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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

GENERAL ORDERS—

2024 WAIRC 00282

RESCIND LOCATION ALLOWANCE GENERAL ORDER 2 OF 2023 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM

COMMISSION IN COURT SESSION

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

COMMISSIONER T KUCERA

DATE

FRIDAY, 7 JUNE 2024

FILE NO.

CICS 2 OF 2024

CITATION NO.

2024 WAIRC 00282

Result General Order issued

Representation

Mr B Entrekin on behalf of the Honourable Minister for Industrial Relations

Mr G Hansen on behalf of UnionsWA

General Order

HAVING heard from Mr B Entrekin on behalf of the Honourable Minister for Industrial Relations and Mr G Hansen on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT each award cited in Schedule A of this General Order be varied by substituting the table within the first subclause of the location allowance provisions contained in each such award with the table at Schedule B of this General Order.
2. THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2024.
3. THAT this General Order replace the General Order in Matter No. CICS 2 of 2023 ([2023] WAIRC 00320) which hereby shall be rescinded.

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

SCHEDULE A

<u>Title of Award or Order</u>	<u>Clause No.</u>
Aerated Water and Cordial Manufacturing Industry Award 1975	31
Aged and Disabled Persons Hostels Award, 1987	28
Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	20
Animal Welfare Industry Award	14
Artworkers Award	20
The Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002	5.14
Bakers' (Country) Award No. 18 of 1977	20
Breadcarters (Country) Award 1976	27
Building Trades Award 1968	24
Building Trades (Construction) Award 1987	Appendix A
Child Care (Out of School Care - Playleaders) Award	10
Children's Services (Private) Award 2006	12
Cleaners and Caretakers Award, 1969	3.6
Cleaners and Caretakers (Car and Caravan Parks) Award 1975	22
Clerks' (Accountants' Employees) Award 1984	23
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	27
Clerks' (Customs and/or Shipping and/or Forwarding Agents) Award	30
Clerks' (Hotels, Motels and Clubs) Award 1979	22
Clerks (Timber) Award	31
Clerks (Unions and Labor Movement) Award 2004	37
Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947	28
Clothing Trades Award 1973	22
Contract Cleaners Award, 1986	24
Contract Cleaners' (Ministry of Education) Award, 1990	21
Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011	17.6
Dental Technicians' and Attendant/Receptionists' Award, 1982	27
The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979	32
Dry Cleaning and Laundry Award 1979	22
Earth Moving and Construction Award	25
Electrical Contracting Industry Award R 22 of 1978	22
Electrical Trades (Security Alarms Industry) Award 1980	19
Electronics Industry Award No. A 22 of 1985	24
Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973	25
Engine Drivers' (General) Award	20
Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978	23
Fast Food Outlets Award 1990	35
Foremen (Building Trades) Award 1991	15
Funeral Directors' Assistants' Award No. 18 of 1962	33
Furniture Trades Industry Award	46
Gate, Fence and Frames Manufacturing Award	21
Golf Link and Bowling Green Employees' Award, 1993	28
Hairdressers Award 1989 / Hair and Beauty Industry (WA) Award ¹	
¹ The Hairdressers Award 1989 is the subject of s 40B proceedings to vary the award in which it is proposed to change the award title.	31 ²
² Or whichever clause number is associated with the award's location allowance provisions after any variation in the s 40B proceedings take effect.	
The Horticultural (Nursery) Industry Award No. 30 of 1980	6
Independent Schools Administrative and Technical Officers Award 1993	22

Independent Schools (Boarding House) Supervisory Staff Award	22
Independent Schools Psychologists and Social Workers Award	21
Independent Schools' Teachers' Award 1976	18
Industrial Spraypainting and Sandblasting Award 1991	19
Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Local Government Officers' (Western Australia) Award 2021	17.2
Meat Industry (State) Award, 2003	21(1)
Metal Trades (General) Award	5.6
Motel, Hostel, Service Flats and Boarding House Workers' Award	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Municipal Employees (Western Australia) Award 2021	19.6
Nurses' (Day Care Centres) Award	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Pest Control Industry Award	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award	41
Retail Pharmacists' Award 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	20(3)
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award	31.6
Social and Community Services (Western Australia) Interim Award 2011	18.10
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R 47 of 1978	24
Western Australian Surveying (Private Practice) Industry Award, 2003 - The	8.4

SCHEDULE B

Replacement Table of Weekly Location Allowances

The table below replaces the table of weekly allowances in each clause listed in Schedule A

TOWN	PER WEEK
Agnew	\$25.30
Argyle	\$68.50
Balladonia	\$26.60
Barrow Island	\$44.60
Boulder	\$10.90
Broome	\$41.00
Bullfinch	\$11.80
Carnarvon	\$21.00

Cockatoo Island	\$44.80
Coolgardie	\$10.90
Cue	\$26.20
Dampier	\$35.70
Denham	\$21.00
Derby	\$42.50
Esperance	\$7.20
Eucla	\$28.50
Exmouth	\$37.60
Fitzroy Crossing	\$51.80
Halls Creek	\$60.10
Kalbarri	\$9.20
Kalgoorlie	\$10.90
Kambalda	\$10.90
Karratha	\$43.10
Koolan Island	\$44.80
Koolyanobbing	\$11.80
Kununurra	\$68.50
Laverton	\$26.10
Learmonth	\$37.60
Leinster	\$25.30
Leonora	\$26.10
Madura	\$27.60
Marble Bar	\$66.70
Meekatharra	\$22.60
Mount Magnet	\$28.40
Mundrabilla	\$28.10
Newman	\$24.40
Norseman	\$22.70
Nullagine	\$66.60
Onslow	\$44.60
Pannawonica	\$33.20
Paraburdoo	\$33.10
Port Hedland	\$35.60
Ravensthorpe	\$13.30
Roebourne	\$49.70
Sandstone	\$25.30
Shark Bay	\$21.00
Southern Cross	\$11.80
Telfer	\$61.10
Teutonic Bore	\$25.30
Tom Price	\$33.10
Whim Creek	\$42.60
Wickham	\$41.10
Wiluna	\$25.60
Wyndham	\$64.00

FULL BENCH—Appeals against decision of Commission—

2024 WAIRC 00227

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 18/2021 GIVEN ON 26
SEPTEMBER 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**FULL BENCH**

CITATION : 2024 WAIRC 00227
CORAM : CHIEF COMMISSIONER S J KENNER
 COMMISSIONER T B WALKINGTON
 COMMISSIONER C TSANG
HEARD : FRIDAY, 15 DECEMBER 2023
DELIVERED : TUESDAY, 21 MAY 2024
FILE NO. : FBA 6 OF 2023
BETWEEN : WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
 Appellant
 AND
 MINISTER FOR CORRECTIVE SERVICES
 Respondent

ON APPEAL FROM:

Jurisdiction : **WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram : **COMMISSIONER T EMMANUEL**
Citation : **[2023] WAIRC 00773**
File No : **APPL 18 OF 2021**

Catchwords : Industrial Law (WA) – Appeal to the Full Bench against decision of Commission – Interpretation of cl 80 of the *Department of Justice Prison Officers Industrial Agreement 2020* – Relevant principles applied – Rostered annual leave and whether employees required to take leave in the year of accrual – Industrial agreement provides scheme for taking leave – Not at discretion of employees – Appeal dismissed

Legislation : *Industrial Relations Act 1979* (WA) s 41, s 41(4), s 46, s 46(1), s 49
Minimum Conditions of Employment Act 1984 (WA) s 8, s 8(1), s 8(3), s 25(1), s 25(2)

Result : Appeal dismissed

Representation:
Counsel:
Appellant : Mr C Fordham of counsel
Respondent : Mr R Andretich of counsel
Solicitors:
Appellant : Slater & Gordon
Respondent : State Solicitor's Office

Case(s) referred to in reasons:

Commission's Own Motion v Dardanup Butchering Co [2004] WAIRC 12690; (2004) 84 WAIG 2739
 Department of Education v State School Teachers Union of WA (Incorporated) [2020] WAIRC 00927; (2020) 100 WAIG 1493
 Fedec v The Minister for Corrective Services [2017] WAIRC 00828; (2017) 97 WAIG 1595
 Minister for Corrective Services v Western Australian Prison Officers Union of Workers [2023] WAIRC 00909; (2023) 103 WAIG 1953
 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
 Western Australian Prison Officers' Union of Workers v Minister for Corrective Services [2023] WAIRC 00773; (2023) 103 WAIG 1777
 Western Australian Prison Officers Union v Minister for Corrective Services [2024] WAIRC 00139; (2024) 104 WAIG 322

*Reasons for Decision***THE FULL BENCH:****Background**

- 1 In prisons throughout the State covered by the *Department of Justice Prison Officers Industrial Agreement 2020*, annual leave is taken in accordance with a roster. The terms of the *Agreement* set out annual leave rostering arrangements in cl 80. Clause 80 of the *Agreement* is in the following terms:

80. Annual Leave Roster

- 80.1 The following annual leave rosters shall apply to all Officers who will be divided into groups. The actual annual leave dates may vary from Prison to Prison.

Southern Prisons (Eight Year Cycle)

	2019/20	2020/21	2021/22
July	E	B	A
	F	A	B
	B	E	C
	A	F	D
Christmas	H	C	E
	G	D	F
	C	H	G
June	D	G	H

Northern Prisons (Six Year Cycle)

	2019/20	2020/21	2021/22
July	B	C	D
	C	B	F
	E	D	C
Christmas	A	F	B
	D	E	A
June	F	A	E

- 80.2 The leave roster shall commence on a date each Leave Year agreed between the parties and shall continue in the order shown for the Leave Year with each group commencing at six or eight week intervals. An Officer who commences employment subsequent to the introduction of the leave roster shall be allocated to a group and shall have the option of taking the balance of the year's annual leave in advance in addition to taking their annual leave already accrued.
- 80.3 Annual leave rosters to be developed and managed by the local Superintendent, subject to the annual block sequence and principles in this *Agreement* being followed.
- 80.4 An Officer's position on the leave roster will be confirmed in writing in an Annual Leave Letter on commencement at a Prison.
- 80.5 An Officer who has special reasons for doing so may apply to the Employer in writing, to take annual leave at a time other than as set out in the leave roster. If the application is approved a new date for the commencement of the annual leave must be agreed in writing at the time the application is made. If the application is approved the Officer will be deemed to have taken the leave in accordance with the leave roster.
- 80.6 The non-leave period will be made up of three weeks and six weeks in any order over a three year period.
- 2 Clause 80 operates in conjunction with another provision of the *Agreement* which is cl 81 – Annual Leave Letter Procedure for Transfers and Promotions. This provides as follows:

81. Annual Leave Letter Procedures for Transfers and Promotions

- 81.1 An Officer who is Transferred or promoted to another Prison shall be allocated a new Annual Leave Letter where there is an irresolvable conflict between that Prison's established leave roster and the Officer's original Annual Leave Letter, provided that:
- the Officer was notified of the conflict before the Transfer or promotion; and
 - the Employer, before issuing the new Annual Leave Letter, takes into consideration travel bookings, travel deposits paid and any other circumstances which makes it imperative for the Officer to take their annual leave at the time prescribed by their original Annual Leave Letter.

- 81.2 The allocation of a new Annual Leave Letter that places an Officer with an immediate second annual leave period in the same Leave Year is to be avoided.
- 3 For the purposes of cl 80.6 of the *Agreement*, set out above, the ‘non-leave period’ is not defined. There are other definitions that are relevant to cls 80 and 81 and they are set out in cl 7 – Definitions of the *Agreement*. Relevantly for present purposes they are the definitions of ‘Annual Leave Letter’ and ‘Leave Year’ which are in the following terms:
- Annual Leave Letter** means the letter issued by the Employer to an Officer in accordance with clause 80 - Annual Leave Roster and clause 81 - Annual Leave Letter Procedures for Transfers and Promotions.
- Leave Year** means 1 July to 30 June.
- 4 A difference of opinion arose between the appellant and the respondent, who are the only parties to the *Agreement*, about how cl 80 operated. The *Agreement* has now been superseded by a later industrial agreement, the *Department of Justice Prison Officers Industrial Agreement 2022*.
- 5 The point of difference between the parties is whether during the operation of the annual leave roster, a prison officer is required to take their accrued annual leave in each Leave Year. The appellant is of the view that the taking of annual leave under the roster is not mandatory. An officer, according to the appellant’s view, can:
- take their annual leave in accordance with the roster;
 - make an application to take their annual leave at another time outside of the roster; or
 - decide to not take annual leave at all.
- 6 On the other hand, the respondent maintains that the effect of cl 80 of the *Agreement* required officers to take all of their annual leave which accrued to them during a Leave Year, and that leave be taken in accordance with the leave roster in cl 80 and a prison officer’s Annual Leave Letter.

Agreed facts

- 7 The dispute came before the Commission by way of an application to interpret cl 80 of the *Agreement* under s 46 of the *Industrial Relations Act 1979* (WA). The parties put before the Commission Agreed Facts, along with a bundle of agreed documents. The Agreed Facts were:
- The Applicant and the Respondent are both parties to the *Department of Justice Prison Officers’ Industrial Agreement 2020 (Agreement)*.
 - Amongst other things, the *Agreement* provides the terms and conditions applicable in respect of annual leave for officers (**officers**) who are employed by the Respondent in any of the positions listed in the *Agreement* at Schedule A.
 - Under clause 80.1 of the *Agreement*, each prison operated by the Respondent is to prepare an annual leave roster that is derived from one of the two examples that are listed within that sub-clause, namely –
 - The ‘Eight Year Cycle’ roster (eight-year cycle roster); or
 - The ‘Six Year Cycle’ roster (six-year cycle roster).
 - The eight-year cycle roster applies to officers who ordinarily work at a prison that is located south of 26 degrees south latitude.
 - The six-year cycle roster applies to officers who ordinarily work at a prison that is located north of 26 degrees south latitude.
 - Under clause 80.1 of the *Agreement*, the six-year cycle roster and the eight-year cycle roster provide that –
 - Officers on commencement are to be assigned by an Annual Leave Letter into a group (groups are numbered A to H in the case of an eight-year roster, and groups are numbered A to F in the case of a six-year roster);
 - Officers within each group have according to their Annual Leave Letter a specific period in the roster within which to take annual leave, which period(s) are to commence at set intervals during the leave year;
 - In the case of a six-year roster, the duration between the commencement of each interval is 8 weeks. In the case of an eight-year cycle roster the duration between the commencement of each interval is 6 weeks.
 - The eight-year cycle roster referred to in clause 80.1 of the *Agreement* provides a pattern that is repeated every 8 years. An example of the full cycle of the eight-year cycle roster is illustrated in the table below –

Leave interval periods	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9
July	E	B	A	C	D	G	H	F	E
	F	A	B	D	C	H	G	E	F
	B	E	C	A	G	D	F	H	B
	A	F	D	B	H	C	E	G	A
Christmas	H	C	E	G	A	F	D	B	H

	G	D	F	H	B	E	C	A	G
	C	H	G	E	F	A	B	D	C
June	D	G	H	F	E	B	A	C	D

8. The six-year cycle roster referred to in clause 80.1 of the Agreement provides a pattern that is repeated every 6 years. An example of the full cycle of the six-year cycle roster is illustrated in the table below –

Leave interval periods	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
July	B	C	D	F	A	E	B
	C	B	F	D	E	A	C
	E	D	C	A	F	B	E
Christmas	A	F	B	E	D	C	A
	D	E	A	C	B	F	D
June	F	A	E	B	C	D	F

9. The practical effect of the eight-year cycle roster pattern is that officers may be assigned yearly leave intervals that commence between 40 to 64 weeks apart, depending on the position on the roster cycle.
10. The practical effect of the six-year cycle roster pattern is that officers may be assigned yearly leave intervals that commence between 36 and 68 weeks apart, depending on the position on the roster cycle.
11. The effect of the current policy position of the Respondent is that, subject to the other provisions of the Agreement, an officer is required to take his or her full yearly entitlement of annual leave as rostered.
12. The Respondent's policy position contemplates that an officer who is required to take leave strictly in accordance with his or her leave roster may fall into negative leave balance.

The decision of the Commission

- 8 The decision of the Commission was published on 22 September 2023: *Western Australian Prison Officers' Union of Workers v Minister for Corrective Services* [2023] WAIRC 00773; (2023) 103 WAIG 1777. At [7], the learned Commissioner posed the question to be determined in the interpretation application as follows:

The Union asks the Commission to decide 'whether the true meaning of cl 80 of the *Department of Justice Prison Officers' Industrial Agreement 2020* is that prison officers are, as a condition of employment, subject to cl 80.5, to take their annual leave that accrues during the Leave Year at the time determined by the annual leave rosters developed in accordance with cl 80.'

- 9 The learned Commissioner answered the question in the affirmative and in doing so at [72] stated:

... I consider that the parties' objective intention as expressed in the text of the Industrial Agreement, having regard to its context, is that prison officers are, as a condition of employment, subject to cl 80.5, to take their annual leave that accrues during the Leave Year at the time determined by the annual leave rosters developed in accordance with cl 80.

- 10 Accordingly, in accordance with s 46(1) of the *Act*, the learned Commissioner made the following declaration:

THAT the true meaning of cl 80 of the *Department of Justice Prison Officers' Industrial Agreement 2020* is that prison officers are, as a condition of employment, subject to cl 80.5, to take their annual leave that accrues during the Leave Year at the time determined by the annual leave rosters developed in accordance with cl 80.

- 11 In support of the declaration that she made, the learned Commissioner in relation to the interpretation of cl 80 of the *Agreement*, found and concluded as follows:

- the reference to 'non-leave period' in cl 80.6 is a time period in the leave roster, comprising three or six weeks, in relation to which no Annual Leave Letter applies and no annual leave is taken over this period;
- that (a) did not mean that officers could choose to not take annual leave under the *Agreement*, at the time of their Annual Leave Letter;
- that the reference to 'annual' when referring to an Annual Leave Letter does not mean such a letter is issued yearly. It refers to 'annual' in an adjectival sense;
- clause 80 of the *Agreement* contains no express limitation on the accumulation of leave from one year to another on the basis that officers use their annual leave under cl 80 and therefore the issue of accumulation does not arise;
- nothing in cl 80.5 supports the appellant's position. It applies to the exceptional situation of annual leave being taken other than in accordance with the officer's Annual Leave Letter. Ordinarily, there is no accumulation of annual leave because officers use their leave entitlement under their Annual Leave Letter;
- there was no basis for concluding that s 8 of the Minimum Conditions of Employment Act 1993 (WA) means that annual leave arrangements under cl 80 of the *Agreement* constitute 'cashing out of accrued annual leave';
- that the language of cl 80 is expressed in mandatory terms and the significance of cl 80.5 is that it requires a departure from the leave arrangement to be based on special reasons requiring approval, and that the *Agreement* constitutes an agreement between the parties as to how annual leave is taken under the roster;

- (h) on the basis of the objective intention of the parties, from the language used in the *Agreement*, an officer must take annual leave at the time specified in the roster under the officer's Annual Leave Letter. This represents what a reasonable person in the position of the parties would consider the terms of the *Agreement* mean. This is reinforced by the industrial context that in a prison environment predictable, minimum staffing levels are essential in order for a prison to operate safely;
- (i) that if officers could choose to take annual leave at any time that they liked, this would be inconsistent with cl 80 and the planned and regulated system of taking annual leave. Officers being able to not take annual leave under their Annual Leave Letter makes a 'commercial nonsense' of the arrangement contemplated by cl 80; and
- (j) this conclusion is consistent with other relevant provisions of the *Agreement* including those in relation to purchased annual leave and long service leave.

The appeal

- 12 An appeal has been brought by the appellant from the decision of the Commission under s 49 of the *Act*. The grounds of appeal are in the following terms (footnotes omitted):

Ground 1

The Commissioner has erred at law by the failure to provide adequate reasons for significant findings referred to at paragraphs [58], [65] and [71] of the Judgment.

Particulars

- a. At paragraph [58] of the Judgment the Commissioner construed the phrase, "non leave period" referred to at clause 80.6 of the Industrial Agreement as meaning "*the period of time in the annual leave roster ... against which there is no Annual Leave Letter*".
- b. There are no express words in clause 80, or in any provision of the Industrial Agreement which import the particular meaning that was upheld by the Commissioner at paragraph [58] of the Judgment.
- c. If the Commissioner has relied upon evidence from the bar given on the day of hearing by Counsel for the Respondent, then no reasons have been given to explain why that evidence was accepted, and no reasons have been given to explain why that evidence ought to be relied upon to construe the objective meaning of the words in clause 80.6.
- d. The Commissioner has also given no reasons to explain her related conclusions at [58] of the Judgment where it was held that a "non-leave period" also exists with respect to individual officers who do not take their annual leave, and that any such period can be planned by the Respondent.
- e. The Commissioner has also not provided any reasons to explain how she has found at paragraph [65] of the Judgment that a requirement to take a period of annual leave before the leave has accrued to an employee does not conflict with section 8 of the *Minimum Conditions of Employment Act 1993 (MCE Act)*.
- f. Finally, the Commissioner has not provided any reasons to explain her finding at paragraph [71] that the words of clauses 56 and 85 of the Industrial Agreement "clearly show" a specific intent as to the operation of clause 80.
- g. The findings at [58], [65] and [71] are contentious matters and were important considerations in the construction of the terms of clause 80 in the relevant legislative context, and in the context of the Industrial Agreement as a whole.
- h. The failure to explain the approach that was taken, and the failure to identify the specific meanings of contentious words and phrases does not allow an objective observer to understand the Commissioner's reasoning process, or to form any view as to how relevant principles have been applied.

Ground 2

The Commissioner erred in fact by concluding at [62], [63] and [70] of the Judgment that prison officers who are covered by the Industrial Agreement do not accumulate annual leave from year to year.

Particulars

- a. It was material to the Commissioner's ultimate finding regarding clause 80, and her related finding concerning the interaction of the Industrial Agreement with section 25 of the MCE Act that that [sic] annual leave does not accumulate from year to year.
- b. An assumption to the effect that annual leave does not accumulate from year to year to all of the workforce who are covered by the Industrial Agreement was not a fact in evidence and was not a realistic or reasonable inference to draw in the process of construction of the clause 80.

Ground 3

The Commissioner erred in law by failing to properly consider the operation of the annual leave provisions in the Industrial Agreement in the context of s 25 of the *Minimum Conditions of Employment Act 1993*.

Particulars

- a. In written submissions, it was put by the Appellant that section 25 of the MCE Act implied a condition on the use of annual leave. The nature of the condition being that leave is ordinarily to be taken by agreement, failing which, section 25(2) of that Act provides a mechanism to resolve a stalemate.

- b. The reasons of the Commissioner do not indicate that any consideration was given to the meaning and any conditions to be implied by MCE Act section 25.
- c. Further, the Commissioner has held at paragraph [70] of the Judgment that the minimum condition implied by section 25(2) of the MCE Act creates a “commercial nonsense” in relation to the use of annual leave, and it was an error for the Commissioner to strive for a construction of the Industrial Agreement which seeks to lessen or avoid that statutory entitlement provision.

Ground 4

The Commissioner erred in law by the failure to consider all the words of clauses 85 and 56 of the Industrial Agreement in the assessment of clause 80.

Particulars

- a. To paraphrase paragraph [71] of the Judgment, the Commissioner has found that the entitlement provisions at clauses 56 and 85 of the Industrial Agreement are harmonious with a construction of clause 80 which provides that all employees are required to take leave for the full period referred to in the annual leave roster each Leave Year.
- b. It is not apparent which words and phrases the Commissioner has considered from clauses 56 and 85 to reach her finding.
- c. The Appellant contends that terms of clauses 56 and 85 of the Industrial Agreement show the entitlements to be in the nature of an incentive for the use of leave, and when read as a whole those provisions do not support the finding reached by the Commissioner.

Orders Sought

The Appellant seeks the following orders -

1. The appeal be allowed.
2. The declaration of the Commission made on 26 September 2023 be set aside.

Principles to apply on the appeal

Nature of the appeal

- 13 As to the nature of the appeal and the approach to be adopted, recently, in *Western Australian Prison Officers Union v Minister for Corrective Services* [2024] WAIRC 00139; (2024) 104 WAIG 322, the Full Bench at [32] observed:

The approach to the disposition of the appeal by the Full Bench is dependent on the nature of the decision appealed from. There are two broad approaches to appellate review, involving a ‘deferential standard’, reflecting the exercise of a discretion, and the ‘correctness’ standard, involving the application of a legal principle or standard: *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158 at [124]-[129] citing and applying *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 92 ALJR 713 per Gageler J (as his Honour then was) at [35]-[37], [39]-[41], and [43]-[50] (see too *Pritchard v M 6:8 Legal Pty Ltd* [2024] WASCA 4 at [35]).

- 14 We adopt and apply that approach for the purposes of the disposition of the present appeal.
- 15 In this case, the issue at first instance, was the proper construction of cl 80 of the *Agreement*, as applied to the Agreed Facts, and the other uncontroversial evidence. The correctness standard therefore applies, and it is for the Full Bench to decide for itself, the proper construction of cl 80 of the *Agreement*, in the context of the facts as agreed or as found.

Interpretation of industrial instruments

- 16 There was no contest as to the relevant principles to apply in the interpretation of industrial instruments. In *Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595 Smith AP (as her Honour then was) and Scott CC observed at [21]-[23]:

Interpreting an industrial agreement - general principles of interpretation

- [21] The approach that is to be applied when interpreting an industrial agreement is well established. This is:
- (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.
 - (b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362.
 - (c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498; *City of Wanneroo v Holmes* (378 - 379) (French J).
- [22] The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In *Re Harrison; Ex parte Hames* [2015] WASC 247, Beech J said [50] - [51]:

The general principles relevant to the proper construction of instruments are well-known. In summary:

- (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;

- (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
- (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
- (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
- (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
- (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); *Kidd v The State of Western Australia* [2014] WASC 99 [122]; *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 [106] - [112]; *Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd* [2014] WASCA 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).

These general principles apply in the construction of an industrial agreement (*Director General, Department of Education v United Voice WA* [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (*Ancor Ltd v Construction, Forestry, Mining & Energy Union* [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); *Director General v United Voice* [81]; see also *Ancor v CFMEU* 66 (Kirby J), 129 - 130 (Callinan J)).

- [23] To these principles, the following observations made by Pullin J in *Director General, Department of Education v United Voice WA* [2013] WASCA 287; (2013) 94 WAIG 1 [18] - [19] should be added:

The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22].

Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 352; *McCourt v Cranston* [2012] WASCA 60 [23].

Effect of clause 80 of the Agreement

- 17 Before considering each ground of appeal, we make the following general observations as to the operation and effect of cl 80 of the *Agreement*, taken in the context of the *Agreement* as a whole.
- 18 Prison officers under the *Agreement*, are, by cl 79, entitled to five consecutive weeks of annual leave for each year of continuous service. The annual leave entitlement accrues pro rata on a weekly basis. Officers working north of the 26th parallel in the State and those who are regularly rostered to work on Sundays and public holidays receive an additional one week of annual leave each year. Officers who are located in regional areas are additionally entitled to extra payments and paid travel time when proceeding on annual leave, under cls 56 and 85 of the *Agreement*. Of note, by cls 56.3 and 85.3, an officer is only entitled to this benefit once in any Leave Year, unless they are rostered by their Annual Leave Letter to two periods of leave, and the second period does not result from their own request.
- 19 Clause 80 establishes an annual leave roster. In cl 80.1, it is provided that annual leave rosters 'shall apply to all Officers'. The roster arrangements for annual leave are therefore mandatory in their application, for the two roster groupings established by cl 80.1. The first group is those in Southern Prisons which roster operates over an eight year cycle. The second group is for Northern Prisons, which operates on a six year roster cycle. As set out in the Agreed Facts referred to above, officers are assigned to a position on the relevant roster, in accordance with their 'Annual Leave Letter', when they commence at a prison. This is provided in cl 80.4. Each of the two roster groups commences their leave at six or eight week intervals under the roster arrangement.
- 20 The Annual Leave Letter is a key component of the operation of the annual leave roster scheme. The Annual Leave Letter definition is set out above.
- 21 The Annual Leave Letter is also referred to in cl 81. Whilst this clause does not deal with the issuance of an Annual Leave Letter, which is assumed to be covered by cl 80.4 referred to above, cl 81 is important because it describes what occurs when an officer moves to another prison by way of a transfer or is promoted. By cl 81.1, it is provided that if this occurs, it is only in the case of an 'irresolvable conflict', that is between the original prison Annual Leave Letter and the roster applying at the officer's new prison, that a new Annual Leave Letter will be issued. This is subject to conditions not relevant to consider for present purposes.

- 22 The importance of the Annual Leave Letter to the operation of cl 80 and the scheme for the taking of annual leave under the *Agreement* is evident. This is because there will only be a change to the Annual Leave Letter, and hence when an officer takes leave in accordance with the relevant roster, in the case of an ‘irresolvable conflict’. If the taking of annual leave is not only governed by cl 80 and cl 81 of the *Agreement*, but confers on an officer discretion whether, and when, to take annual leave as appears to be the appellant’s position, it is difficult to see how such any irresolvable conflict could arise. This is simply because on the appellant’s case, if an officer moved to a new prison by way of a transfer or a promotion, the officer could simply elect to not take leave as set out in their Annual Leave Letter, and no irresolvable conflict would arise.
- 23 The management of the annual leave roster for each prison is the responsibility of the relevant Superintendent, under cl 80.3. This is consistent with other parts of the *Agreement*, referred to above and discussed in *Minister for Corrective Services (2024)* referred to below, that places matters of leave management and staffing generally, in the hands of the Superintendent. Notably, the operation of cl 80.3, and the role of the Superintendent, is ‘subject to the annual leave block sequence and the principles in this Agreement being followed’. Presumably, as to the latter, the relevant principles are those referred to in cl 9 of the *Agreement*, which includes cl 9.2(a) which states ‘Maximise the efficiency and security of the prison Service for its benefit and that of Officers and the community; ...’.
- 24 The reference to the role of the Superintendent is also subject to the ‘annual block sequence’, which seems to affirm the importance of the content of the leave roster, and the individual officer’s position on it, as set out in their Annual Leave Letter.
- 25 Clause 80.5 is an important provision for present purposes. The first sentence makes it clear that annual leave may only be taken at a time other than that set out in the leave roster, if ‘special reasons’ exist. In accordance with its ordinary meaning, ‘special’ as defined in the *Shorter Oxford English Dictionary* relevantly means ‘1. Of such a kind as to exceed or excel in some way that which is usual or common; exceptional in character, quality or degree ...’. It is thus only in exceptional circumstances, where an officer’s departure from the leave roster may be considered. This is a strong indicator in favour of the sanctity of the annual leave roster, and the absence of any residual discretion for an officer to depart from it of their own volition.
- 26 The last part of this subclause is also important in the overall scheme. It is provided in the last sentence of cl 80.5 that if the employer is satisfied that special reasons do exist for an officer to take annual leave at a time other than that set out in the roster, such a different time for the taking of leave will be deemed to have been taken under the leave roster. Again, this provision seems to reaffirm the central part played by the leave roster in cl 80.1 of the *Agreement*.
- 27 As to the last part of cl 80, in cl 80.6, there is reference to ‘The non-leave period’. It is unclear from the *Agreement* what this is. This provision states that periods of three and six weeks over a three year period, are the non-leave period. There is no other reference to this concept in the *Agreement*. Given the extent to which other matters are defined in cl 7 - Definitions, this may have been an oversight by the drafters of the *Agreement*. The use of ‘The’ at the commencement of cl 80.6, would ordinarily suggest that this provision follows an earlier definition of it or the concept is otherwise referred to in an earlier part of the *Agreement*, but this is not so. Somewhat curiously, it appears for the first and last time in cl 80.6.
- 28 As industrial instruments are to be construed generously, and may be informed by customs, practices, and established procedures in workplaces, some latitude is to be given to ascertain the meaning of provisions such as cl 80.6. The appellant contended at first instance that this was a period when no leave is taken, and which supported its position that officers can take leave in accordance with their discretion, as long as this three or six week period is preserved. On the other hand, the respondent’s position was that the reference to the ‘non-leave period’, was simply a means of filling in gaps in the annual leave roster, because without it, the weeks’ over the roster periods did not add up. As this point was contentious, we will return to it later in these reasons.
- 29 Separate from a request to take annual leave for special reasons, outside of the annual leave roster, an officer could seek approval to take up to five shifts of annual leave as single days each year, under cl 82. It is clear however, that unless a ‘reply agreement’, as defined in cl 7, is entered into, by cl 82.7, an officer who takes single day leave absences, is required to delay the commencement of their rostered annual leave (under the roster), and work shifts equal to the number of single days of leave taken. Again, this provision tends to affirm the importance of the annual leave roster as the fulcrum point in relation to annual leave being taken under the *Agreement*.
- 30 Importantly, in contrast to other forms of leave available under the *Agreement*, there is no provision by which officers were required to apply to take annual leave, other than in the circumstances to which reference has been made above.
- 31 Context is also important in construing the terms of an industrial instrument. The terms of the *Agreement* were recently considered by the Full Bench in *Minister for Corrective Services (2024)*. In that matter, which involved an appeal from a decision of the Industrial Magistrates Court in relation to an alleged failure to comply with cl 138 of the *Agreement* regarding purchased annual leave, the Full Bench made some observations about the contextual operation of the *Agreement* and said at [66]-[69]:

[66] As cl 138 of the Agreement must be construed and read with the terms of the Agreement as a whole, other provisions of the Agreement can be considered in the construction of cl 138. In cl 6 – Relationship with Legislation, Awards and Other Agreements, in subclause c. 6.4, it is provided that “This Agreement will be read in conjunction with ‘the relevant legislation and associated regulations.’” The relevant legislation and associated regulations are not defined or expressed. However, the Agreement is an industrial agreement made between the appellant and the respondent in relation to terms and conditions of employment to apply to prison officers in the corrections system at prisons throughout the State. As part of the context, and the industrial character and purpose of the Agreement, we think it is reasonably open to conclude that the reference to ‘relevant legislation and associated regulations’ will include the Prisons Act establishing, and governing the operation of the prisons system. In particular, ss 36 and 37 of the Prisons Act set out the role and responsibility of prison

Superintendents, as being responsible for the ‘good government, good order, and security of the prison of which he is a superintendent’: s 36(3).

- [67] The role and responsibility of a prison Superintendent is referred to in cl 153 – Staffing Shortfalls of the Agreement. This provision refers to the importance of the maintenance of prison routine and the security and welfare of prisoners and the safety of staff, consistent with s 36 of the Prisons Act. In the event of a staffing shortfall, on any given day, the Superintendent can take steps to ensure that the prison routine, security and welfare of prisoners and the safety of staff are maintained, including by requiring prison officers to return to duty.
- [68] Furthermore, in cl 26 - Development of Rosters, in relation to working hours arrangements, a staffing roster is required in each prison to ‘fulfil the operational requirements’ of a prison. Any changes to officers’ days of work must be approved by the prison Superintendent. We have already noted the terms of cl 80 – Annual Leave Roster, which sets out a highly regulated scheme for the taking of planned leave by prison officers, rostered well in advance. It is also the responsibility of the Superintendent to manage the leave roster. If an officer wishes to take annual leave at a different time to that on the roster, they may only do so if they have ‘special reasons’, and must apply in writing to the employer (cl 80.5).
- [69] In our view, in terms of the industrial context, having regard to the industry to which the Agreement relates, and other relevant provisions of the Agreement to which we have referred, and the Prisons Act, the need for a strict regime as to working hours arrangements, and as to the taking of leave, is apparent. Staffing arrangements are to be closely managed, to maintain the routine, good order and security of prisons...
- 32 Those observations are also relevant to the way in which cl 80 should be interpreted in the context of the *Agreement* as a whole and to the disposition of the present appeal.

Consideration of appeal grounds

Ground 1

- 33 This ground contends that the learned Commissioner was in error in not giving adequate reasons for conclusions that she reached at [58], [65] and [71] of her reasons for decision. It was submitted that in relation to each of these issues, which the appellant contended were important aspects of the dispute between the parties at first instance, the learned Commissioner’s reasons failed to adequately explain the basis for the conclusions that she reached. At [58]-[59] of her reasons, as to cl 80.6 of the *Agreement*, the learned Commissioner said:
- [58] The ‘non-leave period’ is the period of time in the annual leave roster, made up of three and six weeks, against which there is no Annual Leave Letter. As the Union says, it is a period during which annual leave is not taken. But that does not mean that the Industrial Agreement contemplates that employees can choose not to take annual leave at the time of their Annual Leave Letter. Further, contrary to the Union’s submission set out above at [23], in my view the non-leave period can be planned in advance.
- [59] I cannot accept the Union’s submission that reference to the ‘non-leave period’ in cl 80.6, taken with cl 9, means that it is up to a prison officer to decide whether or not to take annual leave at the time of her Annual Leave Letter. In relation to the Union’s argument set out above at [19] about the need for an equitable, uniform approach, in my view the Annual Leave Letter system that the Minister and the Union have agreed to in reaching the Industrial Agreement is that equitable, uniform approach.
- 34 It was submitted by the appellant that the learned Commissioner adopted submissions made by counsel for the respondent on the day of the hearing of the matter, as to the meaning of cl 80.6, which deals with the ‘non-leave period’. It was submitted that the learned Commissioner may have confused the appellant’s and the respondent’s submissions made in the course of the hearing, as to the meaning of this provision. The appellant contended that the learned Commissioner adopted a subjective approach to the construction of cl 80.6, and did not consider its meaning objectively.
- 35 At [65] of her reasons, the learned Commissioner commented on annual leave being taken in advance of it falling due under the *Agreement* and whether this offended s 8 of the *MCE Act* regarding ‘cashing out’ of annual leave as contended by the appellant. She said:
- [65] I agree that the Industrial Agreement anticipates and permits annual leave being taken before it accrues. Under cl 79.7 the value of such annual leave is refunded if the prison officer’s employment ends before the leave that has been taken accrues. I am not persuaded that the arrangement under cl 80 amounts to a ‘cashing out of accrued annual leave’ agreement as contemplated by s 8 of the *MCE Act*, where an employee agrees to forgo taking annual leave in exchange for an equivalent benefit in lieu.
- 36 The appellant contended that the learned Commissioner’s conclusions in relation to an officer taking annual leave prior to its accrual, may have conflated arguments put to the Commission, distinguishing between an officer agreeing to take leave in advance, and an officer being required to do so.
- 37 As to [71] of her reasons, the learned Commissioner referred to her earlier conclusion at [68] that cl 80 has the effect of requiring officers to take their annual leave as it accrues in a Leave Year, when viewed objectively. She also stated that cls 56 and 85, which deal with additional benefits for certain officers when going on leave, confirms this approach to cl 80 as follows:
- [71] In my view, the construction set out above at [68] is harmonious and consistent with the other clauses of the Industrial Agreement, including those in relation to long service leave and purchased leave. Contrary to the Union’s submission, it does not follow from cl 119 and cl 138 that a prison officer can decide whether to use annual leave at all, if they cannot agree with their employer about when to use it. Further, I agree with the Minister and consider that cl 56.3 and cl 85 clearly show an assumption that cl 80 intends to require prison

officers to take their annual leave that accrues in any Leave Year at the time allocated to them in the annual leave roster by their Annual Leave Letter.

