Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 4 | WEDNESDAY 23 APRIL, 2025 | Vol. 105—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

105 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2025 WAIRC 00172

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER B 32/2023 GIVEN ON 11 APRIL 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2025 WAIRC 00172
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER C TSANG
HEARD	:	WEDNESDAY, 2 OCTOBER 2024
DELIVERED	:	TUESDAY, 18 MARCH 2025
FILE NO.	:	FBA 14 OF 2024
BETWEEN	:	MY FOODIE BOX LIMITED Appellant AND ALAIN TRABELSI Respondent

ON APPEAL FROM:

Jurisdiction	:	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	:	**COMMISSIONER T KUCERA**
Citation	:	**[2024] WAIRC 00153**
File No	:	**B 32 OF 2023**

Catchwords	:	Industrial Law (WA) – Claim for denied contractual benefits – Procedural fairness and bias – Assistance to unrepresented parties – Relevant principles – Absence of evidence before the Commission to establish contractual payments conditional on achievement of performance measures – Appeal dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) s 22B, s 23, s 23(1), s 26, s 26(3), s 29(1)(b)
Result	:	Appeal dismissed

Appearances:

Appellant	:	Mr B Hughes
Respondent	:	In person

Case(s) referred to in reasons:

Director-General Department of Justice v The Civil Service Association of WA (Inc.) [2025] WAIRC 00146

Jones v Dunkel [1959] HCA 8

Kiosses v Presidian Management Services Pty Ltd [2018] WAIRC 00330; (2018) 98 WAIG 295

Mak Industrial Water Solutions Pty Ltd v Doherty (No2) [2023] WASC 279

Palermo v Rosenthal [2011] WAIRC 00069; (2011) 91 WAIG 129

Reasons for Decision

THE FULL BENCH:

Brief background

1 The respondent was initially employed as the Advertising Manager for the appellant, commencing employment in August 2019. The appellant operated an online meal supply business which business was conducted on a subscription service basis. The respondent is a French national, and was employed under a Temporary Skill Shortage 482 Visa. At the time of his initial employment, the respondent was employed on a base salary of $70,000 per annum exclusive of superannuation. In April 2021 the respondent's salary increased from $70,000 to $100,000 per annum exclusive of superannuation. Later, in October 2021, the respondent obtained a promotion to a new position of Director of Business Development.

2 As a result, the respondent maintained that there was an agreement for his salary to increase to $140,000 per annum, exclusive of superannuation. The respondent maintained that at the time however, an agreement was reached between himself and the Chief Executive Officer of the appellant, Mrs Hughes, that the additional remuneration would be payable in increments of $10,000 every three months. The respondent maintained that these additional amounts were not linked to performance based KPI targets or other incentives to be achieved.

3 In May 2022, the first quarterly payment of $10,000 for the March 2022 quarter was paid by the appellant to the respondent. This was reflected in a letter from Mrs Hughes to the respondent dated 31 May 2022 (exhibit A1). It was common ground that the letter mistakenly referred to the respondent's former position of Advertising Manager and not his new position of Director of Business Development. The letter relevantly provided as follows:

> Dear Alain,
>
> Congradulations (sic) on completing 3 months of the Advertising Manager role.
>
> While the role remains probationary you are entitled to a payment equivalent of AUD $10,000 every three months served as discussed with Mai & Bryan Hughes.
>
> Please accept this letter as formal notice the payment for the period 1st Jan 2022 to 31st March 2022 will be paid into your nominated account on the 31st May 2022.

4 In August 2022, the respondent obtained permanent residency in Australia. He then went on a period of annual leave. On his return from annual leave in September 2022, he was informed by Mrs Hughes that there had been a change to his duties with a number of them, including his managerial duties, being transferred to another employee. The respondent maintained that there was no explanation provided to him for this change.

5 In November 2022, the respondent tendered his resignation by the giving of eight weeks' notice. The respondent ceased employment with the appellant on 30 December 2022.

Claim at first instance

6 The respondent commenced a claim for denied contractual benefits alleging that the appellant had failed to pay him his quarterly payments of $10,000 for the second quarter of 2022 and had failed to pay him a pro rata amount for the third quarter of 2022. The respondent's total claim was in the sum of $17,692.30.

7 The appellant's response to the respondent's claim was to the effect that whilst not denying there had been an agreement to remunerate the respondent by way of additional payments of $10,000 per quarter, those payments were made conditional upon the respondent achieving performance benchmarks by way of measurable KPIs, which he failed to do. The appellant maintained therefore, that it had not denied the respondent any entitlements under his contract of employment.

