIEF COMMISSIONER S J KENNER

**DATE**

TUESDAY, 16 JANUARY 2024

**FILE NO/S**

PRES 15 OF 2023

**CITATION NO.**

2024 WAIRC 00014

**Result**

Order issued

**Representation**

**Applicant**

Mr S Farrell as agent

**Respondent**

Mr S Farrell as agent

*Order*

WHEREAS on 18 December 2023, the Commission published reasons for decision ([2023] WAIRC 00968);  
 AND WHEREAS on 18 December 2023, the Commission made an order ([2023] WAIRC 00969) which was deposited in the office of the Registrar;  
 AND WHEREAS the applicant has applied to vary order (1) of the order to add a new subparagraph (o) “Director, Northern Region Sergeant Bryn Papalia”;  
 AND WHEREAS the variation is unopposed;  
 NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT order (1) of the order of the Commission of 18 December 2023 ([2023] WAIRC 00969) be and is hereby rescinded and a new order (1) be made in the following terms:
- (1) THAT an Interim Board of Directors of the Western Australian Police Union of Workers is established and constituted as follows:
- (a) President  
Sergeant Paul Gale
  - (b) Senior Vice President  
Sergeant David Flaherty
  - (c) Vice President  
Senior Constable Todd Robinson

- (d) Treasurer  
Inspector Martin Voyez
- (e) Director, Metropolitan Region  
Sergeant David McDonald
- (f) Director, Metropolitan Region  
Senior Sergeant Bradley Bird
- (g) Director, Metropolitan Region  
Senior Constable Matthew Pow
- (h) Director, Metropolitan Region  
Detective Senior Sergeant Lindsay Garratt
- (i) Director, Metropolitan Region  
Inspector Gary Lewis
- (j) Director, Metropolitan Region  
Sergeant Scott Sulley
- (k) Director, Metropolitan Region  
Sergeant Dayna Rigoir
- (l) Director, Metropolitan Region  
Senior Constable Aaron Hickey
- (m) Director, Metropolitan Region  
Ms Narelle Kiddey
- (n) Director, Metropolitan Region  
Sergeant Russell Cowie
- (o) Director, Northern Region  
Sergeant Bryn Papalia

(Sgd.) S J KENNER,  
Chief Commissioner.

[L.S.]

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## CORRECTIONS—

2024 WAIRC 00042

### CITY OF BELMONT OUTSIDE WORKFORCE INDUSTRIAL AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
CITY OF BELMONT

**PARTIES**

**APPLICANT**

-v-

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) AND  
ANOTHER

**RESPONDENTS**

**CORAM** SENIOR COMMISSIONER R COSENTINO

**DATE** MONDAY, 29 JANUARY 2024

**FILE NO.** AG 2 OF 2024

**CITATION NO.** 2024 WAIRC 00042

---

**Result** Correction Order issued

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*Correction Order*

WHEREAS a ‘slip’ error occurred in the Order ([2024] WAIRC 00036) that was deposited in the office of the Registrar on 25 January 2024;

NOW THEREFORE the Commission, in order to correct this error, and pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the date of the Order ([2024] WAIRC 00036) be corrected by substituting the date ‘Thursday, 29 January 2024’ with ‘Thursday, 25 January 2024’.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

2024 WAIRC 00017

**DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2022**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

DEPARTMENT OF JUSTICE

**APPLICANT**

-v-

WESTERN AUSTRALIAN PRISON OFFICERS UNION

**RESPONDENT**

**CORAM** COMMISSIONER T EMMANUEL  
**DATE** WEDNESDAY, 17 JANUARY 2024  
**FILE NO/S** AG 33 OF 2023  
**CITATION NO.** 2024 WAIRC 00017

**Result** Correcting order issued**Representation****Applicant** Mr C Pettit (as agent)**Respondent** Mr B Hanlon (as agent)*Correcting Order*

WHEREAS the *Department of Justice Prison Officers' Industrial Agreement 2022* (Industrial Agreement) was registered as an industrial agreement by the Commission's order [2023] WAIRC 00910 on Tuesday, 21 November 2023;

AND WHEREAS on Monday, 18 December 2023 the parties identified three unintentional sets of drafting errors in the Industrial Agreement and asked the Commission to issue an order correcting the Industrial Agreement;

AND WHEREAS the parties identified that in order to correct the unintentional drafting errors in cl 27 – Rate of Pay for Overtime, pages 24-26 of the Industrial Agreement need to be replaced;

AND WHEREAS the parties identified that in order to correct the unintentional drafting errors in cl 155 – Dispute Resolution Procedure for Individual Disputes, page 115 of the Industrial Agreement needs to be replaced;

AND WHEREAS the parties identified that in order to correct the unintentional drafting errors in Schedule A – Annualised Salaries, page 121 of the Industrial Agreement needs to be replaced;

AND WHEREAS on Monday, 18 December 2023 the parties provided to the Commission replacement pages correcting the unidentified drafting errors in cl 27, cl 155 and Schedule A;

NOW THEREFORE the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) orders:

THAT the *Department of Justice Prison Officers' Industrial Agreement 2022* be corrected by inserting the replacement pages 24-26, 115, and 121 provided by the parties on Monday, 18 December 2023; and

THAT the corrected agreement annexed to this order replace the agreement registered on Tuesday, 21 November 2023.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

2024 WAIRC 00048

**DISABILITY SERVICES COMMISSION – UNITED WORKERS UNION (WA) – DISABILITY SUPPORT WORKERS INDUSTRIAL AGREEMENT 2022**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

DISABILITY SERVICES COMMISSION

**APPLICANT**

-v-

UNITED WORKERS UNION (WA)