- 38 The appellant contended that the Commission's reference to cls 56 and 85 of the *Agreement*, failed to take into account that access to the benefits of these clauses is by a process of application and approval. It was submitted that these provisions do not support the conclusions reached by the learned Commissioner as to cl 80, that officers are required to take all of their accrued annual leave in accordance with the leave roster in each Leave Year under their Annual Leave Letter.
- 39 Overall the appellant submitted that the learned Commissioner's reasons as to this issue, were insufficiently clear as to how cls 56 and 85 supported the conclusions she came to.
- 40 As to the obligation to give sufficient or adequate reasons for decision, in *Department of Education v State School Teachers Union of WA (Incorporated)* [2020] WAIRC 00927; (2020) 100 WAIG 1493, Kenner SC (as he then was) referred to relevant authorities and said at [51]-[53] as follows:

[51] In a recent decision of the Court of Appeal in *Chief Executive Officer, Department for Child Protection and Family Support v IGR* [2019] WASCA 20; (2019) 54 WAR 222 Quinlan CJ, Murphy and Beech JJA summarised the legal principles as to the adequacy of a judge's reasons at [112]:

Adequacy of reasons for decision: legal principles

112 Principles relevant to an evaluation of the adequacy of reasons include the following:

- (1) Reasons for decision need not be lengthy or elaborate.
- (2) Reasons should disclose the intellectual process that led to the decision in sufficient detail and with sufficient certainty to enable the litigant to know why they were unsuccessful and to enable an appeal court to determine whether the decision involved appealable error.
- (3) It is not necessary to refer to every submission advanced by a party. However, a tribunal or court must engage with the central element(s) of a losing party's case and explain why that case fails.
- (4) In determining the adequacy of the reasons, the reasons must be read as a whole, and, if necessary, considered in the context of the evidence. An appellate court may take into account what can legitimately be inferred from the reasons. Whether reasons are adequate will depend upon the circumstances of the case and the matters that arose for the judge's or tribunal's consideration.

[52] (See too *Mt Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273; *Marshall v Lockyer* [2006] WASCA 58; *Scaffidi v Chief Executive Officer, Department of Local Government and Communities* [2017] WASCA 222; (2017) 52 WAR 368 at 409 – 410; *Bucu v Midland Brick Co Pty Ltd* (2002) 82 WAIG 743; *Ruane v Woodside Offshore Petroleum Pty Ltd* (1991) 71 WAIG 913)

[53] In *Marshall*, McClure JA referred to the obligation on a judge to give reasons and at [247] - [249] and said:

Adequacy of reasons

247 The trial Judge was under a duty to give reasons. In determining the adequacy or sufficiency of the reasons, it is necessary to look at the reasons as a whole, and if necessary in the context of the evidence, to see if they give the sense of what was intended in a way that achieves the required function and purpose of reasons: *Garrett v Nicholson* (1999) 21 WAR 226 at 248 per Owen J. The function of reasons is to allow an appeal court to determine whether the decision was based on an appealable error and to provide procedural fairness to a litigant who is entitled to know why it is that he or she has been successful or unsuccessful. It is sufficient if the reasoning process which led to the result is disclosed with sufficient certainty to enable a litigant to know why it is that the result ensued and to ensure that the statutory right of appeal has been secured: *Garrett v Nicholson* at 248.

248 However, reasons need not be lengthy and elaborate nor do they require reference to all of the evidence led in the proceedings or every submission advanced by the parties: *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at [28]; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247.

249 Further, as the Full Court stated in *Mount Lawley Pty Ltd v Western Australian Planning Commission* at [29], inadequacy of reasons does not necessarily amount to an appealable error; an appeal court will only intervene when the inadequacy or insufficiency in the reasons are such as to give rise to a miscarriage of justice.

(Footnotes omitted)

- 41 In this case, as we have already observed, cl 80.6 is brief and undefined. It simply refers to a period where no leave is taken. The appellant argued at first instance that cl 80.6 refers to a period where no annual leave is taken, as a part of its case (see transcript at first instance p 13). In the appellant's written submissions at first instance, the appellant also submitted that cl 80.6 'does provide guidance as to how an officer can choose to not use his or her accrued annual leave for each contemplated [sic] year of the Agreement term (see appellant's written submissions [31d] AB41). With respect, it is unclear to us how cl 80.6 has this effect. On this point, the appellant appeared to argue at first instance that cl 80.6 was consistent with the appellant's general argument, that some officers may not take leave, and this was at their discretion, in line with provisions of the *Agreement* in cl 9, requiring employees to be treated equitably and fairly.

- 42 For the respondent, at first instance it was submitted as noted above, that cl 80.6, prescribing the non-leave period, was a 'filler', in the leave roster scheme, to bring it into balance. Counsel for the respondent during the hearing, took instructions as to the purpose of cl 80.6, as it seemed unclear. Counsel informed the Commission that the three or six week period was used as a 'spacer', in the roster during which no annual leave is taken, and which period may be used for training or for short periods of long service leave, for example (see transcript at first instance p 25). Whilst no objection was taken by the appellant to the respondent's submissions on this point, the appellant maintained its position that cl 80.6 was for the purposes that it contended.
- 43 We are not persuaded that the learned Commissioner's reasons as to what cl 80.6 may mean were inadequate. It was not in dispute that annual leave is not taken over this period, on either the appellant's or the respondent's cases. We consider that this clause simply means what it says. It is a period in the roster where no annual leave is taken, whether it be for a three or six week block of time. It makes common sense that this period is in connection with the operation of the annual leave roster because it is in cl 80 dealing with the subject matter. Also, as a matter of common sense, if no annual leave is to be taken over these periods, then they would not be required to be referred to in an officer's Annual Leave Letter, which does set out when leave is to be taken in accordance with the roster.
- 44 It is not the case that the operation of this provision is in some way inequitable. We cannot see in its terms, construed with the rest of cl 80, that it is. The learned Commissioner concluded that cl 80.6 was not consistent with officers being able to take leave at a time of their choosing, outside of the Annual Leave Letter, and that these time periods may be planned in advance. Being planned in advance, means that the time periods are allocated in the annual leave roster, which we would have thought would be an entirely uncontroversial proposition.
- 45 Therefore we cannot see any inadequacies in the learned Commissioner's reasoning as to this issue.
- 46 The appellant's sub ground [1e] contends that the learned Commissioner's reasons at [65], failed to explain how it is that she concluded that the taking of annual leave in advance by reason of cl 79.7 of the *Agreement*, did not contravene s 8 of the *MCE Act*.
- 47 We are not persuaded that there was any conflation of the appellant's arguments or any inadequacy of the learned Commissioner's reasons on this point. Clause 79.7 clearly contemplates that an officer may take annual leave before the entitlement to it fully accrues. Clause 79.7 is as follows:
- 79.7 An Officer, whose employment terminates before accruing annual leave that has already been taken, must refund the value of the annual leave not accrued calculated at the rate of the Officer's Hourly Annualised Rate of Pay as at the date the annual leave was taken. No refund is required in the event of the death of an Officer.
- 48 It provides that in this situation, on termination of an officer's employment, the officer is required to refund to the employer an amount equal to the value of the leave taken, but not fully accrued. Two points arise from the argument put by the appellant at first instance.
- 49 First, it is clear that cl 79.7 of the *Agreement* concerns itself with leave arrangements in the relevant year in which leave accrues. It is not concerned with already accrued leave from any previous year(s). Second, nothing in cl 79.7 suggests that an officer forgoes annual leave: quite the opposite. It concerns itself with taking leave before that entitlement to leave has arisen. It is a benefit in advance. Clause 80.2 also refers to an officer taking leave in advance under the roster, before such leave falls due.
- 50 It was contended at first instance by the appellant, that the effect of cl 79.7, to confer annual leave in advance on an officer, creates a debt, contrary to s 8 of the *MCE Act*. In our view, even as a matter of context, s 8 of the *MCE Act* is not engaged in the circumstances contemplated by cls 79.7 and 80 of the *Agreement*.
- 51 Section 8 of the *MCE Act* deals with a different subject matter of 'cashing out' accrued annual leave in return for a benefit, normally a sum of money, in lieu. This applies to a period of leave that has accrued after at least one year's service by an employee: s 8(1). The prohibition in s 8(3) on forcing an employee to forgo leave in return for a benefit in lieu, is not contemplated by cl 80 of the *Agreement*. Whilst the learned Commissioner's reasons were brief on this point, no more was required.
- 52 The final part of this ground, in [1f], contended that [71] of the learned Commissioner's reasons did not adequately explain her rationale for concluding that cls 56 and 85 of the *Agreement*, supported the respondent's contention that cl 80 requires officers to take annual leave accruing in a Leave Year, in accordance with the roster and the Annual Leave Letter. In the respondent's written submissions at first instance (AB50), it was contended that given the nature of a prison operation, there is a need to maintain suitable staffing levels and it is essential that the respondent be able to predict staff availability.
- 53 The learned Commissioner referred to her agreement with the respondent's views about these two clauses. The respondent's submissions were to the effect that it is understandable that cl 80 requires officers to take their annual leave as it accrues under the annual leave roster, given the need for certainty and predictability of staffing in a prison, noted above. It was contended that other clauses of the *Agreement* contain the same assumption, and reference was made to cls 56.3 and 85.3, which relate to annual leave travel concessions and the payment of travelling time. The respondent's submission on appeal was that it is cl 80 that informed the meaning of both of these provisions, to the same effect.
- 54 In terms of this sub ground of appeal, all that can be said is that in concluding as she did at [71] of her reasons, the learned Commissioner simply considered that these two subclauses of the *Agreement* affirmed the intention that officers are to take their annual leave in accordance with the annual leave roster and the Annual Leave Letter in cl 80. We do not think any more can be inferred from her reasons and there was little more that needed to be said. There was no inadequacy in the learned Commissioner's reasons in this respect. These matters are further considered in ground 4.
- 55 This ground of appeal is not made out.

Ground 2

56 As to this ground, the appellant submitted that the learned Commissioner was in error in concluding at [62]-[63] and [70] of her reasons, that officers covered by the *Agreement*, do not accumulate annual leave from year to year. It was submitted that the terms of cl 80 taken as a whole, read with other provisions of the *Agreement*, such as cls 77.3 and 69, do not permit the inference that the appellant says that the learned Commissioner drew to the effect that cl 80 does not permit the accumulation of annual leave. It was submitted that the learned Commissioner's reference to s 25(2) of the *MCE Act*, at [70] of her reasons, tended to support the appellant's assertion that the Commission concluded that there is no such accumulation.

57 At [62]-[63], in considering the appellant's argument at first instance that cl 80 indicates that officers have complete discretion whether or not to use annual leave, and the fact the provision does not limit the accumulation of annual leave from year to year, the learned Commissioner observed:

[62] In relation to the union's argument set out above at [30] – [31], in my view cl 80 does not expressly limit the accumulation of annual leave from year to year because under cl 80 a prison officer uses annual leave at the time of the Annual Leave Letter, so accumulation is not an issue. Consistent with this construction:

- a. there is no need for express words setting out when and in what circumstances the employer can direct a prison officer to start a period of annual leave in accordance with the annual leave roster, or not in accordance with the annual leave roster; and
- b. guidance or a process by which a prison officer can apply to *not use* her accrued annual leave is unnecessary.

[63] The argument that cl 80.5 provides guidance about how a prison officer can choose not to use her accrued annual leave for each contemplated year of the Industrial Agreement term does not assist the Union. Clause 80.5 makes it clear that it is exceptional to take annual leave other than in accordance with the Annual Leave Letter. In the ordinary course of events, a prison officer's annual leave does not accumulate beyond the timeframes indicated on the roster by the Annual Leave Letter, because prison officers use the annual leave at the time of the Annual Leave Letter.

58 A little later, after considering the industrial context in which cl 80 of the *Agreement* operates, from the terms of the *Agreement* read as a whole, the learned Commissioner then further observed at [70]:

[70] If prison officers could choose not to take annual leave at the time of their Annual Leave Letter, they would be able to choose to take annual leave that had accrued over 12 months earlier whenever they liked, simply by giving the employer two weeks' notice, in accordance with s 25 of the *MCE Act*. Such a construction is at odds with the text of cl 80, which sets out a planned and regulated system of using annual leave. A construction that prison officers can choose not to take annual leave at the time of their Annual Leave Letter makes a 'commercial nonsense' of the very arrangement proposed in cl 80, because it would undermine it entirely.

59 The difficulty with this ground is that, taken in the context of the Commission's reasons as a whole, the learned Commissioner did not, in the impugned paragraphs, actually conclude that annual leave does not accumulate. What she said was, given her views as to the operation of cl 80, whilst not expressly precluding the accumulation of annual leave, its accumulation under the terms of cl 80 is not an issue because on the construction of the clause that she preferred, officers are required to use the annual leave that they accrue in a leave year, in accordance with their Annual Leave Letter and the annual leave roster.

60 The respondent did not contest the proposition at first instance, that annual leave may accumulate under other provisions of the *Agreement*, such as cls 69.2, 77 and 126.3(b). This was noted by the learned Commissioner at [52] of her reasons. The respondent submitted on the appeal that these circumstances are implicitly recognised in the learned Commissioner's conclusion at [63], set out above, where she refers to an officer's annual leave not accumulating 'in the ordinary course of events'. As to the submission by the appellant that the reference by the learned Commissioner to s 25(2) of the *MCE Act* suggested that she did conclude that annual leave did not accrue under the *Agreement* at all, we do not consider this to be so. Section 25 of the *MCE Act* only has effect in circumstances where there has been an accrual of annual leave in a prior annual leave year, and the employer and the employee have not agreed when that accrued leave will be taken. In those circumstances, by s 25(2) the employee may take such previously accrued annual leave on the giving of two weeks' notice to the employer.

61 We do not read [70] of the learned Commissioner's reasons, as suggesting that there can be no accrual of annual leave under the *Agreement* at all. As noted above, we consider it implicit in her conclusions at [63], that she recognised this could occur arising from other provisions of the *Agreement*. However, this particular passage at [70] of the reasons, simply says that if 25(2) of the *MCE Act* did operate, because officers could, on the appellant's case, take annual leave as and when they wished, it would be contrary to the scheme established by cl 80 of the *Agreement*. As also pointed out by the respondent in his appeal submissions, s 25 of the *MCE Act*, is not concerned with and does not apply to annual leave which accrues in the course of an accrual year, which is the concern of cl 80, as opposed to already accrued annual leave: *Commission's Own Motion v Dardanup Butchering Co* [2004] WAIRC 12690; (2004) 84 WAIG 2739 at [192].

62 This ground of appeal is not made out.

Ground 3

63 This ground complains that, in essence, the learned Commissioner did not fully consider s 25 of the *MCE Act* when addressing the appellant's argument as to when annual leave could be taken under the *Agreement*. It was submitted that in concluding at [71], that if s 25 operated as contended by the appellant, this would lead to a 'commercial nonsense', the learned Commissioner then failed to properly construe s 25 in accordance with the relevant principles discussed and applied in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355. In this respect, the appellant submitted that the learned Commissioner should have found that applying s 25(1) of the *MCE Act* as a minimum condition,

that annual leave can only be taken under the *Agreement* by the agreement of the parties in accordance with s 25(2) of the *MCE Act*, and implicitly, not in accordance with the respondent's view of cl 80.

- 64 It is unnecessary to consider the appellant's arguments as to the learned Commissioner's approach to s 25 of the *MCE Act*. This is because, for the brief reasons identified in relation to ground 2 above, s 25 simply did not operate in the circumstances before the Commission in this case, in the construction of cl 80 of the *Agreement*. This is because under cl 80, annual leave is taken in the year of its accrual, in accordance with the annual leave roster and the officer's Annual Leave Letter. As noted above, s 25 of the *MCE Act* only applies to leave that has already accrued from a previous year.
- 65 Even if s 25 did apply, by the reaching of an industrial agreement and its registration under s 41 of the *Act*, the parties reached such an agreement as to the taking of annual leave. We say this because by s 41(4) of the *Act*, an industrial agreement once registered, 'extends to and binds' all employees employed in any calling in the industrial agreement and their employer. That is, in the present case, under the *Agreement*, the appellant on behalf of each prison officer covered by it, is taken to have agreed with the respondent about matters covered by it, including the obligations imposed by cl 80.
- 66 This ground of appeal is not made out.

Ground 4

- 67 As to this ground, the appellant contended that the learned Commissioner did not, when referring to cls 56 and 85 of the *Agreement*, at [71] of her reasons, properly construe the full terms of these two clauses. Clause 56 deals with remote area travel concessions and provides for additional payments to officers if they proceed on annual leave to an area outside of the region of their headquarters. The relevant provision referred to by the learned Commissioner is 56.3 which is as follows:

56.3 An Officer is only entitled to the Annual Leave Travel Concession once per Leave Year unless the Officer is rostered in their Annual Leave Letter to take annual leave twice in that Leave Year. An Officer who is rostered in their Annual Leave Letter to take annual leave twice in a Leave Year shall be entitled to the concession twice in that Leave Year unless the annual leave is rostered twice in the same Leave Year at the request of the Officer pursuant to subclause 80.5.

- 68 A similar provision is cl 85 which provides for travelling time, again for officers who go on annual leave outside of the region of their headquarters. The relevant part is cl 85.3 which is as follows:

85.3 An Officer is only entitled to be paid travelling time once per Leave Year unless the Officer is rostered by their Annual Leave Letter to take annual leave twice in that Leave Year. An Officer who makes a request under subclause 80.5 and is subsequently rostered to take annual leave twice in the same Leave Year will not be entitled to the additional travelling time provided by this clause.

- 69 We have set out [71] of the learned Commissioner's reasons above. Submissions as to cls 56 and 85 of the *Agreement*, were made by the appellant during the course of the hearing at first instance (see p 12-13, 17, and 26 transcript at first instance). The argument appeared to be that given that this additional time and payments are available only upon application by an officer, which must be approved, and both provisions go hand in hand, the relevant additional time period cannot be predicted in advance, at the time of the issuance of an officer's Annual Leave Letter. Accordingly, as we understood the argument, the Annual Leave Letter therefore, cannot be a mechanism that requires an officer to take an unknown period of leave in the future, having regard to this additional time benefit, if sought and if approved. It was therefore contended that these two clauses of the *Agreement*, referred to by the learned Commissioner, do not support the construction of cl 80 that she preferred.
- 70 On the appeal, it was also submitted that these two provisions of the *Agreement* only operate on the application of an officer, and relate to an officer's choice of holiday destination, and act as an incentive to officers. Viewed in this way, they do not support the approach taken by the learned Commissioner to cl 80.
- 71 The two clauses referred to in relation to this ground of appeal, while related to the taking of annual leave, deal with different subject matter. Clause 56 provides for additional payments made to officers going on annual leave for travel from remote locations and cl 85 provides for additional paid time in doing so.
- 72 The learned Commissioner's conclusion that both provisions tend to support the role of the annual leave roster and the Annual Leave Letter in cl 80, was open. This is because by the express words of cls 56.3 and 85.3, both affirm the taking of annual leave by officers in accordance with 'their Annual Leave Letter', and the scheme in cl 80. Neither subclause refers to an officer taking annual leave in any other way. Under cl 85.3 it is clear that the only alteration to the dates in an officer's Annual Leave Letter, is by an application under cl 80.5, in which case there is no second benefit of travelling time payable. Clause 56.3 is to a similar effect.
- 73 The learned Commissioner's reference to these provisions of the *Agreement* is broadly supportive of the core proposition that by cl 80 of the *Agreement*, when read in the context of the *Agreement* as a whole, annual leave is to be taken as it accrues in accordance with the annual leave roster and an officer's Annual Leave Letter, and not at the discretion of officers. It is to be taken as it accrues in a Leave Year, in accordance with the scheme set out in cl 80. We are not persuaded there was any error in the learned Commissioner's reference to these provisions of the *Agreement*.
- 74 This ground of appeal is not made out.

Conclusion

- 75 For the foregoing reasons, none of the appeal grounds are made out and the appeal is dismissed.

2024 WAIRC 00234

**APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 18/2021 GIVEN ON 26
SEPTEMBER 2023**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS	APPELLANT
	-v- MINISTER FOR CORRECTIVE SERVICES	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON COMMISSIONER C TSANG	
DATE	THURSDAY, 23 MAY 2024	
FILE NO/S	FBA 6 OF 2023	
CITATION NO.	2024 WAIRC 00234	
Result	Appeal dismissed	
Appearances		
Appellant	Mr C Fordham of counsel	
Respondent	Mr R Andretich of counsel	

Order

This appeal having come on for hearing before the Full Bench on 15 December 2024 and having heard Mr C Fordham of counsel on behalf of the appellant, and Mr R Andretich of counsel on behalf of the respondent, and reasons for decision having been delivered on 21 May 2024, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979 (WA)*, hereby orders –

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2024 WAIRC 00247

**APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER M 72/2023 GIVEN ON 22
DECEMBER 2023**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FULL BENCH

CITATION	:	2024 WAIRC 00247
CORAM	:	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL COMMISSIONER T KUCERA
HEARD	:	TUESDAY, 7 MAY 2024
DELIVERED	:	MONDAY, 27 MAY 2024
FILE NO.	:	FBA 2 OF 2024
BETWEEN	:	ARC HOLDINGS (WA) PTY LTD (ACN 076 523 487) Appellant AND INDUSTRIAL INSPECTOR CHIARA CATALUCCI Respondent

ON APPEAL FROM:

Jurisdiction	:	Industrial Magistrates Court
Coram	:	Industrial Magistrate Tsang
Citation	:	2023 WAIRC 00991 (Reasons for Decision)
File No	:	M 72 of 2023

CatchWords	:	Industrial Law (WA) - Appeal against a decision of the Industrial Magistrate – Interlocutory application seeking extension of time to appeal the decision – Factors to consider – Whether appeal demonstrates prospects of success – Whether the notice of appeal clearly and concisely sets out the grounds of appeal – Grounds unparticularised – <i>Long Service Leave Act 1958</i> (WA) – Meaning of ‘continuous employment’ – Extension of time not granted – Appeal dismissed
Legislation	:	<i>Fair Work Act 2009</i> (Cth) <i>Industrial Relations Act 1979</i> (WA) <i>Industrial Relations Commission Regulations 2005</i> (WA) <i>Industrial Relations Legislation Amendment Act 2021</i> (WA) <i>Industrial Relations Legislation Amendments Bill 2021</i> (WA) <i>Long Service Leave Act 1958</i> (WA)
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	Mr A Fauchon, of counsel
Respondent	:	Ms S Power, of counsel
Solicitors:		
Appellant	:	Solve Legal
Respondent	:	State Solicitor’s Office

Case(s) referred to in reasons:

Arpad Security Agency Pty Ltd v The Federated Miscellaneous Workers’ Union of Australia, Hospital, Service and Miscellaneous WA Branch (1989) 69 WAIG 1287

Browne v Director General, Department of Water and Environmental Regulation [2020] WASCA 16

Byrne v Australian Airlines Limited [1995] HCA 24; 185 CLR 410

Gallo v Dawson [1990] HCA 30; (1990) 64 ALJR 458

Holland v UGL Resources Pty Ltd T/A UGL Resources [2012] FWA 3453

Jose Rogelia A Acosta v Gerry Francis Broderick, Bryan Francis Stokes [2004] WAIRC 11557; (2004) 84 WAIG 1321

Kelly v Director General, Department of Justice [2003] WAIRC 08164; (2003) 83 WAIG 1283

United Voice WA v The Director General, Department of Education [2014] WAIRC 01361; (2014) 95 WAIG 13

United Workers Union v Child and Adolescent Health Service and others [2023] WAIRC 00666

Case(s) also cited:

Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196

Ellison v Sandini Pty Ltd [2018] FCAFC 44; 263 FCR 460

*Reasons for Decision***THE FULL BENCH:**

- 1 The appellant, **Arc Holdings** Pty Ltd, is seeking an extension of time to appeal a decision of the Industrial Magistrates Court under s 84 of the *Industrial Relations Act 1979* (WA) (**IR Act**) and, if that extension of time is granted, a short extension of time within which to file the appeal books.
- 2 The decision Arc Holdings intends to appeal is a decision dated 22 December 2023 affirming the respondent, Industrial Inspector Chiara Catalucci’s Compliance Notice which required Arc Holdings to pay an amount of accrued but untaken long service leave to its employee, Mr Patrick McCormick.

- 3 In the proceedings at first instance, Arc Holdings argued that Mr McCormick was not due long service leave as he had not completed the relevant qualifying period of continuous employment.
- 4 At first instance, it was agreed that Mr McCormick was employed by Arc Holdings as an apprentice pursuant to a written employment contract starting on 23 October 2012 to 1 January 2016 (**First Contract**). It was agreed that this First Contract automatically came to an end at the expiry of its term on 1 November 2017. It was also agreed that Mr McCormick was employed by Arc Holdings as an electrician after he completed his apprenticeship from the day following the day the First Contract expired, 2 November 2017 pursuant to a second contract of employment which was entered into (**Second Contract**).
- 5 The crux of Arc Holdings' case at first instance was, and on appeal is, that there was a break in continuous employment between the end of the First Contract and the commencement of the Second Contract, by virtue of the expiry of the First Contract.
- 6 The learned Industrial Magistrate rejected Arc Holdings' arguments. Her Honour concluded:
 - a. Mr McCormick's employment was continuous for the period from 23 October 2012 to 29 October 2020: [50].
 - b. As Mr McCormick completed at least seven years of continuous employment, he was entitled to pro rata long service leave on the termination of his employment on 29 October 2020, pursuant to s 8(3) of the *Long Service Leave Act 1958* (WA) (**LSL Act**): [51].
 - c. Arc Holdings had an obligation to pay Mr McCormick his pro rata long service leave entitlement on the termination of his employment, pursuant to s 9(2) of the LSL Act: [52].
 - d. Accordingly, the compliance notice should be confirmed, and Arc Holdings' claim dismissed: [54].

Principles that apply in granting an extension of time to appeal

- 7 The Full Bench is empowered to extend the time to appeal under s 84 of the IR Act: *Arpad Security Agency Pty Ltd v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1989) 69 WAIG 1287 affirmed by a majority of the Full Bench in *United Voice WA v The Director General, Department of Education* [2014] WAIRC 01361; (2014) 95 WAIG 13 at [18]-[21].
- 8 The principles that apply to such an application were set out in: *Jose Rogelia A Acosta v Gerry Francis Broderick, Bryan Francis Stokes* [2004] WAIRC 11557; (2004) 84 WAIG 1321
 - [42] The grant of an extension of time within which to appeal is not automatic. The object of a power to extend time which exists in this Full Bench, and has been so held, in relation to s49(3) and s84(3) of *the Act* is like all such powers and is for the sole purpose of enabling the Full Bench to do justice between the parties.
 - [43] In order to determine whether rules, and, indeed, in this case *the Act*, will work an injustice by the time limit which *the Act* imposes, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation and the consequence for the parties of the grant or refusal of the application for extension of time. It is, of course, always necessary to consider the prospects of the applicants succeeding in the appeal. It is also necessary to bear in mind in such applications that upon the expiry of the time for appealing, the respondent has a vested right to retain the judgement unless the application is granted. The initial step in determining whether there would otherwise be an injustice to the appellant may often be to decide whether the prospect of the appellant succeeding in the substantive appeal if an extension of time were granted, is a real one.
 - [44] In *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, the Full Court of the Supreme Court of this State held that there were usually four major factors to be considered in exercising the Court's decision to extend time. These are the length of the delay, the reason for the delay, whether there was an arguable case, and the extent of any prejudice which was suffered by the respondent.
- 9 In this case, the notice of appeal was filed one day late. The length of the delay is short. There is at least an adequate explanation for the delay, namely Arc Holdings' solicitors having a Christmas shutdown period between 22 December 2023, being the date that the Industrial Magistrates Court issued its orders, and 8 January 2024, in effect leaving only five days for Arc Holdings to consider the orders, obtain advice, and provide instructions to institute an appeal, as well as for the its solicitors to prepare the documents necessary to institute the appeal.
- 10 The contentious and determinative issue is whether the appeal has merit. Unless the appeal has real prospects of success, no injustice can result from the refusal to extend time to appeal.
- 11 The authorities are clear that the applicant bears the onus of demonstrating that to refuse an extension of time would result in an injustice: *Gallo v Dawson* [1990] HCA 30; (1990) 64 ALJR 458 at 459; *Kelly v Director General, Department of Justice* [2003] WAIRC 08164; (2003) 83 WAIG 1283 at [69].
- 12 It is therefore for Arc Holdings to demonstrate that the appeal is arguable and that the appellant has real prospects of succeeding in the appeal.

Prospects of success

- 13 There are seven proposed grounds of appeal. They are:
 1. The Industrial Magistrate denied procedural fairness by making conclusions that were beyond the evidence and submissions presented by the parties in the hearing, and further, of which the Appellant was provided no notice, nor an opportunity to respond.

2. The Industrial Magistrate erred by incorrectly applying the principle in *Ellison v Sandini [Pty Ltd]* [2018] FCAFC 44; (2018) 263 FCR 460] to expand the application of a deeming provision as opposed to the narrow interpretation that is appropriate (para 23(a)).
 3. The Industrial Magistrate erred by incorrectly interpreting Section 6 of the *Long Service Leave Act* as being calculated by an accumulation of otherwise distinct periods of both employment and apprenticeship. (para 23(b)).
 4. The Industrial Magistrate erred by incorrectly interpreted the meaning of “absence” at s6(2)(i) to be a reference to termination of employment. (para 23(c))
 5. The Industrial Magistrate erred by incorrectly applying the authority in *Byrne v Australian Airlines [Ltd]* [1995] HCA 24; (1995) 185 CLR 410] (paras 46-48). Her Honour incorrectly determined that the employment relationship did not cease, even if only briefly, with the expiration of said contract.
 6. The Industrial Magistrate erred by distinguishing between the meaning of “continuous service” and “continuous employment”, such that Her Honour concluded a meaning inconsistent with that of the *Fair Work Act 2009* (Cth).
 7. The Industrial Magistrate erred by not giving due consideration to the principle of legality, such that the legislature must clearly and unambiguously by the text of a statute, evidence its intention to depart from the common law or extinguish established common law rights.
- 14 Arc Holdings correctly notes that this application for an extension of time is not an appropriate forum for a pre-trial of the appeal itself. The Full Bench does not need to undertake an elaborate analysis of the grounds of appeal.
- 15 In its written submissions, Arc Holdings submitted that the grounds of appeal should be sufficient to demonstrate to the Full Bench that there are prima facie merits to its appeal. At the hearing of its application, counsel for Arc Holdings appropriately conceded that at least some of the grounds of appeal were inadequately particularised for such a conclusion to hold. Counsel for Arc Holdings elaborated on the issue that was at the crux of the hearing at first instance, and is at the crux of the appeal, that is, whether there is a break in continuous employment by virtue of the end of an employment contract in a series of employment contracts.

Ground 1

- 16 This ground is not particularised. It does not identify any particular findings or conclusions which the learned Industrial Magistrate is alleged to have made which were beyond the evidence and submissions, or in relation to which the appellant had no notice or opportunity to respond.
- 17 Regulation 102(2) of the *Industrial Relations Commission Regulations 2005* (WA) says that a notice of appeal must clearly and concisely set out the grounds of appeal and what alternative decision the appellant seeks.
- 18 The ground does not comply with reg 102(2) and is liable to be struck out.
- 19 At hearing, Arc Holdings’ counsel explained the lack of particularity was because the Notice of Appeal was filed immediately after a Christmas shut-down period, and at a time when the appellant’s lawyers had not yet obtained transcript.
- 20 Arc Holdings has had ample time between the filing of the Notice of Appeal on 16 January 2024 and the time of the hearing of this application to have provided the Full Bench with proposed amended grounds, or particulars of its grounds.
- 21 Counsel foreshadowed that if permitted to appeal, this ground would be particularised to allege that the learned Industrial Magistrate failed to give the parties notice that she would place reliance upon the Explanatory Memorandum to the *Industrial Relations Legislation Amendment Bill 2021* (WA) to inform her reasoning at [40] – [45].
- 22 Her Honour’s reasoning at [40]-[45] is part of her reasoning in support of her conclusion at [30]:

I agree with Ms Catalucci’s submissions that s 4 of the LSL Act always contemplated that an apprentice would be an employee for the purposes of the LSL Act.

- 23 This was in answer to Arc Holding’s submission at first instance that before the enactment of s 6(7) of the LSL Act by s 84 of the *Industrial Relations Legislation Amendment Act 2021* (WA), the LSL Act did not contemplate that a period of apprenticeship would form part of an employee’s continuous employment.
- 24 The principal difficulty with this foreshadowed ground is that there are no grounds which challenge her Honour’s ultimate finding that an apprentice is an employee under the LSL Act, as it was prior to the 2021 amendments. None of the grounds attempt to demonstrate that this fundamental conclusion was in error, such that any opportunity that might have been given to the parties to address the Explanatory Memorandum could have altered the result.
- 25 As the High Court unanimously observed in *Stead v State Government Insurance Commission* [1986] HCA 54; (1988) 161 CLR 141 at [9]-[11] (footnote omitted):

9. The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker L.JJ.) in *Jones v. National Coal Board* [[1957] 2 QB 55], in these terms:

“There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.”

That general principle is, however, subject to an important qualification which Bollen J. plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the

same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.

10. For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.
11. Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. ...

Ground 2

- 26 This challenge is made to part of the learned Industrial Magistrate's reasoning to the conclusion at [23] that s 6 of the LSL Act does not need to expressly state that a period following termination of an employment contract counts as continuous employment.
- 27 In making this conclusion, her Honour was dealing with Arc Holdings' submission to the effect that s 6 is exhaustive of the absences and interruptions that are deemed not to break continuous employment.
- 28 This ground of appeal proceeds on the basis that the effect of her Honour's reasoning at [23] is that her Honour found s 6 itself applied to Mr McCormick's circumstances, that is, the termination of the First Contract fell within the meaning of 'continuous employment' by virtue of s 6. If that was the effect of the reasoning, error could arguably be demonstrated.
- 29 However, Arc Holdings' contentions misconstrue the Industrial Magistrate's reasoning process. Reading the primary decision fairly and as a whole, the Industrial Magistrate did not find s 6 deemed Mr McCormick's circumstances to amount to continuous employment.
- 30 It is important to note that her Honour had concluded, at [20] that 'employment' and 'continuous employment' should be construed in accordance with their ordinary meanings. This conclusion is not challenged in the appeal grounds. At the hearing of the appeal, Arc Holdings' counsel accepted that 'continuous employment' has its ordinary meaning, that is, a period of unbroken service to an employer by an employee: *Browne v Director General, Department of Water and Environmental Regulation* [2020] WASCA 16, per Le Miere J at [119]; *Holland v UGL Resources Pty Ltd T/A UGL Resources* [2012] FWA 3453 at [20] and [22]; *Butterworths Employment and Law Dictionary* (1st ed, 1997) 'continuous employment'.
- 31 Once the learned Industrial Magistrate accepted, at [23], that s 6 does not deem a period following termination of a fixed term contract and the commencement of a new contract to be 'continuous employment', the question remained whether the instant facts qualified as 'continuous employment'.
- 32 This question was not a question of construction of any part of the LSL Act. It was a question of the application of the LSL Act, as properly construed, to the facts in Mr McCormick's case. That in turn involved an assessment of whether, as a matter of law and of fact, the end of the First Contract broke 'continuous employment' where continuous employment has its ordinary meaning.
- 33 The learned Industrial Magistrate proceeded to apply this meaning to the facts of the instant case from [24] of her Honour's reasons and following.
- 34 Ultimately her Honour did not purport to interpret s 6 in either an expansive or narrow way. If she had, any error in so doing is inconsequential, as s 6 was not then applied in reasoning to the conclusion that Mr McCormick's employment was continuous.

Ground 3

- 35 This ground is unintelligible. It takes aim at her Honour's reasoning at [23(b)] as follows:

Secondly, s 6 operates to treat certain periods of absences from, and interruptions to, employment that might not have counted towards an employee's continuous employment as deemed to be counted. This means, s 6 would have no role to play if an employee was not absent from, or there was no interruption to, their employment.
- 36 This summary of the effect of s 6 is plainly correct and utterly orthodox. It is a statement of the obvious. There is nothing in it capable of being seriously questioned. It does not have the effect attributed to it by the ground of appeal, of requiring continuous service to be calculated by an accumulation of otherwise distinct periods of both employment and apprenticeship, if, by 'distinct' Arc Holdings means 'broken'.
- 37 The ground is without merit.

Ground 4

- 38 By this ground it is said the learned Industrial Magistrate erred by incorrectly interpreting the meaning of 'absence' at s 6(2)(i) to be a reference to termination of employment when her Honour said at [23(c)]:

Thirdly, s 6 is intended to operate broadly and not be limited by the circumstances stated in the provision. This is apparent from s 6(2)(i) which deems any absence not specified in s 6(1) and s 6(2) as counting towards an employee's continuous employment, unless the employer gives written notice to the employee during the absence or within 14 days of the termination of the absence, that the continuity of their employment has been broken by the absence.
- 39 The ground of appeal misconstrues the primary decision read fairly, as a whole.
- 40 Section 6(2)(i) of the LSL Act says:

For the purposes of this Act, the employment of an employee whether before or after the commencement of this Act shall be deemed to be continuous notwithstanding —

...

(i) any absence of the employee from his employment after the coming into operation of this Act by reason of any cause not specified in subsection (1) or in this subsection unless the employer, during the absence or within 14 days of the termination of the absence, gives written notice to the employee that the continuity of his employment has been broken by that absence, in which case the absence shall be deemed to have broken the continuity of employment.

- 41 Her Honour did not equate ‘absence’ in s 6(2)(i) to termination of employment, nor conclude that termination of employment was such an absence. Her Honour simply paraphrased s6(2)(i).
- 42 As we have said, her Honour’s conclusion that the termination of the First Contract did not break continuous service was not ultimately arrived at by applying s6. Her Honour correctly concluded that s 6 was not the exclusive route by which continuity of employment can be achieved. Even if this part of the primary decision involved error, it is inconsequential.

Ground 5

- 43 Arc Holdings alleges that the Industrial Magistrate erred at [46] – [48] by incorrectly applying the authority in *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 and therefore wrongly concluding that the employment relationship did not cease, even if only briefly, when the First Contract expired.
- 44 This ground goes to the crux of the issue that was before the Industrial Magistrate at first instance. Despite Arc Holdings’ focus in its submissions at first instance on:
- a. the correct construction of ‘continuous employment’;
 - b. the effect of s 6 of the LSL Act; and
 - c. whether ‘continuous employment’ had the same meaning as ‘continuous service’ under the Fair Work Act 2009 (Cth) (**FW Act**),

at the end of the day what Arc Holdings had to show was that the expiry of the First Contract was a break in Mr McCormick’s continuous employment.

- 45 On this issue, her Honour found at [47]:

I find that while the First Contract expired on the completion of the term covering Mr McCormick’s apprenticeship on 1 November 2017, this did not terminate his employment relationship with Arc Holdings. This is because, on 2 November 2017, his employment with Arc Holdings continued, as an Electrician. I find that there was no absence, break or interruption in Mr McCormick’s employment between the ending of the First Contract and the commencement of the Second Contract, for the purposes of the LSL Act. I find Mr McCormick’s employment under the First Contract is continuous with his employment under the Second Contract.