Decision of the Commission

8 The Commission heard and determined the matter and declared that the respondent had been denied a benefit under his contract of employment in the amount of $10,000 for the April to June quarter 2022. The Commission was not satisfied that the respondent had established a pro rata entitlement for the July to September quarter 2022 and that claim was dismissed. In doing so, the learned Commissioner found and concluded as follows:

(a) In terms of relevant principles of law, the determination of rights and liabilities under a contract are to be considered objectively having regard to what a reasonable person in the position of the parties would have intended to apply. The text, context and purpose of a contract are to be considered, in determining the parties' common intentions. Relevant principles set out in ***Mak Industrial Water Solutions Pty Ltd v Doherty [No2]*** [2023] WASC 279 at [53] per Quinlan CJ were stated and relied upon;

(b) That except in the case of a variation, the conduct of the parties to a contract after it is formed cannot be taken into account to ascertain the meaning of the terms of the contract;

(c) As to the evidence of both the respondent and Mrs Hughes, the only witnesses called to give evidence in the matter, a preference was given to each of them as to certain matters arising on the proceedings, and that the overall truth of the witnesses as to the matters in question 'fell somewhere in the middle' (reasons at [106]). The failure by the appellant to call Mr Hughes, to corroborate aspects of Mrs Hughes' evidence led to a ***Jones v Dunkel*** [1959] HCA 8, inference;

(d) The respondent's initial contract as Advertising Manager did not contain any express term for performance based on KPIs;

(e) That in August 2021, a second written contract of employment was entered into between the parties. This was prepared to assist the respondent with his visa application. This second contract incorporated an increase in the respondent's salary from $70,000 to $100,000 effective from April 2021;

(f) In about October 2021, there was an agreement to change the respondent's duties and retitle it to Director of Business Development. To reflect the increase in responsibilities, the respondent would be paid an additional amount of $40,000 per annum, payable at $10,000 per quarter;

(g) In relation to the agreed additional amount of $10,000 per quarter, there was no evidence to support a finding that those additional payments were payable conditional upon the respondent meeting KPIs or other performance targets; and

(h) On this basis, the respondent was entitled to be paid for the April to June quarter 2022 in the sum of $10,000. As to the respondent's pro rata claim, there was no evidence that the contract contained a term for pro rata payments and this was refused.

The appeal

9 The appellant did not articulate discrete grounds of appeal. The appeal filed is more in the nature of a narrative in relation to various aspects of the learned Commissioner's reasons for decision. Particular paragraphs of the reasons for decision are challenged. Whilst the appellant made broad ranging submissions before the Full Bench on the hearing of the appeal, it is the appeal notice and the appeal grounds that mark out what the Full Bench must consider. For ease of reference we have numbered each of the relevant paragraphs in the notice of appeal. The appeal notice contains the following:

> The Commissioner was biased and it is reflected in his attitude and decision. He then rejected or overlooked important evidence.
>
> We make the following comments on his decision
>
> 1 Paragraph 25 refers to the Respondents non-compliance with programming orders but does not acknowledge the valid reasons for any non-compliance.
>
> 2 Paragraph 26 fails to acknowledge that the Applicant did not make his request for documents until 7.08pm on 21 September. The request was voluminous and required the Respondent to find and provide substantial documentation. This could not be done in one day. We initially provided some of the information by 27 September with the balance on 2 October. It could not be done any faster than that.
>
> 3 Paragraph 27 is not correct. The Respondent supplied substantial documents in the discovery process. 25 documents related to KPI's.
>
> 4 Paragraph 30 is not correct. The Associate did telephone Mr Hughes but at no time were the words "commensurate extension" used or implied. Mr Hughes was also not advised at any time, let alone on that call, that any request was required before 3 November. The Associate was a lovely man and he gave the Respondent the strong impression that an extension of time was not a problem.
>
> 5 Paragraph 31 denies the bleeding obvious. Mai Hughes had attended mediation and programming hearings at the Commission and at that time we advised the Commission of her obvious pregnancy (she is a small lady who was huge with twins) and that it may have an impact on the process, although we could not predict what that may be. We never realised this process does not have common sense and that a medical certificate would be needed given we were in the hospital from 6am on 6 November, getting one would not have been hard. Surely there is some presumption of honesty and that we would not be lying about to the birth of twins. Please see my attached annexure 1, complaint to the Minister who oversees this process (but has subsequently changed). I note I am still seeking a response to my complaint.
>
> 6 Paragraph 34 defies believe (sic). Because we receive the Applicants request for documents at 7.08pm on 21 September it is our fault he is then delayed when we don't provide the mountain of documents he requested the very next day.
>
> 7 The Commissioner then makes some completely ignorant and uninformed comment based on virtually no information, and without any enquiry of us, that "it is apparent the respondent has been able to actively meet its obligations to the ASX under the Corporations Act 2001 (Cth) in the period the directions applied." This seems to imply that we have been able to comply with others requirements so we can comply with his. For starters his comment is not true, not to mention wrong. The company has been suspended from trading on the ASX since 2 October 2023 and remains suspended due to non-compliance. The comment is representative of the bias shown by the Commissioner on numerous occasions throughout this process.
>
> 8 Mr Kucera used the above uninformed analysis to then make some programming orders which completely prejudiced the Respondents. The other witness statements needed to be prepared after Mai Hughes' witness