**RESPONDENT**

**CORAM** COMMISSIONER T KUCERA  
**DATE** WEDNESDAY, 31 JANUARY 2024  
**FILE NO/S** AG 27 OF 2023  
**CITATION NO.** 2024 WAIRC 00048

<b>Result</b>	Correction Order issued
<b>Representation</b>	
<b>Applicant</b>	Department of Communities
<b>Respondent</b>	United Workers Union

*Correction Order*

WHEREAS on 14 December 2023, the Disability Services Commission - United Workers Union (WA) - Disability Support Workers Industrial Agreement 2022 (Agreement) was registered as an industrial agreement in the Commission by Order ([2023] WAIRC 00951);

AND WHEREAS on 22 December 2023, the Department of Communities wrote to the Commission informing that typographical errors in the Agreement had been identified at subclauses 11A.6, 11A.6(a)(i)(bb), 11A.6(d), 39.33(d), and 47.7(a)(ii);

AND WHEREAS on 24 January 2024, the parties have provided to the Commission a replacement Agreement to correct the typographical errors identified;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the IR Act, hereby orders –

THAT the Order ([2022] WAIRC 00951) be corrected by substituting the Agreement as provided by the parties on 24 January 2024.

[L.S.]

(Sgd.) T KUCERA,  
Commissioner.

## PROCEDURAL DIRECTIONS AND ORDERS—

2024 WAIRC 00015

### WA LABOR ENTERPRISE AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES

**APPLICANT**

-v-

AUSTRALIAN LABOR PARTY (WESTERN AUSTRALIAN BRANCH) AND PERTH TRADES  
HALL INCORPORATED

**RESPONDENT**

<b>CORAM</b>	COMMISSIONER C TSANG
<b>DATE</b>	TUESDAY, 16 JANUARY 2024
<b>FILE NO/S</b>	AG 36 OF 2023
<b>CITATION NO.</b>	2024 WAIRC 00015

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr R Knox
<b>Respondent</b>	Ms L Cayoun

*Order*

WHEREAS the parties consent to an order amending the name of the respondents to the application to correctly reflect the record;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the name of the respondent to the application ‘Australian Labor Party (Western Australian Branch) and Perth Trades Hall Incorporated’ be deleted and substituted for ‘Australian Labor Party (Western Australian Branch)’ as the first respondent and ‘Perth Trades Hall Incorporated’ as the second respondent.

[L.S.]

(Sgd.) C TSANG,  
Commissioner.



2024 WAIRC 00052

**INTERPRETATION OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2022**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MINISTER FOR CORRECTIVE SERVICES

**APPLICANT**

-v-

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

**RESPONDENT****CORAM** COMMISSIONER T B WALKINGTON**DATE** TUESDAY, 6 FEBRUARY 2024**FILE NO.** APPL 1 OF 2024**CITATION NO.** 2024 WAIRC 00052**Result** Direction issued**Representation****Applicant** Mr C Arnold (of counsel)**Respondent** Mr D Stojanoski (of counsel)*Direction*

HAVING heard from Mr C Arnold of counsel on behalf of the Minister for Corrective Services and Mr D Stojanoski of counsel on behalf of the Western Australian Prison Officers' Union of Workers, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the Western Australian Prison Officers' Union of Workers file any application to dismiss APPL 1 of 2024 by no later than 20 February 2024.
2. THAT the Western Australian Prison Officers' Union of Workers file written submissions in support of the application to dismiss at least 14 calendar days prior to the date of the hearing.
3. THAT the Minister for Corrective Services file submissions in response to the application to dismiss at least 7 calendar days prior to the date of the hearing.
4. THAT the application to dismiss be listed for a hearing of 1 day's duration on a date to be fixed.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

2024 WAIRC 00043

**MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES**APPLICANT**

-v-

CITY OF KALAMUNDA, LOCAL GOVERNMENT, RACING AND CEMETERIES  
EMPLOYEES UNION (WA), SHIRE OF BODDINGTON, SHIRE OF DALWALLINU, SHIRE OF  
YALGOO, SHIRE OF BRIDGETOWN GREENBUSHES, SHIRE OF BRUCE ROCK, SHIRE OF  
CARNAMAH, SHIRE OF DOWERIN, SHIRE OF GOOMALLING, SHIRE OF HALLS CREEK,  
SHIRE OF HARVEY, SHIRE OF KONDININ, SHIRE OF LAVERTON, SHIRE OF LEONORA,  
SHIRE OF MURRAY, SHIRE OF NANNUP, SHIRE OF NAREMBEEN, SHIRE OF  
RAVENSTHORPE, SHIRE OF SANDSTONE, SHIRE OF THREE SPRINGS, SHIRE OF  
VICTORIA PLAINS, SHIRE OF WAGIN, SHIRE OF WANDERING, SHIRE OF WAROONA,  
SHIRE OF WOODANILLING, WESTERN AUSTRALIAN LOCAL GOVERNMENT  
ASSOCIATION

**RESPONDENTS****CORAM** COMMISSIONER T B WALKINGTON**DATE** MONDAY, 29 JANUARY 2024**FILE NO.** APPL 3 OF 2023**CITATION NO.** 2024 WAIRC 00043

<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr C Fogliani (of counsel)
<b>Respondents</b>	Mr K Trainer (as agent) Mr M FitzGerald (as agent) Mr N Ellery (of counsel)

*Direction*

WHEREAS on 23 January 2024, the Commission issued directions in this matter: [2024] WAIRC 00027;

AND WHEREAS on 25 January 2024, the Western Australian Local Government Association (WALGA) notified the Commission that at the hearing on 17 January 2024, it had opposed the directions sought and that the Direction [2024] WAIRC 00027 issued was not "by consent" as described;