- 46 It is arguable that the Industrial Magistrate’s reference to, and the distinction between the employment relationship and the employment contract indicates that her Honour was asking herself the wrong question. The question was not whether the employment relationship continued. Nor was the question whether the employment contract continued. Rather, it was whether Mr McCormick’s period of employment was continuous across the two contracts. Was the period of employment broken?
- 47 However, this does not reveal error in the final conclusion that Mr McCormick’s employment was continuous. Rather, it underscores the very problem with Arc Holdings’ case at first instance, which relied on distinct employment contracts to establish a break in continuous employment.
- 48 As we have said, Arc Holdings takes no issue with the correct meaning of ‘continuous employment’ being a period of unbroken service to an employer by an employee.
- 49 What Arc Holdings has failed to adequately explain is why an employee’s period of service starts and ends with each engagement as understood in the common law of employment, or why a period of continuous employment cannot be made up of a series of periods of service, with no break between them.
- 50 At the hearing of this application, Arc Holdings’ counsel submitted that the position at law is that when a contract expires resulting in the termination of employment, there ceases to be an employment contract and there ceases to be an employment relationship. That is an uncontroversial proposition. But in the instant case, Mr McCormick continued to be employed by Arc Holdings under the Second Contract. There was no break in the **period** of employment between the First Contract and the Second Contract. The employment under the Second Contract commenced the day following the expiry of the First Contract.
- 51 Counsel conceded that the instant case did not involve any **period of absence** from employment. Rather, it was said to involve an **‘interruption’** to continuous employment, particularly as Mr McCormick’s accrued entitlements were paid out at the expiry of the First Contract. But while the end of a contract may obviously interrupt that contract, the relevant question is whether it interrupts the **period of employment**.
- 52 On the agreed facts, it is clear that Mr McCormick’s period of employment with Arc Holdings was not broken when the First Contract expired.
- 53 There may be an error in her Honour’s reasoning. But any error cannot have affected the ultimate result, and would not result in the appeal being upheld.

Ground 6

- 54 This ground is also unintelligible. Arc Holdings accepts that it is inadequately particularised. It appears to allege two possible errors. First, that the learned Industrial Magistrate erred in finding continuous employment had a different meaning to continuous service. Second that the Industrial Magistrate erred in not finding ‘continuous employment’ under the LSL Act has the same meaning as ‘continuous service’ in the FW Act.
- 55 Despite these alleged errors, Arc Holdings accepts that the correct meaning of ‘continuous employment’ is its ordinary meaning as we have articulated it in the preceding paragraphs. The Industrial Magistrate also concluded at [20] that ‘continuous employment’ has its ordinary meaning.
- 56 Even if this ground was properly particularised, and made out, it would not lead to any different result for the reasons set out under Ground 5, and so would not result in the appeal being upheld.

Ground 7

- 57 This ground is also inadequately particularised. Arc Holdings did not attempt to elaborate on the ground or establish why it had merit, other than to say that the FW Act either has a bearing on the definition of ‘continuous employment’ or it does not. But the meaning of ‘continuous employment’ is ultimately not controversial. The ground can go nowhere.

Conclusion and disposition

- 58 We have concluded that the grounds of appeal do not establish any appealable error of consequence. While Arc Holdings might be able to establish error in the learned Industrial Magistrate’s process of reasoning in selective respects, any such errors are inconsequential because Arc Holdings has not established there is an arguable case that the ultimate finding that Mr McCormick’s period of employment with it was unbroken was wrong. This finding was sound and inevitable as a result of the orthodox application of the meaning of ‘continuous employment’ under the LSL Act to Mr McCormick’s employment with Arc Holdings.
- 59 Accordingly, Arc Holdings has not shown that the interests of justice require that an extension of time to appeal be granted, because it has not shown that the appeal has prospects of success.
- 60 We decline to exercise the discretion available to the Full Bench to extend the time for filing the appeal, and dismiss the appeal.

2024 WAIRC 00253

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ARC HOLDINGS (WA) PTY LTD (ACN 076 523 487)

APPELLANT

-and-

INDUSTRIAL INSPECTOR CHIARA CATALUCCI

RESPONDENT**CORAM**

FULL BENCH

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

COMMISSIONER T KUCERA

DATE

TUESDAY, 28 MAY 2024

FILE NO/S

FBA 2 OF 2024

CITATION NO.

2024 WAIRC 00253

Result

Appeal dismissed

Appearances**Appellant**

Mr A Fauchon of counsel

Respondent

Ms S Power of counsel

Order

HAVING heard from Mr A Fauchon of counsel on behalf of the appellant, and Ms S Power of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, hereby orders –

THAT the appeal be and is hereby dismissed.

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

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2024 WAIRC 00283

INTERPRETATION OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2022 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00283
CORAM : COMMISSIONER T B WALKINGTON
HEARD : THURSDAY, 11 APRIL 2024
DELIVERED : FRIDAY, 7 JUNE 2024
FILE NO. : APPL 1 OF 2024
BETWEEN : MINISTER FOR CORRECTIVE SERVICES
 Applicant
 AND
 WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
 Respondent

CatchWords : Application for Interpretation of Agreement – s. 46 – Application to dismiss application because of abuse of process and not in the public interest – Claim for enforcement – Effect of s. 46(3)
Legislation : *Industrial Relations Act 1979 (WA)*
Result : Application to Dismiss Application Refused
Representation:
Applicant : Mr D Anderson (of counsel)
Respondent : Mr D Stojanoski (of counsel)

Case(s) referred to in reasons:

Bernard Chipadza v Freo Group Pty Ltd [2020] WAIRC 00273

Civil Service Association of Western Australia Incorporated v Director General, Department of Justice [2002] WAIRC 06496

Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] HCA 43

Mineralogy Pty Ltd and Clive Frederick Palmer v Sino Iron Pty Ltd, Korean Steel Pty Ltd, Citic Ltd and Sinor Iron Holdings Pty Ltd [2020] WASC 40

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WAIRC 00830

Western Australian Prison Officers' Union v Minister for Corrective Services [2024] WAIRC 00152

Reasons for Decision

1. The Minister for Corrective Services (Minister) has applied under s 46 of the *Industrial Relations Act 1979 (WA)* (the IR Act) for an interpretation of cl 28 of the Department of Justice Prison Officers' Industrial Agreement 2022 (2022 Industrial Agreement).
2. The only other party to the Agreement, the Western Australian Prison Officers' Union (the Union), seeks an order pursuant to ss 27(1)(a)(ii) and (iv) of the IR Act to dismiss this application because they say the processes of the state industrial relations system are not being fairly used but are being employed in an improper way. The Union says that the effect of APPL 1 of 2024 is to either (or all) fetter, stay, permanently stay, nullify or usurp the proceedings they previously filed in M 153 of 2023.
3. Both parties are the same parties in each application. The Union asserts the Minister's application, APPL 1 of 2024, amounts to an abuse of process.
4. I need to decide whether to dismiss the Minister's application for an interpretation because it is neither necessary nor in the public interest.

Background

5. On 22 December 2023, the Union filed a claim in the Industrial Magistrates Court of Western Australia (M 153 of 2023) for the enforcement of cl 23 of the Department of Justice Prison Officers' Industrial Agreement 2020 (the 2020 Agreement) and is headed 'Minimum Time off Duty when Overtime is Worked'.
6. The Union claims that the Minister contravened cl 23 of the 2020 Agreement on five occasions and seeks orders for the Minister to pay a penalty to the Union and orders preventing further contravention or failure to comply with cl 23.1.

7. On 21 March 2024, by order of the Industrial Magistrate, leave was granted for the parties in APPL 1 of 2024 to refer to and rely on documents filed in M 153 of 2023 for the purposes of the dismissal application proceedings in APPL 1 of 2024.
8. It appears the Union's claim in M 153 of 2023 was served on the Minister on 9 January 2024, albeit the Form 4 stating that service was effected, and names the claimant as 'Western Australian **Police** Officer's Union of Workers'. (my emphasis).
9. On 18 January 2024, the Minister applied pursuant to s 46 of the IR Act for an interpretation of the Agreement. The Minister seeks an answer to the question of whether cl 28 of the 2022 Industrial Agreement, read in its entirety, requires the Minister to provide Officers a 12 hour break when they have worked Overtime following a 12-hour shift. Clause 28 of the Agreement provides:
 28. Minimum Time off Duty when Overtime is Worked
 - 28.1 Subject to subclause 28.2, an Officer required to work a 12-hour shift shall be entitled to 12 hours off duty between successive shifts.
 - 28.2 In an extreme emergency, an Officer who works a 12-hour shift may be required to perform 2 hours Overtime, requiring at least 10 hours off duty before returning to work.
 - 28.3 All other Officers required to perform Overtime shall be entitled to have at least ten hours off duty between the hours of successive rostered shifts.
 - 28.4 (a) An Officer who has not had at least 10 hours off duty before their next rostered shift is due to commence shall, without loss of pay for ordinary hours of work for which they are absent, not be required to commence the shift until the Officer has had 10 hours off duty.
 - (b) If the Officer resumes or continues work on the instruction of the Employer without 10 successive hours off duty, the Officer shall be granted time off in lieu for the hours worked until the Officer has had 10 consecutive hours off duty without loss of pay for ordinary hours of work for which they are absent.
 - 28.5 Subclauses 28.2 and 28.4 are to be read in conjunction with the Department's Fatigue Management Guidelines, as amended from time to time.
10. Clause 23 of the 2020 Agreement and cl 28 of the 2022 Agreement are both headed 'Minimum Time off Duty when Overtime is Worked'. The text and language of cl 23 of the 2020 Agreement and cl 28 of the 2022 Agreement are identical.
11. On 1 February 2024, the Minister responded to the claim in M 153 of 2023, wholly denying the claim and opposing the Industrial Magistrate granting the orders sought.
12. On 20 February 2024, the Union filed an application pursuant to s 27(1)(a) of the IR Act, seeking orders to wholly dismiss APPL 1 of 2024 on the grounds that APPL 1 of 2024 is either (or both):
 - a) not necessary or desirable in the public interest: s 27(1)(a)(ii) IR Act; and or
 - b) an abuse of process pursuant to s 27(1)(a)(iv) IR Act.

Parties Submissions

13. The Union submits that APPL 1 of 2024 ought to be dismissed without hearing and determination because the proceedings are not being fairly used and are being employed in an improper way. The effect of APPL 1 of 2024 will be to either (or all) fetter, stay, permanently stay, nullify, or usurp the proceedings in previously filed M 153 of 2023. In this way, the Union asserts, APPL 1 of 2024 amounts to an abuse of process.
14. The Union says the issues to be canvassed in APPL 1 of 2024 are the same issues to be canvassed in the application already before the Industrial Magistrates Court, namely M 153 of 2023. The Union says there will be a duplication of issues canvassed, and that cannot be considered necessary or desirable in the public interest.
15. The Union contends that APPL 1 of 2024 will cause delay to M 153 of 2023 which was filed before APPL 1 of 2024 and APPL 1 of 2024 is vexatious in this regard. The applicant in APPL 1 of 2024 was aware of the existence of M 153 of 2023 and the issue therein prior to filing APPL 1 of 2024 and asserts APPL 1 of 2024 amounts to an abuse of process to that end.
16. The Union refers the Commission to the decision of the Industrial Magistrate in *Bernard Chipadza v Freo Group Pty Ltd* [2020] WAIRC 00273; (2020) 100 WAIG 274, citing the High Court of Australia in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43 (*Jeffery*). In *Jeffery*, the High Court considered the approach taken in Australia and offered a number of categories of conduct attracting the intervention of the Courts in relation to an abuse of process and determined that 'proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or an improper way' would amount to an abuse of process.
17. The Union contends that in the present matter, there is a real and actual risk that there will be two different decisions on the same subject in two different jurisdictions. That is evidently so because as the Full Bench of the Commission has recognised in the decision of *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2017] WAIRC 00830; (2017) 97 WAIG 1689 (*RTBU*), in both s 46 and s 83 matters the Commission and the Industrial Magistrates Court (IMC) will necessarily interpret the relevant provision in accordance with the same legal principles. Therefore, not only will the same task be undertaken by this Commission should it hear APPL 1 of 2024, as the task that will be undertaken by the Industrial Magistrate in M 153 of 2023, but there is the real and actual risk that both those decisions will be different.
18. The Union submits that there is little utility to APPL 1 of 2024 being finally determined because it is likely that any declaration issued therein, would not ultimately resolve the dispute between the parties and in accordance with the decision of the Commission in *Civil Service Association of Western Australia Incorporated v Director General, Department of Justice* [2002] WAIRC 06496; (2002) 82 WAIG 2679 (*CSA decision*), further proceedings are not necessary or desirable in the public

- interest. The Union contends that M 153 of 2023 was filed prior to APPL 1 of 2024, and is more advanced than APPL 1 of 2024, and is ultimately proceedings to hearing.
19. The Union submits that the s 46 APPL 1 of 2024 matter will not assist the s 83 M 152 of 2023 matter, as the Commission's role under s 46 is not undertaken to provide assistance to the IMC in any regard.
 20. The Union says there is no utility in APPL 1 of 2024 and it is not necessary or desirable nor in the public interest to be heard. It says the effect of the continuation of APPL 1 of 2024 will be that it will either (or all) fetter, stay, permanently stay, nullify or usurp the proceedings in previously filed M 153 of 2023. Allowing APPL 1 of 2024 to proceed would give rise to the perception that the administration of justice is inefficient, its careless of costs and its wasteful in its application of public monies.
 21. On this point, the Union refers the Commission to a recent decision of the Supreme Court of Western Australia in *Mineralogy Pty Ltd and Clive Frederick Palmer v Sino Iron Pty Ltd, Korean Steel Pty Ltd, Citic Ltd and Sinor Iron Holdings Pty Ltd* [2020] WASC 40 (*Mineralogy*) [68]. The Supreme Court sets out some non-exhaustive broad principles into what may constitute an abuse of process and considered that for a judicial body to, citing Dowsett J in *USB AG v Tyne* [2018] HCA 45 at [59] 'lend its procedures to the staged conduct of **what is factually the one dispute prosecuted by related parties under common control with the attendant duplication of court resources, delay, expense and vexation**, as Dowsett J found, is likely to give rise to the perception that the **administration of justice is inefficient, careless of costs and profligate in its application of public monies**. The primary judge was right to permanently stay the proceedings as an abuse of the process of the Federal Court.' (original emphasis).
 22. The Union says that there can be no doubt that if APPL 1 of 2024 proceeds:
 - a) there will be a duplication of the court's resources, mindful that both the Commission and the Industrial Magistrates Court fall under the same umbrella of the Department of the Registrar; and
 - b) there will be an avoidable and illegitimate delay to M 153 of 2024 including a duplication of costs/ or unnecessary additional costs.
 23. The Union says that to that end, the Commission's system is not being fairly used and is being employed in an improper way, and all of which will give rise to the perception that the administration of justice is inefficient, careless of costs, and profligate in its application of public monies. Such a perception can be avoided by the dismissal of APPL 1 of 2024.
 24. The Minister contends that the settled position is that set out in *The Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* [2017] WAIRC 00177 (*Olynk*), and is that a party is entitled to invoke the Commission's jurisdiction to declare the true meaning of an award and expect it to be exercised unless the application is predicated on facts belonging only to a person or persons claiming to be affected by the disputed meaning.
 25. The Minister asserts that its application for interpretation does not reference facts belonging to the officers concerned in M 153 of 2023 and asks a general question of whether cl 28 requires them to provide officers a 12-hour break where they have worked overtime following a 12-hour shift. The Minister submits it is entitled to expect that the application will be heard and determined.
 26. The Minister refers the Commission to the decision of Senior Commissioner Cosentino SC in APPL 63 of 2023, applying *Olynk*. In those proceedings, WAPOU applied for orders dismissing or staying the proceedings under s 27(1)(a) as an abuse of process on the grounds that the proceedings duplicated issues raised by the Minister in defense of the proceedings between the same parties in the IMC. The Minister submits that Senior Commissioner Cosentino found that where the balance is against dismissal of proceedings, unless tilted the other way, the s 27(1)(a) application to dismiss ought to be dismissed because: (a) there is an entitlement to invoke the Commission's jurisdiction under s 46; (b) the fact that an interpretation under s 46 will be binding on the parties and the Court weighs against dismissal; (c) the facts giving rise the application were generalised and it was clear the interpretation was sought in relation to employees generally; (d) the purpose of the question was clearly stated as the Minister seeking to understand his obligations; (e) the facts in the IMC proceedings were as likely as not to cloud the constructional issues; (f) the constructional issues were of the type that s 46 is intended to resolve and, therefore, it was appropriate for the Commission to resolve them; (g) the Minister was faced with allegations of contravention in the IMC and there was prejudice to the parties and individuals bound by the industrial agreement if the questions around construction are left unresolved; and, (h) there was no significant delay in commencing the interpretation application; (i) the IMC proceedings remained unlisted for hearing at all relevant times.
 27. The Minister contends that the circumstances of APPL 1 of 2024 align with APPL 63 of 2023, and the Commission ought to similarly refuse the Union's application to dismiss this matter.

Principles Applicable to Summary Disposition

28. Section 27(1)(a) of the Act provides as follows:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
 - (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
 - (i) that the matter or part thereof is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or

- (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
- (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

29. Similarly, in *RTBU*, concurrent applications had been made to the Commission for an interpretation under s 46 and to the IMC for enforcement under s 83.

Entitlement to invoke the Commission's jurisdiction under s 46

30. As observed in *RTBU* and adopted by Senior Commissioner Cosentino in APPL 63 of 2023, the discretion in s 27 (1)(a) to dismiss an application is broad and does not require the achievement of a particular level of satisfaction. The onus is on the party seeking that the proceedings be dismissed to persuade the Commission that the other party's entitlement to invoke the Commission's jurisdiction ought to be overridden.
31. In this matter, the Union is seeking the dismissal of proceedings and must persuade the Commission to exercise its power to dismiss.
32. The Union contends there is an abuse of process because there are concurrent proceedings and the issues canvassed in the application before the IMC will be the same as those canvassed in this matter.
33. In *RTBU*, the majority of the Full Bench found that the application for an interpretation under s 46 concerned the same factual circumstances relating to one individual as the claim for enforcement under s 83 and therefore reasoned the s 46 application ought to be dismissed.
34. In this matter, the facts that give rise to the application are expressed generally and the Minister seeks an answer to be applied across the relevant workforce. In this respect, *RTBU* is distinguishable from this matter. This weighs against dismissing APPL 1 of 2024 at this stage of the proceedings.

Effect of s.46(3)

35. The Union contends that APPL 1 of 2024 has no practical utility and refers the Commission to the *CSA decision*.
36. The Union submits that APPL 1 of 2024 should be dismissed because it is a duplication of issues that will be canvassed in M 153 of 2023 and refers the Commission to the *CSA decision*.
37. In the *CSA decision*, the Civil Service Association (CSA) had applied to the Industrial Commission for an interpretation of cl 18(1)(k) of the *Public Service Award 1992*. The respondent had applied to the Commission for the s 46 application to be dismissed because the same issues had been canvassed previously in s 44 proceedings brought by the CSA, and there were proceedings commenced in the IMC by one of the members of the CSA who was also subject of the application for interpretation.
38. I understand the Commission to have dismissed the application for an interpretation under s 46 on the basis that it was neither necessary nor in the public interest because even if the declaration sought was made, the issue between the parties would not be resolved because a declaration would have no practical effect [11], it was evident that the application for an interpretation was a stepping stone in aid of a dispute in the Industrial Magistrates Court and that dispute would remain to be dealt with [16] and a declaration would not encourage the parties to resolve outstanding matters without recourse to litigation and possibly encourage further litigation [17].
39. In the proceedings before me, it is not possible for me to conclude that the same elements are present as those in the *CSA decision*. However, the duplicated applications in the *CSA decision* are all matters commenced by the CSA or one of its members. In this matter, the Union commenced the enforcement proceedings before the IMC, whereas the Minister has commenced this application and it cannot be said that it is a 'stepping stone' in the matter before the Industrial Magistrate. It is not the same circumstances as those found in the *CSA decision*.
40. A declaration issued pursuant to s 46 is binding on the parties and the Industrial Magistrates Courts pursuant to 46(3). In this matter, a declaration has a real prospect of resolving any disagreement as to the true meaning of the relevant clause. Such a declaration would lessen the likelihood of further litigation and disputation in this Commission and in other courts. This weighs against dismissing these proceedings.

Nature of Dispute and Mechanism to Resolve

41. I now turn to considerations of the nature of the dispute and the mechanisms for resolution under s 46 and s 83 of the IR Act available to the parties.
42. In *RTBU*, the Acting President sets out the nature of the Commission's powers under s 46: [100]:

- 100 From the authorities referred to above and the express provisions of s 46 and s 83 of the Act, the following principles emerge in respect of an award as defined in s 46(5):
- (a) The power to interpret the true meaning of an award, pursuant to the power conferred by s 46, is to enable a determination of whether ambiguity arises and to resolve it, if it does.
 - (b) If a provision in question is capable in the ordinary sense of not having an ambiguous meaning, then consideration of the expressed or supposed intention of the provision does not fall to be considered under s 46.
 - (c) If a provision is found to be ambiguous, the Commission acting pursuant to s 46 can embark upon a fact-finding exercise to determine the surrounding circumstances that existed when the award or

industrial agreement was made. These surrounding circumstances can include ascertaining the object of the provision by:

- (i) inquiring into the history of the award;
 - (ii) any established custom, practice or usage which led to the making of the award and any relevant established custom, usage and practice since the award was made.
- (d) If ambiguity is found and after ascertaining the true meaning of the award and declaring its effect it is found the words in the provision in question are defective, in that the words do not put into effect or reflect that meaning or it is found that the words used require amendment to give fuller effect to the true meaning, the Commission is authorised to exercise arbitral power to amend the provision.
- (e) The power to interpret an award or industrial agreement pursuant to s 46 of the Act is, except for the power to amend a provision in s 46(1)(b), merely declaratory and any declaration made cannot be made as an order to enforce a right.
- (f) The determination of whether a particular employee has an entitlement pursuant to the provisions of an award is an enforcement matter in relation to which the Industrial Magistrate has exclusive jurisdiction to determine, pursuant to the power conferred by s 83 of the Act.
43. The Acting President refers to the power being one to enable a determination of whether an ambiguity arises and to resolve it. Assuming there is an ambiguity found, s 46 enables a declaration of the true meaning to be made and the Commission is authorised to exercise arbitral power to amend the provisions if this is required to give further effect to the true meaning.
44. The Minister's application in this matter does not refer to an ambiguity within cl 28. The application states that 'Some officers have questioned whether clause 28 of the industrial agreement requires the applicant (*the Minister*) to provide Officers with a 12 hour break if they worked Overtime following a 12 hour shift.' The application does not set out the reasoning of the questions posed to the Minister by some officers nor the Minister's response as to why the cl 28 does not require the officers be provided a 12-hour break.
45. The Union contends that the same task will be undertaken by this Commission should it hear APPL 1 of 2024 as the task that will be undertaken by the Industrial Magistrate in M 153 of 2023 and in these circumstances, there is the real and actual risk that both those decisions will be different.
46. The Union has not yet filed a response to the application in APPL 1 of 2024. The Union's claim in M 153 of 2023 does not provide any further information concerning differences between possible constructions or interpretations that inform the application of the clause concerning mandatory breaks between shifts following the working of overtime.
47. However, at this stage of proceedings, the construction issue to be resolved and the parties' contentions as to the true meaning are sufficiently set out to conclude that the same set of facts and same issues will be canvassed and there is a real and actual risk that different decisions will issue. Without more, it is not possible to conclude that M 153 of 2023 will require the same task or that there may be conflicting outcomes in the two proceedings. The most that can be said is that there may be a risk, however the likelihood of this is not possible to conclude at this stage of proceedings.
48. However, as Senior Commissioner Cosentino observed in APPL 63 of 2023 'there is potential for prejudice to the parties and individuals bound by the industrial agreement if the questions around construction are left unresolved'.
49. Similarly, I refer to the observations of Industrial Magistrate Kucera in *Western Australian Prison Officers' Union v Minister for Corrective Services* [2024] WAIRC 00152 on the appropriate avenue to resolve issues concerning disagreements on the application of industrial instruments:
- [65] Firstly where are respondent is a large and well resource government department, it is reasonable to expect it could have done more to prevent a contravention. On this, there were other avenues open to the respondent to resolve any issues it may have had regarding the interpretation of the 2020 agreement, in so far as it dealt with the requirement for Principal Officers to work on public holidays and what they would be paid. One such avenue was an application to the WAIRC under section 46 of the IR Act. This is a point to which I will turn to when framing the final orders.
 - [78] Rather than adopting and applying by directive, a new blanket approach to entitlement provisions that exposed the respondent to the risk of pecuniary penalty, the respondent could have utilised the more cautious avenue available to it under section 46 of the IR Act.
50. The Minister, by APPL 1 of 2024, seeks to clarify their obligations with respect to prison officers who work overtime following a 12-hour shift.
51. Acknowledging that there may be a risk, although difficult to discern the likelihood in these matters, that there will be conflicting outcomes in the two proceedings, this needs to be balanced against the risk that the Minister faces to penalties as set out by Senior Commissioner Cosentino and Industrial Magistrate Kucera. These considerations weigh against dismissing the application.

Abuse of Process

52. The Union says the Minister is using the processes in s 46 in an improper way and refers the Commission to *Jeffrey* in which the High Court of Australia examined what an abuse of process is and at [27] considered the approach taken in Australia and offered a number of categories of conduct attracting the intervention of the Courts in relation to an abuse of process and determined that 'proceedings where the process of the court is not being fairly honestly used but is employed for some ulterior or improper purpose or an improper way' would amount to an abuse of process.
53. The Union submits that the High Court went on at [28] to determine that although it offered a number of categories, the term

‘abuse of process’ is not limited to any particular categories and observed that the categories of ‘abuse of process’ are not closed.

54. The Union submits that the Commission should adopt a similar approach to that of the Industrial Magistrates Court in *Bernard Chipadza v Freo Group Pty Ltd* [2020] WAIRC 00273 (*Chipadza*) applying those principles set out in *Jeffery*.
55. I understand the Industrial Magistrate dismissed the application before them in *Chipadza* because the application sought to relitigate a previous failed application. The earlier application had been determined prior to the second application, which set out the same claim and the same facts.
56. In this matter, the applications said to be duplications have not been made by the same party. The applications do not have the same purpose. The applications seek different outcomes and do not recite the same facts. The application before the IMC has not yet been decided. The circumstances in this application are different to those in *Chipadza*.
57. The Union submits that there can be no doubt that if APPL 1 of 2024 proceeds that:
- a) there will be a duplication of the court’s resources, mindful that both the Commission and the Industrial Magistrates Court fall under the same umbrella of the Department of the Registrar; and
 - b) there will be an avoidable and illegitimate delay to M 153 of 2024 including a duplication of costs/ or unnecessary additional costs.
58. To that end, the Commission’s system is not being fairly used but is being employed in an improper way, all of which will give rise to the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public monies. The Union refers the Commission to the principles in *Mineralogy* and submits that adverse perceptions can be avoided, and in this case, it can be avoided by the dismissal of APPL 1 of 2024.
59. Acknowledging the principle set out by the Supreme Court in *Mineralogy*:

[68] ...

(g) that ‘An abuse of process can extend beyond a mere situation of a party seeking to relitigate matters or issues that have been finally decided. There may be an abuse of process found by a person seeking to litigate matters which could and should have been litigated in earlier proceedings.’

(o) Towards an issue of illegitimate oppression by bringing successive civil actions, the plurality justices duly concluded in *UBS AG v Tyne* at [58] and [59], in the following terms:

The fact that UBS is a large commercial corporation does not deny that permitting the Trust’s claim to proceed will subject it to unjustifiable oppression. That oppression is found not only in the significant delay in the resolution of the dispute and the inevitability of increased costs to UBS. **At its core is the vexation of being required to deal again with claims that should have been resolved in the SCNSW proceedings.** The fact that UBS had not been required to admit or defend the Trust’s claim **does not lessen that vexation...** On the final determination of the SCNSW proceedings, it was reasonable for UBS to order its affairs upon the understanding that the dispute between it and Mr Tyne, and the entities that he controlled, arising out of those dealings was at an end.

For the Federal Court to lend its procedures to the staged conduct of **what is factually the one dispute prosecuted by related parties under common control with the attendant duplication of court resources, delay, expense and vexation**, as Dowsett J found, is likely to give rise to the perception that the **administration of justice is inefficient, careless of costs and profligate in its application of public moneys.** The primary judge was right to permanently stay the proceedings as an abuse of the process of the Federal Court. (my emphasis)

60. I find that in the application commenced in APPL 1 of 2024 is not a duplication to that in M 153 of 2023 because they have not been made by the same party, the applications do not have the same purpose, they seek different outcomes and do not recite the same facts.
61. In this matter, the Minister has applied the relevant clause in the manner consistent with their interpretation of the meaning of the clause. Given there is a disagreement about the correct meaning and application of the clause from those persons affected by the clause, an application for interpretation is an appropriate course of action on their part. It cannot be concluded that the Minister could have or should have sought to litigate this matter in earlier proceedings. The Minister has not brought successive applications that could have been resolved in earlier proceedings. The application in M 153 of 2023 was commenced by another party, not the Minister.

Conduct of Parties, Delays and Stages of Proceedings

62. The Union does not claim that the Minister’s conduct, other than the making of this application, is an abuse of process.
63. The Union submits that APPL 1 of 2024 will cause delays in proceedings in M 153 of 2023; however has not referred to specific nor actual delays. There was not a significant delay in the commencement of these proceedings by the Minister. Documents for the IMC proceedings indicate that those proceedings are at a preliminary stage.
64. These factors weigh against dismissing APPL 1 of 2024.

Conclusion

65. For the reasons set out above, I refuse the Union’s application to dismiss APPL 1 of 2024.

2024 WAIRC 00295

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** WEDNESDAY, 12 JUNE 2024**FILE NO/S** APPL 1 OF 2024**CITATION NO.** 2024 WAIRC 00295**Result** Application to Dismiss Application Refused**Representation****Applicant** Mr D Anderson (of counsel)**Respondent** Mr D Stojanoski (of counsel)*Order*

HAVING HEARD from Mr Anderson on behalf of the applicant and Mr Stojanoski on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT the application pursuant to s 27(1)(a) of the *Industrial Relations Act 1979* (WA) to dismiss an application is refused.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

NOTICES—Application for General Order—

2024 WAIRC 00310

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Level 2, 111 St Georges Terrace, Perth Ph: (08) 9420 4444

Application No. CICS 2 of 2024

NOTICE**REVIEW OF LOCATION ALLOWANCE GENERAL ORDER 2 OF 2023 PURSUANT TO SECTION 50 OF THE INDUSTRIAL RELATIONS ACT 1979**

Notice is given of an application on the motion of the Western Australian Industrial Relations Commission to review the Location Allowance General Order with a view to rescinding Location Allowance General Order 2 of 2023 and issuing a new Location Allowance General Order pursuant to section 50 of the *Industrial Relations Act 1979*.

A copy of the draft schedules, including a list of all awards to which the proposed revised General Order will have application and the proposed rates, may be inspected by appointment at Level 2, 111 St Georges Terrace, Perth by any interested person without charge.

This matter will be heard by the Commission in Court Session: On: Thursday, 6 June 2024

At: 2:00 PM

At: Western Australian Industrial Relations Commission

Level 18, 111 St Georges Terrace,

Perth WA 6000

Any person wishing to appear at this hearing should provide notice to the Registrar by no later than Wednesday, 5 June 2024.

For further information, please contact the Associate to Senior Commissioner Cosentino by email at shiya.tee@wairc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

13 June 2024

Industrial Relations Act 1979
Industrial Relations Commission Regulations 2005

Form 17 – Notice of Hearing

Matter No.

CICS 2 of 2024

This Notice of Hearing is issued by the Western Australian Industrial Relations Commission

Parties:	Commission's Own Motion	Applicant
	(Not Applicable)	Respondent
Nature of matter:	Rescind Location Allowance General Order 2 of 2023 and issue a new General Order	
Hearing Type:	Hearing	


DETAILS OF PROCEEDINGS:

Commission Constituted by:	Senior Commissioner R Cosentino, Commissioner T Emmanuel, Commissioner T Kucera
Date:	Thursday, the 6th day of June 2024
Time:	2:00PM
Address:	Level 18, 111 St Georges Terrace, Perth WA 6000

Please inform the Commission as soon as possible if you require an interpreter or if you or any person attending the Commission with you require any special assistance; (*such as wheelchair access or audio hearing loop*).

Any enquiries in relation to this Notice of Hearing should be directed to Shiya Tee, Associate to Senior Commissioner R Cosentino, by telephone (08) 9420 4455 or by email to chambers-cosentino@waipc.wa.gov.au.

THE STAMP OF THE
WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS
COMMISSION
31 MAY 2024



Registrar

REGISTRAR
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
The Western Australian Industrial Relations Commission
Industrial Relations Commission Regulations 2005 – Form 17 – Notice of Hearing

NOTICES—Award/Agreement matters—

2024 WAIRC 00261

NOTICE

RETIREMENT FROM REGISTERED NURSES - AUSTRALIAN NURSING FEDERATION - DISABILITY SERVICES COMMISSION INDUSTRIAL AGREEMENT 2019 PURSUANT TO SECTION 41(7) OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 93 of 2024

IN THE MATTER of the filing in the Office of the Registrar a Notice of Retirement from an Industrial Agreement in accordance with section 41(7) of the *Industrial Relations Act 1979*, the Disability Services Commission will cease to be a party to the

Registered Nurses - Australian Nursing Federation - Disability Services Commission Industrial Agreement 2019 on and from the 22nd day of June 2024.

DATED at Perth this 28th day of May 2024.

[L.S.]

(Sgd.) S KEMP,
Registrar.

2024 WAIRC 00308

NOTICE

RETIREMENT FROM SHIRE OF KENT ENTERPRISE AGREEMENT 2015 PURSUANT TO SECTION 41(7) OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 106 of 2024

IN THE MATTER of the filing in the Office of the Registrar a Notice of Retirement from an Industrial Agreement in accordance with section 41(7) of the *Industrial Relations Act 1979*, the Shire of Kent will cease to be a party to the *Shire of Kent Enterprise Agreement 2015* on and from the 1st day of July 2024.

DATED at Perth this 6th day of June 2024.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2024 WAIRC 00297

NOTICE

RETIREMENT FROM TOWN OF BASSENDEAN ASSET SERVICES ENTERPRISE AGREEMENT 2020 PURSUANT TO SECTION 41(7) OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 104 of 2024

IN THE MATTER of the filing in the Office of the Registrar a Notice of Retirement from an Industrial Agreement in accordance with section 41(7) of the *Industrial Relations Act 1979*, the Town of Bassendean will cease to be a party to the *Town of Bassendean Asset Services Enterprise Agreement 2020* on and from the 1st day of July 2024.

DATED at Perth this 6th day of June 2024.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2024 WAIRC 00307

NOTICE

RETIREMENT FROM TOWN OF BASSENDEAN ENTERPRISE AGREEMENT 2020 PURSUANT TO SECTION 41(7) OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 105 of 2024

IN THE MATTER of the filing in the Office of the Registrar a Notice of Retirement from an Industrial Agreement in accordance with section 41(7) of the *Industrial Relations Act 1979*, the Town of Bassendean will cease to be a party to the *Town of Bassendean Enterprise Agreement 2020* on and from the 29th day of June 2024.

DATED at Perth this 6th day of June 2024.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

INDUSTRIAL MAGISTRATE—Claims before—

2024 WAIRC 00272

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2024 WAIRC 00272
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 8 MAY 2024
DELIVERED : THURSDAY, 6 JUNE 2024
FILE NO. : M 126 OF 2023
BETWEEN : CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION
CLAIMANT

AND

QUBE PORTS PTY LTD
RESPONDENT

CatchWords : INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) - Alleged contravention of a term of an enterprise agreement in the payment of a meal allowance – Proper construction of provisions relating to the payment of a meal allowance – Whether certain terms are inconsistent

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Act 1979 (WA)
Industrial Magistrate’s Court (General Jurisdiction) Regulations 2005 (WA)
Fair Work (Registered Organisations) Act 2009 (Cth)

Instrument : *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2020 Stevedoring Industry Award 2020*
POAGS Pty Ltd and Maritime Union of Australia Union Collective Agreement (Dampier) 2010
Qube Ports Pty Ltd and Maritime Union of Australia Enterprise Agreement 2011 (Port of Dampier)
Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2016
Stevedoring Industry Award 2010

Case(s) referred to in reasons: : *Maribyrnong City Council v Australian Municipal, Administrative, Clerical and Services Union* [2019] FCA 733
Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (2019) 366 ALR 698; [2019] FCAFA 59
Kucks v CSR Ltd (1996) 66 IR 182
Miller v Minister of Pensions [1947] 2 All ER 372
Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336
Sammut v AVM Holdings Pty Ltd [No2] [2012] WASC 27
Fedec v The Minister for Corrective Services [2017] WAIRC 00828; 97 WAIG 1595
City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813; 153 IR 426
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd [2013] FCA 638

Result : The claim is dismissed

Representation:

Claimant : Mr K. Sneddon (of counsel)

Respondent : Mr R. Boothman (of counsel)

REASONS FOR DECISION

The Claim

- 1 On 8 November 2023, the claimant lodged a claim pursuant to the *Fair Work Act 2009* (Cth) (FWA) seeking the payment of the amount of \$744.51, pre-judgment interest and the payment of a penalty for an alleged contravention by the respondent.
- 2 The particulars of the claim include:
 - a. a breach of s 50 of the FWA where it is alleged the respondent failed to pay Wayne Gordon (Mr Gordon) a meal allowance when he worked overtime shifts in excess of 1,820 hours per year contrary to cl 11.13.2 of Part A of the *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2020* (the Agreement) (the Meal Allowance);
 - b. payment of an amount of \$744.51 for the Meal Allowance, being an amount, the respondent was required to pay under a fair work instrument (the Agreement), and which is a contravention of a civil remedy provision;
 - c. the payment of a civil penalty in respect of the alleged contravention of the Agreement pursuant to s 546(1) of the FWA, and payment of the civil penalty to the claimant; and
 - d. pre-judgment interest on the amount to be paid.
- 3 The respondent denies the claimant's claim asserting that, on a proper construction of cl 11.13.2 of the Agreement, the respondent has not contravened the Agreement.
- 4 The claimant's evidence at trial was limited to an uncontested witness statement of Mr Gordon. My only observation of the content of Mr Gordon's evidence is that paragraph 7 of his witness statement contains a conclusionary statement on the ultimate issue, which is a matter of determination for the court.¹
- 5 The respondent relied upon the evidence of Daniel Ortiz, General Manager, Industrial Relations for the respondent. He has held this position since July 2022, and is responsible, relevantly, for negotiating and drafting enterprise agreements, employee engagement including implementing strategies and human resources policies and procedures. He is also responsible for identifying requirements in enterprise agreements that exist nationally and ensuring that the respondent is compliant.²
- 6 Schedule I contains the principles relevant to the jurisdiction, practice and procedure of the Industrial Magistrates Court (IMC) under the FWA and the *Industrial Relations Act 1979* (WA) (IR Act).
- 7 Schedule II contains the principles relevant to the construction of industrial instruments.