statement as she is the principal party in this. Other witness statements would be in support of her, not the other way around. So requiring other witness statements to be lodged before hers was not a practical or workable outcome for the Respondent. Furthermore, at all times this minimal extension was provided, Mai was in hospital dealing with a significant number of medical issues that arise from the premature birth of twins. This should be a special moment in a mother's life, and certainly one when she is afforded the respect to be able to focus on her babies whilst she is in hospital. Can you believe I am even having to say this?

9 Paragraph 36 is telling. At the commencement of this process, we were advised to not be too concerned about the legalities of the process, and to treat this more informally. He acknowledged neither party has legal representation or legal background, which must be commonplace for small claims like this. With that as the backdrop you would expect the Commissioner should be providing important information to the parties about how the matter is conducted. It was only in the week leading up to the hearing that both parties were informed that any witnesses whose statements we wished to rely on, must attend the Court for the full duration of the hearing. It also would have been good to know before organising those witness statements. Important information contained in their statements would have been added to Mai Hughes' statement if this information was known. This led to important information not being admitted. This prejudiced our case but made no difference to the Applicant's case.

10 Paragraph 63. The Applicant acknowledges he is on Probation in the new position. To state the obvious, probation is a period under which you are being monitored closely to ensure you are adequate to the role. That monitoring is assessed next to expectations which in this case included, not unusually, KPI's. The Applicant was the senior management member responsible for reporting the KPI's to the senior management meeting each week. Senior management, including the Applicant, were assessed with regard to those KPI's. This is all very standard in many/most businesses.

11 As stated in the decision of the Commission, "The applicant stated that Mrs Hughes had agreed not to roll the salary increase into his base salary during his probation period in the new position." In his own words he effectively acknowledges that this additional (bonus) payment is tied to the probation. If he does not perform he does not get it and he does not retain the new position, which he did not because he did not perform.

12 Paragraph 67 is representative of the bias regularly shown throughout this process. The applicant said he emailed Mrs Hughes but he could not provide evidence of this. No email was ever received as we mistakenly believed Alain was still awaiting a decision on his permanent residency. We kept him employed because of that because we did not want to risk his application for permanent residency to be rejected because he was terminated due to the impact it would have on his family.

13 Paragraph 68. Who gets demoted and doesn't understand why? It was made crystal clear to Alain that he was not performing and someone was brought in over the top of him to try and save the situation. As it turns out, Alain was trying to be made redundant, when that didn't work he tried giving 10 weeks notice over Christmas, when our business closes down. We obviously did not accept that and it was agreed he would finish 30 December 2022.

14 Clause 72 is further evidence of the bias encountered by the Respondent. The Applicant accused the Respondent of perjury and fraud. These are very serious allegations which should have been withdrawn. All the evidence clearly shows the Applicant applied his digital signature to the document in question, as he had done before and as we have on file. Nothing supports the outrageous allegations that we made up this document many months later and forged his signature. The fact that this matter was not addressed forthrightly by the Commissioner is telling of his state of mind and bias towards the applicant and against the respondent. We will provide details in the appeal book from the transcript. The Commissioner writes in his decision how accommodating he was of our 8 week old twins, like we should be grateful, but his treatment of our family, and the fact we even had to be there on that date when we had no other option for our twins, is so misogynistic as to be alarming.