NOW THEREFORE the Commission notes the error in the direction issued and now pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (the Act) and hereby directs:

1. THAT the Direction [2024] WAIRC 00027 issued on 23 January 2024 be vacated.
2. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, the relevant respondents (City of Kalamunda, Shire of Boddington, Shire of Bruce Rock, Shire of Carnamah, Shire of Dowerin, Shire of Goomalling, Shire of Halls Creek, Shire of Harvey, Shire of Kondinin, Shire of Murray, Shire of Nannup, Shire of Narembeen, Shire of Ravensthorpe, Shire of Three Springs, Shire of Wagin, Shire of Wandering, Shire of Woodanilling, and Shire of Yalgoo) are to file with Registry a copy of the Equal Employment Opportunity Annual Workforce Data Spreadsheet that the relevant respondent completed and provided to the Public Sector Commission for the period of 2022-2023.
3. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, WALGA shall file all documents relating to its 'sector survey' concerning proposed amendments to the Municipal Employees (Western Australia) Award 2021 (Award). This includes:
  - (a) The survey documents distributed by WALGA to local governments concerning the proposed amendments to the Award.
  - (b) The unredacted, individual responses received by WALGA from local governments.
4. THAT the disclosure of documents at direction 3 be limited to the representatives of the parties and officers of the parties' organisations.
5. THAT the applicant's application to vary the Award be listed for a hearing of 10 days, starting on a date not before 1 March 2024.
6. THAT no later than 14 days before the hearing date, the applicant shall file an outline of opening submissions.
7. THAT no later than 7 days before the hearing date, the respondents shall file an outline of opening submissions.
8. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**2024 WAIRC 00027**

**MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES	<b>APPLICANT</b>
	-v-	
	CITY OF KALAMUNDA, LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA), SHIRE OF BODDINGTON, SHIRE OF DALWALLINU, SHIRE OF YALGOO, SHIRE OF BRIDGETOWN GREENBUSHES, SHIRE OF BRUCE ROCK, SHIRE OF CARNAMAH, SHIRE OF DOWERIN, SHIRE OF GOOMALLING, SHIRE OF HALLS CREEK, SHIRE OF HARVEY, SHIRE OF KONDININ, SHIRE OF LAVERTON, SHIRE OF LEONORA, SHIRE OF MURRAY, SHIRE OF NANNUP, SHIRE OF NAREMBEEN, SHIRE OF RAVENSTHORPE, SHIRE OF SANDSTONE, SHIRE OF THREE SPRINGS, SHIRE OF VICTORIA PLAINS, SHIRE OF WAGIN, SHIRE OF WANDERING, SHIRE OF WAROONA, SHIRE OF WOODANILLING, WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION	
		<b>RESPONDENTS</b>
<b>CORAM</b>	COMMISSIONER T B WALKINGTON	
<b>DATE</b>	TUESDAY, 23 JANUARY 2024	
<b>FILE NO.</b>	APPL 3 OF 2023	
<b>CITATION NO.</b>	2024 WAIRC 00027	

<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr C Fogliani (of counsel)
<b>Respondent</b>	Mr K Trainer (as agent) Mr M FitzGerald (as agent) Mr N Ellery (of counsel)

*Direction*

HAVING heard from Mr Fogliani on behalf of the applicant and Mr Trainer, Mr FitzGerald and Mr Ellery on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (the Act), and by consent, hereby directs:

1. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, the relevant respondents (City of Kalamunda, Shire of Boddington, Shire of Bruce Rock, Shire of Carnamah, Shire of Dowerin, Shire of Goomalling, Shire of Halls Creek, Shire of Harvey, Shire of Kondinin, Shire of Murray, Shire of Nannup, Shire of Narembeen, Shire of Ravensthorpe, Shire of Three Springs, Shire of Wagin, Shire of Wandering, Shire of Woodanilling, and Shire of Yalgoo) are to file with Registry a copy of the Equal Employment Opportunity Annual Workforce Data Spreadsheet that the relevant respondent completed and provided to the Public Sector Commission for the period of 2022-2023;
2. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, the Western Australian Local Government Association (WALGA) shall file all documents relating to its 'sector survey' concerning proposed amendments to the Award. This includes:
  - (a) The survey documents distributed by WALGA to local governments concerning the proposed amendments to the Award.
  - (b) The unredacted, individual responses received by WALGA from local governments.
3. THAT the disclosure of documents at paragraph 2 be limited to the representatives of the parties and officers of the parties' organisations;
4. THAT the applicant's application to vary the Award be listed for a hearing of 10 days, starting on a date not before 1 March 2024;
5. THAT no later than 14 days before the hearing date, the applicant shall file an outline of opening submissions;
6. THAT no later than 7 days before the hearing date, the respondents shall file an outline of opening submissions; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**2024 WAIRC 00044**

**LOCAL GOVERNMENT OFFICERS' (WESTERN AUSTRALIA) AWARD 2021**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES

**APPLICANT**

-v-

CITY OF KALAMUNDA, THE ASSOCIATION OF PROFESSIONAL ENGINEERS,  
AUSTRALIA (WESTERN AUSTRALIAN BRANCH) ORGANISATION OF EMPLOYEES  
(APEA), SHIRE OF BODDINGTON, SHIRE OF DALWALLINU, SHIRE OF YALGOO, SHIRE  
OF BRIDGETOWN GREENBUSHES, SHIRE OF BRUCE ROCK, SHIRE OF CARNAMAH,  
SHIRE OF DOWERIN, SHIRE OF GOOMALLING, SHIRE OF HALLS CREEK, SHIRE OF  
HARVEY, SHIRE OF KONDININ, SHIRE OF LAVERTON, SHIRE OF LEONORA, SHIRE OF  
MURRAY, SHIRE OF NANNUP, SHIRE OF NAREMBEEN, SHIRE OF RAVENSTHORPE,  
SHIRE OF SANDSTONE, SHIRE OF THREE SPRINGS, SHIRE OF VICTORIA PLAINS, SHIRE  
OF WAGIN, SHIRE OF WANDERING, SHIRE OF WAROONA, SHIRE OF WOODANILLING,  
WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