Agreed Facts and Facts not in Dispute

- 8 The parties submitted a statement of agreed facts, which are set out in Schedule III of these reasons (the Agreed Facts)
- 9 In accordance with the facts set out in paragraphs 2 and 3 of the Agreed Facts, the claimant has standing to bring the claim and the respondent is an organisation bound by the FWA.
- 10 The Agreement was approved by the Fair Work Commission on 18 August 2021 and operated from 25 August 2021 with a nominal expiry date of 30 June 2024. The Agreement applies to the respondent's employees at the Port of Dampier engaged in classifications in cl 11.1 of Part A.
- 11 Mr Gordon was employed by the respondent as a full-time salaried employee (FSE) at the Port of Dampier; a national systems employee; and entitled to the terms of the Agreement.
- 12 To those agreed facts, I would also add the following facts which, in my view, were either not in dispute or the subject of uncontroverted evidence which I find to be reliable.
- 13 As an FSE, Mr Gordon is required to work 1,820 hours per year from 1 July to 30 June.³
- 14 From 16 April 2022 to 30 June 2022, Mr Gordon worked 38 overtime shifts.⁴
- 15 Mr Gordon was not paid a standalone meal allowance when he worked the 38 overtime shifts [the entitlement to which is the issue in dispute].⁵
- 16 FSE and Provisional Full-Time Salaried Employees (PFSE) at the Port of Dampier who work overtime in excess of 1,820 hours in a year have never been paid the Meal Allowance by the respondent.⁶
- 17 The respondent paid FSE and PFSE a composite hourly rate payable to Supplementary Employees (SE), incorporating a 20% loading in respect of allowances including meal monies.⁷
- 18 Between 30 June 2019 and 3 March 2024, no respondent employee at the Port of Dampier covered by the Agreement was paid the Meal Allowance for any reason.⁸

Parties' submissions

- 19 The parties agree, in part, on the structure of the Agreement, including that the Agreement has two parts, Part A and Part B, with Part A applying nationally and Part B applying to the Port of Dampier (the Parts). The Parts are not disjunctive but the terms in Part B prevail to the extent of any inconsistency between Part A and Part B: cl 5.6 of Part A of the Agreement.
- 20 Further, the parties agree the Agreement is read in conjunction with the *Stevedoring Industry Award 2020* (2020 Award), save that if there is any inconsistency between the 2020 Award and the Agreement, the Agreement applies: cl 5.3 of Part A of the Agreement.

Claimant

- 21 Relevant to the claim, the claimant submits that an FSE is paid a fixed annualised salary, inclusive of a meal allowance, to work 1,820 hours annually. Thereafter, an FSE is entitled to overtime being paid at the hourly rate normally paid to SE where the FSE works over 1,820 annualised hours: cl 9.1.1a, cl 11.3 to cl 11.4 of Part A and cl 6.1 of Part B of the Agreement.

However, the claimant's contention is that, in addition to this hourly rate, an FSE who works overtime is also entitled to a standalone meal allowance in accordance with cl 11.13.2 of Part A of the Agreement. The claimant further contends there is no inconsistency between the inclusive overtime hourly rate in Part B and the entitlement to the Meal Allowance in Part A when working overtime shifts.

- 22 The claimant refers to cl 11.3 of Part A of the Agreement and says as follows:
- a. in an industrial sense, the terms *meal monies* and *meal allowance* mean the same thing;
 - b. notwithstanding an FSE annualised salary encompasses, amongst other things, meal monies or a meal allowance (cl 11.3, cl 11.4 and cl 11.5), this clause contemplates additional payments being made in addition to salaries and composite hourly rates where detailed in the Agreement; and
 - c. clause 11.13.2 is a circumstance where the Agreement contemplates an additional payment being made to the salary or composite rate, namely when an FSE works overtime (that is, works over 1,820 annualised hours per year).
- 23 The claimant further says its contention is strengthened by cl 30.6 of Part A of the Agreement where Permanent Employees⁹ receive a meal allowance for each overtime shift worked.
- 24 If the Meal Allowance was never paid to an FSE, cl 11.13.2 and cl 30.6 of Part A of the Agreement would never be enlivened for employees at the Port of Dampier leaving those clauses with 'no work to do'. These clauses must have been inserted with the intention of paying a meal allowance in certain circumstances, which the claimant submits includes an FSE working overtime.
- 25 It was open to the drafters of the Agreement to expressly exclude the payment of a meal allowance to an FSE working overtime in the same way the Agreement excludes overtime rates for Variable Salary Employees (VSEs), Provisional Variable Salary Employees (PVSEs), Guaranteed Wage Employees and SEs at the Ports of Port Hedland and Dampier under cl 30.7.3 of Part A of the Agreement.
- 26 The claimant submits that for the payment of a meal allowance, Part A and Part B of the Agreement work in harmony and are not inconsistent. When an FSE works overtime at the Port of Dampier, the employee is paid an hourly rate equivalent to an SE hourly rate under Part B *and* is entitled to a meal allowance under Part A.
- 27 The claimant agrees with the respondent's contention to the extent that the composite hourly rate paid to an SE is inclusive of meal monies (see cl 2.3.1 of Part B of the Agreement), but says cl 2.3 of Part B, as it relates to an FSE, is to set an hourly rate for overtime work for an FSE, not to determine *more broadly* FSE remuneration. It would be a mistake to conflate the entitlements paid to an SE with those paid to an FSE. An SE gets paid a composite rate incorporating all their entitlements (including meal allowance) and an FSE gets paid the same composite rate for working overtime *plus* a meal allowance.
- 28 The claimant says the respondent manufactures an inconsistency which does not exist when regard is had to the plain wording of the Agreement.
- 29 The provision of an additional benefit for an FSE when they work overtime does not result in any inconsistency between Part A and Part B of the Agreement, nor does it render the Agreement unworkable. In this way, the Agreement is clear and unambiguous.

Respondent

- 30 The respondent submits, under the Agreement, the phrase *meal monies* is intended to incorporate the phrase *meal allowance* where a meal allowance is the payment of money in lieu of the provision of a meal. This renders an inconsistency between the terms in Part A and Part B of the Agreement, as it relates to the payment of a meal allowance, and Part B therefore applies to the extent of that inconsistency.
- 31 Both historically and when construed according to its ordinary meaning, the term 'meal monies' applies where the respondent pays an employee in lieu of providing them with an actual meal.
- 32 Under the Agreement, this occurs in cl 26.9 and cl 11.13 of Part A of the Agreement for an interstate or intrastate port transfer or when overtime is worked. Thus, when considering the term *meal monies*, it should incorporate the term *meal allowance*, which is included in the composite hourly rate paid to SEs.
- 33 The respondent says consequentially any entitlement Mr Gordon has to the Meal Allowance under cl 11.13.2 of Part A of the Agreement is overridden by cl 2.3.1 of Part B of the Agreement where, if an overtime shift is worked, he is entitled to payment at the SE composite rate being a 20% loading for, amongst other things, *meal monies* (incorporating the Meal Allowance).
- 34 To find otherwise would mean an FSE who works over 1,820 annualised hours would be paid the SE composite rate of \$65.08 (inclusive of *meal monies*) *plus* the Meal Allowance of \$19.09, described as 'double dipping'.
- 35 While cl 11.13.2 of Part A of the Agreement might expect the payment of a standalone meal allowance for an FSE who works overtime, the respondent says Part B applies as follows:
- a. clause 6 provides that an FSE is entitled to overtime paid at the SE hourly rate; and
 - b. clause 2.3.1 provides that the composite hourly rate payable to an SE includes a 20% loading to account for various entitlements including *meal monies*.
- 36 Clause 2.3.1 of Part B of the Agreement is unambiguous and should be understood in the broader context of the Agreement concerning the payment of entitlements and the payment structure.
- 37 It was open to the parties to the Agreement to retain only cl 11.13.2 of Part A at the Port of Dampier. However, the parties agreed a port specific entitlement in Part B relevant to FSEs working overtime. Consistent with this agreement and the respondent's understanding of the parties' intention as it related to the composite hourly rate payable, the respondent never

paid a standalone meal allowance to FSEs who worked over 1,820 annualised hours. The reason being is that the composite hourly rate for paid overtime already incorporated meal monies (inclusive of or equivalent to a meal allowance).

Meal Monies versus Meal Allowance

- 38 As I understood the claimant's oral submissions, the claimant agreed the terms *meal monies* and *meal allowance* mean the same thing. That is, a payment in lieu of the provision of a meal.
- 39 However, to the extent that there is disagreement on this issue, I would resolve the issue in favour of the respondent's suggested interpretation. That is, the terms are used interchangeably in the Agreement but have the same meaning. I would do so for the following reasons:
- 40 The Agreement is the successor to various iterations, including:
- *POAGS Pty Ltd and Maritime Union of Australia Union Collective Agreement (Dampier) 2010* (2010 Agreement)
 - *Qube Ports Pty Ltd and Maritime Union of Australia Enterprise Agreement 2011 (Port of Dampier)* (2011 Agreement)
 - *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2016* (2016 Agreement)
- 41 The Agreement is to be read in conjunction with the 2020 Award, although where there is any inconsistency between the Agreement and any provision of the 2020 Award, the Agreement applies to the extent of the inconsistency: cl 5.2a and cl 5.3 of the Agreement.
- 42 Similarly, the 2010 Agreement incorporated the terms of the *Stevedoring Industry Award 2010* which came into effect in October 1999, provided that the terms of the 2010 Agreement prevailed where they were inconsistent with an incorporated term of that award: cl 4 of the 2010 Agreement.
- 43 The terms *meal monies* and *meal allowance* are often used together within the same clause in reference to the same subject matter: cl 11.3, cl 11.4, and cl 11.5 of Part A of the Agreement.
- 44 These same terms also apply in the same way in previous versions of the Agreement: cl 11.3, cl 11.4 and cl 11.5 of Part A of the 2016 Agreement; cl 11.5 and cl 11.8.2(a) of the 2011 Agreement; cl 9 of the 2010 Agreement.
- 45 The SE Hourly Rate in cl 2.3.1 of Part B of the 2011 Agreement; the 2016 Agreement; and the 2020 Agreement included payment for, amongst other things, *meal monies*.
- 46 The 2020 Award uses the term *meal allowance* but does so in the same context to that contained in the various agreements.
- 47 There is simply no alternative meaning attributable to the use of those words in the context in which the words are used. Accordingly, the only reasonable interpretation is that *meal monies* and *meal allowance* mean the same thing. Notably, many of the same clauses permeate the agreements and were no doubt carried over from agreement to agreement suggestive of the phrase '*if it ain't broke, don't fix it*'.
- 48 On that basis, where the term is used in a general sense, the term meal allowance will be used for the remainder of these reasons.

Issue for Determination

- 49 The principal issue for determination is whether there is an inconsistency between Part A and Part B of the Agreement relating to the payment of the Meal Allowance for an FSE.
- 50 As already stated, cl 5.6 of Part A of the Agreement provides that in the event of any inconsistency between Part A and Part B, Part B prevails to the extent of the inconsistency.
- 51 The same, or similar, Part A and Part B terms were also contained in cl 4 of the 2010 Agreement, cl 5.5 of the 2011 Agreement and cl 5.6 of the 2016 Agreement.

Inconsistency

- 52 While I accept the parties' submission (albeit phrased differently) that the question for determination is whether there is an inconsistency between the terms in Part A and Part B, I am not convinced this question is limited to a yes or no answer by comparing cl 11.13.2 in Part A with cl 6 in Part B.
- 53 In my view, the starting point is to consider how Parts A and B of the Agreement are intended to operate.
- 54 The reason for doing so follows consideration of the process undertaken by Wheelahan J in *Maribyrnong City Council v Australian Municipal, Administrative, Clerical and Services Union* [2019] FCA 733. In summary, *Maribyrnong City Council Enterprise Agreement 2016* contained a similar clause to cl 5.6 of the Agreement, save that it also expressly provided that Part A was to be read in conjunction with the other parts. I accept the nature of the enquiry was different and the structure of the agreement was likely different, but the principles applied in resolving the question of inconsistency, in my view, are apposite to the question to be resolved in this case.
- 55 That is, firstly, '*while the process of construction ... should focus on the text of the Agreement, the text is to be construed in its context and having regard to its industrial purpose*': *Maribyrnong City Council* at [44]. In this case, the Agreement is an industrial instrument where the terms of Part B are specific to employees at the Port of Dampier and, in that context, are designed to prevail over conflicting generic terms of Part A. However, it is also clear Part A and Part B, where possible, are to be read together to bind the respondent and its employees: cl 4.1 and cl 5.1 of the Agreement.
- 56 Second, there may be inconsistency between the terms in Part A and Part B of the Agreement, and, if the terms cannot be sensibly and fairly read together, there may be terms in Part B which are intended to cover a particular subject matter to the exclusion of terms in Part A such that the terms of Part B prevail: *Maribyrnong City Council* at [53].

- 57 By way of example, cl 54 of Part A of the Agreement and cl 4 of Part B of the Agreement refer to the establishment of committees in the workplace.
- 58 Clause 54 of Part A provides for the requirement of an employee representative committee (ERC) and health and safety committee (HSC) in each workplace. Clause 54.3 of Part A provides that all committees will be elected from the workplace and there will be a minimum of nine ERC meetings each year and a minimum of 11 HSC meetings each year. However, cl 54 of Part A does not provide for the mechanics of these meetings. This is provided for in Part B, no doubt because it is port specific.
- 59 Clause 4 of Part B provides more detail regarding where, how and the composition of the meetings at the Port of Dampier, but, relevantly, cl 4.1b of Part B provides there are to be a minimum of eight ERC meetings each year and cl 4.2a of Part B provides there are to be a minimum of 12 HSC meetings each year. That is, there is an inconsistency between Part A and Part B as to the number of ERC and HSC meetings to be held each year at the Port of Dampier.
- 60 A sensible and fair reading of the operation of cl 54 of Part A and cl 4 of Part B is that an ERC and HSC is to be formed at the Port of Dampier but they are to operate in accordance with cl 4.1, cl 4.2 and cl 4.3 of Part B with a minimum of eight ERC meetings each year and a minimum of 12 HSC meetings each year (rather than the minimums provided for in cl 54.3 of Part A).
- 61 Thus, beyond the need to form an ERC and HSC, cl 4 of Part B was intended to otherwise cover the operation of these meetings to the exclusion of cl 54.3 of Part A.
- 62 By adopting the process in *Maribyrnong City Council*, proper regard can also be had to the well-known principles applicable to the construction of enterprise agreements and awards as set out in [39] to [40] of that judgment.¹⁰
- 63 With that in mind, it might be tempting to launch into an analysis of the payment of a meal allowance under the Agreement. However, the payment of a meal allowance is associated with other circumstances, one of which is overtime, the foundation for the claim.
- 64 To determine if any inconsistency exists between Part A and Part B as it relates to the payment of a meal allowance for overtime work by an FSE, in my view, it is necessary to consider both the remuneration and the operation and payment of overtime relevant to an FSE.

Remuneration of FSEs

- 65 Clause 11 of Part A of the Agreement and its subclauses provide for: how the rates of pay are calculated for an FSE; where the rates of pay apply; and what the rates of pay include (or exclude). Save for a table in cl 11.7, which is the 2020 Award rates of pay and only apply where referred to in the Agreement, cl 11 does not otherwise provide the actual rates of pay or remuneration for employees, including FSEs (see also cl 11.8 of Part A of the Agreement).
- 66 The remuneration of employees at the Port of Dampier is determined by reference to the classifications in Schedule 2 of Part A of the Agreement¹¹ and cl 2 of Part B of the Agreement.
- 67 That is, the classifications in Schedule 2 of Part A of the Agreement are likely national classifications with the remuneration attributable to those classifications in cl 2 of Part B referable to the Port of Dampier.
- 68 However, a fair and sensible reading of the terms of the remuneration in Part B of the Agreement is not that it applies without reference to Part A. That is, the remuneration amounts in Part B are predicated on the basis stated in cl 11.3, cl 11.4 and cl 11.5 of Part A of the Agreement.
- 69 That is, relevant to an FSE:
- a. salary and composite hourly rates include allowances, leave loadings, shift premiums, a meal allowance and the application of the irregular part of any roster (where applicable), although this is subject to additional payments where the Agreement provides for such payment arrangements: cl 11.3 of Part A of the Agreement;
 - b. the history of the salary and composite hourly rates included wage related allowances, shift penalties, overtime, public holidays, weekend penalties and a meal allowance: cl 11.4 of Part A of the Agreement; and
 - c. the remuneration in Part B of the Agreement continues to include a meal allowance: cl 11.5 of Part A of the Agreement.
- 70 The apparent intention of cl 11.3, cl 11.4 and cl 11.5 of Part A of the Agreement, and reinforced in cl 11.6, is to make clear that the remuneration in cl 2 of Part B of the Agreement is the *total* remuneration relevant to classifications, unless the Agreement otherwise entitles additional payments *where applicable*.
- 71 There is no inconsistency between the actual remuneration in cl 2 of Part B and the basis underpinning the remuneration provided in cl 11 of Part A of the Agreement.

The Operation and Payment of Overtime under the Agreement

- 72 Clause 30 of Part A and cl 6 of Part B of the Agreement both provide for overtime (other than shift extensions) for an FSE.
- 73 The significant difference between Part A and Part B of the Agreement is remuneration for working overtime.
- 74 Clause 30.2 of Part A of the Agreement provides that all hours worked in excess of or outside the ordinary hours of work are to be paid in accordance with the 2020 Award, which, having regard to cl 21 of the 2020 Award, could be anywhere from 200% to 312.5% of the ordinary hourly rate of pay. Clause 30.5 of Part A of the Agreement provides that Permanent Employees, including FSEs, who work in excess of 1,820 annualised accumulated hours are paid in accordance with the rates in cl 30.5 and, *in addition*, to those rates, Permanent Employees *also* receive a meal allowance for each shift worked in cl 30.6.

- 75 Clause 6 of Part B of the Agreement provides that an FSE (and other employees) who work more than 1,820 hours per year will be paid overtime at the 'Supplementary Employees hourly rate' (SE Hourly Rate).
- 76 The following observations apply:
- a. to the extent that there is a difference in the amount calculated for overtime payments between the 2020 Award and the Agreement, cl 6 of Part B of the Agreement is intended to cover the payment of overtime for an FSE. That is, there is an inconsistency between Part A and Part B as to the payment of an amount of overtime for an FSE;
 - b. the payment of a meal allowance in cl 30.6 of Part A of the Agreement is tied to the payment rate in cl 30.5. That is, in my view, the words 'in addition to' and 'also' in cl 30.6 of Part A, indicates the payment of a meal allowance does not operate independently of the overtime payment rate. Therefore, unless the employee is entitled to be paid at penalty rate in cl 30.5 of Part A of the Agreement, they are not entitled to a meal allowance in cl 30.6 of Part A of the Agreement; and
 - c. clause 2.3.1 of Part B of the Agreement provides that the composite hourly rate payable to SE is set out in the table in the clause and incorporates a 20% loading in respect of leave, etc, as well as shift premiums and allowances and a meal allowance.
- 77 The claimant's submission that a clause like cl 30.7.3 of Part A of the Agreement could have been inserted after cl 30.6 of Part A of the Agreement may be true, but, in my view, it does not otherwise change a fair and sensible reading of cl 30.5 and cl 30.6 of Part A of the Agreement. Nor does it change the wording in cl 2.3.1 and cl 6 of Part B of the Agreement as it relates to the payment of overtime for an FSE.
- 78 As an aside, there appears to be a duplication of classifications of employees in cl 30.5 and cl 30.7 of Part A of the Agreement, where the definition of Permanent Employee includes VSE and PVSE, however, this anomaly does not need to be reconciled in the case. For the same reasons given at [72] - [75], the payment of overtime for this classification of employee is also covered by cl 6 of Part B of the Agreement. In addition, I note the document was likely drafted by those without a keen eye on legal niceties, and there is little, if any, relevance for determining the issue in dispute in this case.

Payment of a Meal Allowance

- 79 Clause 11.11 of Part A of the Agreement provides that employees are entitled to the following allowances *where applicable*: cl 11.12 - Trainers Allowance; and cl 11.13 - Meal Allowance.
- 80 Clause 11.13.1 of Part A of the Agreement provides that unless a meal allowance is incorporated into a salary, it is payable in accordance with the 2020 Award and the amount payable is set out in the table provided.
- 81 Clause 11.13.2 of Part A of the Agreement provides that, relevantly, FSEs are not entitled to the payment of a standalone meal allowance other than where overtime is worked or where specifically identified in the Agreement.
- 82 It is this clause, which the claimant substantially relies upon to make its claim.
- 83 Is there an inconsistency between cl 11.13.2 of Part A of the Agreement and cl 6 of Part B of the Agreement as it relates to payment of a meal allowance for overtime worked by an FSE?
- 84 The claimant says there is not an inconsistency, and these two clauses can and do work harmoniously with each other. The respondent says there is an inconsistency, and that the claimant's construction results in 'double dipping'.

Determination

- 85 For the following reasons, I find there is an inconsistency between cl 11.13.2 of Part A of the Agreement and cl 6 of Part B of the Agreement:
- a. as is generally accepted by the parties, Part A of the Agreement is intended to apply across ports operated by the respondent where Part A contains many generic terms (by way of example but not limited to, cl 9, cl 13, cl 21 and so on);
 - b. Part B of the Agreement is port specific and is intended to apply, in this case, to the Port of Dampier with specific clauses that are unlikely to apply to all or other ports operated by the respondent (by way of example but not limited to, cl 13 (heat agreement), cl 16 (payment of north-west expense or allowance), cl 18 (cyclone procedure));
 - c. remuneration of FSEs, both in relation to the payment of annualised hours and overtime, is port specific with Part B of the Agreement determining the amount to be paid for both;
 - d. clause 6 of Part B of the Agreement is intended to cover the rate of pay for overtime worked by an FSE;
 - e. the rate of pay for overtime worked as provided in cl 6 of Part B of the Agreement is the SE Hourly Rate, which is a composite rate inclusive of, amongst other things, the Meal Allowance;
 - f. clause 30.6 of Part A of the Agreement is not intended to be read as a separate entitlement to the penalty rate provided in cl 30.5 of Part A; and
 - g. clause 11.11 of Part A of the Agreement entitles an employee to the Meal Allowance under cl 11.13.2 *where applicable*, meaning a meal allowance is to be paid to an FSE who works overtime, but that is not when working overtime at the Port of Dampier, which is covered by cl 6 of Part B.
- 86 I further find that cl 11.13.2 of Part A and cl 6 of Part B cannot fairly and sensibly be read together where to find otherwise would mean that an FSE who works overtime at the Port of Dampier would be remunerated twice for the Meal Allowance. That is, by being remunerated for a standalone meal allowance and by payment of a composite overtime rate which includes a meal allowance. I do not accept this was drafters' intention, which is also consistent with the parties' historical position where

no Meal Allowance was paid to an FSE who worked overtime shifts between 30 June 2019 and 3 March 2024, and bargaining on a new enterprise agreement must have occurred prior to the 2020 Agreement being approved on 18 August 2021.

- 87 Accordingly, as provided in cl 5.6 of Part A of the Agreement, cl 6 of Part B of the Agreement prevails to the exclusion of any overtime payment terms in Part A of the Agreement, inclusive of cl 11.13.2 and cl 30.6.
- 88 It is not that cl 11.13.2 and cl 30.6 of Part A of the Agreement have ‘no work to do’, but they have been excluded in their operation by cl 5.6 of Part A of the Agreement, which is consistent with the intention of the drafters of the Agreement in having two operative parts that may overlap on occasion but where only one part can reasonably, and was intended to, apply.
- 89 As a result, I am not satisfied the claimant has proven its claim that the respondent contravened cl 11.13.2 of Part A of the Agreement in failing to pay the Meal Allowance for the overtime shifts worked by Mr Gordon.
- 90 The claimant’s claim is dismissed.

Orders

- 91 The claim is dismissed.

D. SCADDAN

INDUSTRIAL MAGISTRATE

SCHEDULE I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court of Western Australia Under the *Fair Work Act 2009* (Cth) and the *Industrial Relations Act 1979* (WA)

Jurisdiction

- [1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA. The IMC, being a court constituted by an industrial magistrate, is ‘an eligible State or Territory court’: s 12 of the FWA (see definitions of ‘eligible State or Territory court’ and ‘magistrates court’); IR Act s 81, s 81B.
- [2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.
- [3] The civil penalty provisions identified in s 539 of the FWA include:
- Section 50 – contravening a term of an enterprise agreement.
- [4] An ‘employer’ has the statutory obligations noted above if the employer is a ‘national system employer’ and that term, relevantly, is defined to include ‘a corporation to which paragraph 51(xx) of the Constitution applies’: s 14 and s 12 of the FWA. The obligation is to an ‘employee’ who is a ‘national system employee’ and that term, relevantly, is defined to include ‘an individual so far as he or she is employed ... by a national system employer ...’: s 13 of the FWA.
- [5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for a person to pay a pecuniary penalty: s 546 of the FWA.
- [6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the modern award or FWA: s 545(3)(a) of the FWA.

Burden and Standard of Proof

- [7] In an application under the FWA, the claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof ‘on the balance of probabilities’. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say “we think it more probable than not,” the burden is discharged, but, if the probabilities are equal, it is not.

- [8] In the context of an allegation of the breach of a civil penalty provision of the Act it is also relevant to recall the observation of Dixon J said 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).

- [9] 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 of Western Australia

- [10] Subject to the provisions of the FWA, the procedure of the IMC relevant to claims under the FWA is contained in the *Industrial Magistrate’s Court (General Jurisdiction) Regulations 2005* (WA) (IMC Regulations). Notably, reg 35(4) of the IMC Regulations provides the court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.

[11] In *Sammut v AVM Holdings Pty Ltd [No 2]* [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:

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 [40]. (citations omitted)

SCHEDULE II: Construction of Industrial Instruments

[1] This case involves construing an enterprise agreement. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in *Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; 97 WAIG 1595 [21] - [23].

In summary (omitting citations), the Full Bench stated:

The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement;

- (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
- (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
- (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
- (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
- (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ;
- (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation; and
- (7) industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.

[2] The following is also relevant:

Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed. *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426 [53] - [57] (French J) (City of Wanneroo).

Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate: *City of Wanneroo* [53] - [57] (French J); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638 [28] - [30] (Katzmann J).

SCHEDULE III: STATEMENT OF AGREED FACTS

PRELIMINARY

[1] For the purpose of these proceedings only, the parties agree the following facts.

CLAIMANT

[2] The claimant was at all material times:

- a. a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act);
- b. a body corporate able to be sued in its registered name by reason of section 27 of the RO Act;
- c. an 'employee organisation' as defined in section 12 of the FWA; and
- d. an employee organisation to which the Agreement applied within the meaning of section 52 of the FWA.

RESPONDENT

[3] The respondent was at all material times:

- a. a 'constitutional corporation' within the meaning of that term in section 12 of the FWA;
- b. a 'national system employer' within the meaning of that term in section 14 of the FWA;
- c. a corporation able to sue and be sued; and

d. an employer to which the Agreement applied within the meaning of section 52 of the FWA.

THE AGREEMENT

[4] The Agreement was approved by the Fair Work Commission on 18 August 2021.

[5] The Agreement operated from 25 August 2021 and has a nominal expiry date of 30 June 2024.

[6] The Agreement applies to stevedoring Employees engaged in the classifications set out at clause 11.1 and Schedule 2 of the Agreement and who are employed by the respondent at the Port of Dampier from 25 August 2021.

THE AFFECTED WORKER

[7] At all material times Wayne Gordon was:

- a. employed as an FSE by the respondent at the Port of Dampier;
- b. a national system employee; and
- c. entitled to the terms of the Agreement.

¹ Exhibit 1 - Witness statement of Wayne Gordon filed 22 March 2024.

² Exhibit 2 - Affidavit of Daniel Ortiz affirmed on 5 April 2024 at [5].

³ Exhibit 1 at [6].

⁴ Exhibit 1 at [8].

⁵ Exhibit 1 at [9].

⁶ Exhibit 2 at [12b].

⁷ Exhibit 2 at [12a].

⁸ Exhibit 2 at [13] to [15].

⁹ Defined in cl 2.1p of Part A of the Agreement to mean: FSE 'paid a fixed salary in accordance with clause 9.1 of this Agreement, a Provisional Full-time Salary Employee (PFSE) paid a fixed salary in accordance with clause 9.2. A Variable Salary Employee (VSE) who is irregularly engaged to work and is paid a minimum salary in accordance with clause 9.5 of this Agreement and a Provisional Variable Salary Employee (PVSE) who is irregularly engaged to work and is paid a minimum salary in accordance with clause 9.6 of this Agreement.'

¹⁰ *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* (2019) 366 ALR 698; [2019] FCAFA 59 at [5]; and *Kucks v CSR Ltd* (1996) 66 IR 182 at 184

¹¹ See cl 11.1 of Part A of the Agreement.

2024 WAIRC 00220

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2024 WAIRC 00220
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 8 MAY 2024
DELIVERED : FRIDAY, 17 MAY 2024
FILE NO. : M 149 OF 2023
BETWEEN : CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION

CLAIMANT

AND

QUBE PORTS PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth) – Failure to pay an intra port transfer allowance for one night in accordance with the terms of an enterprise agreement

Legislation : *Fair Work Act 2009* (Cth)
Crimes Act 1914 (Cth)
Industrial Relations Act 1979 (WA)
Industrial Magistrate's Court (General Jurisdiction) Regulations 2005 (WA)

Instrument	:	<i>Qube Ports Pty Ltd Port of Tasmania Enterprise Agreement 2020</i>
Case(s) referred to in reasons:	:	<p><i>Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)</i> [2016] FCA 244; 242 FCR 492</p> <p><i>Miller v Minister of Pensions</i> [1947] 2 All ER 372</p> <p><i>Briginshaw v Briginshaw</i> [1938] HCA 34; 60 CLR 336</p> <p><i>Sammut v AVM Holdings Pty Ltd (No 2)</i> [2012] WASC 27</p> <p><i>Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)</i> [2017] FCA 557</p> <p><i>Australian Building and Construction Commissioner v Pattinson</i> [2022] HCA 13; 274 CLR 450</p> <p><i>NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission</i> [1996] FCA 1134; 71 FCR 285</p> <p><i>Kelly v Fitzpatrick</i> [2007] FCA 1080; 166 IR 14</p> <p><i>Mason v Harrington Corporation Pty Ltd</i> [2007] FMCA 7</p> <p><i>Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith</i> [2008] FCAFC 8; 165 FCR 560</p> <p><i>Commonwealth v Director, Fair Work Building Inspectorate</i> [2015] HCA 46; 258 CLR 482</p> <p><i>Rocky Holdings Pty Ltd v Fair Work Ombudsman</i> [2014] FCAFC 62; 221 FCR 153</p> <p><i>Fair Work Ombudsman v South Jin Pty Ltd (No 2)</i> [2016] FCA 832</p> <p><i>Sayed v Construction, Forestry, Mining and Energy Union</i> [2016] FCAFC 4; 239 FCR 336</p> <p><i>Trade Practices Commission v CSR Ltd</i> [1990] FCA 762;</p>
Result	:	Pecuniary penalty to be paid
Representation:		
Claimant	:	Mr K. Sneddon (of counsel)
Respondent	:	Mr R. Boothman (of counsel)

REASONS FOR DECISION

Introduction

- 1 On 11 December 2023, the Construction, Forestry and Maritime Employees Union (the claimant) lodged a claim alleging that Qube Ports Pty Ltd (the respondent) failed to comply with the *Qube Ports Pty Ltd Port of Tasmania Enterprise Agreement 2020* (the Agreement) and contravened s 50 of the *Fair Work Act 2009* (Cth) (FWA) by failing to pay an (intra port transfer) allowance to Craig Duncan (Mr Duncan) in accordance with Part B, cl 7.1.3 of the Agreement (Allowance).
- 2 The claimant applies for a pecuniary penalty in respect of the alleged contravention.
- 3 On 16 January 2024, the respondent formally admitted it had not paid the Allowance prior to or on the day of the intra port transfer, which was entitled to be paid on 17 January 2022. However, the respondent says the Allowance was paid in full to Mr Duncan on 21 January 2022, and otherwise denies that a pecuniary penalty should be awarded.
- 4 The parties provided to the court a Statement of Agreed Facts (the Agreed Facts) and an outline of written submissions on the payment of a pecuniary penalty. The parties also made oral submissions.
- 5 In addition, the respondent relies upon the affidavit of Daniel Ortiz, General Manager – Industrial Relations (Mr Ortiz) affirmed on 28 March 2024 (Ortiz Affidavit).
- 6 Schedule I of these reasons outline the jurisdiction, standard of proof and practice and procedure of the Industrial Magistrates Court (IMC).
- 7 Schedule II of these reasons outline the provisions of the FWA and principles relevant in determining an appropriate pecuniary penalty (if any) for the respondent’s contraventions.

The Agreed Facts

- 8 Schedule III of these reasons annex the Agreed Facts (only). The salient facts from the Agreed Facts are as follows.
- 9 The Agreement was approved by the Fair Work Commission on 23 December 2020.
- 10 Mr Duncan was employed by the respondent at the Port of Burnie, Tasmania, four hours’ drive from the Port of Risdon.
- 11 On 15 January 2022, the respondent requested Mr Duncan to work a 12-hour shift on 17 January 2022 at the Port of Risdon on an intra port transfer. Mr Duncan confirmed his availability to work the shift.
- 12 On 16 January 2022, the respondent rostered Mr Duncan to work at the Port of Risdon using the respondent’s computer-based roster allocation system (Microster), and Mr Duncan drove to, and accommodated himself at, Risdon.
- 13 On 17 January 2022, Mr Duncan worked the 12-hour rostered shift.

- 14 At the completion of the rostered shift, Mr Duncan was unable to return to the Port of Burnie because he would have exceeded the Agreement's combined maximum travel time and hours worked in any one day.
- 15 Accordingly, Mr Duncan accommodated himself overnight in Risdon on 17 January 2022.
- 16 On 19 January 2022, Mr Duncan notified the respondent's Site Supervisor, Ben Ward (Mr Ward), by email that he had not been paid the Allowance for one of the two nights he had accommodated himself in Risdon.
- 17 On 20 January 2022, Mr Ward instructed the respondent's payroll to pay Mr Duncan the Allowance of \$229.83.
- 18 On 21 January 2022, the respondent paid Mr Duncan the Allowance of \$229.83.

Other Evidence

- 19 To the Agreed Facts, I would also add the following facts which were either not in dispute or the subject of uncontroverted evidence deposed to in the Ortiz Affidavit.
- 20 The respondent employs 2,025 employees and the respondent's corporate group employs approximately 10,000 employees.
- 21 The respondent's payroll team operates Monday to Friday from 9.00 am to 5.00 pm.
- 22 Mr Ward is no longer employed by the respondent, but enquiries were made with the respondent's operations team in Tasmania to, relevantly, obtain information about the process for employees who intended to accommodate themselves on intra port transfers.
- 23 These enquiries demonstrated an informal process existed, which was readily understood by the operations teams, whereby an Operations Manager enquires with an employee whether they are available to work at another port, discusses the combined work and travel time, and inquires whether the employee needs the respondent to arrange accommodation or whether the employee will arrange their own.
- 24 The employee verbally agrees (or does not agree) to work a shift at another port.
- 25 If the Operations Manager approaches an employee over a weekend to work at another port on a Monday, requiring the employee to travel on a Sunday, the same discussion occurs, save that the Operations Manager and employee agree to process the Allowance once the respondent's payroll team have returned to work (after the weekend).
- 26 The Operations Manager notifies the respondent's National Labour Centre, which controls and enters the employee's shift on Microster, and the employee formally accepts or rejects the shift on Microster.
- 27 Thereafter, the Operations Manager notifies the respondent's payroll team by email (the preferred option) or verbally about the shift and the payment of any applicable allowances, including the Allowance.
- 28 Mr Duncan's intra port transfer was arranged on a Saturday and consequently the respondent's payroll team would not have been aware of transfer until Monday (17 January 2022).
- 29 Mr Ortiz looked for, but did not locate any, correspondence between Mr Duncan and the respondent identifying that Mr Duncan intended to arrange his own accommodation or between Mr Ward and the respondent's payroll team identifying Mr Duncan's work and travel time on 17 January 2022 would exceed the maximum allowed.
- 30 Emails between Mr Duncan, Mr Ward and Alisha Bull, Deputy Secretary of the Tasmanian Branch of the Maritime Union of Australia (Ms Bull), indicate the respondent was notified of its obligation to pay the second night of the Allowance at 11.58 pm on 19 January 2022.
- 31 On 20 January 2022 at 10.55 am, Mr Ward agreed the Allowance should be paid for the second night and informed Mr Duncan the request had been submitted to payroll to be included in the next pay noting the amount to be paid was *small*.
- 32 On the same day, Ms Bull emailed Mr Ward requesting immediate payment of the Allowance in accordance with the terms of the Agreement.
- 33 On 21 January 2022 at 10.59 am, Mr Ward emailed Mr Duncan, Ms Bull and others confirming the Allowance was paid.
- 34 Mr Ortiz was first aware of the respondent's non-compliance with payment of the Allowance when the respondent was served with the claim for M 149 of 2023 on 20 December 2023.
- 35 On 25 March 2024, Mr Ortiz arranged for an email to be sent to all port operation managers, which referred to an operations manager meeting and arrangements for manual payments of the Allowance on the day before or on the day of travel to ensure compliance with the Agreement.
- 36 In addition, Mr Ortiz has requested any intra port transfers to be added as a standing agenda item to the fortnightly operations meeting so the respondent can monitor the process and payroll's awareness of payments.
- 37 Mr Ortiz acknowledges the respondent's error, has cooperated with the claimant and the respondent's lawyers to admit the claim, and apologises to Mr Duncan for any inconvenience caused to him.

The Claimant's Submissions on Penalty

- 38 In summary, the claimant submits:
 - the IMC is empowered to order a person to pay a pecuniary penalty the court considers appropriate if the court is satisfied the person has contravened a civil remedy provision: s 546(1) of the FWA;
 - contraventions of s 50 of the FWA are contraventions of a civil remedy provision: s 539(2) of the FWA, where the maximum penalty for the contravention is 300 penalty units or \$66,600;¹
 - Mr Duncan was paid the second night's Allowance five days after it was due;

- the respondent should have been aware Mr Duncan would have been away from his home port for two nights and was entitled to the Allowance for two days;
- the Allowance should have been paid promptly and not in the next pay, displaying a *laissez-faire attitude* by the respondent requiring intervention by Mr Duncan's union;
- there is no evidence the contravention was deliberate, but the respondent did not consider compliance to be particularly important;
- the respondent ought to pay a penalty amount of \$49,950 where the only tool to denunciate the contravention is a monetary one;
- the respondent has shown *some* contrition, but this did not translate to ensuring ongoing compliance in a timely manner, where Mr Ortiz arranged for an e-mail to be sent three months after becoming aware of the issue. The respondent has shown *little haste* in making sure the contravention did not happen again;
- the respondent has a record of non-compliance with the FWA and their enterprise agreements, referring to another IMC decision, and six other IMC claims involving a breach of s 50 of the FWA. Therefore, the penalty ought to have a cumulative effect on impressing on the respondent the need for compliance;

The claimant provided the following table in support of its submission: ²

MATTER	CONTRAVENTION	STATUS
M 149 of 2023	s. 50 FW Act	Admitted
M 119 of 2023	s. 50 FW Act	Admitted
M 95 of 2023	s. 50 FW Act	Penalty ordered
M 101 of 2022	s. 50 FW Act s. 323 FW Act	Penalty ordered
M 91 of 2022	s. 50 FW Act s. 323 FW Act	Admitted
M 76 of 2022	s. 50 FW Act s. 323 FW Act	Admitted

- the respondent is a large, sophisticated, and profitable company, who should be expected to have sufficient structures in place to ensure compliance with the legislation and (presumably) Agreements to which it is bound.