15 Paragraph 99. This important matter was ignored.

16 Paragraph 100 does not accurately reflect the questions and answers as contained in the transcript. In the transcript the Respondent (Appellant here) clearly says there is a KPI document which shows the quarterly targets that needed to be met. The Respondent then says "but the Commissioner mentioned that I was not able to provide that evidence anymore." This is the evidence the Commissioner previously did not admit because he said it would be "ambushing" the Applicant. This is despite this information being contained in the discovery documents and in witness statements that the Applicant had received months earlier, and this information was actually updated each week by the Applicant as part of his role, so he was the person responsible for ensuring the senior management team received this updated KPI dashboard each week so performance could be monitored. How this can be ambushing him is impossible for us to understand, he knew this information intimately.

17 It is worthy of pointing out that when reviewing the transcript the level of coaching and assistance the Commissioner provided the applicant is extraordinary and not balanced by a similar level of assistance to the respondent.

18 Paragraph 107 is inaccurate. The lack of guidance on some basic matters did not assist anyone. We consider that non lawyers should be told that witness statements can only be admitted as evidence if the witness is present during the hearing. We would have put the KPI information, some of which was contained in the witness statement of our CFO, in Mai's statement. Having said that, we also believe the Applicant was not "ambushed" if that evidence had of been allowed given his intimate knowledge of that report.

19 The key performance indicator for Alain was Active Subscribers, targets of which were set for the quarter and the year. Alain even had performance options which only vested if this KPI was met. KPI's are how his performance was measured, and he knew it. KPI's on cost of acquisition per customer, ROI of marketing campaigns, Active Subscriber numbers, etc are completely standard in this sector and Alain was responsible for monitoring and reporting those results, together with projecting for budgets.

20 The decision was based on there being no evidence of KPI's and we believe the flawed findings throughout the process, together with the lack of appropriate guidance during the process, led to the omission of critical evidence that completely changes the outcome. This evidence was provided during discovery and referred to in Mai's witness statement together with specific evidence of these KPI's that the Commissioner has not acknowledged. It is evidence the Applicant knows intimately and cannot deny.

Relevant principles

10 Before considering the specific complaints of the appellant, we will turn to some matters of principle first.

Procedural fairness and bias

11 At various points in the notice of appeal narrative, the appellant contended that the learned Commissioner did not afford the appellant procedural fairness and was biased in his hearing and determination of the respondent's claim. It was also submitted by the appellant that the learned Commissioner demonstrated undue leniency to the respondent in the conduct of his case. Recently, the Full Bench of the Commission set out the relevant principles applicable to procedural fairness to be afforded to a party to proceedings. In ***Director-General Department of Justice v The Civil Service Association of WA (Inc.)*** [2025] WAIRC 00146, the Full Bench observed at [36]-[38] as follows:

[36] A party to proceedings before the Commission is entitled to procedural fairness in the conduct of their case. This requires a party being given a reasonable opportunity to present their respective cases and to respond to issues that may be adverse to them. As Le Miere J observed in ***BHP Billiton Iron Ore v CFMEU*** [2006] WASCA 49; (2006) 151 IR 362 at [33]-[34]:

BHPB was denied right to be heard

[33] The second step is whether BHPB was denied the right to be heard in relation to those findings. Procedural fairness does not normally require a Judge to disclose his thinking processes or proposed conclusions. However, a party may be denied procedural fairness if a Judge departs from the basis upon which the case has been argued by the parties without notice to the parties.

[34] The right to be heard includes a proper opportunity to present submissions seeking to persuade a court or tribunal that the evidence and inferences from it support or fail to support any fact necessary to be established. A restriction upon the opportunity afforded to one of the parties through their counsel to make submissions upon the facts that are said to be established by the evidence deprives a party of their right to be heard.

[37] Recently, the Court of Appeal in ***Davie*** considered the relevant principles in relation to procedural fairness. The Court (Buss P, Vaughan JA and Seaward J) said at [86]-[91] as follows:

[86] The principles relating to procedural fairness are well settled and were recently outlined by this court in ***Defendi v Szigligeti*** and approved in ***Frigger v Frigger***.

[87] It is axiomatic that a court is obliged to accord procedural fairness to a litigant. However, to say that a court is obliged to afford procedural fairness is only the first step of analysis. The second step (and usually the more critical step) is to identify the content of the requirements of procedural fairness.