**RESPONDENTS**

**CORAM** COMMISSIONER T B WALKINGTON

**DATE** MONDAY, 29 JANUARY 2024

**FILE NO.** APPL 4 OF 2023

**CITATION NO.** 2024 WAIRC 00044

<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr C Fogliani (of counsel)
<b>Respondents</b>	Mr K Trainer (as agent) Mr M FitzGerald (as agent) Mr N Ellery (of counsel)

*Direction*

WHEREAS on 23 January 2024, the Commission issued directions in this matter: [2024] WAIRC 00028;

AND WHEREAS on 25 January 2024, the Western Australian Local Government Association (WALGA) notified the Commission that at the hearing on 17 January 2024, it had opposed the directions sought and that the Direction [2024] WAIRC 00028 issued was not "by consent" as described;

NOW THEREFORE the Commission notes the error in the direction issued and now pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (the Act) and hereby directs:

1. THAT the Direction [2024] WAIRC 00028 issued on 23 January 2024 be vacated.
2. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, the relevant respondents (City of Kalamunda, Shire of Boddington, Shire of Bruce Rock, Shire of Carnamah, Shire of Dowerin, Shire of Goomalling, Shire of Halls Creek, Shire of Harvey, Shire of Kondinin, Shire of Murray, Shire of Nannup, Shire of Narembeen, Shire of Ravensthorpe, Shire of Three Springs, Shire of Wagin, Shire of Wandering, Shire of Woodanilling and Shire of Yalgoo) are to file with Registry a copy of the Equal Employment Opportunity Annual Workforce Data Spreadsheet that the relevant respondent completed and provided to the Public Sector Commission for the period of 2022-2023.
3. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, WALGA shall file all documents relating to its 'sector survey' concerning proposed amendments to the Local Government Officers' (Western Australia) Award 2021 (Award). This includes:
  - (a) The survey documents distributed by WALGA to local governments concerning the proposed amendments to the Award.
  - (b) The unredacted, individual responses received by WALGA from local governments.
4. THAT the disclosure of documents at direction 3 be limited to the representatives of the parties and officers of the parties' organisations.
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**2024 WAIRC 00028**

**LOCAL GOVERNMENT OFFICERS' (WESTERN AUSTRALIA) AWARD 2021**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES

**APPLICANT**

-v-

CITY OF KALAMUNDA, THE ASSOCIATION OF PROFESSIONAL ENGINEERS,  
AUSTRALIA (WESTERN AUSTRALIAN BRANCH) ORGANISATION OF EMPLOYEES  
(APEA), SHIRE OF BODDINGTON, SHIRE OF DALWALLINU, SHIRE OF YALGOO, SHIRE  
OF BRIDGETOWN GREENBUSHES, SHIRE OF BRUCE ROCK, SHIRE OF CARNAMAH,  
SHIRE OF DOWERIN, SHIRE OF GOOMALLING, SHIRE OF HALLS CREEK, SHIRE OF  
HARVEY, SHIRE OF KONDININ, SHIRE OF LAVERTON, SHIRE OF LEONORA, SHIRE OF  
MURRAY, SHIRE OF NANNUP, SHIRE OF NAREMBEEN, SHIRE OF RAVENSTHORPE,  
SHIRE OF SANDSTONE, SHIRE OF THREE SPRINGS, SHIRE OF VICTORIA PLAINS, SHIRE  
OF WAGIN, SHIRE OF WANDERING, SHIRE OF WAROONA, SHIRE OF WOODANILLING,  
WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

**RESPONDENTS**

**CORAM** COMMISSIONER T B WALKINGTON

**DATE** TUESDAY, 23 JANUARY 2024

**FILE NO.** APPL 4 OF 2023

**CITATION NO.** 2024 WAIRC 00028

<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr C Fogliani (of counsel)
<b>Respondent</b>	Ms J Parnell (as agent) Mr M FitzGerald (as agent) Mr N Ellery (of counsel)

*Direction*

HAVING heard from Mr Fogliani on behalf of the applicant and Ms Parnell, Mr FitzGerald and Mr Ellery on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (the Act), and by consent, hereby directs:

1. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, the relevant respondents (City of Kalamunda, Shire of Boddington, Shire of Bruce Rock, Shire of Carnamah, Shire of Dowerin, Shire of Goomalling, Shire of Halls Creek, Shire of Harvey, Shire of Kondinin, Shire of Murray, Shire of Nannup, Shire of Narembeen, Shire of Ravensthorpe, Shire of Three Springs, Shire of Wagin, Shire of Wandering, Shire of Woodanilling and Shire of Yalgoo) are to file with Registry a copy of the Equal Employment Opportunity Annual Workforce Data Spreadsheet that the relevant respondent completed and provided to the Public Sector Commission for the period of 2022-2023;
2. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, the Western Australian Local Government Association (WALGA) shall file all documents relating to its 'sector survey' concerning proposed amendments to the Award. This includes:
  - (a) The survey documents distributed by WALGA to local governments concerning the proposed amendments to the Award.
  - (b) The unredacted, individual responses received by WALGA from local governments.
3. THAT the disclosure of documents at paragraph 2 be limited to the representatives of the parties and officers of the parties' organisations; and
4. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**2024 WAIRC 00012**