39 Therefore, the need for specific and general deterrence is great.

40 The penalties should be awarded to the claimant in accordance with decision in *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244; 242 FCR 492 [40] (*Milardovic*).

The Respondent's Submissions on Penalty

41 In summary, the respondent submits:

- any penalty should be nominal and a penalty of \$222 (equal to one penalty unit) is appropriate;
- the contravention involved one single failure to pay the Allowance under the Agreement;
- the contravention was inadvertent involving a breakdown in communication involving a request for an intra port transfer on a weekend day when the respondent's payroll team was not working on the day prior to or the day of transfer to process the Allowance as required by the Agreement;
- payment of the Allowance was rectified quickly;
- this is not a matter in which there was an appreciable role for specific deterrence where prior to the breach it had an informal process for employees advising the respondent of their intention to accommodate themselves on intra port transfers, and there is no evidence this process failed on other occasions;
- however, it has now taken formal steps to ensure the process does not fail in the future;
- while it has been subject to three previous findings of contraventions of the FWA,³ none involve a port in Tasmania or involve the failure to pay an intra port transfer allowance either on the day prior to or the day of transfer. This demonstrates that it is not a recalcitrant employer or has a culture of breaking or disregarding the law;
- the Agreement at cl 23.2 in Part A, contemplates that errors on pay may be made and dealt with promptly, and that any shortfall owed to the employee will be rectified as soon as reasonably practicable, which may include the next pay cycle. In Mr Duncan's case, the respondent immediately acknowledged it had not paid the Allowance (for the second night) and paid it within two days;
- the contravention involved one employee on one occasion and the respondent has demonstrated early and active cooperation (like the cases referred to by the claimant in its table above);
- a smaller quantum may be imposed in circumstances where a party has inadvertently breached its obligations rather than engaged in a deliberate and calculated breach;
- it has demonstrated remorse, cooperation and taken prompt corrective action;

- consistency of approach in like cases is important;
- there is no evidence of Mr Duncan suffering any or any great prejudice, although the respondent accepts 'relatively low amounts of money' is relative and not trivial; and
- while the breach is admitted, the contravention is properly categorised at the lower end of offending.

42 The respondent refers to cases dealing with failures to pay allowances, however for the purposes of consistency, says that these cases mainly deal with multiple contraventions of multiple provisions over a period of years involving more than one employee.

Determination On Penalty

43 The maximum penalty with respect to a contravention of s 50 of the FWA by the respondent is 300 penalty units, given the respondent is a body corporate. The maximum penalty in respect of each contravention is \$66,600.

44 The following considerations are significant in assessing the appropriate penalty in this case:

Whether the organisation has engaged in similar conduct:

There is no evidence the respondent has previously failed to pay the Allowance in accordance with the Agreement, either in Tasmania or other ports in Australia operated by the respondent. I will comment on other conduct below, as it has been raised by the parties in their submissions.

Whether the conduct was deliberate:

As accepted by the claimant, I am satisfied the contravention was not deliberate. The respondent is obliged to comply with the terms of the Agreement, although a fair reading of the email communications between Mr Duncan, Mr Ward and Ms Bull demonstrates the respondent never intended to escape its obligation to pay the second night of the Allowance, having paid the first night of the Allowance.

Corrective action:

The respondent paid the Allowance five days after it was due, but initially the Allowance was to be paid in a future pay cycle consistent with cl 23.2 of the Agreement. However, upon being told of its obligation by Ms Bull, the respondent paid the Allowance immediately. The respondent has taken steps commensurate with the contravention to ensure future compliance with the Agreement and the FWA, including making provision for the payments of future allowances on intra port transfer agreements on weekends. It is unlikely this conduct will occur again in the future.

Contrition and avoidance of repetition:

Mr Ortiz has apologised for the respondent's contravention. Together with corrective action, this demonstrates a willingness to learn from the proceedings and a commitment not to repeat the conduct.

The size of the entity and involvement of senior management:

The respondent is a large well-resourced organisation. While the respondent does not operate a payroll department on weekends, arrangements can be, and have been, made to ensure entitlements are paid even in atypical situations. The respondent is obligated under the law and to its employees to act diligently with respect to employee entitlements.

Loss or damage suffered as a result:

Mr Duncan's consequential 'loss' (being the actual entitlements) is reasonably modest and was addressed within five days after the Allowance was due under the Agreement.

45 To this, I would also add the following comments.

46 The application for a pecuniary penalty was lodged approximately one year and 11 months after contravention. True enough, the claimant has six years to bring the application. However, the relative delay in doing so supports the respondent's contention that the resolution of the underpayment occurred in accordance with the Agreement. That is, the issue was reported to Mr Ward, he confirmed payment of the Allowance, and steps were taken to rectify the situation all with Ms Bull's knowledge. In those circumstances, it was reasonable to infer the matter was finalised, from the employer's, the employee's and, at the time, the relevant union's perspective.

47 This casts some light on the respondent's purported *little haste* in taking corrective action, which I accept has since been taken by Mr Ortiz. In addition, there is no evidence that, in the meantime, the same issue has arisen.

48 The contravening conduct in all circumstances is properly categorised in the low range.

49 Considering the above, while specific deterrence is important in this case, the need to deter employers more generally in contraventions of the FWA and ensure the public interest in the protection of employee entitlements is of greater importance.

50 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.⁴ This purpose is met by imposing an 'appropriate penalty' striking a balance between oppressive severity and the need for deterrence in respect of the particular case.⁵

51 Further, in certain cases a modest penalty, if any, may reasonably be thought to be sufficient to provide effective deterrence against future contraventions where, by way of example, the contravention is a 'one-off' result of inadvertence and not part of a deliberate strategy to circumvent the law, the person responsible for the contravention has been disciplined or counselled, there is genuine remorse, or, the contravention is unlikely to arise again having regard to the reduced risk of future contraventions.⁶

- 52 I am satisfied, on the evidence, that the respondent's failure to pay the Allowance was a 'one-off' in atypical circumstances where I am further satisfied the respondent had no intention of avoiding its obligation under the Agreement. Consistent with cl 23.2 of the Agreement, once brought to its attention its failure to pay the second night of the Allowance, the respondent took immediate steps to rectify Mr Duncan's underpayment (or shortfall). The respondent has taken corrective action to ensure the contravention does not occur again in the future.
- 53 To the extent the claimant says the table in [38] shows a *record of non-compliance*, I am not satisfied that it does. The claims referred to in the table show discrete, individual episodes of non-compliance, which, save for one disparate outcome, involved the application of a modest penalty or where no penalty has yet been applied as the circumstances have not been determined.
- 54 Limited guidance is obtained from the claims referred to in the table.
- 55 For the above reasons, the pecuniary penalty to be applied in respect of the claim is \$1,500. I am satisfied this is an appropriate penalty striking a balance between oppressive severity and the need for deterrence in respect of this particular case.

Claimant

	Maximum	Penalty applied
Breach of Agreement contravention	\$66,600	
Total		\$1,500

- 56 The claimant seeks an order pursuant to s 546(3)(c) of the FWA that the penalty be paid to the claimant. An order will be made that the respondent pay the penalty of \$1,500 to the claimant.

Orders

- 57 Pursuant to s 546(1) and (3)(b) of the FWA, the respondent is to pay to the claimant a pecuniary penalty of \$1,500.

D. SCADDAN

INDUSTRIAL MAGISTRATE

Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court of Western Australia Under the Fair Work Act 2009 (Cth)

Jurisdiction

- [1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA. The Industrial Magistrates Court of Western Australia, being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': s 12 of the FWA (see definitions of 'eligible State or Territory court' and 'magistrates court'); *Industrial Relations Act 1979* (WA) s 81, s 81B.
- [2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.
- [3] The civil penalty provisions identified in s 539 of the FWA include:
- Section 50 – contravention of an enterprise agreement;
- [4] An 'employer' has the statutory obligation noted above if the employer is a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the [Australian] Constitution applies': s 14, s 12 of the FWA. The obligation is to an 'employee' who is a 'national system employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed ... by a national system employer...': s 13 of the FWA.
- [5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for a person to pay a pecuniary penalty: s 546 of the FWA.

Burden and Standard of Proof

- [6] In an application under the FWA, the claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:
- It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.
- [7] In the context of an allegation of the breach of a civil penalty provision of the Act it is also relevant to recall the observation of Dixon J said 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)

- [8] 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 of Western Australia

- [9] Subject to the provisions of the FWA, the procedure of the IMC relevant to claims under the FWA is contained in the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (IMC Regulations). Notably, regulation 35(4) of the IMC Regulations provides the court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.

- [10] In *Sammut v AVM Holdings Pty Ltd (No 2)* [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:

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 [40]. (citations omitted)

Schedule II: Pecuniary Penalty Orders Under the Fair Work Act 2009 (Cth)

Pecuniary Penalty Orders

- [1] The FWA provides that the IMC may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1) of FWA. The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the FWA: s 546(2) of the FWA. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the FWA.

- [2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the FWA. The relevant rate is that applicable at the date of the contravening conduct:

January 2022	\$222
--------------	-------

- [3] The purpose served by penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 (*Grouped Property Services*) 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 [388]. (citations omitted)

- [4] In *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 (*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'. 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.

- [5] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [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:

- 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.

- [6] In *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560 (*Australian Ophthalmic Supplies*) Buchanan J said this 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 [91].
- [7] Although these factors provide useful guidance, the task of assessing the appropriate penalty is not an exact science: *Commonwealth v Director, Fair Work Building Inspectorate* [2015] HCA 46; 258 CLR 482 [47]. The Court must ultimately fix a penalty that pays appropriate regard to the contraventions that have occurred: *Pattinson* [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* [48].
- [8] 'Multiple contraventions' may occur because the contravening conduct done by an employer:
- resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;
 - was done once only or was repeated; and
 - was done with respect to a single employee or was done with respect to multiple employees.
- [9] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on s 323 of the FWA on the payments) by an employer are taken to be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a 'course of conduct', the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 [22] (White J) The section does *not* to apply to cases where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Grouped Property Services Pty Ltd* [411] (Katzmann J).
- [10] 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* [47] - [52].

- [11] Section 546(3) of the FWA also provides:

Payment of penalty

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

- the Commonwealth; or
- a particular organisation; or
- a particular person.

- [12] In *Milardovic* [40] - [44], Mortimer J, in light of *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; 239 FCR 336, summarised the law:

[T]he power conveyed by s 546(3) is *ordinarily to be exercised by awarding any penalty to the successful applicant*. ... [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. (original emphasis) (omitting citations)

Schedule III: Statement of Agreed Facts

PRELIMINARY

- [1] For the purpose of these proceedings only, the parties agree the following facts.

CLAIMANT

- [2] The Claimant was at all material times:

- a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**);
- a body corporate able to be sued in its registered name by reason of section 27 of the RO Act;
- an 'employee organisation' as defined in section 12 of the *Fair Work Act 2009* (Cth); and
- an employee organisation to which the Qube Ports Pty Ltd Port of Tasmania Enterprise **Agreement 2020** applied within the meaning of section 52 of the Act.

RESPONDENT

- [3] The Respondent was at all material times:

- a 'constitutional corporation' within the meaning of that term in section 12 of the Act;

- b. a 'national system employer' within the meaning of that term in section 14 of the Act;
- c. a corporation able to sue and be sued; and
- d. an employer to which the Agreement applied within the meaning of section 52 of the Act.

THE AGREEMENT

[4] The Agreement was approved by the Fair Work Commission on 23 December 2020. A copy of the Commission's decision is annexed and marked "SOAF-1".

THE AFFECTED WORKER

[5] At all material times Craig Duncan was:

- a. a national system employee;
- b. employed by the Respondent;
- c. a member of the Claimant; and
- d. entitled to the terms of the Agreement.

[6] Mr Duncan's usual place of work is the Port of Burnie in Tasmania, which is approximately four-hours' drive from the Port of Risdon.

[7] On Saturday, 15 January 2022, the Respondent verbally requested Mr Duncan to work a 12-hour shift on 17 January 2022 at the Port of Risdon, which constituted an intra port transfer within the meaning of the Agreement.

[8] On Saturday, 15 January 2022, Mr Duncan confirmed his availability and accepted the Respondent's request.

[9] On Sunday, 16 January 2022, the Respondent rostered Mr Duncan to work at the Port of Risdon by sending him a notification via "Microster", the Respondent's computer-based roster allocation system.

[10] On Sunday, 16 January 2022, Mr Duncan drove to, and accommodated himself in, Risdon.

[11] On Monday, 17 January 2022, Mr Duncan worked a 12-hour shift at the Port of Risdon.

[12] On Monday, 17 January 2022, Mr Duncan was restricted from returning to his usual place of work because:

- a. Part A, Clause 26.5 of the Agreement provides that the maximum travel time and actual hours worked in any one day must not exceed 14 hours; and
- b. Mr Duncan's travel time and actual hours worked would have accumulated to 16 hours.

[13] Following the shift referred at paragraph 11 above, and for the reasons outlined at paragraph 12 above, Mr Duncan accommodated himself overnight in Risdon.

[14] On 19 January 2022, Mr Duncan notified Mr Ben Ward, who at the relevant time was the Site Supervisor for the Respondent, by email that he had only been paid an intra port transfer allowance for one of the two nights he had accommodated himself in Risdon.

[15] On 20 January 2022, Mr Ward instructed the Respondent's payroll to pay to Mr Duncan an additional intra port transfer allowance of \$229.83.

[16] On 21 January 2022, the Respondent paid Mr Duncan an additional intra port transfer allowance of \$229.83.

[signatures and annexures removed]

¹ The Respondent being a body corporate is liable to a maximum penalty five times that for a natural person – see the table at s 539(2) of the FWA where each contravention is subject to a maximum penalty of 60 units for a natural person and s 546(2).

² M 149 of 2023 is the current proceedings for which the court is determining a pecuniary penalty.

M 119 of 2023 involves the payment for Closed Port Days under a different enterprise agreement the circumstances of which are yet to be determined relevant to the payment of a pecuniary penalty.

M 76 and 91 of 2022 are consolidated proceedings determined by Industrial Magistrate Coleman where part of the claim was admitted, and part of the claim was dismissed. The payment of a pecuniary penalty is yet to be determined.

M 95 of 2023 involved two of 13 leading hands not undertaking First Aid training in six months, a pecuniary penalty of \$936 was applied.

M 101 of 2022 involved an underpayment of \$159.25 for work performed in a two-week period in May 2022 for which a pecuniary penalty of \$11,300 was applied.

³ Namely, in *Maritime Union of Australia v Qube No 1 Pty Ltd* [2017] SAIRC 5; *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd* [2023] WAIRC 00976; and *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd* (Industrial Magistrates Court of Western Australia, Magistrate Coleman, 23 November 2024).

⁴ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 [55] (referring to *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR 41-076).

⁵ *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 [46].

⁶ *Pattinson* [46] and [47].

STAY OF OPERATION OF DECISIONS/ORDERS—Application for

2024 WAIRC 00217

A STAY OF OPERATION OF THE ORDER IN MATTER NUMBER PSAB 10/2023 WHICH IS THE SUBJECT OF FBA
6/2024

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	GIANNA TATI	APPLICANT
	-v-	
	WESTERN AUSTRALIA POLICE FORCE	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO	
DATE	THURSDAY, 16 MAY 2024	
FILE NO/S	PRES 3 OF 2024	
CITATION NO.	2024 WAIRC 00217	

Result	Order issued
Representation	
Applicant	No appearance
Respondent	Mr M McIlwaine, of counsel.

Order

HAVING had no appearance by or for the applicant and having heard from Mr M McIlwaine of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

THAT the application to stay the order in the matter PSAB 10 of 2023 is dismissed

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2024 WAIRC 00219

A STAY OF OPERATION OF THE ORDER IN MATTER NUMBER PSAB 10/2023 WHICH IS THE SUBJECT OF FBA
7/2024

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	GIANNA TATI	APPLICANT
	-v-	
	WESTERN AUSTRALIAN POLICE FORCE	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO	
DATE	THURSDAY, 16 MAY 2024	
FILE NO/S	PRES 4 OF 2024	
CITATION NO.	2024 WAIRC 00219	

Result	Order issued
Representation	
Applicant	No appearance
Respondent	Mr M McIlwaine, of counsel.

Order

HAVING had no appearance by or for the applicant and having heard from Mr M McIlwaine of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –
 THAT the application to stay the order in the matter PSAB 10 of 2023 is dismissed

[L.S.]

(Sgd.) R COSENTINO,
 Senior Commissioner.

2024 WAIRC 00279

**A STAY OF THE OPERATION OF THE ORDER IN MATTER NUMBER B 32/2023 WHICH IS THE SUBJECT OF
 FBA 14/2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00279
CORAM : CHIEF COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 17 MAY 2024
DELIVERED : FRIDAY, 7 JUNE 2024
FILE NO. : PRES 6 OF 2024
BETWEEN : MY FOODIE BOX LIMITED
 Applicant
 AND
 ALAIN TRABELSI
 Respondent

Catchwords : Industrial Law (WA) - Appeal filed - Application to stay operation of order filed - s 49(11) - Application granted by consent
 Legislation : *Industrial Relations Act 1979* (WA) s 49, s 49(11)
 Result : Application granted
Representation:
 Applicant : Mr B Hughes
 Respondent : In person

Case(s) referred to in reasons:

GHD Pty Limited v WorkSafe Western Australia Commissioner [2021] WAIRC 00190; (2021) 101 WAIG 569

Reasons for Decision

- 1 The applicant seeks an order that the decision of the Commission made on 11 April 2024 in application B 32 of 2023 be stayed pending the hearing and determination of appeal FBA 14 of 2024. The order of the Commission, the subject of the stay application, declared that the respondent had been denied a benefit under his contract of employment and that he was entitled to receive the sum of \$10,000, as a payment for the April to June 2022 quarter, under a bonus arrangement. The applicant was ordered to pay the respondent the sum of \$10,000 with the balance of the applicant's claim of \$7,692.30 for the July to September 2022 quarter, being dismissed.
- 2 In appeal FBA 14 of 2024, a number of appeal grounds are advanced, which, for the reasons to follow, are unnecessary for me to recite for the purposes of this application. However, in broad terms they assert that the applicant was denied procedural fairness; that the Commissioner at first instance failed to have regard to relevant evidence and took into account irrelevant evidence; and that the Commissioner was biased against the applicant.
- 3 Following the filing of the appeal, the applicant commenced this application under s 49(11) of the *Industrial Relations Act 1979* (WA) to stay the operation of the decision appealed against. Whilst the stay application does not articulate any reasons as to why the order at first instance should be stayed, a subsequent statutory declaration from Mr Hughes deposed to various matters, broadly aligned to the grounds of appeal.
- 4 At the hearing of the stay application before me on 17 May 2024, I raised with the parties whether there may be some prospect of an agreement being reached between the parties that the monies ordered to be paid to the respondent, be paid into a trust account, pending the hearing and determination of the appeal. The application was adjourned for a period of time to enable the parties to consider the matter further. As a result of that conferral, agreement has been reached that the sum of \$10,000 will be paid into a trust account operated by solicitors Steinepries Paganin, pending the hearing and determination of the appeal. This will be done by no later than the close of business on 14 June 2024.

- 5 Accordingly, whilst it is unnecessary, in light of the parties' agreement, to consider the relevant principles in relation to stay applications as discussed by me in *GHD Pty Limited v WorkSafe Western Australia Commissioner* [2021] WAIRC 00190; (2021) 101 WAIRG 569, I am satisfied that in this matter, the following are established. First, that an appeal to the Full Bench has been properly instituted by the applicant under s 49 of *the Act*. Second, that the applicant is a person with a sufficient interest under s 49(11) of *the Act*, to make an application for a stay of the Commission's order. Third, given the agreement of the parties, an order and declaration should be made.
- 6 Accordingly, I will now make an order and declaration that order 2 of the Commission's order made on 11 April 2024 in application B 32 of 2023 be and is hereby stayed, pending the hearing and determination of this appeal or until further order. And that the sum of \$10,000 be paid by the applicant into a trust account operated by Steinepries Paganin solicitors, on the terms and conditions as specified in the order, pending the hearing and determination of the appeal, by no later than the close of business on 14 June 2024.

2024 WAIRC 00288

STAY OF OPERATION OF DECISION - S.49(11)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MY FOODIE BOX LIMITED

APPLICANT

-v-

ALAIN TRABELSI

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE MONDAY, 10 JUNE 2024
FILE NO/S PRES 6 OF 2024
CITATION NO. 2024 WAIRC 00288

Result Order issued
Appearances
Applicant Mr B Hughes
Respondent In person

Order and Declaration

This matter having come on for hearing before me on 17 May 2024, and having heard Mr B Hughes on behalf of the applicant and Mr A Trabelsi on his own behalf, and the parties herein having reached agreement, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, it is ordered and declared –

- (1) THAT the applicant has a sufficient interest as required by s 49(11) of the *Act* and is therefore entitled to apply for orders which appear hereunder.
- (2) THAT appeal No. FBA 14 of 2024 has been instituted within the meaning of s 49(11) of the *Act*.
- (3) THAT the operation of order 2 of the Commission made on 11 April 2024 in application B 32 of 2023 be and is hereby stayed, pending the hearing and determination of this appeal or until further order.
- (4) THAT the applicant places the sum of \$10,000.00 into a trust account operated by solicitors Steinepries Paganin, pending the hearing and determination of the appeal, by no later than close of business 14 June 2024.
- (5) THAT within 14 days of the determination of the appeal, disbursement be made of the sum awarded in accordance with the decision of the Commission in its determination of the appeal.
- (6) THAT on disbursement of the sum awarded to a party in accordance with par 5 of this order, any interest earned on the trust account shall be paid to the party to whom the money is disbursed.
- (7) THAT there be a liberty to apply generally in relation to this order.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

YOUNG OFFENDERS ACT 1994— APPEAL—Matters pertaining to—

2024 WAIRC 00292

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	JORG ARNO NOTTLE	APPELLANT
	-and-	
	CHIEF EXECUTIVE OFFICER (DOJ)	RESPONDENT
CORAM	FULL BENCH	
	SENIOR COMMISSIONER R COSENTINO	
	COMMISSIONER T EMMANUEL	
	COMMISSIONER T B WALKINGTON	
DATE	TUESDAY, 11 JUNE 2024	
FILE NO/S	APPL 92 OF 2024	
CITATION NO.	2024 WAIRC 00292	
Result	Direction issued	
Appearances		
Appellant	Mr J A Nottle, on his own behalf	
Respondent	Mr J Carroll, of counsel	

Direction

HAVING heard from Mr J A Nottle on his own behalf and Mr J Carroll of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs —

1. THAT the question of whether an appeal lies under s 11CH of the *Young Offenders Act 1994* (WA) from the appellant's dismissal be determined as a preliminary issue (Preliminary Issue).
2. THAT the respondent file any documentary evidence relied upon by the respondent and written submissions in relation to the Preliminary Issue by no later than 18 June 2024.
3. THAT the appellant file any documentary evidence he relies upon in relation to the Preliminary Issue and any written submissions in relation to the Preliminary Issue by no later than 2 July 2024.
4. THAT subject to any further order, the Preliminary Issue be determined on the papers.
5. THAT there be liberty to apply.

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

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2024 WAIRC 00238

UNFAIR DISMISSAL APPLICATION

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	DEANNE PARTINGTON	APPLICANT
	-v-	
	MIB TRAFFIC PTY LTD	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON	
DATE	THURSDAY, 23 MAY 2024	
FILE NO/S	U 17 OF 2023	
CITATION NO.	2024 WAIRC 00238	

Result Application discontinued
Representation
Applicant Ms D Partington
Respondent Mr C Bunker

Order

WHEREAS on 12 May 2023, the applicant advised the Commission of their request to withdraw their application;
 AND WHEREAS on 12 May 2023, the Registry of the Commission advised the applicant to file a *Form 1A – Multipurpose – Discontinuance*, to discontinue their application;
 AND WHEREAS on 23 May 2023, the Commission noted they had not been in receipt of a filed *Form 1A – Multipurpose – Discontinuance*;
 AND WHEREAS on 8 May 2024, the Commission noted that unless there was an objection by either party by 15 May 2024, the application would be discontinued;
 NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the application be and by this order is discontinued by leave.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2024 WAIRC 00243

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELEANOR SPENCER

APPLICANT

-v-

MOERUA, ROBERT FRANK

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE MONDAY, 27 MAY 2024
FILE NO/S U 82 OF 2023
CITATION NO. 2024 WAIRC 00243

Result Application discontinued
Representation
Applicant Ms E Spencer
Respondent Ms M Chadwick

Order

WHEREAS on 9 February 2024, the Commission convened a conciliation conference and the matter settled between the parties;
 AND WHEREAS on 24 April 2024, the Commission requested an update from the parties;
 AND WHEREAS on 27 April 2024, the respondent notified the Commission that the terms of the settlement had been fulfilled;
 AND WHEREAS on 23 May 2024, the applicant filed a *Form 1A – Multipurpose – Discontinuance*;
 NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the application be and by this order is discontinued by leave.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2024 WAIRC 00203

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ISAAC JAHN

APPLICANT

-v-

THE TRUSTEE FOR THE 5TH DIMENSION TRUST

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 10 MAY 2024
FILE NO/S U 18 OF 2023
CITATION NO. 2024 WAIRC 00203

Result Application discontinued
Representation
Applicant Mr I Jahn
Respondent Mr S Evans

Order

WHEREAS on 8 May 2024, the Commission sought the views of the applicant and respondent on how to progress this matter;
AND WHEREAS on 8 May 2024, the respondent proposed the discontinuation of this application;
AND WHEREAS on 9 May 2024, the applicant sought leave to discontinue the application;
NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the application be and by this order is discontinued by leave.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00208

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JACQUELINE STARK

APPLICANT

-v-

ROSANNE DOWLAND DESIGN- THE TRUSTEE FOR THE DOWLAND FAMILY TRUST

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE MONDAY, 13 MAY 2024
FILE NO/S B 23 OF 2022
CITATION NO. 2024 WAIRC 00208

Result Application discontinued
Representation
Applicant Ms S Haynes (of agent)
Respondent Ms R Dowland

Order

WHEREAS on 1 November 2022, the applicant notified the Commission that the parties had reached an in-principle agreement;
AND WHEREAS on 29 April 2024, the applicant filed a *Form 1A – Multipurpose – Discontinuance*;

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

THAT the application be and by this order is discontinued by leave.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2024 WAIRC 00244

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LIAM BAILEY

APPLICANT

-v-

GALE VETERINARY SERVICES PTY. LTD.

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE MONDAY, 27 MAY 2024

FILE NO/S B 13 OF 2024

CITATION NO. 2024 WAIRC 00244

Result Application discontinued

Representation

Applicant Dr L Bailey

Respondent Dr G Gale

Order

WHEREAS on 15 May 2024, the Commission convened a conciliation conference and the matter settled between the parties;

AND WHEREAS on 24 May 2024, the applicant filed a *Form 1A – Multipurpose – Discontinuance*;

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

THAT the application be and by this order is discontinued by leave.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2024 WAIRC 00277

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00277

CORAM : COMMISSIONER T EMMANUEL

HEARD : WEDNESDAY, 5 JUNE 2024

DELIVERED : FRIDAY, 7 JUNE 2024

FILE NO. : U 87 OF 2023

BETWEEN : NANCY MATHEW

Applicant

AND

EAST METROPOLITAN HEALTH SERVICE

Respondent

CatchWords	:	Jurisdiction - Applicant employed on fixed-term contract - No dismissal - Application dismissed for want of jurisdiction
Legislation	:	<i>Industrial Relations Act 1979</i> (WA): s 27(1)(a)
Result	:	Application dismissed
Representation:		
Applicant	:	In person
Respondent	:	Mr P Heslewood (as agent)

Cases referred to in reasons:

Gallotti v Argyle Diamond Mines Pty Ltd [2003] WASCA 166

Gallotti v Argyle Diamonds Pty Ltd [2003] WAIRC 07928

Metropolitan (Perth) Passenger Transport Trust v Gersdorf (1981) 61 WAIG 611

Townes-Vigh v North Metropolitan Health Service [2020] WAIRC 00188; (2020) 100 WAIG 256

Reasons for Decision

- Miss Nancy Mathew says East Metropolitan Health Service (**Health Service**) unfairly dismissed her. The Health Service says it did not dismiss Miss Mathew. Rather, her employment ended with the passing of time when her fixed-term contract ended.
- For Miss Mathew to pursue her unfair dismissal claim, she must first establish that the Health Service dismissed her.

What must the Commission decide?

- To resolve this matter, the Commission must decide whether the Health Service dismissed Miss Mathew from her employment.

Background

- The following background is not in dispute.
- In late November 2022, the Health Service offered Miss Mathew a fixed-term contract of employment to work as a Registered Nurse. The fixed term of employment started on 19 December 2022 and ended on 17 December 2023.
- On 21 October 2023 Miss Mathew sent an email to the Nurse Unit Manager, Ms Beata Adamczyk:

Good morning Betty,

Could I please request for an extension of my contract of full time fixed contract for another 6 months please, as I am sure I will get some placements at WA health by then.

Or how can you ensure that there is a job for me at RPH please?

My situation is that I cannot live without the RPH job due to the matters going on in my life.

I thought, my contract will be renewed, before offering positions to others, as I am already in the WA health system for more than 13 years.

Thank you

Nancy Mathew
- Miss Mathew was not offered a further full-time fixed-term contract and the last day she worked was 15 December 2023.

Evidence and submissions

- At the hearing Miss Mathew gave evidence about an email she received on 28 October 2022 from Mr Gavin Ekholm, who was the Acting Nurse Unit Manager at the time. It says:

Hi Nancy,

Apologies for the delay.

I appreciate you would prefer Permanent Full Time but at this stage would you please consider a Fixed Term start with us?

Contract Offer: 12 MONTHS FIXED TERM- with potential to transfer to PERMANENT

Contract Hours: 72 HOURS

Start Date 19 DECEMBER 2022

Please advise if the listed offer & start date is acceptable to you. Please do not hesitate to call me if you would like to discuss further.

Many Thanks
- Miss Mathew says that this email shows that she was 'asked to start with a fixed-term contract and then convert to a permanent placement'.

- 10 Having not complied with several directions by the Commission to file the evidence, documents and written submissions she relies on, Miss Mathew eventually sent this email to the Commission:
- Good morning,
- As per the request for evidence,
- I can address these points of concerns to the commission.
- 1.I was rotated and being treated badly by the staff in that speciality, staff allocation and theatre management system is evidence, while I had quiet [sic] a lot of experience in theatre as well at RPH.
- 2.
- My annual leave was scheduled for February 2024, and I was advised that My contract will be renewed
- 3.
- In the offer letter, It was mentioned to me that my contract will be renewed later (by E mail)
- 4.
- I have started working weekends and after hours and has completed all speciality rotation
- 5.I have a lot of experience in trauma and theatre management system is evidence.
- 5.(sic) Ms Betty informed us in meeting that she recruited some ones friend, and she somewhat belongs to the same nationality as Betty. Minutes of the meeting on that day would be an evidence
- I am denied job again at RPH for an RN position, for which I have been successfully and has been orientated to the department and finally refused the job.
- Manager said there is no concern with me, still not given RN position, which is way beyond less to my qualifications.
- I am extremely upset.
- Thank you
- Nancy Mathew
- 11 The effect of Miss Mathew's evidence was:
- a. when she raised permanency with Ms Adamczyk, Ms Adamczyk would say 'let's see after two months, or three months or four months';
 - b. no issues were raised with her performance;
 - c. in February 2023, Ms Adamczyk included Miss Mathew's February 2024 annual leave dates in the leave register, which shows that her contract would be extended;
 - d. the Health Service rotated Miss Mathew through specialties, which shows that her employment would continue. Further, the Specialist Staff Development Nurse told Miss Mathew: 'you will be getting a full time permanent contract';
 - e. in October 2023, Ms Adamczyk met with Miss Mathew and told her she could not extend her contract because her hands were tied and there were budgetary constraints. When Miss Mathew approached Ms Kerry Hodgkinson, the Co-Ordinator of nursing, she was unaware of why Miss Mathew's contract could not be extended; and
 - g. after Miss Mathew's fixed-term contract ended, other people were recruited to high paid nursing positions.
- 12 Miss Mathew argues that this means the Health Service dismissed her.
- 13 In effect, the Health Service says there was no dismissal and Miss Mathew's employment ended with the passing of time when her fixed-term contract expired.
- 14 The Health Service submits that it appointed Miss Mathew to the position to cover an employee's parental leave and Miss Mathew 'was advised in October 2023 that her contract would not be extended beyond its end date'.
- 15 Ms Adamczyk gave evidence for the Health Service. She was the Nurse Unit Manager at the time Miss Mathew was employed by the Health Service. Her role included responsibility for recruitment, rostering, budgeting, management of FTE contracts and payroll matters.
- 16 Ms Adamczyk gave evidence that:
- a. annual leave was planned 12 months in advance. Accordingly, in February 2023 she included Miss Mathew's leave dates for February 2024 in the leave register to secure Miss Mathew's annual leave in the event that her contract were extended, but that Ms Adamczyk told Miss Mathew then that she did not know if her contract would be extended;
 - b. in October 2023 the Directors of Nursing and Executive Directors sent an 'overall directive' to all divisions (**Executive Directive**) that there could be no more recruitment because the Health Service was over budget for FTE; and
 - c. her general practice is to make it very clear that any potential contract extension or permanent contract will depend on the Health Service's budget and FTE at the time of consideration.

- 17 Ms Adamczyk disputed that she ever promised Miss Mathew permanency, a new fixed-term contract or a further fixed-term contract. She gave evidence that she offered Miss Mathew casual employment after her fixed-term contract ended, but Miss Mathew did not accept.
- 18 The Health Service argues that not offering a further contract, fixed-term or otherwise, does not amount to a decision to dismiss. It says the evidence does not show that the Health Service dismissed Miss Mathew. Accordingly the Health Service says the Commission should dismiss application U 87 of 2023 for want of jurisdiction.

Consideration

- 19 The Public Service Appeal Board chaired by Emmanuel C in *Townes-Vigh v North Metropolitan Health Service* [2020] WAIRC 00188; (2020) 100 WAIG 256 (**Townes-Vigh**) considered what constitutes a dismissal from [25] – [36] of that decision. I respectfully adopt and apply that reasoning in this matter.
- 20 It is clear that a dismissal involves being sent away or removed from office, employment or position: *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611; *Gallotti v Argyle Diamonds Pty Ltd* [2003] WAIRC 07928 (**Gallotti (1)**) at [55] – [62]. The Commission is bound by *Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASCA 166 (**Gallotti (2)**) and EM Heenan J’s reasoning at [5]: ‘There is ample authority for the proposition that the cessation of the relationship of employer and employee by the effluxion of an agreed term of employment is not a “dismissal” and at [7]: ‘There will not be a dismissal where the term of a contract of employment expires’.
- 21 In my view, the evidence in this matter does not establish that Miss Mathew was dismissed. In particular, the following factors weigh against her argument that she was dismissed:
- a. Miss Mathew’s employment contract clearly states that it is for a fixed-term and the parties agree that ‘upon expiration of this fixed-term contract there is no obligation on either party to enter into any further employment arrangement’;
 - b. at best, before offering the fixed-term contract, the Health Service noted Miss Mathew’s preference for permanent employment and flagged the potential to transfer to permanency. Although in her email to Mr Ekholm dated 28 October 2022, Miss Mathew said: ‘I am happy to start as a Fixed Term contract on December 19 2022, and eventually can change to a Permanent contract’, it is clear that no one promised Miss Mathew that she would be permanently appointed or that her contract would be renewed;
 - c. Miss Mathew’s email to Ms Adamczyk dated 21 October 2023 set out at [6] above, requesting an extension of her fixed-term contract, supports a finding that Miss Mathew was aware that her contract would come to an end because it was for a fixed-term; and
 - d. there is no evidence that the Health Service said or did anything that could reasonably lead to an expectation of ongoing employment.
- 22 As in *Townes-Vigh*, in the circumstances of this matter, the failure to offer a subsequent contract is not a dismissal and nor is the contract coming to an end by the effluxion of time. Even if the Commission were to go beyond the four corners of the fixed-term contract, it would not lead to a finding that that Miss Mathew was dismissed.
- 23 Miss Mathew’s contract was clear that employment was for a fixed-term only. Indeed that short document says at least six times that the employment is for a fixed-term. The parties expressly agreed in writing that the employment would end when the term of the contract came to an end.
- 24 None of the matters Miss Mathew relies on lead me to conclude that the Health Service removed or sent Miss Mathew away from her office, employment or position. In particular:
- a. That Ms Adamczyk was aware that Miss Mathew wanted a further contract because of Miss Mathew’s family circumstances at the time does not mean that Ms Adamczyk promised or offered Miss Mathew a further contract or permanency. I accept Ms Adamczyk’s evidence and prefer it to that of Miss Mathew to the extent of any inconsistency. Ms Adamczyk presented as a reliable, forthcoming witness. Her evidence was not materially disturbed or undermined, whereas at times Miss Mathew would not make concessions that were plainly due. I find Ms Adamczyk never promised Miss Mathew permanency or a further full-time fixed-term contract. Rather Ms Adamczyk told Miss Mathew that those matters would depend on budgetary constraints and approval at the relevant time.
 - b. That Ms Adamczyk included Miss Mathew’s February 2024 leave dates in the leave register in February 2023 does not mean that Ms Adamczyk promised or offered Miss Mathew a further full-time fixed-term contract or permanency. I accept that Ms Adamczyk included Miss Mathew’s February 2024 leave dates in the leave register just in case Miss Mathew were to be offered a further contract, in circumstances where annual leave was planned 12 months in advance.
 - c. That Miss Mathew was rotated through specialties does not mean her employment would continue beyond the fixed-term of her contract. Miss Mathew did not call the Specialist Staff Development Nurse to give evidence. But even if that person did tell Miss Mathew that she would be made permanent, I accept Ms Adamczyk’s evidence that only Co-Directors and Executive Directors had delegated authority to approve permanent employment. Accordingly, I am satisfied that that the Specialist Staff Development Nurse did not have delegated authority to offer Miss Mathew permanent employment.
 - d. That performance issues were not raised with Miss Mathew does not mean Miss Mathew would be made permanent or given a further full-time fixed-term contract. Moreover, it does not have a bearing on whether Miss Mathew was dismissed.

- e. That other staff were recruited while Miss Mathew was not offered a further full-time fixed-term contract or permanency does not assist Miss Mathew. Further and any event, I accept Ms Adamczyk's evidence that the employees who started employment from October 2023 had been recruited before the Executive Directive was sent.
- 25 In the circumstances of this matter, I find that although Miss Mathew wanted a further contract, there was no reasonable basis on which she could conclude that she would be given a further contract or converted to permanency.
- 26 Even though Miss Mathew wanted her employment to continue beyond the end of the fixed-term contract, on the evidence I cannot find that she was removed or sent away from employment. Rather, I find Miss Mathew's employment ended in accordance with what she and the Health Service agreed when they entered into the fixed-term contract. It was the effluxion of time in accordance with the parties' agreement, and not any action on the part of the Health Service, that resulted in the contract and the employment relationship ending. I must find that Miss Mathew was not dismissed.