[88] Although sometimes expressed in terms referring to a necessity for a hearing, the fundamental requirement of procedural fairness is (relevantly for present purposes) that a party is given a reasonable opportunity to be heard, in other words, to present their case by evidence, information and submissions. However, the requirements of procedural fairness are not fixed or immutable. Procedural fairness is directed to avoid practical injustice, and what is necessary to avoid practical injustice will depend upon the circumstances.

[89] Generally speaking, in litigation the parties must anticipate combinations and permutations of various findings and adduce evidence and make submissions at the trial on all the potential findings of fact on the issues litigated. Any gap in the evidence on an issue will generally operate to the detriment of the party carrying the burden of proof on that issue.

[90] A person to whom procedural fairness is owed is, ordinarily, entitled to have brought to his or her attention the critical issues or factors on which the decision is likely to turn so as to give the person an opportunity to deal with them. However, a decision maker is not usually required to disclose to a person to whom procedural fairness must be accorded the decision maker's mental processes, provisional views or proposed conclusions before a final decision is made. The position may be different when the decision-maker's evaluation or conclusion is one that could not have reasonably been anticipated. In this context, the observations of the Full Court of the Federal Court in ***Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd***, are relevant:

> Within the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case …

The general propositions set out above may be subject to qualifications in particular cases. Two such qualifications were enunciated by Jenkinson J in Somaghi at 108-109:

1 The subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it: ***Kioa v West*** at 587 (Mason J); ***Sinnathamby*** at 348 (Burchett J); ***Broussard v Minister for Immigration and Ethnic Affairs*** (1989) 21 FCR 472 (Burchett J).

2 The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material: ***Minister of Immigration and Ethnic Affairs v Kumar*** (unreported, Full Court, Federal Court, 31 May 1990); ***Kioa v West*** at 573, 588 and 634.

[91] This statement of principles was referred to with approval by this court in ***Apache Northwest Pty Ltd v Agostino*** [No 2] and ***McKay v Commissioner of Main Roads***.

[38] The above general principles find expression in the Act in s 26(3) which provides:

(3) Where the Commission, in deciding any matter before it proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission must, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information.

12 Also in ***Palermo v Rosenthal*** [2011] WAIRC 00069; (2011) 91 WAIG 129 the Full Bench commented on the right to a fair hearing in proceedings before the Commission. In that case Smith AP and Beech CC said at [73]:

[73] In considering the nature of proceedings in the Commission and the rules under which the Commission is required to act, it is important that the nature of the jurisdiction and the powers of the Commission to enquire into and deal with any industrial matter under s 23 by an application brought under s 29(1)(b) of the Act are such that the dispute ought to be arbitrated with reasonable expedition: ***MRTA of WA Inc v Tsakisiris*** [2007] WAIRC 01121; (2007) 87 WAIG 2795. The Commission is not a court of pleadings. It is required by s 26 of the Act to act according to equity, good conscience and the substantial merits of the case and without regard to technicalities and legal form. However, the nature of an enquiry under s 23(1) of the Act is not inquisitorial in the sense that the Commission can undertake an enquiry outside the bounds of particulars. Particulars of a claim and corresponding particulars of defence to a claim are necessary to avoid a trial by ambush. Such particulars need not be drafted with any finesse or to the same extent as required in a court of pleadings but must leave the opposing party in no doubt as to what is alleged so as to enable the opposing party to know what case he or she is required to meet. Proceedings brought by an employee under s 29(1)(b) of the Act are adversial in nature and as such, once particulars are given each party is entitled to run their case on the basis that the particulars set the boundaries of relevant issues in dispute. Unless an application to amend particulars is granted, a party should be bound by the particulars they have provided.

13 Additionally, the Full Bench in ***Palermo*** made some observations in relation to bias and the duty of judicial officers to conduct proceedings free from bias or the appearance of bias. In relation to these issues, Smith AP and Beech CC observed as follows at [120]-[127]:

[120] The obligation on a member of the Commission when hearing a matter is to observe procedural fairness. This obligation includes the duty to hear and decide matters without bias or the appearance of bias. Bias means some preponderating disposition or tendency, a propensity, predisposition towards, predilection, prejudice. It may be occasioned by interest in the outcome, by affection, enmity or prejudgment: *Minister for Immigration v Jia* [2001] HCA 17; (2001) 205 CLR 507, 563 (Hayne J).