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

JESSICA MCCARTHY

**APPLICANT**

-v-

MY FOODIE BOX LIMITED

**RESPONDENT**

**CORAM** COMMISSIONER T B WALKINGTON  
**DATE** FRIDAY, 12 JANUARY 2024  
**FILE NO.** B 67 OF 2023  
**CITATION NO.** 2024 WAIRC 00012

<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Ms J McCarthy
<b>Respondent</b>	Ms M Hughes and Mr B Hughes

*Direction*

HAVING heard from the applicant on her own behalf and Ms Hughes and Mr Hughes on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the respondent file and serve a on *Form 3A – Employer Response to Contractual Benefit Claim*, by no later than 30 January 2024;

- 2 THAT the applicant file and serve (by way of affidavit or statutory declaration) sworn signed witness statements by no later than 13 February 2024;
- 3. THAT the respondent file and serve (by way of affidavit or statutory declaration) sworn signed witness statements by no later than 27 February 2024;
- 4. THAT the applicant file and serve an outline of submissions, and any list of authorities upon which they intend to rely, by no later than 5 March 2024;
- 5. THAT the applicant file and serve (by way of affidavit or statutory declaration) sworn witness statements in response to the respondent’s witness statements by no later than 12 March 2024;
- 6. THAT the respondent file and serve an outline of submissions, and any list of authorities, upon which they intend to rely, by no later than 19 March 2024;
- 6. THAT the matter be listed for a hearing on a date to be determined not before 26 March 2024; and
- 7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**2024 WAIRC 00011**

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

JESSICA MCCARTHY

**APPLICANT**

-v-

MY FOODIE BOX PTY LTD

**RESPONDENT**

**CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

FRIDAY, 12 JANUARY 2024

**FILE NO/S**

B 67 OF 2023

**CITATION NO.**

2024 WAIRC 00011

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<b>Result</b>	Name of respondent amended
<b>Representation</b>	
<b>Applicant</b>	Ms J McCarthy
<b>Respondent</b>	Ms M Hughes and Mr B Hughes

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*Order*

HAVING heard from the applicant on her own behalf and Ms Hughes and Mr Hughes on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979 (WA)*, and by consent, hereby directs:

THAT the name of the respondent be amended to My Foodie Box Limited.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**2024 WAIRC 00045**

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

LACHLAN JOHN CRAIGIE

**APPLICANT**

-v-

GMA METALS AUSTRALIA PTY LTD

**RESPONDENT**

**CORAM**

COMMISSIONER T KUCERA

**DATE**

TUESDAY, 30 JANUARY 2024

**FILE NO/S**

B 95 OF 2023

**CITATION NO.**

2024 WAIRC 00045

**Result** Order issued  
**Representation**  
**Applicant** Ms S Edwards (of counsel)  
**Respondent** Mr R Pedulla

*Order*

HAVING heard from Ms S Edwards of counsel on behalf of the applicant and Mr R Pedulla on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the applicant file his witness statements attaching all documents that will be relied upon in support of the claim by 20 February 2024;
2. THAT the respondent file its witness statements attaching all documents that will be relied upon in support of its response by 12 March 2024;
3. THAT for the purposes of listing the matter for hearing, the parties are to provide the Commission with a list of their unavailable dates by 6 February 2024; and
4. THAT there be liberty to apply on short notice.

[L.S.]

(Sgd.) T KUCERA,  
Commissioner.

**2024 WAIRC 00024**

**DISPUTE RE DISMISSAL OF UNION MEMBER**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 LOCAL GOVERNMENT, RACING AND CEMETERIES UNION (WA)

**PARTIES**

**APPLICANT**

-v-

CITY OF SWAN

**RESPONDENT**

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** MONDAY, 22 JANUARY 2024  
**FILE NO.** C 1 OF 2024  
**CITATION NO.** 2024 WAIRC 00024

**Result** Direction issued  
**Representation**  
**Applicant** Mr K Trainer  
**Respondent** Mr P van den Merwe of counsel

*Direction*

WHEREAS on 29 December 2023 the applicant, the Local Government, Racing and Cemeteries **Union** (WA), filed an application under s 44 of the *Industrial Relations Act 1979* (WA) for a compulsory conference to seek the assistance of the Commission to resolve a dispute concerning the termination of employment of its member, Mr Matthew Hepi by the **City** of Swan on 12 December 2023;

AND WHEREAS by its application, the Union alleges that Mr Hepi's employment was terminated unfairly, and the Union seeks Mr Hepi's reinstatement to employment with the City without loss of wages or conditions;

AND WHEREAS the City denies the termination of employment was unfair or that the Union is entitled to any relief in respect of it;

AND WHEREAS a compulsory conference was convened by the Commission on 19 January 2024;

AND WHEREAS in the course of the compulsory conference, the parties explored options for resolution of the dispute on a confidential basis, but did not reach agreement for resolution of the dispute;

AND WHEREAS during the compulsory conference, the City sought a direction from the Commission that the parties exchange final written offers after the conclusion of the conference to allow the parties a period of time to consider further whether the matter could be resolved by agreement. The City also sought a direction that the Union's offer detail how its final offer resolved the concerns it and Mr Hepi had which were identified as barriers to resolution of the matter on terms explored in the conference;

AND WHEREAS the Union agreed to exchange final written offers but did not agree to provide details of how its final offer resolved the concerns it and Mr Hepi had on the basis that to do so would have no utility in light of the discussions had during the conference;

AND WHEREAS the parties consent to the dispute being referred for arbitration if the exchange of final written offers does not result in the resolution of the matter;