Conclusion

- 27 Accordingly, an order will issue dismissing this application for want of jurisdiction.

2024 WAIRC 00278

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NANCY MATHEW

APPLICANT

-v-

EAST METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE FRIDAY, 7 JUNE 2024

FILE NO/S U 87 OF 2023

CITATION NO. 2024 WAIRC 00278

Result Order issued

Representation

Applicant On her own behalf

Respondent Mr P Heslewood (as agent)

Order

HAVING heard from the applicant on her own behalf, and Mr P Heslewood (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), orders –

THAT application U 87 of 2023 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2024 WAIRC 00270

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NANCY MATHEW

APPLICANT

-v-

ROYAL PERTH HOSPITAL

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE WEDNESDAY, 5 JUNE 2024

FILE NO/S U 87 OF 2023

CITATION NO. 2024 WAIRC 00270

Result Order issued
Representation
Applicant Miss N Mathew (on her own behalf)
Respondent Mr P Heslewood (as agent)

Order

HAVING heard from Miss N Mathew on her own behalf and Mr P Heslewood (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders by consent –

THAT the name of the respondent be amended to East Metropolitan Health Service.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2024 WAIRC 00223

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
NASONI SERU

PARTIES

APPLICANT

-v-

NGANGGANAWILI ABORIGINAL COMMUNITY CONTROLLED HEALTH AND MEDICAL
SERVICES ABORIGINAL CORPORATION

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE FRIDAY, 17 MAY 2024
FILE NO/S U 26 OF 2024
CITATION NO. 2024 WAIRC 00223

Result Application dismissed
Representation
Applicant Mr N Seru
Respondent Ms K Biggs

Order

WHEREAS the applicant on 2 April 2024 filed a *Form 2 – Unfair Dismissal Application* pursuant to s 29 (1) (a) of the *Industrial Relations Act 1979* (**application**);

AND WHEREAS the respondent on 10 April 2024 filed a *Form 2A – Employer Response to Unfair Dismissal Application* in which it objected to the application on the ground that it was a national system employer (**jurisdictional objection**);

AND WHEREAS the Commission convened a conference, to hear from the parties on the jurisdictional objection that was held on 16 May 2024;

AND WHEREAS the Commission, having heard from the parties has determined that it does not have the jurisdiction to hear the application;

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

THAT the application be dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2024 WAIRC 00215

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SATYAWAN DIVEKAR

PARTIES

APPLICANT

-v-

SHIRE OF HALLS CREEK

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE WEDNESDAY, 15 MAY 2024
FILE NO/S B 10 OF 2024
CITATION NO. 2024 WAIRC 00215

Result	Order issued
Representation	
Applicant	Mr S Divekar
Respondent	No appearance by or for the respondent

Order

HAVING heard from Mr S Divekar on his own behalf and with no appearance by or for the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT in respect of the Applicant's claimed denied contractual benefit of annual leave, the Respondent pay the Applicant the sum of \$1,929.89 less applicable taxation by no later than 14 May 2024.
2. THAT the balance of the Applicant's claim being for \$667.20 be dismissed.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2024 WAIRC 00233

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TALIA GEORGE

APPLICANT

-v-

UNIVERSITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE THURSDAY, 23 MAY 2024
FILE NO/S U 89 OF 2023
CITATION NO. 2024 WAIRC 00233

Result	Application discontinued
Representation	
Applicant	Ms T George
Respondent	Ms G Rosendorff

Order

WHEREAS on 8 February 2024, the Commission convened a conciliation conference between the parties;
AND WHEREAS on 10 May 2024, the Commission requested an update of the matter from the parties;
AND WHEREAS on 17 May 2024, the applicant filed a *Form 1A – Multipurpose – Discontinuance*;
NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the application be and by this order is discontinued by leave.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

CONFERENCES—Matters arising out of—

2024 WAIRC 00265

DISPUTE RE DEFINITION OF 'REQUIRED STATION' AS REFERRED TO IN CLAUSE 18(2)(C)(I) OF THE WESTERN AUSTRALIA FIRE SERVICE ENTERPRISE BARGAINING AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DEPARTMENT OF FIRE AND EMERGENCY SERVICES

APPLICANT

-v-

UNITED PROFESSIONAL FIREFIGHTERS UNION OF WA

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 31 MAY 2024

FILE NO/S

C 13 OF 2024

CITATION NO.

2024 WAIRC 00265

Result Interim Order made**Representation****Applicant** Mr J Carroll (of counsel)**Respondent** Mr T Nolan (of counsel)

Interim Order

WHEREAS the applicant filed on 23 April 2024 an application under s 44 of the *Industrial Relations Act 1979* (WA) (the Act) for a compulsory conference to seek the assistance of the Commission and for the Commission to issue an Order for the Union to rescind Circular 11 of 2024 – Immediate Ban on Call Backs to Stations Where PPC is not located.

AND WHEREAS at a compulsory conference on 2 May 2024 before the Commission, the parties agreed to a Recommendation by the Commission that issued 7 May 2024 [2024] WAIRC 00195:

Recommendation

HAVING heard from Mr J Carroll on behalf of the applicant and Mr T Nolan on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby recommends:

1. THAT the respondent suspends the bans imposed by its Circular dated 22 March 2024 and does not re-institute those bans without providing the Fire and Emergency Services Commissioner with 7 days written notice;
2. THAT subject to (3) below, the parties agree to discuss in good faith the following topics:
 - (a) Personal Protective Clothing (PPC);
 - (b) SAPs as they relate to clause 18 of the Western Australian Fire Service Enterprise Bargaining Agreement 2023 (Agreement);
 - (c) insurance in respect journey cover and PPC whilst in transit; and
 - (d) the consequences of a non-consensual resolution to the issues raised in these proceedings;
3. THAT in agreeing to discuss the topics identified in (2) above, the parties agree not to discuss:
 - (a) the proper construction of clause 18 of the Agreement; nor
 - (b) any matter that falls within the scope of clause 8(2) of the Agreement;
4. THAT for all discussions that occur in relation to this matter the applicant will ensure attendance by the following persons unless there is a reasonable reason for their absence, in which case the applicant will communicate such reason to the respondent unless the reason(s) are of a personal and confidential nature: Assistant Commissioner Metro Operations, Chief Superintendent Metro Operations, Acting Manager Industrial Relations, and Acting Principal Industrial Relations Consultant;
5. THAT the parties agree to provide each other with a reasonable opportunity to consider and comment upon any communications it proposes to make in relation to:
 - (a) these proceedings; and
 - (b) any discussions between the parties, or outcomes as a result of any discussions between the parties, on the topics referred to in (2) above; and
6. THAT terms 2 to 5 of this recommendation are to be observed for a fortnight following the Recommendation being issued, with the parties having the ability to confer and extend this timeframe.

AND WHEREAS on 27 May 2024, the respondent informed the Commission and the applicant that it intended to reimplement the bans outlined in their circular of 22 March 2024 in seven days' time.

AND WHEREAS on 28 May 2024, the applicant sought orders from the Commission that the respondent be prevented from reimplementing the work bans.

AND WHEREAS the applicant and respondent disagree on the impact of the work bans. The applicant's evidence is that the consequences of the bans have been the need to hold back firefighters who have completed one shift to undertake a second shift to address short falls, restrictions to the scope of duties has been required and it has been necessary to decommission appliances thereby reducing response capacity. The respondent submits the applicant's decisions on the method by which staffing shortages are addressed and the decommissioning of appliances are discretionary ones and that the staffing shortfalls are a consequence of inadequate staffing generally and not a consequence of the work bans.

The Commission accepts that the consequences of the work bans, whether intended by the respondent or not, are to reduce the pool of firefighters potentially available to perform the callbacks and the possibility of there being shortfalls in staffing at fire stations is increased. Both parties agree that there are staffing shortfalls because of absences of firefighters for various reasons associated with illness and health, family responsibilities and to undertake training and development. Both parties submit that there is significant overtime worked. The work bans create further challenges in managing any shortfalls and reduce the means available to address the operational requirements of a station.

AND WHEREAS the Commission has heard the parties, the Commission is of the opinion that it is not satisfied that it is in the public interest for the bans to be reimplemented. When regard is had to the interests of the public for the capacity of the Fire and Emergency Services to respond to emergency situations safely, the Commission is not satisfied that the reimplementing of the work bans would not adversely impact the Department's operational capacity.

AND WHEREAS the Commission notes the industrial issue at the centre of the dispute is longstanding and deeply felt by at least some of the respondent's members and has been resistant to resolution. The Commission notes that since its inception, the environmental and contextual changes have impacted the dispute concerning the criteria to be eligible for an incentive payment. The Commission is of the view that to prevent further deterioration of industrial relations there is a benefit in the parties engaging in further conciliation and, where a resolution cannot be reached through conciliation, arbitration.

AND WHEREAS the Commission having heard from the parties and having regard to the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question, pursuant to its powers vested in it by s 44 of the Act, hereby orders that —

- (a) The respondent by its officers, employees, agents, and members are not to engage in the conduct of bans described as The United Professional Firefighters Union of Western Australia Circular No 11/2024 dated 11 March 2024.
- (b) The parties are to report back to the Commission on options for resolution of the dispute at a conference in the week beginning Monday 10 June 2024.
- (c) This order remains in force until revoked or varied by the Commission.
- (d) The parties have liberty to apply at short notice to vary, revoke or extend this order.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00211

**DISPUTE RE PREVENTION FROM COMMUNICATING AND REPRESENTING MEMBERSHIP IN RESPECT TO
CURRENT ENTERPRISE BARGAINING NEGOTIATIONS.**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

APPLICANT

-v-

CITY OF COCKBURN

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

TUESDAY, 14 MAY 2024

FILE NO/S

C 2 OF 2023

CITATION NO.

2024 WAIRC 00211

Result Application discontinued
Representation
Applicant Mr A Johnson
Respondent Ms K Borg

Order

WHEREAS on 8 December 2023, the Commission sought the views of the applicant and respondent on how to progress this matter;
 AND WHEREAS on 8 December 2023, the respondent proposed the discontinuation of this application;
 AND WHEREAS on 8 May 2024, the Commission sought the views of the applicant on how to progress this matter;
 AND WHEREAS on 9 May 2024, the applicant filed a *Form 1A – Multipurpose – Discontinuance*;
 NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the application be and by this order is discontinued by leave.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00202

DISPUTE RE LONG SERVICE LEAVE ENTITLEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STEVEN DELNON

APPLICANT

-v-

ANZENVIRO PTY LTD

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE WEDNESDAY, 10 MAY 2024
FILE NO/S C 4 OF 2024
CITATION NO. 2024 WAIRC 00202

Result Application dismissed
Representation
Applicant Mr S Delnon
Respondent Ms J Beeson

Order

WHEREAS the applicant filed a *Form 1B – Application for a Conference – s 44, Industrial Relations Act 1979* on 18 January 2024 in relation to a dispute over the alleged non-payment of Long Service Leave (**application**);

AND WHEREAS the respondent filed a *Form 4 – General Response* to the application on 2 February 2024;

AND WHEREAS the Commission held a compulsory conciliation conference on 13 February 2024 in relation to the application;

AND WHEREAS the Commission was advised during the conciliation conference the parties were in dispute over a number of matters arising from the applicant’s employment relationship with the respondent, including an unfair dismissal application to the Fair Work Commission (**FWC**) in U2023/12854 (**unfair dismissal claim**);

AND WHEREAS the Commission adjourned the application to allow the parties to consider whether they wanted the Commission to conduct mediation under the provisions of the *Employment Dispute Resolution Act 2008* in relation to all matters including the unfair dismissal claim and the application (**mediation**);

AND WHEREAS Deputy President Beaumont of the FWC in a decision issued on 12 March 2024; [2024] FWC 625, dismissed the unfair dismissal claim for want of jurisdiction;

AND WHEREAS the respondent on 22 April 2024 informed the Commission that it did not intend to enter into any further commercial settlement discussions with the applicant or participate in mediation;

AND WHEREAS the Commission on 24 April 2024 gave the applicant a further opportunity to advise whether he intended to proceed with the application, with a response required by the close of business, 30 April 2024;

AND WHEREAS the Commission did not receive advice from the applicant that he intended to proceed with the application;

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

THAT the application be dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2024 WAIRC 00260

DISPUTE RE CAREER PROGRESSION SYSTEM FOR WORKSAFE INSPECTORS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC.)

APPLICANT

-v-

DEPARTMENT OF MINES INDUSTRY REGULATION AND SAFETY

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 29 MAY 2024

FILE NO

PSAC 2 OF 2023

CITATION NO.

2024 WAIRC 00260

Result	Application discontinued
Representation Applicant	Mr J Robb
Representation Respondent	Mr M McIlwaine (of counsel)

Order

WHEREAS on 17 February 2023, the Commission convened a conference between the parties;

AND WHEREAS on 5 April 2023, the Commission convened another conference between the parties;

AND WHEREAS on 8 May 2024, the Commission requested an update from the parties;

AND WHEREAS on 21 May 2024, the respondent notified the Commission that the matter between the parties had been settled and proposed the discontinuance of the application;

AND WHEREAS on 28 May 2024, the applicant filed a *Form 1A – Multipurpose – Discontinuance*;

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

THAT the application be and by this order is discontinued by leave.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner,
Public Service Arbitrator.

2024 WAIRC 00226

DISPUTE RE PROCEDURAL FAIRNESS IN RELATION TO ALLEGATIONS OF MISCONDUCT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED WORKERS UNION (WA)

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

TUESDAY, 21 MAY 2024

FILE NO.

C 10 OF 2024

CITATION NO.

2024 WAIRC 00226

Result Direction issued
Representation
Applicant Mr M Giles
Respondent Mr D Anderson

Direction

HAVING heard from Mr M Giles on behalf of the applicant and Mr D Anderson (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

THAT the Directions issued on 26 April 2024 ([2024] WAIRC 00187) be vacated.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

UNIONS—Matters dealt with under Section 66

2024 WAIRC 00273

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00273
CORAM : CHIEF COMMISSIONER S J KENNER
HEARD : FRIDAY, 24 MAY 2024
DELIVERED : THURSDAY, 6 JUNE 2024
FILE NO. : PRES 8 OF 2024
BETWEEN : TIM CLARKE
Applicant
AND
MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA
(UNION OF EMPLOYEES)
Respondent

Catchwords : Industrial Law (WA) - Application under s 66 - State union Rules no longer aligned with federal WA Branch Rules - Section 71 certificate likely to be no longer effective - Interim Union Council established - Order issued
Legislation : *Industrial Relations Act 1979* (WA) s 66, s 66(1), s 66(2), s 71
Result : Order issued
Representation:
Counsel:
Applicant : Mr T Borgeest of counsel
Respondent : No appearance

Reasons for Decision

- 1 The above matter is an application under s 66 of the *Industrial Relations Act 1979* (WA) seeking the establishment of an Interim Union Council of the respondent, to conduct its operations, pending the obtaining of a s 71 certificate under the *Act*. The applicant is a member of the respondent and also is a member of the Media, Entertainment and Arts Alliance, an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). The MEAA is the respondent's counterpart federal body for the purposes of s 71 of the *Act*.
- 2 The matter came before me for hearing on 24 May 2024. Having considered the application, and having heard counsel for the applicant, I was satisfied that the applicant had standing under s 66(1) of the *Act* to bring the application and that in all the circumstances an order under s 66(2) should be made. These are my short reasons for so concluding.
- 3 The matter has some background. This is set out in the statement of the applicant annexed to the application. From May 2010, the respondent operated under a s 71 certificate issued by the Registrar for a number of years. The effect of this certificate was to relieve the respondent of the need to hold general elections for office bearers of the respondent. Officers elected to office in the MEAA were deemed to hold the corresponding office in the respondent.

- 4 In or about July 2020, a number of alterations were made to the Rules of the MEAA including its governance structure and consequential abolition of offices. In 2021, as a result of these changes, the Registrar notified the respondent that the changes made to the MEAA Rules meant that the s 71 certificate no longer had effect. Accordingly, the respondent had no duly elected officers to conduct the business of the respondent.
- 5 As a result, an application was made under s 66 of the *Act* for an order to be issued to establish an Interim Union Council, and to progress any necessary alterations to the respondent's Rules to enable a new s 71 certificate to be sought: *Kate Ferguson v Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)* [2022] WAIRC 00087; (2022) 102 WAIG 194. That order operated until 28 February 2023.
- 6 Subsequently in December 2022, an application for alteration of the respondent's Rules was filed. Whilst the Rules alterations application was being considered by the Registrar, due to the impending expiry of the s 66 order made in March 2022, I made a further order extending the original order's effect until 31 August 2023: *Venning v Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)* [2023] WAIRC 00210; (2022) 103 WAIG 467.
- 7 On 15 May 2023, the Registrar registered the alterations to the Rules of the respondent. Shortly thereafter on 31 August 2023, the extended s 66 order ceased to have effect. By that time, there was no certificate in place under s 71 of the *Act*. The Interim Union Council having ceased to exist, meant there were no officers of the respondent who had authority to make an application under s 71 of the *Act*, for a certificate.
- 8 Accordingly, the present application has been made. I was also informed that as a result of elections for officer bearers of the MEAA recently conducted, declarations were made by the Australian Electoral Commission in February 2024, in respect of contested elections. The results of both contested and uncontested elections for positions were declared at a meeting of the Board of the MEAA in early March 2024. As a result of the election, the applicant holds office as the MEAA Western Australian Branch President (Media). The applicant is also a member of the Committee of Management of the Western Australian Branch of the MEAA. The other two members of the Committee of Management are Ms Amy Welsh and Ms Helen Tuckey.
- 9 The applicant seeks an order that himself, Ms Welsh and Ms Tuckey constitute the Interim Union Council, as they are the elected members of the Committee of Management of the MEAA Western Australian Branch, and therefore, constitute its governing body in accordance with the Rules of the MEAA. They would also, if a new s 71 certificate is subsequently granted, hold corresponding offices in the respondent.
- 10 The applicant indicated that if the order sought is made, the Interim Union Council would, as a matter of urgency, obtain advice and conduct a review of the respondent's Rules, to ensure that they are in an appropriate form in order for an application under s 71 of the *Act* to be made. Furthermore, the Interim Union Council would undertake a review of the respondent's reporting and general obligations under the *Act*, to ensure that there is compliance.
- 11 The applicant advised that both Ms Welsh and Ms Tuckey have been informed of the present application, and consented to being made members of the Interim Union Council. A signed acknowledgement and agreement to this effect from Ms Welsh and Ms Tuckey accompanied the application.

2024 WAIRC 00252

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TIM CLARKE

APPLICANT

-v-

MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)

RESPONDENT**CORAM**

CHIEF COMMISSIONER S J KENNER

DATE

TUESDAY, 28 MAY 2024

FILE NO/S

PRES 8 OF 2024

CITATION NO.

2024 WAIRC 00252

Result

Order issued

Appearances**Applicant**

Mr T Borgeest of counsel

Respondent

No appearance

Order

This matter having come on for hearing before me on 24 May 2024, and having heard Mr T Borgeest of counsel on behalf of the applicant, and there being no appearance on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders —

- (1) THAT an Interim Union Council of the respondent is established, constituted by:
 - a. Tim CLARKE,
 - b. Amy WELSH, and
 - c. Helen TUCKEY.
- (2) THAT Tim CLARKE is designated Senior President for the purposes of rules 25 and 25AA of the respondent's rules.
- (3) THAT rules 52 and 53 of the respondent's rules have no operative effect.
- (4) THAT the Interim Union Council shall have the authority to exercise all of the powers, duties, and functions of the Council of the respondent and each of the members of the Interim Union Council shall have the authority to exercise all of the powers, duties and functions of the office of member of the Council held by each of them.
- (5) THAT unless otherwise varied, this order will operate until 30 October 2024.
- (6) THAT there be liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2024 WAIRC 00249

MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LOCAL GOVERNMENT, RACING AND CEMETERIES UNION (WA)

PARTIES

APPLICANT

-v-

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION, SHIRE OF BRIDGETOWN GREENBUSHES, SHIRE OF CARNAMAH, SHIRE OF DALWALLINU, SHIRE OF DOWERIN, SHIRE OF GOOMALLING, SHIRE OF HARVEY, SHIRE OF KONDININ, SHIRE OF LAVERTON, SHIRE OF LEONORA, SHIRE OF MURRAY, SHIRE OF NANNUP, SHIRE OF NAREEMBEEN, SHIRE OF RAVENSTHORPE, SHIRE OF THREE SPRINGS, SHIRE OF VICTORIA PLAINS, SHIRE OF WAGIN, SHIRE OF WANDERING, SHIRE OF WOODANILLING, SHIRE OF YALGOO, SHIRE OF BODDINGTON, SHIRE OF BRUCE ROCK, SHIRE OF WAROONA, SHIRE OF SANDSTONE, SHIRE OF HALLS CREEK

RESPONDENTS

CORAM SENIOR COMMISSIONER R COSENTINO
DATE TUESDAY, 28 MAY 2024
FILE NO/S APPL 6 OF 2024
CITATION NO. 2024 WAIRC 00249

Result	Order issued
Representation	(on the papers)
Applicant	Local Government, Racing and Cemeteries Union (WA)
First Respondent	Western Australian Municipal, Administrative, Clerical and Services Union
Second Respondent	Shire of Boddington
Third Respondent	Shire of Bridgetown Greenbushes
Fourth Respondent	Shire of Bruce Rock
Fifth Respondent	Shire of Carnamah
Sixth Respondent	Shire of Dalwallinu

Seventh Respondent	Shire of Dowerin
Eight Respondent	Shire of Goomalling
Ninth Respondent	Shire of Halls Creek
Tenth Respondent	Shire of Harvey
Eleventh Respondent	Shire of Kondinin
Twelfth Respondent	Shire of Laverton
Thirtieth Respondent	Shire of Leonora
Fortieth Respondent	Shire of Murray
Fiftieth Respondent	Shire of Nannup
Sixtieth Respondent	Shire of Narembeen
Seventieth Respondent	Shire of Ravensthorpe
Eightieth Respondent	Shire of Sandstone
Ninetieth Respondent	Shire of Three Springs
Twentieth Respondent	Shire of Victoria Plains
Twenty-first Respondent	Shire of Wagin
Twenty-second Respondent	Shire of Wandering
Twenty-third Respondent	Shire of Waroona
Twenty-fourth Respondent	Shire of Woodanilling
Twenty-fifth Respondent	Shire of Yalgoo

Order

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

1. The application be determined on the papers.
2. If any party wishes to file written submissions or documents they seek to rely upon in relation to the application, they may do so by no later than 17 June 2024.
3. There be liberty to apply.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2024 WAIRC 00258

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CALLUM MCCARTHY

APPLICANT

-v-

QETRA PTY LTD

RESPONDENT**CORAM**

COMMISSIONER T KUCERA

DATE

WEDNESDAY, 29 MAY 2024

FILE NO.

B 4 OF 2024

CITATION NO.

2024 WAIRC 00258

Result

Direction issued

Representation**Applicant**

Mr K Sneddon (of counsel)

Respondent

Ms M Ivanovski (of counsel)

Direction

HAVING HEARD from Mr K Sneddon of counsel on behalf of the applicant and Ms M Ivanovski of counsel 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 parties file a statement of agreed facts by 21 June 2024.
2. THAT the applicant files its evidence in chief in the form of witness statements in the manner required by practice note 9 of 2021, together with any documents, which the applicant intends to rely on by 2 August 2024.
3. THAT the respondent files its evidence in chief in the form of witness statements in the manner required by practice note 9 of 2021, together with any documents, which the respondent intends to rely on by 30 August 2024.
4. THAT the applicant and the respondent file written submissions by 20 September 2024.
5. THAT this matter be listed for hearing on a date to be fixed in October 2024.
6. THAT there be liberty to apply on short notice.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2024 WAIRC 00259

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CHRIS LORETO

APPLICANT

-v-

QETRA PTY LTD

RESPONDENT**CORAM**

COMMISSIONER T KUCERA

DATE

WEDNESDAY, 29 MAY 2024

FILE NO.

B 5 OF 2024

CITATION NO.

2024 WAIRC 00259

Result	Direction issued
Representation	
Applicant	Mr K Sneddon (of counsel)
Respondent	Ms M Ivanovski (of counsel)

Direction

HAVING HEARD from Mr K Sneddon of counsel on behalf of the applicant and Ms M Ivanovski of counsel 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 parties file a statement of agreed facts by 21 June 2024.
2. THAT the applicant files its evidence in chief in the form of witness statements in the manner required by practice note 9 of 2021, together with any documents upon which it intends to rely on by 2 August 2024.
3. THAT the respondent files its evidence in chief in the form of witness statements in the manner required by practice note 9 of 2021, together with any documents upon which it intends to rely on by 30 August 2024.
4. THAT the applicant and the respondent file written submissions by 20 September 2024.
5. THAT this matter be listed for hearing on a date to be determined in October 2024.
6. THAT there be liberty to apply on short notice.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2024 WAIRC 00281

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MINISTER FOR CORRECTIVE SERVICES	APPELLANT
	-and-	
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL COMMISSIONER C TSANG	
DATE	FRIDAY, 7 JUNE 2024	
FILE NO/S	FBA 10 OF 2024	
CITATION NO.	2024 WAIRC 00281	

Result	Direction issued
Appearances	(on the papers)
Appellant	Minister for Corrective Services
Respondent	Western Australian Prison Officers' Union of Workers

Direction

The Full Bench, pursuant to the powers conferred to it under the *Industrial Relations Act 1979* (WA) hereby directs –

1. THAT the respondent has leave to file amended Grounds of Cross Appeal in accordance with the Minute of Proposed Amended Grounds of Appeal dated 6 June 2024.
2. THAT the respondent file the Amended Grounds of Cross Appeal by 11 June 2024.

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

[L.S.]

2024 WAIRC 00280

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
APPELLANT

-and-
MINISTER FOR CORRECTIVE SERVICES
RESPONDENT

CORAM FULL BENCH
SENIOR COMMISSIONER R COSENTINO
COMMISSIONER T EMMANUEL
COMMISSIONER C TSANG

DATE FRIDAY, 7 JUNE 2024
FILE NO/S FBA 13 OF 2024
CITATION NO. 2024 WAIRC 00280

Result Direction issued
Appearances (on the papers)
Appellant Western Australian Prison Officers' Union of Workers
Respondent Minister for Corrective Services

Direction

The Full Bench, pursuant to the powers conferred to it under the *Industrial Relations Act 1979* (WA) hereby directs –

1. THAT the appellant has leave to file amended Grounds of Appeal in accordance with the Minute of Proposed Amended Grounds of Appeal dated 6 June 2024.
2. THAT the appellant file the Amended Grounds of Appeal by 11 June 2024.

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

[L.S.]

2024 WAIRC 00255**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 MITCHELL J
DATE TUESDAY, 28 MAY 2024
FILE NO/S IAC 1 OF 2024
CITATION NO. 2024 WAIRC 00255

Result Programming Orders Issued

Order

1. The time for the appellant to file the appeal book together with three hard copies and serve a copy on the respondent be further extended to 4:00pm on 4 June 2024.

(Sgd.) S KEMP,
Clerk of Court.

[L.S.]

2024 WAIRC 00256

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2023

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPELLANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT**CORAM**

MITCHELL J

DATE

TUESDAY, 28 MAY 2024

FILE NO/S

IAC 2 OF 2024

CITATION NO.

2024 WAIRC 00256

Result

Programming Order Issued

Order

1. The time for the appellant to file submissions and a list of legal authorities and serve a copy on the respondent be further extended to 4:00pm on 4 June 2024.
2. The time for the respondent to file submissions and a list of legal authorities and serve a copy on the respondent be further extended to 4:00pm on 25 June 2024.
3. The time for the appellant to file the appeal book together with three hard copies and serve a copy on the respondent be further extended to 4:00pm on 26 July 2024.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

2024 WAIRC 00228

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2023

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPELLANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT**CORAM**

BUSS J

DATE

TUESDAY, 21 MAY 2024

FILE NO/S

IAC 2 OF 2024

CITATION NO.

2024 WAIRC 00228

Result

Programming Orders Issued

Order

1. The time for the appellant to file submissions and a list of legal authorities and serve a copy on the respondent be extended to 4:00pm on 24 May 2024.
2. The time for the respondent to file submissions and a list of legal authorities and serve a copy on the respondent be extended to 4:00pm on 18 June 2024.
3. The time for the appellant to file the appeal book together with three hard copies and serve a copy on the respondent be extended to 4:00pm on 19 July 2024.

[L.S.]

(Sgd.) S BASTIAN,
Clerk of Court.

2024 WAIRC 00225

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2023

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPELLANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM

BUSS J

DATE

TUESDAY, 23 APRIL 2024

FILE NO/S

IAC 2 OF 2024

CITATION NO.

2024 WAIRC 00225

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 17 May 2024.
2. The respondent file submissions and a list of legal authorities and serve a copy on the appellant by 4:00pm on 11 June 2024.
3. The appellant file the appeal book together with three hard copies and serve a copy on the respondent by 4:00pm on 4 July 2024.

[L.S.]

(Sgd.) S BASTIAN,
Clerk of Court.

2024 WAIRC 00262

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 10 OF 2023

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE

APPELLANT

-v-

THE STATE SCHOOL TEACHERS' UNION OF W.A.

RESPONDENT

CORAM

MITCHELL J

DATE

FRIDAY, 31 MAY 2024

FILE NO/S

IAC 3 OF 2024

CITATION NO.

2024 WAIRC 00262

Result

Programming Orders Issued

Order

1. The appellant file submissions and a list of legal authorities and serve a copy on the respondent by 4pm on 28 June 2024.
2. The respondent file submissions and a list of legal authorities and serve a copy on the appellant by 4pm on 26 July 2024.
3. The appellant file the appeal book and provide three hard copies and serve a copy on the respondent by 4pm on 9 August 2024.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

2024 WAIRC 00271

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAREL VAN STYN

APPLICANT

-v-

BAKING INDUSTRY EMPLOYER'S ASSOCIATION OF WEST AUSTRALIA

RESPONDENT

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INTERVENOR**CORAM** CHIEF COMMISSIONER S J KENNER**DATE** WEDNESDAY, 5 JUNE 2024**FILE NO/S** PRES 7 OF 2024**CITATION NO.** 2024 WAIRC 00271

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance
Intervener	Mr J Carroll of counsel and with him Ms S Pontifex

Order

WHEREAS on 24 May 2024, the Commission made an order ([2024]) WAIRC 000241) which was deposited in the office of the Registrar;

AND WHEREAS the applicant has requested a further adjournment of the matter;

AND WHEREAS the request is unopposed;

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

THAT the application be and is hereby adjourned for a further 14 days to 21 June 2024.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2024 WAIRC 00241

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAREL VAN STYN

APPLICANT

-v-

BAKING INDUSTRY EMPLOYER'S ASSOCIATION OF WEST AUSTRALIA

RESPONDENT**CORAM** CHIEF COMMISSIONER S J KENNER**DATE** FRIDAY, 24 MAY 2024**FILE NO/S** PRES 7 OF 2024**CITATION NO.** 2024 WAIRC 00241

Result	Order issued
Appearances	
Applicant	In person
Respondent	No appearance
Proposed Intervener	Mr J Carroll of counsel and with him Ms S Pontifex

Order

This matter having come on for hearing before me on 24 May 2024 and having heard Mr K Van Styn on his own behalf and Mr J Carroll of counsel on behalf of the proposed intervener, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT the Registrar be and is hereby granted leave to intervene in the proceedings.
- (2) THAT the application be and is hereby adjourned for 14 days.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2024 WAIRC 00257

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7 DECEMBER 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JULIE ANN LUCAS

APPELLANT

-v-

DIRECTOR GENERAL OF DEPARTMENT OF JUSTICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T KUCERA - CHAIRPERSON
MS B CONWAY - BOARD MEMBER
MS N PYNE - BOARD MEMBER

DATE

WEDNESDAY, 29 MAY 2024

FILE NO

PSAB 1 OF 2024

CITATION NO.

2024 WAIRC 00257

Result	Order issued
Representation	
Appellant	Ms J Lucas
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Ms J Lucas and Mr J Carroll of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent –

1. THAT the appellant file an outline of evidence in the manner required by practice note 9 of 2021, together with any documents which she intends to rely upon by 12 June 2024.
2. THAT the respondent file its outline of evidence in the manner required by practice note 9 of 2021, together with any documents which it intends to rely upon by 19 June 2024.
3. THAT this matter be listed for a one day hearing on a date to be fixed.
4. THAT there be liberty to apply on short notice.

(Sgd.) T KUCERA,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2024 WAIRC 00232

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 27 NOVEMBER 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAREN AUZINS

APPELLANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MS R ANDERSON – BOARD MEMBER
MS J SYMONS – BOARD MEMBER**DATE**

TUESDAY, 22 MAY 2024

FILE NO.

PSAB 25 OF 2023

CITATION NO.

2024 WAIRC 00232

Result

Direction issued

Representation**Applicant**

The Civil Service Association of Western Australia Incorporated

Respondent

State Solicitor's Office

Direction

HAVING heard from Ms G Murray (agent) on behalf of the appellant and Ms S Power (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT Directions 3 to 7 of the Directions issued on 5 March 2024 ([2024] WAIRC 00091) be vacated.
2. THAT the appellant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Wednesday, 16 May 2024.
3. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Friday, 31 May 2024.
4. THAT the appellant file an outline of legal submissions by Friday, 21 June 2024.
5. THAT the respondent file an outline of legal submissions by Friday, 12 July 2024.
6. THAT the 3-day hearing listed 15 July 2024 to 17 July 2024 be vacated and the appeal be re-listed for a 2-day hearing not before Friday, 19 July 2024.

(Sgd.) C TSANG,

Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2024 WAIRC 00239

DISPUTE RE UNION MEMBERS ENTITLEMENT TO PAID SICK LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

APPLICANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 24 MAY 2024

FILE NO.

PSACR 2 OF 2024

CITATION NO.

2024 WAIRC 00239

Result	Direction issued
Representation	
Applicant	Mr S Farrell (as agent)
Respondent	Mr J Carroll (of counsel)

Direction

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

1. THAT by 4:00pm on 13 May 2024, the respondent file:
 - (a) any application to appear by a legal practitioner at the hearing of this matter; and
 - (b) written submissions in support of any such application;
2. THAT by 4:00pm on 28 May 2024, the applicant file any written submissions in opposition to any application made under Direction 1;
3. THAT if an application is made under Direction 1, the Arbitrator will notify the parties as to whether leave is granted for the respondent to appear by a legal practitioner at the substantive hearing at least 7 days prior to the hearing of the matter;
4. THAT by 4:00pm on 28 May 2024, the parties file any statement of agreed facts and bundle of agreed documents;
5. THAT by 4:00pm on 10 June 2024, the applicant file any outlines of witness evidence and any documents which are not agreed documents upon which it intends to rely;
6. THAT by 4:00pm on 24 June 2024, the respondent file any outlines of witness evidence and any documents which are not agreed documents upon which it intends to rely;
7. THAT by 4:00pm on 1 July 2024, the applicant file any outlines of witness evidence in response;
8. THAT by 4.00pm on 15 July 2024, the applicant is to file an outline of written submissions and list of authorities upon which it intends to rely;
9. THAT by 4.00pm on 29 July 2024, the respondent is to file an outline of written submissions and list of authorities upon which it intends to rely;
10. THAT the matter is to be listed for a hearing of up to two days on a date to be fixed not before 29 July 2024;
11. THAT discovery be informal; and
12. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00294

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MYANDRAN SUBRAYAN

APPLICANT

-v-

LYNWOOD CHRISTIAN CHURCH INC

RESPONDENT

CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 12 JUNE 2024
FILE NO.	U 9 OF 2024
CITATION NO.	2024 WAIRC 00294

Result	Directions issued
Representation	
Applicant	Mr M Subrayan
Respondent	Mr C Fordham (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Mr Fordham 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 question of whether to accept the application which was filed 'out of time', being more than 28 days after the termination of employment, must first be decided;
2. THAT the applicant file and serve any outlines of witness evidence, any documents or materials and any submissions including authorities upon which they intend to rely by no later than 19 June 2024;
3. THAT the respondent file and serve any outlines of witness evidence, any documents or materials and any submissions including authorities, upon which they intend to rely by no later than 3 July 2024;
4. THAT the applicant may file any further outlines of witness evidence, any documents, and an outline of submissions and any list of authorities in response by no later than 17 July 2024;
5. THAT the applicant inform the respondent and the Commission whether they wish to cross examine any of the respondent's witnesses;
6. THAT the matter be listed for hearing on a date to be fixed; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00296

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JASON MICHAEL CARLEO

APPLICANT

-v-

A.S CAMPBELL & A.R STENT

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE WEDNESDAY, 12 JUNE 2024
FILE NO/S U 16 OF 2024
CITATION NO. 2024 WAIRC 00296

Result	Order issued
Representation	
Applicant	Mr J Carleo
Respondent	No appearance

Order

WHEREAS the applicant on 16 February 2024, filed a Form 2 Unfair Dismissal Application (**application**) pursuant to s 29(1)(c) of the *Industrial Relations Act 1979* (**IR Act**);

AND WHEREAS the respondent on 8 March 2024 filed a Form 2A – Employer Response to Unfair Dismissal Application;

AND WHEREAS the Commission listed the application for a conciliation conference to be held on 12 June 2024 having regard to the parties' unavailable dates;

AND WHEREAS the Notice of Listing required the applicant and the respondent to attend the conciliation conference in person;

AND WHEREAS the respondent failed to appear at the conciliation conference as required;

AND WHEREAS the applicant had to take a half day of annual leave to attend the conciliation conference and incurred costs of \$25.31 for parking;

AND WHEREAS the applicant provided a receipt for his parking costs and informed the Commission of what he would be paid to access his leave entitlement;

AND WHEREAS the Commission was, by reason of the respondent's non-attendance, unable to deal with the application by way of conciliation;

NOW THEREFORE, the Commission pursuant to the powers vested in it under s 27 of the IR Act hereby ORDERS –

1. The matter will be listed for a hearing to show cause why the application should not be decided in the applicant's favour;

2. The parties are to provide their unavailable dates for the months of July and August 2024 by close of business **Friday 14 June 2024**.
3. The respondent is to pay the applicant the sum of **\$150.36**, being the total amount for a half day of annual leave that was thrown away and for the applicant's parking costs by **Friday 28 June 2024**.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.**2024 WAIRC 00287****UNFAIR DISMISSAL APPLICATION**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CARL ANTHONY HOUSE**PARTIES****APPLICANT**

-v-

DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION, AND
ATTRACTIONS**RESPONDENT**

CORAM COMMISSIONER T B WALKINGTON
DATE MONDAY, 10 JUNE 2024
FILE NO. U 17 OF 2024
CITATION NO. 2024 WAIRC 00287

Result Directions issued
Representation
Applicant Mr S Maré (of counsel)
Respondent Mr J Carroll (of counsel)

Direction

HAVING heard from Mr Maré on behalf of the applicant and Mr Carroll 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 parties file and serve a statement of agreed facts and any documents upon which they intend to rely by no later than 14 May 2024;
2. THAT the applicant file and serve any outlines of witness evidence and any documents upon which they intend to rely by no later than 11 June 2024;
3. THAT the respondent file and serve any outlines of witness evidence and any documents, upon which they intend to rely by no later than 2 July 2024;
4. THAT the applicant may file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 15 July 2024;
5. THAT the respondent may file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 29 July 2024;
6. THAT the matter be listed for hearing on a date to be fixed; and
7. THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.**2024 WAIRC 00237****UNFAIR DISMISSAL APPLICATION**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
HARSHAD AHIRE**PARTIES****APPLICANT**

-v-

C PROCTOR & C SHENTON

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 24 MAY 2024
FILE NO/S U 70 OF 2023
CITATION NO. 2024 WAIRC 00237

Result	Directions issued
Representation	
Applicant	Mr H Ahire
Respondent	Ms K Hall (of agent)

Direction

HAVING heard from the applicant on his own behalf and the Ms Hall 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 an extension is granted to the applicant, and therefore the direction issued in [2024] WAIRC 00199 are vacated;
2. THAT the applicant file and serve any outlines of witness evidence and any documents, upon which they intend to rely by no later than 12 June 2024;
3. THAT the respondent file and serve any outlines of witness evidence and any documents, upon which they intend to rely by no later than 27 June 2024;
4. THAT the applicant may file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 11 July 2024;
5. THAT the respondent may file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 25 July 2024;
6. THAT the matter be listed for hearing on a date to be fixed; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00224

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STUART BROAD

PARTIES

APPLICANT

-v-

SHIRE OF MURCHISON

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE TUESDAY, 21 MAY 2024
FILE NO. U 92 OF 2023
CITATION NO. 2024 WAIRC 00224

Result	Directions issued
Representation	
Applicant	Ms R Ellis of counsel
Respondent	Ms R Joseph of counsel

Direction

HAVING heard from Ms R Ellis of counsel on behalf of the applicant and Ms R Joseph of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979 (WA)*, hereby directs –

1. THAT the time for compliance with order 1 of the orders made on 12 March 2024 be extended to 20 June 2024.
2. THAT the time for compliance with order 2 of the orders made on 12 March 2024 be extended to 18 July 2024.
3. THAT the time for compliance with order 3 of the orders made on 12 March 2024 be extended to 1 August 2024.