[121] Grounds 1 and 10 raise the issue whether the appellant was denied procedural fairness on grounds of actual bias or apprehended bias by prejudgment. The test of whether the state of mind of a decision maker is affected by bias in the form of prejudgment is as Gleeson CJ and Gummow J described in *Jia* [74]:

is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented.

[122] Actual bias is rarely raised as a ground to impugn a decision, as it is ordinarily sufficient to establish apprehended bias of a decision maker. The test to be applied in determining whether a judge is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend the judge might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide: *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 (492); *R v Lusink; Ex parte Shaw* (1980) 32 ALR 47; (1980) 55 ALJR 12; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Vakauta v Kelly* (1989) 167 CLR 568; and *Webb v The Queen* (1994) 181 CLR 41. The test is objective.

[123] Actual bias usually arises in the form of prejudgment. The distinction between actual bias and apprehended bias was explained by North J in *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 as follows (134 - 135):

Actual bias exists where the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant: *Wannakuwattewa v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, North J, No VG 451/1994, 24 June 1996) and *Singh v*

> *Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, Lockhart J, No 902/96, 18 October 1996). The courts have rarely found actual bias to exist. That is principally because, at common law, a reasonable apprehension of bias suffices to disqualify a judicial officer. Where actual bias exists, reasonable apprehension of bias will also exist and, consequently, courts concerned with supervising the application of the requirements of natural justice have not had to go so far as to find actual bias. Another reason is that actual bias is usually difficult to prove. Rarely will the judicial officer expressly reveal actual bias. However, several New Zealand licensing cases do provide some examples of express actual bias. For instance, in *Isitt v Quill* (1893) 11 NZLR 224, the decision of a Licensing Committee to refuse to renew certain licences was overturned because the Committee members had made pledges in their election campaign to refuse all licences. See also the judgment of Stout CJ in *Re O'Driscoll; Ex parte Frethey* (1902) 21 NZLR 317. Where actual bias is not expressly voiced, it may be proved by inference from the facts and circumstances.
>
> …
>
> [P]roof of actual bias by inference from the facts and circumstances of the case will usually involve an assessment of a series of actions by the decision-maker which, when taken together, form a whole picture leading to the conclusion of pre-judgment. It is unlikely that one single action, as distinct from a pattern of conduct, will demonstrate actual bias.

[124] The appellant also raises an issue in grounds 1 and 10 that the hearing was not fairly conducted. This raises the issue whether the appellant has had a proper opportunity to advance his defence to the applicant's claims. In *Michael v The State of Western Australia* [2007] WASCA 100 Steytler P with whom McLure JA and Miller AJA observed [63]:

> When the contention is one of an unfair trial, the test to be applied, according to Kirby A-CJ and Meagher JA (who agreed with Kirby A-CJ), is whether the impugned behaviour has "created a real danger that the trial was unfair": *Galea* at 281. If so, the judgment must be set aside: *Galea* at 281; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146. In *R v Mawson* [1967] VR 205, in which there had been excessive involvement or interference by the trial judge in the conduct of the case, the Court (Winneke CJ, Adam and Barber JJ) regarded the test as being whether there had been "such a departure from the due and orderly processes of fair trial as to amount to a miscarriage of justice".

[125] However, when considering the responsibilities of a judicial decision maker, it is important to bear in mind the tension between the need to control the proceedings, on the one hand, and to be, and be seen to be, dispassionate and impartial, on the other, with the result that the line between acceptable and unacceptable behaviour can be difficult to draw. This is compounded when one of the litigants is self-represented: *Michael* (Steytler P) [55]. Whilst the appellant was not self-represented he was and is represented by a lay agent. In *Michael* Steytler P said in relation to acceptable conduct [65]-[66]:

> [I]t will often be necessary, particularly with self represented litigants, for a trial judge to intervene in order to stop irrelevant matters being raised (*Love* (1983) 9 A Crim R 1 at 26) and to prevent unnecessary delays or disruptions: *R v Morley* [1988] 2 WLR 963; *Galea* at 279; *Lars* (1994) 73 A Crim R 91 at 125. In *Johnson* at [13] Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said:
>
>> 'At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.'
>
> Indeed, a trial judge who does not intervene to prevent undue delay and to ensure that the parties focus on the crucial issues may be criticised by an appellate court: *R v Wilson and Grimwade* [1995] 1 VR 163; *Thompson* at [39].
>
> Next, a judge is entitled to ask questions of a witness, not only for the purpose of clarifying evidence, but also to test that evidence (*R v Gardiner* [1981] Qd R 394 at 406, 415; *R v Senior* [2001] QCA 346 at [36] per McMurdo P, Davies and Thomas JJA), although he or she should do no more than is absolutely necessary in that respect and should be careful not to take on the role of counsel.