AND WHEREAS having presided over the conference, it appears to me that the provision of the details sought by the City would assist the parties to formulate and respond to future offers or counter-offers and would, therefore, improve the prospects of the matter resolving by conciliation;

AND WHEREAS I the undersigned consider that it is appropriate to give the directions sought;

NOW THEREFORE pursuant to the powers vested in me by s 44(6) of the Act, I hereby direct –

1. THAT by 24 January 2024, the Union provide the City with its final and best proposal for resolution of this matter, in writing, and that in doing so, the Union detail how its proposal addresses Mr Hepi’s concern that he be vindicated and the benefit of permanent employment be restored.
2. THAT by 2 February 2024, the City respond to the Union’s proposal in writing by either accepting the proposal, or making a counter-proposal.
3. THAT if the City makes a written counter-proposal under direction 2, that by 9 February 2024, the Union respond in writing to the counter-proposal either accepting or rejecting the counter-proposal.
4. THAT the conference be adjourned to a date to be fixed not before 9 February 2024.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

**2024 WAIRC 00056**

**DISPUTE RE SETTLEMENT AGREEMENTS REGARDING COUNTRY RELIEVING ALLOWANCE**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA

**APPLICANT**

-v-

DEPARTMENT OF FIRE AND EMERGENCY SERVICES

**RESPONDENT**

**CORAM**

COMMISSIONER T EMMANUEL

**DATE**

TUESDAY 6 FEBRUARY 2024

**FILE NO/S**

CR 12 OF 2023

**CITATION NO.**

2024 WAIRC 00056

**Result** Order issued

**Representation**

**Applicant** Mr J Carroll (of counsel)

**Respondent** Mr C Fogliani (of counsel)

*Order*

WHEREAS this matter was referred for hearing and determination under s 44 of the *Industrial Relations Act 1979* (WA) on 6 December 2023;

AND WHEREAS on 14 December 2023 the Commission directed:

1. That the applicant file outlines of evidence and documents (other than the agreed documents) on which it intends to rely by 4.00 pm, Thursday 25 January 2024;
2. That the respondent file outlines of evidence and documents (other than the agreed documents) on which it intends to rely by 4.00 pm, Thursday 15 February 2024;
3. That the applicant file written submissions and a list of authorities by 4.00 pm, Thursday 29 February 2024;
4. That the respondent file written submissions and a list of authorities by 4.00 pm, Thursday 14 March 2024;
5. That the matter be listed for a two-day hearing on dates to be fixed;
6. That discovery be informal; and
7. That the parties have liberty to apply.

AND WHEREAS on 25 January 2024 the applicant filed outline of evidence for Mr Tom Nolan and an unindexed bundle of documents;



AND WHEREAS on 31 January 2024 the respondent made an application seeking the following orders:

1. The applicant file a substituted witness outline of Mr Tom Nolan which complies with paragraph 10 of Practice Note 9 of 2021 by identifying the substance of the evidence that Mr Nolan will give and not just the topics upon which he will give evidence, by a date to be fixed;
2. The applicant file a substituted bundle of documents upon which it intends to rely which contains an index of the documents in the bundle, by a date to be fixed;
3. Directions 2 to 4 of the directions made on 14 December 2023 be vacated and new programming directions be issued taking into account the time for the applicant to comply with any orders to file a substituted outline of evidence and substituted bundle of documents (Application);

AND WHEREAS on 2 February 2024 the Commission suspended the programming directions and directed the applicant to respond to the Application;

AND WHEREAS on 5 February 2024 the applicant filed a response to the Application. In effect the applicant says that its case is clearly set out in the Memorandum of Matters Referred, Mr Nolan's outline of evidence is not deficient, the documents speak for themselves and the case is likely to turn on the statement of agreed facts and agreed documents, rather than on Mr Nolan's evidence. The applicant says its documents are clearly marked and electronically bookmarked. After the respondent has filed its materials, the applicant will create a court book with an index to the documents;

AND WHEREAS the Commission has considered the Application, the applicant's response to the Application, Mr Nolan's outline of evidence and the documents filed by the applicant;

AND WHEREAS the Commission considers that Mr Nolan's outline of evidence is deficient because it does not adequately identify the substance of Mr Nolan's proposed evidence in relation to the matters set out at [2], [4], parts of [5], and [6], and that it would assist the Commission if the applicant's documents were indexed. In the circumstances, for the expeditious and just hearing and determination of this matter, the Commission considers that the applicant should file a substituted outline of evidence for Mr Nolan that identifies the substance of the evidence that Mr Nolan will give (and not just the topics on which he will give evidence), and a substituted bundle of documents on which the applicant intends to rely which contains an index of the documents in the bundle;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA), hereby order –

THAT by 4.00 pm on Wednesday 14 February 2024 the applicant file a substituted outline of evidence for Mr Nolan that identifies the substance of the evidence that Mr Nolan will give (and not just the topics on which he will give evidence); and

THAT by 4.00 pm on Wednesday 14 February 2024 the applicant file a substituted bundle of documents on which the applicant intends to rely which contains an index of the documents in the bundle.