4. THAT the time for compliance with order 4 of the orders made on 12 March 2024 be extended to 15 August 2024.
5. THAT the directions hearing be adjourned to a date not before 15 August 2024.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Albany Industrial Agreement 2023 AG 19/2024	10/06/2024	City of Albany	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
City of Fremantle Workforce Agreement 2023 AG 16/2024	24/05/2024	City of Fremantle	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Senior Commissioner R Cosentino	Agreement registered
Executive Transport Services Employees Agreement 2023 AG 9/2024	07/06/2024	Department of Premier and Cabinet	Transport Workers' Union of Australia WA Branch	Commissioner T Kucera	Agreement registered
IdentityWA and United Workers Union Support Workers Agreement 2023-2026 AG 18/2024	07/06/2024	IdentityWA, United Workers Union	(Not Applicable)	Senior Commissioner R Cosentino	Agreement registered
Shire of Cranbrook Outside Staff Collective Agreement 2023 AG 10/2024	28/05/2024	Shire of Cranbrook	Local Government, Racing, Cemeteries Employees Union (LGRCEU), Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
Shire of Harvey Enterprise Agreement 2023 AG 11/2024	13/05/2024	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Shire of Harvey	Senior Commissioner R Cosentino	Agreement registered
Shire of Murray (Administration Staff) Enterprise Bargaining Agreement 2023 AG 13/2024	14/05/2024	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Shire of Murray	Senior Commissioner R Cosentino	Agreement registered
Shire of Murray (Outside Workforce) Enterprise Bargaining Agreement 2023 AG 12/2024	14/05/2024	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Shire of Murray, Local Government, Racing and Cemeteries Employees Union (WA) (LGRCEU)	Senior Commissioner R Cosentino	Agreement registered
Shire of Pingelly Industrial Agreement 2023 AG 17/2024	22/05/2024	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Pingelly, Local Government, Racing and Cemeteries Employees Union (WA)	Senior Commissioner R Cosentino	Agreement registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2024 WAIRC 00210

COMMISSION TO MAKE ORDERS AS TO TERMS OF THE CITY OF ALBANY INDUSTRIAL AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2024 WAIRC 00210
CORAM	:	SENIOR COMMISSIONER R COSENTINO
HEARD	:	MONDAY, 22 APRIL 2024, TUESDAY, 23 APRIL 2024 AND WEDNESDAY, 24 APRIL 2024
DELIVERED	:	TUESDAY, 14 MAY 2024
FILE NO.	:	APPL 81 OF 2023
BETWEEN	:	CITY OF ALBANY, WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	:	Industrial Law (WA) – Application for registration of industrial agreement - <i>City of Albany Industrial Agreement 2023</i> – Application for Commission to make orders as to specified matters – s 42G – Wage rates – Monetary allowances – Whether provisions for pay increases beyond the nominal expiry should be included – Orders issued
Legislation	:	<i>Fair Work Act 2009</i> (Cth) <i>Industrial Relations Act 1979</i> (WA)
Result	:	<i>Orders issued</i>
Representation:		
Counsel:		
First Applicant	:	Mr C Beetham, of counsel
Second Applicant	:	Mr Z Doherty, of counsel
Solicitors:		
Applicant	:	MinterEllison
Respondent	:	Fogliani Lawyers

Case(s) referred to in reasons:

Australian Municipal, Administrative, Clerical and Services Union v City of Albany, Andrew Sharpe [2023] WAIRC 00958
Burswood Resort (Management) Ltd v Australian Liquor, Hospitality & Miscellaneous Workers' Union, Western Australian Branch [2003] WASCA 102
Federated Municipal and Shire Council Employees Union of Australia and City of Melbourne & Ors; The Municipal Employees (Western Australia) Award 1982 [1983] CthArbRp 336; (1983) 290 CAR 206
Re City of Albany [2020] FWCA 3663
Re Fire and Emergency Services Authority of Western Australia, United Firefighters Union Australia West Australian Branch [2007] WAIRC 00469; (2007) 87 WAIG 1283
Re Mars Australia Pty Ltd [2023] FWC 2402
Re Tramways Employees (Melbourne) Award 1949 [1951] CthArbRp 528; (1951) 72 CAR. 26
Western Australian Police Union of Workers & Anor v Commissioner of Police [2017] WAIRC 00822; (2017) 97 WAIG 1749
Western Australian Police Union of Workers v Commissioner of Police [2021] WAIRC 00047; (2021) 101 WAIG 293

Reasons for Decision

- 1 Albany, in Menang Country, is a place of stunning natural beauty, of fishing and farming, of ancient traditional culture and Menang-Noongar moort, of significant colonial heritage, and of ANZAC history. The Albany region is a place where a community of some 41,000 people live and work all year round. From what I hear, most Western Australians who do not call Albany home, rate it at or near the top of their favourite places to visit.

- 2 Undeniably, the Albany region has grown to be such a special and esteemed place in no small part because of the role of the local government, the City of Albany (**the City**). The future of this community is very much in the hands of the City and so, is dependent on the dedication, skills, knowledge, experience and work of the City's employees, officers, councillors and volunteers.
- 3 In order for the City to fulfil its statutory functions and deliver quality services to the community, it must attract and retain a dedicated, committed and skilled paid workforce. The pay and conditions afforded to this workforce are key to the City's capacity.
- 4 For many years, the City negotiated with Australian Municipal, Administrative, Clerical and Services Union as bargaining representative for its workforce, to reach collective agreements that were aimed at achieving precisely this objective. Prior to 2022, these agreements were registered with the Fair Work Commission under the *Fair Work Act 2009 (Cth)* (**FW Act**). The *City of Albany (General Workers) Enterprise Agreement 2011 (2011 Agreement)* expressly recognised that it was the mechanism by which the City was to achieve its aim of 'providing services that are responsive to the community needs and aspirations...' by creating an organisation where '[e]mployees are dedicated to working for the good of Albany and its Community and are recognised as a valuable resource...and are rewarded for doing so.': cl 5.
- 5 The *City of Albany Enterprise Agreement 2019 (2019 Agreement)* was the last agreement the parties made under the FW Act. It was approved on 15 October 2019 and operated from 22 October 2019. It reached its nominal expiry date on 30 June 2022.
- 6 On 1 January 2023, the local government sector transitioned from the federal industrial relations system to the state industrial relations system. In the meantime, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (**WASU**)¹ and the City engaged in negotiations for an industrial agreement to replace the 2019 Agreement. The negotiations stalled. WASU and the City agreed on many of the terms of a new agreement, but did not agree on three matters:
- What wage increase should apply during the nominal term of the new agreement on 1 July 2023, 1 July 2024 and 1 July 2025.
 - What increase should apply to allowances contained in the new agreement, on each of those dates.
 - Whether the new agreement should provide for a wage increase after its nominal expiry date if certain conditions concerning negotiations for a replacement agreement are not met.
- 7 Having reached this impasse, the parties jointly applied to the Western Australian Industrial Relations Commission (**the Commission**) under s 42G of the *Industrial Relations Act 1979 (WA)* (**IR Act**) for the Commission to register a new agreement in the terms the parties agreed about, together with any other provisions as ordered by the Commission about the matters that the parties themselves had not agreed.

Outline of parties' positions

- 8 The matters the parties agreed on were set out in a draft agreement to be titled *City of Albany Industrial Agreement 2023 (2023 Agreement)*. The terms of the draft agreement substantially involve a roll-over of the 2019 Agreement. There are no substantive changes to the terms and conditions of employment compared with the 2019 Agreement, save for wage and allowance increases, changes to the Outside Employees Level Matrix Tool, and whatever changes result from this arbitration.
- 9 It is estimated that the 2023 Agreement will apply to 450 employees. This includes part-time and casual employees.
- 10 The 2023 Agreement will operate from the date of its registration and have a nominal expiry date of 30 June 2026.
- 11 Although the 2023 Agreement will commence at a future time, namely, when it is registered, it provides for retrospective pay increases. Wage rates for 2022/2023, described as 'current rates' are set out in three clauses. Clause 52 contains the agreed 2022/2023 hourly and annual wage rates for 'General Employees'. General Employees, also known as 'the Inside Workforce', include clerical and administrative employees, library staff, recreation centre staff, visitor and tourism centre employees, cleaners, community service employees, rangers and emergency service employees.
- 12 Clause 53 contains the agreed 2022/2023 hourly and annual wage rates for the 'Outside Employees'. Outside Employees includes employees working in sanitary, recycling and waste management services, street sweepers, construction and maintenance and parks and gardens.
- 13 Clause 54 contains the agreed 2022/2023 hourly and annual wage rates for Daycare Employees. Daycare employees are those who work in the Albany Regional Daycare as cleaners, kitchen hands, gardeners, early childhood educators, and day care centre managers.
- 14 The wage rates in each clause are set by reference to classification levels. The classifications are defined in clauses 49 to 51. There are nine classification levels for General Employees. The Level 1 adult wage starts at \$52,268.84 per annum. Level 9 step 4 has a wage rate of \$109,983.90 per annum.
- 15 There are eight classification levels for Outside Employees, from Municipal Employee Entry Level 3 at \$57,936.06 per annum through to \$79,134.90 for a Qualified Tradesperson Level 10 step 3.
- 16 There are nine classification levels for Daycare Employees from a Level 1 Support classification with a rate of \$51,333.88 per annum to Level 6 Managers with a rate of \$92,517.88 per annum.
- 17 The wage clauses also include steps or bands within each level, that is, an incremental progression in wage rates. Under clause 17, employees are eligible for incremental progression to the next band within a level at the conclusion of 12 months, subject to providing satisfactory service over the preceding 12 months and acquiring or utilising such new skills as specified in any Personal Performance Development Review.

- 18 The 2023 Agreement contains relatively generous provisions for redundancy pay: cl 43.1.2, pay for attending union meeting and union business: cl 48.3, additional superannuation contribution matching: cl 20.9 and three days' paid festive leave: cl 31.8.
- 19 Clause 19 of the 2023 Agreement contains several monetary allowances, such as allowances for being on-call, for meals when working overtime, for acting as a first aid officer, for provision of own tools if classified as a carpenter, for provision of uniform and for working in hazardous conditions or conditions involving particular hardship.
- 20 The parties agreed that the 2022/2023 wage rates and the monetary allowances specified in the 2023 Agreement should be increased during the life of the 2023 Agreement with effect from 1 July 2023, 1 July 2024 and 1 July 2025.
- 21 As to the matters that were not agreed:
- 22 WASU seeks pay increases of 7.6% on 1 July 2023, 5.8% on 1 July 2024 and 5% or 'Perth CPI', whichever is greater, on 1 July 2025.
- 23 WASU seeks an order for allowances to be increased on 1 July 2023, 1 July 2024 and 1 July 2025 by whichever is greater of the wage increase ordered by the Commission, or 'Perth CPI'.
- 24 WASU seeks the inclusion of a clause making provision for pay increases tied to 'Perth CPI' post the nominal expiry date of the Agreement, if certain conditions are met, including if a replacement agreement has not been agreed within 6 months of the nominal expiry date.
- 25 For the purpose of WASU's claims, 'Perth CPI' is the percentage change in All Groups' Consumer Price Index for Perth in the preceding year to the March quarter. For example, Perth CPI as at 1 July 2026 would be the change in Perth CPI from 1 April 2025 to 30 March 2026.
- 26 The City seeks pay increases of 4% for General Employees and Daycare Employees on each of 1 July 2023, 1 July 2024 and 1 July 2025. It seeks pay increases for Outside Employees of \$4,000 on 1 July 2023 and 4% on 1 July 2024 and 1 July 2025.
- 27 The City seeks an order for allowances to be increased on 1 July 2023, 1 July 2024 and 1 July 2025 by the same percentage that wages are increased, in accordance with the Commission's order on that issue.
- 28 The City opposes the inclusion of any provision for pay increases beyond the nominal expiry date of the 2023 Agreement.

The arbitration

- 29 This arbitration did not involve any contest about facts. The relevant background context, documents, and history were largely agreed.
- 30 The City relied on the evidence of its CEO, Mr Andrew Sharpe and its Executive Director, Corporate and Commercial Services, Mr Matthew Gilfellon, both of whom travelled to Perth from Albany to be present at the hearing. They told the Commission about the nature of the City's functions as a local government, its revenue sources, its budgeting processes, and the considerations it had given to formulating its offers of wage increases in negotiations for the 2023 Agreement.
- 31 The City also called Mr Aaron Morey, Chief Economist for the Chamber of Commerce and Industry Western Australia. Mr Morey produced an expert report addressing the health of the Western Australian Economy, Consumer Price Index movements, both past and forecast, and wage growth in Western Australia, past and forecast.
- 32 WASU relied on the evidence of two of its delegates employed by the City, Mr Andrew Greenwood and Mr Thomas Wenbourne, who travelled to Perth from Albany to be present at the hearing. They explained to the Commission the work they do for the City. They talked about their involvement in bargaining for collective agreements at the City, and in particular, the circumstances leading to the inclusion of different forms of clauses to maintain wages in line with inflation. They referred to pre-2022 wage increases, and that this had given them an expectation about wage increases that should have been applied in 2022 and into the future. They also touched on how increases in costs of living impacted on them personally.
- 33 WASU's Assistant Branch Secretary, Ms Jill Hugo, gave evidence about her involvement in organising and representing WASU's members at the City over the last 14 years. Ms Hugo has, over that period, developed close and strong relationships with members and delegates at the City, and has been involved in bargaining with the City since 2010. Based on this history, she understood members were passionate about maintaining particular conditions as a 'safety net.' She recounted the kinds of things members were telling her about cost of living pressures.
- 34 Ms Hugo was able to provide a good picture of the composition of the City's workforce by gender, occupation and classification level. She told the Commission about the circumstances which led to the City's employees voting to approve a variation to the 2019 Agreement with the effect that they would forego a 2.1% wage increase in 2020, despite WASU recommending against the variation.
- 35 Ms Hugo talked about the bargaining for the 2023 Agreement, a dispute that arose about the post-nominal expiry date increases under the 2019 Agreement leading to enforcement proceedings being commenced in the Industrial Magistrates Court, and the termination of the 2019 Agreement.
- 36 All of the witnesses were frank, honest and credible. I am grateful to them for the assistance they provided to the Commission.
- 37 I was referred to, and have considered, the following categories of documents:
 - a. The collective agreements in place between 2011 to 2019.
 - b. A variation to the 2019 Agreement registered by the Fair Work Commission in 2020.
 - c. Various emails related to the negotiations for the 2013 Agreement.
 - d. Past City of Albany Annual Reports.

- e. City of Albany Annual Budget for 2023/2024.
 - f. Australian Bureau of Statistics (ABS) 2021 Census data for Albany Local Government Area (2021 Census).
 - g. ABS CPI and household spending data, namely the ABS Consumer Price Index, Australia, March Quarter 2024⁷ report (ABS CPI March Quarter 2024 Report).
 - h. Government of Western Australia Economic Profile February 2024 and April 2024.
 - i. Workforce breakdown by classification, band, pay rate and gender.
 - j. A summary of pay increases for local governments under industrial agreements registered with the Commission.
- 38 WASU also tendered evidence of the spending of one of its employee witnesses, comparing the employee's costs of particular goods and services on particular dates between 2019 and 2024. I understand WASU put this evidence before me to demonstrate that employees are facing rising costs of living. While I have no hesitation in accepting that employees have had to deal with, and continue to deal with, rising household costs, I have not placed any weight on these documents which do not provide any meaningful comparison, or, where they do provide a comparison, do not demonstrate costs have risen in any greater amount than the increases in wages paid by, and proposed to be paid by, the City of Albany.

Section 42G principles

39 Section 42G says:

- (1) This section applies where —
 - (a) negotiating parties have reached agreement on some, but not all, of the provisions of a proposed agreement; and
 - (b) an application is made to the Commission for registration of the agreement as an industrial agreement, the agreement to include any further provisions specified by an order referred to in subsection (2); and
 - (c) an application is made to the Commission by the negotiating parties for an order as to specified matters on which agreement has not been reached.
- (2) When registering the agreement, the Commission may order that the agreement include provisions specified by the Commission.
- (3) An order referred to in subsection (2) may only be made in relation to matters specified by the negotiating parties in an application referred to in subsection (1)(c).
- (4) In deciding the terms of an order the Commission may have regard to any matter it considers relevant.
- (5) When an order referred to in subsection (2) is made, the provisions specified by the Commission are, by force of this section, included in the agreement registered by the Commission.
- (6) Despite section 49, no appeal lies from an order referred to in subsection (2).

40 In s 42G proceedings, there is no onus in the usual sense. The parties put their respective cases and the Commission decides the matter in accordance with equity and good conscience: *Western Australian Police Union of Workers v Commissioner of Police* [2021] WAIRC 00047; (2021) 101 WAIG 293 at [14].

41 In determining a dispute under s 42G, the Commission:

- a. Has a broad discretion to reach a conclusion based on the evidence before it;
- b. Can and should consider a range of elements including the IR Act's objects set out in s 6, and any other matter it considers relevant;
- c. Is subject to the requirements of s 26;
- d. Is not bound to take into account the Statement of Principles made under s 50A(1)(d)(i) of the IR Act.

Re Fire and Emergency Services Authority of Western Australia, United Firefighters Union Australia West Australian Branch [2007] WAIRC 00469; (2007) 87 WAIG 1283 [377]; *Western Australian Police Union of Workers v Commissioner of Police* [2021] WAIRC 00047; (2021) 101 WAIG 293 at [37], [61].

42 Ultimately, my task is to balance the competing interests of WASU, its members employed by the City, other employees of the City, the City itself and the community.

43 The assessment of the competing proposals advanced by each party requires that there be a firm evidentiary basis to justify any orders I may make. Though the Commission is not bound by the rules of evidence, this does not mean the Commission is able to act without any evidence. This has been a longstanding principle of industrial arbitration. In *Re Tramways Employees (Melbourne) Award 1949* [1951] CthArbRp 528; (1951) 72 CAR. 26, the Commonwealth Court of Conciliation and Arbitration stated at 27 - 28:

Although the Court is not bound by rules of evidence, this had never been held to mean that the Court would act without evidence. If a tribunal were to so act, obvious injustices and insecurities could result. ...

The industrial system has been functioning for so long that even an inexperienced advocate should know that an industrial claim is not to be had for the asking, but is necessarily dependent upon the quality of the relevant evidence produced...

Wage increases 2022-2025

44 Both parties agree that wages should increase annually to ensure employees are fairly rewarded for their work and so that the City can attract and retain the resources it needs. This is not a case involving claims for increases to wages based on changes in work value, productivity, or working conditions.

- 45 WASU says the increases it seeks keep employees' remuneration in line with inflation. WASU fairly points out that the City's employees are not highly paid workers. The average adult full-time wage of the City's employees (excluding overtime, penalties and allowances) is less than \$70,000 per annum: Exhibit A6.
- 46 There are two grounds for WASU's claimed increases of 7.6%, 5.8% and 5% or Perth CPI.
- 47 First, WASU says that such increases are consistent with the longstanding and well-understood industrial practice that has existed in the City's collective agreements going back at least to the 2011 Agreement, whereby annual wage increases have met or exceeded inflation. In other words, it is the status quo. As a consequence, employees have an expectation that their wages will at least keep pace with inflation as measured by Perth CPI.
- 48 Second, WASU says increases in line with inflation as measured by Perth CPI will ensure that the value of employees' labour is not diminished because of a failure of their wages to keep up with the costs of living. It makes the obvious and uncontroversial point that inflation or increases in the cost of living disproportionately affect low-paid workers because they do not have as much disposable income to absorb those increases compared with higher paid employees. Further, increases in line with the change in Perth CPI ensure that employees are not moving backwards in terms of the value of their labour.
- 49 WASU says that the City's revenue has increased from 2018/2019 to 2022/2023, and expenses have increased commensurately. It says the City is in a healthy financial position, and has the ability to meet any increase in employee expenses.
- 50 Finally, WASU says the Western Australian economy is healthy, with gross state product forecast to grow and the wage price index (WPI) also rising. The WPI for Western Australia increased by 4.7% in the December quarter of 2023. This is relevant to the broader labour market and labour market competition.
- 51 The City's proposed increases of \$4000 or 4% in the first year and 4% in the following two years is based on the following considerations:
- a. It is in line with or better than wage increases that have been agreed to by other local governments in agreements registered under the IR Act since 1 January 2023.
 - b. It is in line with and at or above forecast inflation for the financial years 2023/2024 and 2025/2026.
 - c. It is broadly in line with or cumulatively above predicted All Industries and Public Sector WPI growth during the nominal term of the 2023 Agreement, involving a cumulative wage increase of 12.5% over the term compared with predicted wage growth of 11.5%.
 - d. It has been properly budgeted for and takes into account the City's budgetary constraints, given its functions as a local government.
 - e. From 2014-2022 cumulative wage growth at the City was 24.3% compared with 18.2% in the Western Australian Public Sector WPI and 17.7% in Western Australia All Industries WPI.
- 52 The City says these objective considerations mean that the increases it proposes are sustainable and therefore fair to the City, fair to employees concerned and provide certainty for administrative purposes.

History of wage increases

- 53 Both parties rely, with different emphasis, on historical wage increases in support of their positions.
- 54 WASU says that the fact past wage increases have met or exceeded movements in Perth CPI means that practice ought to continue.
- 55 The City says the fact that past wage increases have, cumulatively, exceeded movements in Western Australia's WPI for both Public Sector and All Industries means the proposed wage increases are fair.
- 56 Both premises are factually true. But they do not meaningfully indicate what is a fair quantum of increases for the 2023 Agreement. A past industrial agreement is not necessarily, or perhaps at all, a yardstick of what is fair and reasonable in the circumstances that have existed since the agreement was reached or in the situation that prevails before the Commission at the time of arbitration. As Commissioner Matthews observed in *Western Australian Police Union of Workers & Anor v Commissioner of Police* [2017] WAIRC 00822; (2017) 97 WAIG 1749 at [72], it is neither here nor there that parties agreed to certain terms and conditions in the past. A past agreement is a product of the circumstances existing at the time it was made, and the usual give and take involved in forming it.
- 57 WASU's claim involves pay increases exceeding actual changes in Perth CPI for 2023 (5.8%) and 2024 (3.4%), and forecast changes in Perth CPI for 2025 (3%). The actual and forecast change in Perth CPI over the life of the 2023 Agreement is 12.2%, compared with WASU's claimed increases of at least 18.4%. WASU's submissions, therefore, do not establish why wages should increase in excess of inflation or to the extent that it claims.
- 58 The City says the pay increases it proposes are broadly consistent with the pay increases provided for in the industrial agreements registered with the Commission which contain provisions for wage increases in the years 2023 to 2025. But I note that the table the City produced in this regard shows that increases for regional local governments are greater on average than those for metropolitan local governments.

59 The difference may be explained by the different labour market condition in regional areas. For example, according to the Government of Western Australia's Economic Profile published in April 2024, the unemployment rate in the Great Southern region in the December quarter 2023 was just 2.7%, compared with Perth's unemployment rate of 3.7%. Mr Morey reported that labour shortages being experienced in the Great Southern region have likely contributed to weaker business confidence in the region, compared with Western Australia as a whole. He based this evidence on the results of the Chamber of Commerce and Industry's Regional Pulse report of March 2024, which was annexed to his report.

Interests of employees concerned: CPI & increased costs of living

60 Inflation, that is, the rising living costs faced by households, is clearly an important consideration. It is the principal interest of the employees concerned.

61 Rigorous and reliable data about inflation and rises in the cost of living in the Albany region is not available to me. There can be no doubt that costs of living in Albany have increased since 2019. Costs will likely continue to increase during the nominal term of the 2023 Agreement.

62 In his report, Mr Morey explained that CPI measures quarterly changes in the price of a 'basket' of goods and services which account for a high proportion of expenditure of a population group. In Australia, the CPI is calculated by the ABS, using several modes of collection to maintain the representativeness of samples and quality in the data.

63 Mr Morey notes that the ABS presents various series of CPI metrics, with the most commonly referenced being All Groups CPI and Trimmed Mean. The All Groups CPI comprises all index components, weighted by the average of eight capital cities. In Western Australia, the most commonly referenced metric is All Groups CPI Perth. This is measured in the same way as All Groups CPI but only for the metropolitan area of Perth.

64 Since 2021, the Perth CPI ex electricity is more commonly referenced, as it removes the electricity sub-component of the CPI basket and therefore removes the significant fluctuations caused by State Government household electricity credits.

65 Mr Morey said that it is theoretically possible to calculate CPI for the Great Southern region, but ABS does not calculate CPI outside the capital cities and the necessary data is not readily available, so the time and effort to collect the necessary data would be prohibitive.

66 Accordingly, the movement in Perth CPI is the most reliable metric available to me to gauge inflation as experienced by Great Southern region residents.

67 Mr Morey was asked whether he agreed that lower income earners would feel the brunt of inflation more than high income earners. Mr Morey noted that because CPI involves many subcategories of goods and services, not all components will be relevant to all people, and different components will be more or less relevant to different subsets of the population over time. He also noted that particular sub-categories have contributed to the rates of inflation since 2019: in the early days of the COVID -19 pandemic, significant supply-side disruptions meant strong inflation for goods, whereas in recent times the contributions have been more from services and rental costs.

68 Although Mr Morey did not agree with the proposition put to him, I can take judicial notice of the fact that lower income earners have less disposable income from which to meet any rise in living costs.

69 Ms Hugo's opinion is that regional areas always feel changes to the cost of living more than Perth. This opinion broadly aligns with Mr Morey's conclusion at [14] of his report that:

While Western Australia has performed well over the past year, it is clear that both the business and household sectors in the Great Southern region have comparatively weaker economic conditions than the state as a whole.

I accept many of the City's employees are experiencing financial stress. Mr Morey also reported that the high cost of living and interest rates are having the biggest drag on consumer confidence in the Great Southern region.

70 As I have already said, the City's claimed wage increases would meet past and forecast inflation measured by Perth CPI, taking into account the cumulative effect of wage increases. For the Outside Employees, the City's proposed increases will outpace past and forecast inflation as measured by Perth CPI. For the rest of the workforce, the City's proposed increases will outpace the past and forecast rate of inflation by 0.3%, once the compounding effect of the increases is taken into account.

71 WASU's claimed wage increases exceed past and forecast inflation measured by Perth CPI by 6.2% without compounding. Its rationale is that it seeks to recoup the 'lag that occurred from when the [2019] Agreement was retired from...[and] certain years where there were no wage increases under the [2019] Agreement, so it's kind of staggered backwards or lagging backwards'.

72 I understand these submissions to be directed to the fact that the agreed 'current rates' for the 2023 Agreement represent a 6% increase to the rates payable under the 2019 Agreement as at its nominal expiry date. The change in Perth CPI in the 12 months ended 30 March 2022 was 7.6%. The difference is 1.6%.

73 I also understand the submissions are a reference to a registered variation to the 2019 Agreement with the effect that no wage increase was payable to employees on 1 July 2020, when the relevant change in Perth CPI for the 12 months to 30 March 2020 was 2.1%: *Re City of Albany* [2020] FWCA 3663

74 WASU seeks to include these differences, amounting to 3.7%, in the wage increases for 1 July 2023 and 1 July 2024.

75 But employee wages have not fallen behind inflation to the extent of 3.7%. The increases that were applied in two years of the 2019 Agreement exceeded the movement in Perth CPI in those years. Any 'lag' between movement in wages and movement in Perth CPI from the commencement of the 2019 Agreement, to the commencement of the 2023 Agreement, is 2.3%.

76 In any event, WASU's case for recouping this 'lag' in the 2023-2025 wage increases, is conceptually awkward and illogical.

77 The rates of pay applicable from 1 July 2022 is a matter that the parties have agreed.

- 78 Similarly, while WASU did not agree to the 2019 Agreement variation, the majority of employees affected by the variation did. The Fair Work Commission's decision records that 298 employees would be affected by the variation, of whom 279 cast a valid vote and 211 voted in favour. The variation was registered in accordance with the FW Act.
- 79 The parties have established and agreed on what rate of pay will apply from 1 July 2022 until 30 June 2023. They did so after the 2019 Agreement variation and with knowledge of it and its effects. Inflation rates prior to 1 July 2022 are therefore irrelevant.
- 80 To build historical 'lag' into a pay increase for 1 July 2023, or subsequent pay increases, is akin to undoing the deals already made. It is inappropriate for me to embark on that course. WASU cannot, on the one hand, be in agreement with the 2022 wage rates, and at the same time try to increase the agreed rate through the side door of annual increments.
- 81 I would observe, as an aside, that there is nothing commercially nonsensical or unreasonable in having agreed the 2022 wage rates. The increase of 6% represented an amount exceeding movements in WPI in Western Australian. Table 3 of Mr Morey's report records that 'WA All Industries WPI Growth' in 2022 was 2.7% and 'WA Public Sector WPI Growth' in 2022 was 1.1%. Local government forms part of the WA Public Sector matrix. In this context, the increase to the wage rates WASU agreed for 2022 are generous.
- 82 WASU's proposal also fails to account for the fact that many employees' pay has increased, or will increase, or has both increased and will increase, in amounts greater than the percentage increases in the 2023 Agreement because they were or will be eligible to progress to the next band within their level on the anniversary of commencing in that level. The increases for bands within each level represent an increase in wage rate of around 2%. The data provided to me about employees' current position within each level shows that 23% of employees covered by the 2023 Agreement are currently at the top band within their level. For these employees, unless promoted, they will not have pay progression. However, a proportion of them will have reached the top of the band since 2019, and so have had the benefit of those increases in the past. And 77% of employees will be eligible for one or more increment increases during the nominal term of the 2023 Agreement.
- 83 Additionally, some employees will also have increases in pay as a result of promotions and reclassification. Mr Gilfellon explained that the City has implemented initiatives to ensure there are opportunities for career progression, such as reclassifying positions, and redrafting position descriptions so that they refer to two levels, rather than one, to ensure an employee can potentially achieve up to eight increments with the same position description. Both he and Ms Hugo also noted that the parties had agreed to changes to the 2023 Agreement's Outside Employees Level Matrix Tool to enable employees to be more easily promoted to a higher level through experience rather than requiring formal qualifications.
- 84 Not all employees will achieve increases in their wages from progression within or between levels. However, a sufficiently significant proportion of the workforce will, such that I consider this is a relevant factor where inflation is used as a justification for claimed increases.
- 85 Finally, WASU's reliance on the movement in Perth CPI does not take into account the compounding effect of past increases. Mr Morey explained that compounding results from the application of a percentage increase to an amount that incorporates a previous increase. The total increase is not simply a matter of adding up individual rates of increase. Mr Morey reports that a 4% increase each year over three years represents cumulative growth of 12.5%, whereas WASU's proposed increases represent cumulative growth of at least 19.5%.

Western Australia's economy

- 86 Some aspects of the state of the economy of Western Australia are relevant to my determination. In particular, inflation forecasts are relevant, as discussed above. Additionally, the Western Australian WPI movements are relevant, as is data about labour force participation, as they reveal things about the labour market, and what is needed to maintain wages at rates that are sufficiently competitive to ensure the City can attract and retain employees. The general health of the Western Australian economy is relevant to the City's prospects of future growth in revenue as well the likelihood of it facing increased operating costs.
- 87 The Government of Western Australia Western Australia Economic Profile published in April 2024 (**Economic Profile**), forecasts gross state product, a measure of the total economic production of the state to rise 1.75% in 2023/2024 and 2% in 2024/2025. I note that this represents slower growth in gross state product compared with the 2022/2023 period when the rise was 3.5%.
- 88 WASU points out that the nominal wage growth in Western Australia, measured by WPI, has increased over the past three years, and was 4.7% in the December quarter 2023. The Economic Profile forecasts Western Australia's annual average wages will rise 4.25% in 2023/2024 and 3.5% in 2024/2025. While nominal wage growth over the past three years has, for most of the time, been lower than inflation this has resulted in falling real wages. Real wages in Western Australia grew for the first time in the December quarter 2023 as the rate of inflation dropped to its lowest level in two years.
- 89 The Economic Profile also relevantly shows that:
- Growth in employment and total monthly hours worked in Western Australia has moderated over the past year. Annual average employment is forecast to increase 2.5% in 2023/2024 and 1.75% in 2024/2025. Average monthly hours worked in all jobs rose 3.6% in March 2024, down from the record high growth of 7.7% in February 2022.
 - While employment growth during the economic recovery from the COVID-19 pandemic was broad based across industries, divergent changes in employment by industry has now emerged, with large rises in average employment in healthcare and social assistance and falls in average employment from March 2023 to March 2024 in public administration and safety.
 - Western Australia's unemployment rate in the Great Southern was 2.7% in the December quarter 2023 compared with 3.6% for all of Western Australia, and 3.7% for Perth.

- d. Western Australia's employment participation rate averaged 69.2% in 2022/2023 and is forecast to decline slightly to 68.8% in 2024/2025.
- 90 Mr Morey's evidence about the state of the Western Australian economy was to the effect that the economy has performed strongly over the past year. WA's domestic economy grew 5.5% over 2023, more than double that of any other state. At the same time, the labour force has continued to grow, reaching a record size in January 2024. This growth has largely been underpinned by business investment from a number of large-scale resources projects ramping up, and the iron ore majors operating close to capacity. The Government investment has also contributed to this result, with the Western Australian Government's Asset Investment Program driving investment.
- 91 Mr Morey also stated at [3], [6] and [8] of his report:
3. Household consumption has gradually slowed over the past two years as inflationary pressures and elevated interest rates have forced households to tighten their belts. While household consumption continues to grow, this is at a slower pace and being supported by strong population growth. Indeed, consumption per capita has started to decline, indicating individual consumers have reduced their spending
 - ...
 6. Looking ahead, economic growth in WA is expected to slow considerably.
 - ...
 8. Overall, [Chamber of Commerce and Industry WA (CCIWA)] expects State Final Demand to grow 4.75% in 2022-23, slowing to 2.5% in each of 2024-25 and 2025-26. Gross State Product (i.e. including net exports) is expected to grow 1.5% this financial year, increasing to 1.75% in 2024-25 then falling to 1.25% in 2025-26. A further slowdown in China's property sector, escalating conflict in the Middle East and more persistent inflation than anticipated are the key risks to this forecast...
- 92 The evidence before me concerning the state of Western Australia's economy supports the view that wages should not remain stagnant during the nominal term of the 2023 Agreement. But it does not provide a justification for wage increases during the nominal term of the 2023 Agreement in the amounts claimed by WASU. On the other hand, the increases proposed by the City are broadly consistent with and supported by the economic evidence.

The City's interests

- 93 The City seeks increases in fixed percentages, rather than by reference to Perth CPI which must be ascertained at a later point in time. Its reason is that a percentage increase in each year provides it with certainty so that it can calculate and forecast employee expenses, and prepare a balanced and responsible budget on that basis. This also provides greater certainty for long term planning.
- 94 Mr Morey's evidence supports this rationale. His evidence was that:
30. CPI can be forecast using a combination of econometric modelling and qualitative analysis. As different forecasters utilise different models and may have differing views on which factors influence CPI, these forecasts may differ. Common variables used in determining inflation forecasts include, but are not limited to, past inflation, economic growth, interest rates, wage growth, unemployment rates and population growth.
 31. CPI can technically be forecast as many periods into the future as one would like. However, the further into the future a forecast is, the greater the error associated with that forecast. For this reason, it is typical to only forecast between two to three years into the future. Any forecast that is further than three years in the future is typically labelled a projection - that is, it is considered to trend towards a steady state.
- 95 He also notes that the COVID-19 pandemic has created a volatile inflationary environment, increasing the difficulty in accurately forecasting inflation.
- 96 WASU did not contest either this evidence or the City's rationale. They are valid considerations that weigh in favour of an order by which wages are increased in a fixed amount.

City's capacity to bear the cost of wage increases

- 97 I am confident that the City can bear the cost of annual wage increases in the order of 4% per annum. The City's witnesses confirmed that the City has budgeted for its proposed increase in the 2023/2024 financial year, and there is no reason to consider it cannot bear the same increases in the following financial years.
- 98 The City's evidence was that the budgeting process was a detailed, thorough and careful process involving managers, directors and the elected Council. The process is designed to ensure:
- a. The budget is balanced.
 - b. The City's business, that is, service delivery to the community and meeting its statutory obligations, is maintained.
 - c. The City's asset base is maintained to an adequate level.
 - d. The City's financial position is sustainable for the future, so that long term planning can be implemented.
 - e. Significant rate shocks are avoided, and rate rises are fair and reasonable.