THAT by 4.00 pm on Monday 19 February 2024 the parties confer and inform chambers of their views about the proposed timing of previous directions 2 to 4.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

**2024 WAIRC 00034**

**APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER PRES 10/2022 GIVEN ON 10 OCTOBER 2023**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SAMANTHA FENN	<b>APPELLANT</b>
	-v-	
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH AND ANOTHER	<b>RESPONDENTS</b>
	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION - INTERVENOR 29B PARTY	<b>INTERVENOR</b>
<b>CORAM</b>	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER T B WALKINGTON COMMISSIONER C TSANG	
<b>DATE</b>	WEDNESDAY, 24 JANUARY 2024	
<b>FILE NO/S</b>	FBA 7 OF 2023	
<b>CITATION NO.</b>	2024 WAIRC 00034	

<b>Result</b>	Direction issued
<b>Representation</b>	(on the papers)
<b>Appellant</b>	Eureka Lawyers
<b>First Respondent</b>	Belinda Burke Legal Pty Ltd
<b>Second Respondent</b>	State Solicitor's Office
<b>Intervenor</b>	State Solicitor's Office

*Direction*

WHEREAS on 20 December 2023, a Direction issued in respect this matter ([2023] WAIRC 00981);  
 AND WHEREAS on 23 January 2023, counsel for the appellant sought for directions 2, 3 and 4 of [2023] WAIRC 00981 to be extended by consent of the parties;  
 AND WHEREAS no objection has been received from the other parties and intervenor in relation to the request;  
 AND WHEREAS the Full Bench has considered the request;  
 NOW THEREFORE, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the date in direction 2 of [2023] WAIRC 00981 be varied to no later than 8 March 2024.
2. THAT the date in direction 3 of [2023] WAIRC 00981 be varied to no later than 5 April 2024.
3. THAT the date in direction 4 of [2023] WAIRC 00981 be varied to no later than 5 April 2024.

By the Full Bench  
 (Sgd.) R COSENTINO,  
 Senior Commissioner.

[L.S.]

**2024 WAIRC 00041**

**APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 3/2023**

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

**PARTIES** PENELOPE ANNE FAGAN

**APPELLANT**

-v-

MINISTER FOR CORRECTIVE SERVICES

**RESPONDENT**

**CORAM** BUSS J

**DATE** THURSDAY, 25 JANUARY 2024

**FILE NO/S** IAC 1 OF 2024

**CITATION NO.** 2024 WAIRC 00041

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**Result** Programming Orders Issued

*Order*

1. The appellant file submissions and a list of legal authorities and serve a copy on the respondent by 4:00pm on 19 February 2024.
2. The respondent file submissions and a list of legal authorities and serve a copy on the appellant by 4:00pm on 14 March 2024.
3. The appellant file the appeal book together with three hard copies and serve a copy on the respondent by 4:00pm on 8 April 2024.

(Sgd.) S BASTIAN,  
 Clerk of Court.

[L.S.]

2024 WAIRC 00018

**INTERPRETATION OF THE WESTERN AUSTRALIA POLICE FORCE INDUSTRIAL AGREEMENT 2021**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

**APPLICANT**

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

**RESPONDENT****CORAM**PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER R COSENTINO**DATE**

WEDNESDAY, 17 JANUARY 2024

**FILE NO**

P 1 OF 2023

**CITATION NO.**

2024 WAIRC 00018

**Result**

Direction issued

**Representation****Applicant**

Mr S Farrell as agent

**Respondent**

Ms E Negus of counsel

*Direction*

HAVING heard from Mr S Farrell as agent on behalf of the applicant and Ms E Negus of counsel on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

THAT leave is granted for the applicant to file an amended schedule to the Form 1 – General Application with amendments to Issues in Dispute and Outcomes Sought by 16 January 2024.

(Sgd.) R COSENTINO,  
Senior Commissioner,  
Public Service Arbitrator.

[L.S.]

2024 WAIRC 00058

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ERIKA BEATTIE-SONC

**APPLICANT**

-v-

CITY OF ARMADALE WA

**RESPONDENT****CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

WEDNESDAY, 7 FEBRUARY 2024

**FILE NO.**

U 68 OF 2023

**CITATION NO.**

2024 WAIRC 00058

**Result**

Direction issued

**Representation****Applicant**

Ms E Beattie-Sonc

**Respondent**

Mr J Collier

*Direction*

HAVING heard from Ms Beattie-Sonc on their own behalf and Mr J Collier on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs, by consent –

1. THAT the jurisdictional issue of whether the Commission ought to accept the application out of time be heard and determined as a preliminary matter;
2. THAT the applicant file and serve upon the respondent any outlines of witness evidence, including any documents upon which they intend to rely, by no later than 21 February 2024;

3. THAT the respondent file and serve upon the applicant any outlines of witness evidence, including any documents upon which they intend to rely, by no later than 6 March 2024;
4. THAT the applicant file and serve upon the respondent an outline of submissions and any list of authorities, by no later than 20 March 2024;
5. THAT the respondent file and serve upon the applicant an outline of submissions and any list of authorities, by no later than 10 April 2024;
6. THAT the preliminary matter be listed for hearing, for one day, on a date to be determined; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

2024 WAIRC 00033

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

TONI MARIE VAN DEN BERG

**APPLICANT**

-v-

MINISTER FOR CORRECTIVE SERVICES

**RESPONDENT**

**CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

WEDNESDAY, 24 JANUARY 2024

**FILE NO.**

U 88 OF 2023

**CITATION NO.**

2024 WAIRC 00033

**Result**  
**Representation**  
**Applicant**  
**Respondent**

Direction issued  
Mr M Fletcher (of counsel)  
Mr J Carroll (of counsel)

*Direction*

HAVING heard from the Mr Fletcher on behalf of the applicant and Mr Carroll on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT by 25 January 2024, the applicant is to file a *Form 5 – Referral of a Matter Under the Public Sector Management Act 1994* in substitution for the *Form 2 – Unfair Dismissal Application* filed on 30 November 2023, and it is to stand as the originating application in this matter;
2. THAT the respondent's *Form 2A – Employer Response to Unfair Dismissal Application* filed on 15 January 2024 is to stand as the respondent's response to the Applicant's *Form 5*, save that paragraphs 1 to 6 of the annexure are withdrawn by the Respondent; and
3. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

2024 WAIRC 00030

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

TONI MARIE VAN DEN BERG

**APPLICANT**

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

**RESPONDENT**

**CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

WEDNESDAY, 24 JANUARY 2024

**FILE NO/S**

U 88 OF 2023

**CITATION NO.**

2024 WAIRC 00030

<b>Result</b>	Name of Respondent amended
<b>Representation</b>	
<b>Applicant</b>	Mr M Fletcher (of counsel)
<b>Respondent</b>	Mr J Carroll (of counsel)

*Order*

HAVING heard from the Mr Fletcher on behalf of the applicant and Mr Carroll on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979 (WA)*, and by consent, hereby orders:

THAT the name of the respondent be amended to Minister for Corrective Services.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

## INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Armadale Industrial Agreement 2024 AG 37/2023	23/01/2024	City of Armadale	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU) and Another	Senior Commissioner R Cosentino	Agreement registered
City of Belmont Inside Workforce Industrial Agreement 2023 AG 1/2024	25/01/2024	City of Belmont	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
City of Belmont Outside Workforce Industrial Agreement 2023 AG 2/2024	29/01/2024	City of Belmont	Local Government, Racing and Cemeteries Employees Union (WA) and Another	Senior Commissioner R Cosentino	Agreement registered
City of Kalgoorlie-Boulder Union Collective Workplace Enterprise Agreement 2022 AG 4/2023	23/01/2024	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	City of Kalgoorlie-Boulder, Local Government, Racing and Cemeteries Employees Union (WA)	Commissioner T B Walkington	Agreement registered
City of Stirling Outside Workforce Agreement 2023 AG 3/2024	24/01/2024	City of Stirling	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU) and Others	Senior Commissioner R Cosentino	Agreement registered
Department of Justice (Jury Officers) CSA Agreement 2022 PSAAG 1/2024	02/02/2024	Department of Justice	The Civil Service Association of Western Australia Incorporated	Commissioner T B Walkington	Agreement registered
Western Australia Police Force Auxiliary Officers Industrial Agreement 2022 PSAAG 17/2023	06/02/2024	Western Australia Police Force	WA Police Union of Workers, Community & Public Sector Union/Civil Service Association of WA	Commissioner T B Walkington	Agreement registered

**NOTICES—Appointments—****2024 WAIRC 00067**Industrial Relations Act 1979

I, the undersigned, the HONOURABLE PETER DAMIEN QUINLAN, Chief Justice of Western Australia, in exercise of the powers conferred on me by s 85(3) of the Industrial Relations Act 1979 (WA), DO HEREBY NOMINATE THE HONOURABLE FIONA SEAWARD, a Judge of the Supreme Court of Western Australia, to be a Member of the Western Australian Industrial Appeal Court from 1 February 2024.

As witness my hand this 1st day of February 2024



Chief Justice of Western Australia

**2024 WAIRC 00066**Industrial Relations Act 1979

I, the undersigned, the HONOURABLE PETER DAMIEN QUINLAN, Chief Justice of Western Australia, in exercise of the powers conferred on me by s 85(3) of the Industrial Relations Act 1979 (WA), DO HEREBY NOMINATE THE HONOURABLE ROBERT MITCHELL, a Judge of the Supreme Court of Western Australia, to be the Deputy Presiding Judge of the Western Australian Industrial Appeal Court from 1 February 2024.

As witness my hand this 1st day of February 2024



Chief Justice of Western Australia

**WORK HEALTH AND SAFETY ACT—Matters dealt with****2024 WAIRC 00059**

**APPLICATION FOR AN ORDER IN RELATION TO ENGAGING IN OR INDUCING DISCRIMINATORY OR COERCIVE CONDUCT PURSUANT TO SECTION 112 OF THE WORK HEALTH AND SAFETY ACT 2020**

THE WORK HEALTH AND SAFETY TRIBUNAL

**PARTIES**

JUSTIN SIMMONDS

**APPLICANT**

-v-

ELECTRICITY NETWORKS CORPORATION T/A WESTERN POWER, SAM BARBARO, GAIR LANDSBOROUGH, ANDY SHAW, SUE NESCI, BEN PRIDEAUX, CHARLENE AMIN, CHRIS PORTEOUS, STEVEN ARMSTRONG, MATTHEW MERCER, ROBERT MITCHELL, SOPHIE SILVESTER

**RESPONDENT****CORAM**

COMMISSIONER T EMMANUEL

**DATE**

THURSDAY, 8 FEBRUARY 2024

**FILE NO/S**

WHST 8 OF 2023

**CITATION NO.**

2024 WAIRC 00059

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr J Hammond (of counsel)
<b>Respondent</b>	Mr G Giorgi (of counsel)

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*Order*

WHEREAS this is an application to the Work Health and Safety Tribunal under s 112 of the *Work Health and Safety Act 2020* (WA);

AND WHEREAS on 2 February 2024 the applicant filed an amended application that lists Electricity Networks Corporation t/a Western Power as the only respondent;

NOW THEREFORE, the Work Health and Safety Tribunal, pursuant to the powers conferred on it under the *Work Health and Safety Act 2020* (WA), and by consent, hereby orders:

THAT this application be, and by this order, is discontinued in relation to Sam Barbaro, Gair Landsborough, Andy Shaw, Sue Nesci, Ben Prideaux, Charlene Amin, Chris Porteous, Steven Armstrong, Matthew Mercer, Robert Mitchell and Sophie Silvester.

[L.S.]

(Sgd.) T EMMANUEL,  
Commissioner.

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