- 99 WASU points out that the City had a surplus of revenue after expenses in both years 2018/2019 and 2022/2023 of over \$12 million. However, in both years, roughly \$11 million of the City's revenue was from non-operating grants, subsidies and contributions. Non-operating grants, subsidies and contributions are amounts received by the City specifically for the acquisition, construction of new or the upgrading of non-current assets: Exhibit U3. Operating revenue, that is, revenue from rates, operating grants, fees and charges and interest earnings exceeded operating expenditure by less than \$1 million in both years: Exhibit U2, Exhibit U3.
- 100 The budgeted position for the 2023/2024 financial year involves roughly similar revenue of \$79 million compared with 2022/2023. However, expenses are budgeted to increase from \$77 million to \$87 million, so that, excluding non-operating grants, subsidies and contributions, the City will have an operating loss in 2023/2024: Exhibit U4
- 101 WASU's written submissions correctly concede that the expenses have increased in an amount exceeding the increases in revenue. It noted that a significant contributor to the increase in expenses is materials and contracts, and submits the City should reign in its spending in this regard. It led no evidence as to how the City could reign in that spending, or what impacts doing so would have on the City's assets, or the services it provides to the community.
- 102 WASU also relies on data which demonstrates the City's rate revenue has grown by an average of 4.73% in the period from 2013/2014 to 2020/2021: Exhibit U1. In more recent years though, rate growth has been more modest: 3.38% in 2019/2020 and 0.97% in 2020/2021. In any event, in isolation this evidence says very little about the City's capacity to pay further increases in wages to employees.
- 103 Nevertheless, the evidence demonstrates the City has had healthy financial performance in recent years, resulting in positive changes in total equity. Its financial reports represent balanced and responsible financial management.
- 104 Mr Sharpe explained that future wage increases beyond those budgeted for will need to be recovered through an increase in revenue, and that the only real lever the City has to increase revenue is through increases in rates, fees and charges. Mr Gilfellon also confirmed that the City's operational and non-operational grant income tends to be fixed, so that the only revenue the City has control over is rates, fees and charges.
- 105 The other option for the City would be, in Mr Sharpe's words to 'structure [employee costs] within the existing budget framework'. I understand this to mean to limit employee costs by reducing either headcount or employee hours, but Mr Sharpe was careful to point out that he did not want to pre-empt what the City's Council might decide in this regard. Mr Gilfellon added that while spending less in some areas is always an option, many functions and services are required to be provided by legislation. It is the City's non-core services which are more likely to be the subject of any cost reductions. Non-core services include the visitor centre, the Anzac Museum, and the Daycare Centre. WASU did not challenge any of this evidence.
- 106 The bottom line is that increases in wages beyond what has been budgeted for will result in any one or more of a combination of a reduction in the City's total equity, increases in rates, fees and charges or reduction in the quantity or quality of community services. In all of these cases, the community, represented by current and future residents, will pay.
- 107 WASU has not established that the 2023/2024 Budget involves any excessive or unreasonable expenditure. It is a responsible and reasonable budget, with operating expenses exceeding operating revenue. It is possible that rate revenue will increase in the future from increases in the rateable value of property without the City increasing the rate in the dollar at which rates are calculated. However, this is a highly uncertain proposition and there is no evidence before me to make any finding in this regard. It is, therefore, safe to infer that in order to have a balanced budget in future years, without any reduction in services, the City will need to increase the rate in the dollar at which rates are calculated and/or increase fees and charges. Future wage increases beyond what has been budgeted by the City will need to be paid for by the City's residents and ratepayers.

Community interest

- 108 This leads to the community interest which I may have regard to under s 26(1)(c) if it is appropriate to do so.
- 109 The median income of residents in Albany is relatively low: as at the 2021 Census, it was \$710 per week. Ratepayers bore an increase to rates in the order of 4.95% in 2023/2024.
- 110 Many of the City's employees are themselves ratepayers. Others are residents who contribute to the City's revenue through payment of fees and charges for the City's facilities and services.
- 111 Of course, it is in the community's interest that the City be able to attract and retain a workforce sufficiently skilled, experienced and capable of delivering services to it.
- 112 In light of these matters, I think this is a case where it is appropriate to have regard to the community interest. It is not a determinative factor, but reinforces my reluctance drawn from the other considerations, to make an order for increases in wages beyond what the City has budgeted and proposed, particularly as WASU has not established a sound basis for the increases it seeks.

Distortion of relativities

- 113 The City proposes an increase on 1 July 2023 of \$4,000 for Outside Employees and 4% for all other Employees. A \$4,000 increase represents an increase of between 5% and 6.9% for Outside Employees depending on their level and band. Outside Employees would therefore receive a greater percentage increase than the rest of the workforce.
- 114 The rationale for the difference in proposed pay increases is that the City has experienced relatively high turnover in the outside workforce. Mr Sharpe said turnover had increased recently from an historical level of under 10% up to 12% or 15%. He said the City is keen to reverse this, and attract and retain employees in this area.
- 115 Mr Gilfellon told the Commission that competition for jobs for outside workforce occupations is higher than other areas, because of projects like the Albany Ring Road construction, which is being undertaken by private contractors. He also noted

that Fly-in, Fly-out positions are readily available to Albany residents because Rio Tinto has flights to and from the Albany airport, and the outside workforce has a readily transferable skill set for that labour market.

116 Ms Hugo agreed that there has been higher turnover in the outside workforce. She noted that there was a time when the City had at least 10 vacancies in the outside workforce to fill. As a result, work had been done by the parties on the Outside Employees Level Matrix Tool to make it easier to employ people based on experience rather than just qualifications and tickets.

117 Mr Sharpe indicated that the Albany Ring Road contract was due to finish in October, and so he thought the market might be 'a little easier for us' once construction was completed.

118 During the hearing, I expressed my concern that the difficulty with retention and recruitment might be a temporary situation, while the proposed pay increases would permanently distort the existing relativities between Outside Employees and the balance of the workforce.

119 This concern is heightened by the fact that the respective workforces are gendered: around 87% of Outside Employees are male, while all of the Daycare Employees and about 72% of the General Employees are female. The proportion of female General Employees is closer to 80% at levels where the annual wage rate is less than \$80,000 per annum.

120 The average wage level of Daycare employees is lower than the other two cohorts at \$54,332.54. The average wage for Outside Employees is around \$63,000 and for General Employees it is around \$69,500: Exhibit A4.

121 Passing on a higher increase in wages to Outside Employees only will distort existing relativities within the 2023 Agreement. This may, in turn, undermine the attainment of equal remuneration for men and women for work of equal or comparable value, bearing in mind the Daycare workforce in particular. I consider these to be important relevant factors.

Determination of wage increases during the 2023 Agreement's nominal term

122 A 4% increase on 1 July 2023 is broadly consistent with inflation as measured by Perth CPI, and Western Australian Public Sector WPI growth. If Albany was in the Perth metropolitan area, I would be satisfied that a wage increase in this order was appropriate.

123 However, the evidence before me suggests the labour market in the Albany region is particularly competitive. The unemployment rate is very low - lower than Perth and Western Australia. Mr Sharpe, Mr Gilfellon and Ms Hugo all gave evidence of high turnover in the outside workforce. Mr Morey referred to the limited availability of skilled labour in the Great Southern as suppressing business confidence in the region.

124 These factors lead me to conclude that a pay increase slightly greater than 4% is warranted for 1 July 2023.

125 The concerns I have about the proposed \$4000 increase to Outside Employees outlined above are such that I am unwilling to make an order in terms that will entrench that increase into the wage rates to address these competitive factors.

126 I am prepared to make an order that the 2023 Agreement include a term providing for a one-off payment to Outside Employees of an amount representing the difference between \$4,000 and the increase in wages on 1 July 2023. So that this payment has the desired effect on recruitment and retention, it should be calculated and paid at a point in time in the future.

127 To account for the fact that this one-off payment will not increase the wage rates, and therefore, future increases will not be calculated on a higher wage rate, and to attempt to reflect the tight labour market in Albany, there should be a 0.5% uplift on the 1 July 2023 increase of 4% to all employees, so that the 1 July 2023 increase be 4.5%. This will ensure there is no distortion of relativities.

128 I am satisfied that the increases proposed by the City of Albany for 1 July 2024 and 1 July 2025 of 4% per annum are fair and reasonable having regard to all the relevant considerations discussed above.

129 My proposed orders will provide all employees with a 12.5% increase in wages during the nominal term of the 2023 Agreement. This is consistent with and at or above inflation and forecast inflation from 1 April 2022 to 30 March 2025. It therefore meets the need for wages to keep pace with increases in costs of living during the 2023 Agreement's nominal term.

130 The increases I propose are also consistent with, or above forecast all industries wage growth, and forecast public sector wage growth during the nominal term of the 2023 Agreement. It is an amount which the City can bear without compromising services, or excessively increasing rates, fees and charges to Albany's residents and ratepayers.

Increases to allowances during the nominal term of the 2023 Agreement

131 WASU seeks increases in the allowances under clause 19 of the 2023 Agreement on 1 July 2023, 1 July 2024 and 1 July 2025 in whichever is greater of the amount that wages are adjusted or Perth CPI. Its position in this regard is based on past industrial practice.

132 However, the past industrial practice was not that allowances were adjusted in the manner WASU now proposes.

133 Clause 19.1 of the 2011 Agreement provided for the adjustment of allowances on 1 July each year 'equal to CPI (Perth)'. That is, the increase was equal to CPI even if CPI was less than the wage increase. Clause 17 of the 2016 Agreement and Clause 19 of the 2019 Agreement are in this same category. Adjustments to allowances under the 2019 Agreement were therefore at a lower rate than adjustments to wages.

134 Clause 22.1 of the 2013 Agreement provides for adjustment of 5% in the first year (regardless of CPI) and by Perth CPI in the years thereafter. Again, the first year increase was 5% regardless of whether it was more or less than CPI for that year, and the subsequent years were Perth CPI regardless of whether that amount was more or less than the amount wages were adjusted.

135 WASU's justification does not hold up

- 136 I also note that the 5% increase in wages of 4.5% on 1 July 2023 and 4% on 1 July 2024 that I propose exceed Perth CPI at those points in time and so, WASU's position on those increases is academic. The issue is practically confined to what should happen to allowances on 1 July 2025.
- 137 The City seeks increases in the same amount that wages are adjusted, without reference to a Perth CPI flaw. It desires certainty and simplicity for the purpose of forecasting labour costs and administering the increases.
- 138 The Commission's Statement of Principles, made under s 50A(1)(d) of the IR Act is relevant to my determination, even if it is not binding in these proceedings. Principle 6 provides:

6. Adjustment of Allowances and Service Increments

- 6.1 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of those expenses.
- 6.2 **(deleted)**
- 6.3 Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the State Wage order, or, if an award contains another method for adjusting such allowances, in accordance with that other method.
- 6.4 In the absence of any other prescribed method, where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed or service increments for a monetary safety net increase, the method of adjustment shall be as follows: divide the monetary safety net increase by the rate of pay for the key classification in the award which applied immediately prior to the safety net increase, and multiply the resulting figure by 100.
- 6.5

- 139 The allowances in clause 19 are of two types. Some allowances are related to the manner in which or the conditions under which work is performed and others are expense related.
- 140 In the first category, I am satisfied that the wages should be adjusted in line with movements in wages generally. That is, the allowances in clauses 19.3, 19.5, 19.7, 19.8 and 19.9 should be adjusted by 4.5%, 4% and 4% respectively, consistent with Principle 6.4, as if the movements in wages were safety net increases.
- 141 For expense related allowances, namely the clause 19.4 Meal Allowance, clause 19.6 Carpenter's Hand Tool Allowance and clause 19.10 Uniforms/Uniform Allowance, the more appropriate rate of adjustment is the Perth movement in the cost of the relevant subgroup, as set out in the ABS CPI March Quarter 2024 Report at Table 9 'CPI: Group, Sub-group and Expenditure Class, Index Numbers by Capital City', for each of the years ending 30 March 2023, 30 March 2024 and 30 March 2025. The relevant subgroups are 'Meals out and take away foods', 'Clothing and footwear' and 'Tools and equipment for house and garden'.
- 142 The adjustments I consider appropriate are set out in the draft clauses in **Annexure A** to these reasons. The calculations supporting the draft clauses are set out in **Annexure B**.

Should the 2023 Agreement provide for increases to wages after the nominal expiry date?

- 143 The parties agree that the 2023 Agreement will have a nominal expiry date of 30 June 2026.
- 144 Under s 41(5) and (6) of the IR Act, the 2023 Agreement will operate for the term specified, and, notwithstanding the expiry of the term, will continue in force in respect of all parties, except those who retire from it, until a new agreement or an award is made in substitution for it.
- 145 WASU seeks to ensure that, if the 2023 Agreement is neither terminated nor replaced after the nominal expiry date, that employees receive an inflation linked pay increase from 1 July 2022 and annually on 1 July each year thereafter until the 2023 Agreement is replaced or terminated.
- 146 The clause proposed is as follows:

Clause 4.2: In the event that:

- a) *The City of Albany fails to initiate discussions for a new Enterprise Agreement at least six (6) months prior to the nominal expiry date of this Agreement, with a first meeting to occur no later than 31 March 2026; or*
- b) *A replacement Enterprise Agreement has not been agreed within six (6) months of the nominal expiry of this Agreement;*

then the pay rates in this Agreement shall be increased on and from 1 July in each year until the Agreement is replaced or terminated. The quantum on the increase shall be equal to the positive movement in Perth CPI between 1 April of the previous year and 31 March of the current year. For the avoidance of doubt, the pay increase that would be applied on 1 July 2026 would be the percentage change in All Groups' Consumer Price Index for Perth between 1 April 2025 to 30 March 2026.

- 147 WASU's justification for the inclusion of this provision is based on, first, it being a longstanding industrial practice. WASU says similar clauses to what it proposes have been included in previous agreements since at least 2011, and that practice should continue. Second, because the clause provides an important safety net for employees if negotiations for or the making of a new agreement is delayed. Third, to incentivise the City to commence bargaining within a reasonable time. Finally, because it helps to incentivise and retain staff.

- 148 The City opposes the inclusion of WASU's proposed term for several reasons. I will attempt to summarise those reasons briefly, and hope I do not do any injustice to the City's comprehensive and cogent written and oral submissions by doing so.
- 149 First, the City says that inclusion of a similar clause created uncertainty and disputation in the past, particularly after the nominal expiry date of the 2019 Agreement. This in turn also had a negative effect on morale at the City, and bargaining for the 2023 Agreement.
- 150 Second, the proposed clause will have a chilling effect on bargaining.
- 151 Third, the proposed clause is poorly drafted. Aside from the scheme envisaged by the clause being prone to disputation, the drafting will additionally be a source of disputation.
- 152 Fourth, the proposed clause is inconsistent with the scheme for making industrial agreements under the IR Act.
- 153 Finally, the proposed clause creates uncertainty which makes forecasting costs and budgeting difficult for the City.

Past industrial practice

- 154 Clauses similar to the one WASU proposes for the 2023 Agreement have been agreed in the past. A similar clause was included in the 2013 Agreement. WASU relied on an email from the City's then manager of Human Resources to employees in December 2013 to show that the wording was drafted by the City to meet WASU and employees' 'wish to include a clause that provides an incentive to negotiate a new agreement in a timely and good faith manner'. This was in the context of the preceding 2011 Agreement having an automatic increase post-nominal expiry date, which the City did not include in its offer for a 2013 replacement agreement because 'this is seen as a disincentive for genuine bargaining by the City'.
- 155 As I said already, the fact that the parties have agreed to certain provisions in the past is not a persuasive factor in and of itself. That parties agreed something for one agreement does not mean they would not try to improve on it in later agreements.
- 156 However, if a provision included in a past agreement created difficulties in its operation, that is relevant to whether it should be maintained in the future. I again refer to *Western Australian Police Union of Workers and Civil Service Association of Western Australia Inc v Commissioner of Police* [2017] WAIRC 00822; (2017) 97 WAIG 1749, where Commissioner Matthews said at [74] – [75] (emphasis added):
74. However, **evidence about the operation of a provision over a period of time is relevant and may be instructive.**
75. A lack of complaint or disputation about the operation of a provision cannot as a matter of logic lead to the conclusion that some or most or all persons affected are content with the operation of the provision nor can it lead to conclusions that the provision must be fair and reasonable or that it cannot, fairly and reasonably, be improved upon.
- 157 It is implicit in Commissioner Matthews' reasoning that evidence that there has been dispute about the operation of a provision is indicative of whether the clause is appropriate.
- 158 In this case, the operation of a similar provision, namely clause 4.2 of the 2019 Agreement, was the subject of dispute. As Ms Hugo explained, when delays in bargaining for the 2023 Agreement triggered clause 4.2's requirement to increase wages from 1 July 2022, the City made the decision to pay a 1% increase, while WASU thought the increase should have been 7.6%.
- 159 WASU commenced proceedings in the Industrial Magistrates Court alleging the City had contravened clause 4.2 and that the CEO was involved in the contravention for the purposes of s 550 of the FW Act.
- 160 While the Industrial Magistrates Court proceedings were on foot, the City retired from the 2019 Agreement.
- 161 The effect of retiring from the 2019 Agreement was that the 2019 Agreement terminated, and employee terms and conditions were then governed by state awards. Only the state award entitlements were then enforceable as against the City.
- 162 Mr Sharpe acknowledged that at the relevant time, employees had interpreted clause 4.2 of the 2019 Agreement in a way such that they considered they were entitled to a 7.6% pay increase on 1 July 2022. He acknowledged that there was a general expectation of an increase of 7.6% and that the dispute was, naturally, divisive for everyone involved. He went on to say that it became a very challenging situation for the organisation, that the work culture and work environment was consumed by the issue, and it was a large distraction from getting on with business. He also said that the issue and its impacts started to spill over into the community as well.
- 163 On 14 December 2023, Industrial Magistrate O'Donnell delivered reasons for dismissing WASU's claim that clause 4.2 had been contravened: *Australian Municipal, Administrative, Clerical and Services Union v City of Albany, Andrew Sharpe* [2023] WAIRC 00958. Her Honour concluded that the City's interpretation of the clause was correct, and there was no contravention by the City or its CEO, in relation to the payment under cl 4.2. In so finding, her Honour found that clause 4.2 was uncertain. At [52], her Honour said:
- The fact that there is on the one hand a defined term in the 2019 Agreement pertaining to an annual CPI figure 'for the most recent March quarter', and on the other hand an undefined term which also pertains to an annual CPI figure, but which is used in contexts quite different from those in which the defined term is used, is sufficient to give rise to uncertainty as to the meaning of that undefined term.
- 164 In the meantime, the negotiations between the parties for a replacement agreement understandably stalled. Without knowing what rate of increase the 2019 Agreement provided, no one knew what they were trading away or gaining in agreeing any particular wage rates.
- 165 I accept this history weighs against including the proposed term in the 2023 Agreement.
- 166 Additionally, the proposed clause contains words and phrases which may be ambiguous or inviting of disputation. This intensifies the difficulty WASU faces in pressing for inclusion of the term. For example, what does it mean for the City to 'initiate discussions for a new Enterprise Agreement'? Is initiating discussions different to initiating bargaining as that term is

used in s 42 of the IR Act? Exactly what act or conduct meets this criteria? Must the City make an offer for a new agreement, or is something less required? And what is the intended purpose of the reference to ‘a first meeting’ occurring no later than 31 March 2026? Is it enough for the City to make itself available for such a meeting, must it send an invitation for such a meeting, or must a meeting actually occur? When is a replacement agreement ‘agreed’? When an offer is accepted, when an agreement is signed by all parties, or when some other criteria are reached? Who must reach agreement?

167 These factors weigh heavily against inclusion of the proposed term.

Will the clause incentivise or disincentivise bargaining?

168 The objects of the IR Act, as set out at s 6, include:

- (ad) to promote collective bargaining and to establish the primacy of collective agreements over individual agreements; and
- (ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises...

169 Further, the Commission must take into consideration the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises: s 26(1)(d)(vii).

170 WASU says the clause it proposes advances these purposes while the City says it undermines them.

171 WASU’s position in this regard is somewhat inconsistent. While it says the clause will incentivise bargaining, it also says employees view the clause as a ‘safety net’. The clause can only operate as a ‘safety net’, if the wage increase it provides for is enshrined in a future agreement. In other words, WASU intends to use the clause to limit the scope of future bargaining and not to agree to a replacement agreement unless it contains wage increases that at least meet inflation. In effect, it seeks to agree future wage rates via an earlier round of bargaining.

172 Rather than operate to incentivise bargaining, the clause is apt to be used strategically to establish a floor for future bargaining. That floor is not one that arises from the bargaining itself, but from the previous agreement. In this sense, it is a disincentive to bargaining and particularly, to reaching agreement appropriate to the parties’ needs at the time the agreement is made.

173 There is no suggestion that WASU has not in the past, or will not in future, bargain in good faith. The point is, the proposed clause does nothing to advance or encourage it. It effectively fixes wage rates at a point in time disconnected from the bargaining context.

174 All that needs to happen for the conditions of the proposed term to be met, and a pay rise be triggered, is that WASU serve a log of claims at any point in time before the City does. For instance, if WASU were to serve a log of claim 12 months prior to the nominal expiry date, arguably the City will then be unable to meet the condition in the clause of ‘initiating discussions’. Its failure is not, in that situation, because it is unwilling to initiate discussions, but because it was beaten to it by WASU.

175 If either party withholds agreement for more than six months following the nominal expiry date, that too is a trigger for the pay rise.

176 The disincentivising effect of clauses that operate post the nominal expiry date of an agreement was recognised in *Re Mars Australia Pty Ltd* [2023] FWC 2402 (*Re Mars*), which the City referred the Commission to. That case concerned an application by the employer to deal with a bargaining dispute under s 240 of the FW Act, where an impasse in bargaining for a new enterprise agreement had been reached. The enterprise agreement then in operation, and previous collective agreements going back to 1996, contained a mechanism for yearly wage increases based on increases in CPI. The bargaining representatives disagreed as to whether the relevant clause continued to operate or have effect past the agreement’s nominal term. In any event, the employer sought to specifically and clearly limit any future increases to the nominal term of the new agreement.

177 The employer’s arguments in *Re Mars* were summarised by Deputy President Boyce at [29]:

Mars has raised cogent legal (including enterprise agreement construction) arguments as to why it says that wage increases do not continue automatically and in perpetuity post the expiry of the nominal term of the 2018 Agreement. It also makes the point that wage increases continuing in perpetuity post the expiry of the nominal term of an enterprise agreement are a disincentive to collective bargaining and productivity improvements, in that such perpetuity encourages or facilitates relevant employees to refuse to bargain, engage in surface bargaining, or to otherwise string-out bargaining (because a pay rise will flow to such employees whether or not an existing enterprise agreement (albeit passed its nominal term) is replaced with a new enterprise agreement).

178 Deputy President Boyce agreed. In recommending that the wage increase clause be expressly limited to increases during the nominal term of the new agreement, the Deputy President observed at [38]:

I am inclined to agree with Mars that pay rises ought be limited to the nominal term of the New Agreement. Automatic pay increases continuing infinitum or in perpetuity post the nominal term of an enterprise agreement ultimately gives rise to something other than enterprise bargaining. Whilst parties can agree on almost anything in an enterprise agreement, the notion that pay rises automatically flow post the nominal expiry date of an enterprise agreement, and absent any further negotiations, trade-offs or productivity improvements relevant to and reflective of the current and evolving needs of the enterprise, makes for an unsustainable relationship.

179 The idea that post nominal expiry date wage increases are a disincentive to genuine and productive bargaining is not novel. It is a matter of good industrial sense. The same considerations apply in this case.

180 A related consideration is that what WASU is asking the Commission to do is impose a floor for future bargaining or fix wage increases outside the nominal term of the 2023 Agreement, through s 42G arbitral proceedings. I consider this is inimical to the objects of the IR Act and the scheme of s 42G.

181 The purpose of s 42G is to resolve the parties' dispute about the instant agreement, that is the dispute that exists between the parties at the time of this arbitration about the 2023 Agreement. It is not appropriate for the Commission to impose a clause on the parties which will change their respective rights and obligations after the nominal expiry date. It is a different thing for parties to themselves agree to limit the scope of future agreements, or to agree to wage increases beyond the nominal term, but for the Commission to do so in the face of s 26(1)(d)(vii) seems a step beyond s 42G's purpose. It reaches beyond the current dispute about the 2023 Agreement.

Interests of employees concerned: the proposed clause as a 'safety net'

182 I have said that I see the 'safety net' argument as being akin to a limit on the scope of bargaining.

183 Additionally, I am not persuaded that employees' expectations of, in effect, a guarantee of wage increases linked to inflation, is a good reason for inclusion of the term, because such expectation, if it is held, is unreasonable.

184 As Scott J said in *Burswood Resort (Management) Ltd v Australian Liquor, Hospitality & Miscellaneous Workers' Union, Western Australian Branch* [2003] WASCA 102 at [16] and [17], one of the purposes of s 41(6) of the IR Act, which extends the operation of an industrial agreement beyond its nominal expiry date, is to act as a transitional provision governing the parties' relationship between the expiration of the agreement and the time when a new agreement is made. The effect of s 41(8) is that, when a new agreement is made, the earlier agreement is taken to be cancelled, except to the extent that the new agreement, award or order preserves any of the provisions of the earlier agreement. Parties are not, by making an industrial agreement, tying themselves to its terms on an indefinite basis.

185 The term as proposed is not a guarantee of future wage increases linked to inflation. The 2023 Agreement can be terminated unilaterally once it has passed its nominal expiry date. By s 41(7), at any time after, or not more than 30 days before, the expiry of an industrial agreement, any party to the agreement can file a notice with the Registrar signifying an intention to retire from the agreement at the expiration of 30 days from the date the notice is filed. On the expiration of that time, the party giving notice ceases to be a party to the industrial agreement. If it is terminated, the wage increases provided for in the clause will not take effect, and employees will revert to award wage rates. The agreement is effectively terminated on the giving of notice of intention to retire from it: *The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch v Western Australian Government Railways Commission* (2000) 80 WAIG 1742 per Fielding SC at 1742 - 1743.

186 If the City wanted to avoid the proposed term being triggered, it could simply retire from the 2023 Agreement. The result would be that the entitlement to pay increases would cease, as would all other entitlements under the Agreement.

187 The proposed clause cannot therefore be characterised as being in the interests of employees concerned. There is a possibility that the clause will induce or encourage tactics in future bargaining that will disadvantage employees.

Interests of employees and employer: attraction and retention of staff

188 It follows from my conclusions that the proposed term is prone to lead to disputation, and is not a guarantee of wage increases in line with inflation, that I do not consider such a term will meaningfully operate to assist in employee recruitment or retention. In any event, there was no evidence before me which would allow me to find it would assist in these objectives anyway.

Interests of the employer: certainty for budget forecasting

189 While I accept that certainty was a compelling consideration for wage increases during the nominal term of the 2023 Agreement, I do not see certainty in this sense as relevant to the question of whether or not the term proposed by WASU should be included in the 2023 Agreement. If, as the City contends, no clause is included, this does not give the City any forward-looking certainty. Wage increases from 1 July 2026 will be a matter for bargaining, and the outcome of bargaining cannot be predicted. The absence of a clause does not promote the City's desire for certainty.

190 Aside from this point, I otherwise agree with the City that there is no proper justification for making an order that the proposed term be included in the 2023 Agreement. The relevant factors weigh strongly against the making of an order requiring the term WASU seeks.

Disposition and orders

191 In accordance with these reasons, I intend to make an order that the 2023 Industrial Agreement contain the following provisions:

- a. At clause 16, for increases in wage rates on 1 July 2023 of 4.5%, 1 July 2024 of 4% and 1 July 2025 of 4%
- b. At clause 16, for a one-off top-up payment to Outside Employees representing the difference between the wage increase for 1 July 2023 and \$4,000, payable on the first pay date after 30 September 2024 .
- c. At clause 19, for wage related allowances to be increased on 1 July 2023 by 4.5%, 1 July 2024 by 4% and 1 July 2025 by 4%.
- d. At clause 19, for expense related allowances to be increased on 1 July 2023, 1 July 2024 and 1 July 2025 at rates reflecting the annual rate of change to the expenses.

192 My proposed draft clauses are set out in annexure A to these reasons.

193 I will hear from the parties in relation to the terms of the proposed clauses, consequential orders and the steps now required to ensure the timely registration of the 2023 Agreement.

Annexure A**Terms to be included in the City of Albany Industrial Agreement 2023.****Clause 16**

- 16.1 From 1 July 2022, Employees are entitled to be paid the wage rates set out in the column headed "2022/2023 Current Rates" of the applicable schedules contained in Part H Wages Schedule clauses 52 to 54.
- 16.2 From 1 July 2023, Employees are entitled to be paid the wage rates set out in the column headed "2023/24 Rates" of the applicable schedules contained in Part H Wages Schedule, such rates being the rates specified in the 2022/2023 Current Rates column plus 4.5%.
- 16.3 From 1 July 2024, Employees are entitled to be paid the wage rates set out in the column headed "2024/25 Rates" of the applicable schedules contained in Part H Wages Schedule, such rates being the rates specified in the 2023/2024 Rates column plus 4%.
- 16.4 From 1 July 2025, Employees are entitled to be paid the wage rates set out in the column headed "2025/26 Rates" of the applicable schedules contained in Part H Wages Schedule, such rates being the rates specified in the 2024/2025 Rates column plus 4%.
- 16.5 In addition to the wage increases set out in clauses 16.1 to 16.2, Outside Employees who were employed full-time from 1 July 2023 to 30 June 2024 are entitled to a one-off payment calculated as the difference, if any, between the gross amount by which the employees' wages are increased under clause 16.2 and \$4,000. The City shall make this payment to each Outside Employee entitled to payment in the next pay period after 30 September 2024.
- 16.6 In addition to the wage increases set out in clauses 16.1 and 16.2, Outside Employees who were employed part-time in, or who were employed for part only of, the period 1 July 2023 to 30 June 2024 are entitled to the one-off payment provided for in clause 16.5 on a pro-rata basis.
- 16.7 Wages are to be paid fortnightly by electronic banking.

Clause 19**Clause 19.1**

- 19.1 The allowances contained in clauses 19.3.2, 19.3.3, 19.5 19.7, 19.8.2 and 19.9 of this Agreement shall be increased by:
- 19.1.2 4.5% with effect from 1 July 2023; and
- 19.1.2 4% with effect from 1 July 2024; and
- 19.1.3 4% with effect from 1 July 2025.

Clause 19.4.4

- 19.4.4 The allowances contained in this clause shall be increased by
- 19.4.4.1 6.4% with effect from 1 July 2023; and
- 19.4.4.2 4.6% with effect from 1 July 2024; and
- 19.4.4.3 The percentage change in the Consumer Price Index, Perth for the period 1 April 2024 to 30 March 2025 for Meals Out and take away foods as published in the Australian Bureau of Statistics Table 9 CPI: Group, Sub-group and Expenditure Class, Index Numbers by Capital City with effect from 1 July 2025.

Clause 19.6.3

- 19.6.3 The allowances contained in clause 19.61. shall be increased by:
- 19.6.3.1 3.3% with effect from 1 July 2023; and
- 19.6.3.2 The percentage change in the Consumer Price Index, Perth for the period 1 April 2024 to 30 March 2025 for Tools and equipment for house and garden as published in the Australian Bureau of Statistics Table 9 CPI: Group, Sub-group and Expenditure Class, Index Numbers by Capital City with effect from 1 July 2025.

Note: No increase is provided on 1 July 2022 because there was no positive change in this expense in the year prior to 1 July 2022 as measured by the ABS CPI: Group, Sub-group and Expenditure Class Index Numbers, Perth.

Clause 19.10.6

- 19.10.6 The cap on reimbursement of uniform expenses contained in clause 19.10.2 shall be increased by:
- 19.10.6.1 2.9% with effect from 1 July 2022; and
- 19.10.6.2 0.9% with effect from 1 July 2023; and
- 19.10.6.3 The percentage change in the Consumer Price Index, Perth for the period 1 April 2024 to 30 March 2025 for Clothing and footwear as published in the Australian Bureau of Statistics Table 9 CPI: Group, Sub-group and Expenditure Class, Index Numbers by Capital City with effect from 1 July 2025.

Annexure B – Calculations for Expense Related Allowances**Clause 19.4.4 Meals allowance**

ABS Table 9 CPI Group, Sub-group and Expenditure Class

Meals out and take away foods

1 July 2023		1 July 2024	
March 2023	125.2	March 2024	130.9
March 2022	117.7	March 2023	125.2
	$125.2 - 117.7 = 7.5$		$130.9 - 125.2 = 5.7$
	$7.5/117.7 \times 100 = 6.37$		$5.7/125.2 \times 100 = 4.55$

Clause 19.6.3 Carpenter's hand tool allowance

ABS Table 9 CPI Group, Sub-group and Expenditure Class

Tools and equipment for house and garden

1 July 2023		1 July 2024	
March 2023	116.5	March 2024	116.1
March 2022	112.8	March 2023	116.5
	$116.5 - 112.8 = 3.7$		No positive change
	$3.7/112.8 \times 100 = 3.28$		

Clause 19.10.6 Uniform allowance

ABS Table 9 CPI Group, Sub-group and Expenditure Class

Clothing and footwear

1 July 2023		1 July 2024	
March 2023	103.2	March 2024	104.1
March 2022	100.3	March 2023	103.2
	$103.2 - 100.3 = 2.9$		$104.1 - 103.2 = 0.9$
	$2.9/100.3 \times 100 = 2.89$		$0.9/103.2 \times 100 = 0.87$

¹ In these reasons, I use the abbreviation 'WASU' to refer to both the state registered union, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees and the Western Australian branch of the federal union, the Australian Municipal, Administrative, Clerical and Services Union unless the precise identity of the organisation is relevant. Similarly, references to "parties" may be a reference to the state union or the federal union. Which entity is intended is generally apparent from the context. For instance, the federal union is party to agreements and proceedings under the *Fair Work Act 2009 (Cth)*.

2024 WAIRC 00229**COMMISSION TO MAKE ORDERS AS TO TERMS OF THE CITY OF ALBANY INDUSTRIAL AGREEMENT 2023**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 22 MAY 2024

FILE NO/S

APPL 81 OF 2023

CITATION NO.

2024 WAIRC 00229

Result	Order issued
Representation	
First Applicant	Mr C Beetham of counsel and Ms K Groves of counsel
Second Applicant	Mr Z Doherty of counsel

Order

HAVING heard from Mr C Beetham of counsel and Ms K Groves of counsel on behalf of the first applicant and Mr Z Doherty of counsel on behalf of the second applicant, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act 1979 (WA), hereby orders –

THAT in accordance with s 42G(2) of the Act, the City of Albany Industrial Agreement 2023 include the provisions in the attached Annexure A.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

Annexure A

Terms to be included in the City of Albany Industrial Agreement 2023.

Clause 16

- 16.1 All Employees shall be paid wages as follows:
- 16.1.1 effective from 1 July 2023 the wage rates set out in the applicable wage schedule in Part H – Wage Schedule which is a 4.5% increase from the pre 1 July 2023 rates;
- 16.1.2 from 1 July 2024 the wage rates set out in the applicable wage schedule in Part H – Wage Schedule which is a 4% increase from the 1 July 2023 wage rates;
- 16.1.3 from 1 July 2025 the wage rates set out in the applicable wage schedule in Part H – Wage Schedule which is a 4% increase from the 1 July 2024 rates.
- 16.2 In addition to the wage increases set out in clauses 16.1.1, Outside Employees who were employed:
- 16.2.1 full-time from 1 July 2023 to 30 June 2024 are entitled to a one-off payment calculated as the difference, if any, between the gross amount by which the employees' wages are increased under clause 16.1.1 and \$4,000;
- 16.2.2 part-time in, or who were employed for part only of, the period 1 July 2023 to 30 June 2024 are entitled to the one-off payment provided for in clause 16.2.1 on a pro-rata basis.
- 16.3 The City shall make the payment referred to in clause 16.2 in the next pay period after 30 September 2024.
- 16.4 Wages are to be paid fortnightly by electronic banking.

Clause 19

Clause 19.1

- 19.1 The allowances contained in clauses 19.3.2, 19.3.3, 19.5.1, 19.7, 19.8.2 and 19.9 of this Agreement shall be increased by:
- 19.1.2 4.5% with effect from 1 July 2023; and
- 19.1.2 4% with effect from 1 July 2024; and
- 19.1.3 4% with effect from 1 July 2025.

Clause 19.4.4

- 19.4.4 The allowances contained in this clause shall be increased by
- 19.4.4.1 6.4% with effect from 1 July 2023; and
- 19.4.4.2 4.6% with effect from 1 July 2024; and
- 19.4.4.3 The percentage change in the Consumer Price Index, Perth for the period 1 April 2024 to 30 March 2025 for Meals Out and take away foods as published in the Australian Bureau of Statistics Table 9 CPI: Group, Sub-group and Expenditure Class, Index Numbers by Capital City with effect from 1 July 2025.

Clause 19.6.3

- 19.6.3 The allowances contained in clause 19.6.1 shall be increased by:
- 19.6.3.1 3.3% with effect from 1 July 2023; and
- 19.6.3.2 The percentage change in the Consumer Price Index, Perth for the period 1 April 2024 to 30 March 2025 for Tools and equipment for house and garden as published in the Australian Bureau of Statistics Table 9 CPI: Group, Sub-group

and Expenditure Class, Index Numbers by Capital City with effect from 1 July 2025.

Note: No increase is provided on 1 July 2024 because there was no positive change in this expense in the year prior to 1 July 2024 as measured by the ABS CPI: Group, Sub-group and Expenditure Class Index Numbers, Perth.

Clause 19.10.6

- 19.10.6 The cap on reimbursement of uniform expenses contained in clause 19.10.2 shall be increased by:
- 19.10.6.1 2.9% with effect from 1 July 2023; and
- 19.10.6.2 0.9% with effect from 1 July 2024; and
- 19.10.6.3 The percentage change in the Consumer Price Index, Perth for the period 1 April 2024 to 30 March 2025 for Clothing and footwear as published in the Australian Bureau of Statistics Table 9 CPI: Group, Sub-group and Expenditure Class, Index Numbers by Capital City with effect from 1 July 2025.

NOTICES—Appointments—

2024 WAIRC 00250

DESIGNATION

SECTION 16(2A) *INDUSTRIAL RELATIONS ACT 1979*

SCHEDULE 1 CLAUSE 27(1) *WORK HEALTH AND SAFETY ACT 2020*

I, the undersigned Chief Commissioner of The Western Australian Industrial Relations Commission, pursuant to s 16(2A) of the *Industrial Relations Act 1979* (the Act), hereby designate Commissioner T Emmanuel, being a Commissioner who holds office under s 8(2)(d) of the Act and who satisfies the additional requirements referred to in s 8(3A) of the Act, to exercise the jurisdiction conferred by the *Work Health and Safety Act 2020* Schedule 1 clause 27(1) from 1 April 2024. This designation ceases to have effect on 31 March 2025.

Dated the 28th day of February 2024.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2024 WAIRC 00263

CANCELLATION OF THE *BREADCARTERS (COUNTRY) AWARD 1976* AND THE *BREADCARTERS' (METROPOLITAN) AWARD* PURSUANT TO SECTION 47(1) OF THE *INDUSTRIAL RELATIONS ACT 1979 (WA)*

NOTICE is given of applications APPL 102 of 2024 and APPL 103 of 2024 by the Commission's Own Motion pursuant to section 47(1) of the *Industrial*

Relations Act 1979 (IR Act).

The Commission intends to make an order to cancel the following awards, namely the:

1. *Breadcarters (Country) Award 1976*; and
2. *Breadcarters' (Metropolitan) Award*

on the grounds that there is no employee to whom the awards apply.

Pursuant to section 47(4) of the IR Act, any person may, within 30 days of the day on which this notice is first published, object to the Commission making the order referred to in the notice. Pursuant to regulation 15(2) of the *Industrial Relations Commission Regulations 2005* (WA), a notice of objection must clearly state the grounds of the objection and must specify with particularity the manner in which the objector is, or is likely to be, affected by the application.

The approved form, a Form 1A – Multipurpose Form, is available on the Western Australian Industrial Relations Commission website at www.wairc.wa.gov.au under 'Resources' and then 'Applications & Forms' and can be lodged online or filed with the Registry at registry@wairc.wa.gov.au.

[L.S.]

(Sgd.) S KEMP,
Registrar.

31 May 2024