[126] As to conduct by a decision maker that oversteps the mark of acceptable conduct Steytler P said [71]-[72]:

> Every judge knows that it is his or her duty to proceed in accordance with due process, independently, impartially and fairly. While judges are human, and can be expected to react with impatience or irritation from time to time, they are not expected to be rude: ***Lars*** at 133 (where the Court said that, while judges may be strong and forceful when necessary, they should, no matter what the provocation, always comport themselves with dignity). In ***Love***, at 3, Wickham J said (in what might be a counsel of perfection) that:
>
>> '… [F]ortunately the time has passed in the administration of the law in this State when a litigant, a witness or counsel is expected to put up with impatience or rudeness from the trial judge. Such conduct on the part of the judge may be understandable because of illness or provocation or stress due to the difficulties of the case, but it can never be excused. It is professional misconduct and should be roundly condemned. Such conduct does not necessarily lead to a miscarriage of justice but it might do so particularly where the trial is a trial by jury.

Justice however will not often miscarry on that ground alone; usually other factors will be present to lead to that result.'

There is, in this respect, an important distinction between conduct that might be regarded only as discourteous or impatient or even rude (in the sense that it leads to no other consequence), on the one hand, and conduct which (whether or not discourteous, impatient or rude) obstructs counsel in the doing of his or her work (*R v Hircock* [1970] 1 QB 67 at 72 per Widgery LJ; *Love*, at 11) or which invites the jury to disbelieve the accused or his or her witnesses, on the other. A judge's interventions should not be such as to create the impression that he or she has identified himself or herself with one of the parties: *Tousek v Bernat* (1959) 61 SR (NSW) 203 at 209; *Galea* at 280.

[127] When assessing whether the conduct of a decision maker amounts to actual bias, apprehended bias or results in an unfair trial the conduct is to be assessed in the context of the whole of a hearing: *Michael* [77] (Steytler P); see also *Galea v Galea* [1990] 19 NSWLR 263 (279 - 280) (Kirby ACJ). Judges and arbitrators are human and from time do react to provocation. As Steytler J in *Michael* points out [79]:

It is important, also, to evaluate the conduct of a trial judge in the light of any provocation offered to him or her. Judges are not superhuman. While they are expected to exercise restraint and, in the vast majority of cases, to resist anything other than a measured reaction to provocation, there will be occasions (hopefully, very rare) when this is extremely difficult or even impossible. In such circumstances an isolated outburst, or even a few isolated outbursts, will not necessarily result in a mistrial. So, for example, in *Love* the appellant was told by the trial Judge, on more than one occasion, that he was "sick and tired of him" (at 10). However, the appellant in that case "broke all the rules of fair combat" despite the trial Judge's efforts to maintain order (at 11, per Wallace J) and had defied the trial Judge. He had also taken advantage of the position that had arisen (at 26, per Pidgeon J). The Court was not persuaded that there was any miscarriage in those circumstances.

Assistance to unrepresented parties

14 In this case both the appellant and the respondent were unrepresented in the proceedings at first instance, and on the appeal. The respondent represented himself and the appellant was represented by Mr Hughes on the appeal and by both Mrs Hughes and Mr Hughes at first instance. This is not a case where one party had representation by a solicitor or agent and the other did not. In this sense, it is fair to observe that both the appellant and the respondent were equally at some disadvantage. In these circumstances, both parties were entitled to receive some assistance from the Commission in the conduct of their respective cases.

15 We would make the initial observation that Mr Hughes, who appeared before the Full Bench on behalf of the appellant, Mrs Hughes and the respondent, were obviously intelligent individuals. Both Mr and Mrs Hughes operated a substantial business. As referred to below, these are relevant considerations in assessing the level of assistance to be provided to unrepresented parties, by a court or tribunal in the conduct of a case.

16 The approach to the issue of assistance to unrepresented parties was considered by the Full Bench in ***Kiosses v Presidian Management Services Pty Ltd*** [2018] WAIRC 00330; (2018) 98 WAIG 295. In this case, Smith AP (Scott CC and Emmanuel C agreeing) observed at [43]-[46] as follows:

[43] In ***Singh v Dhaliwalz Pty Ltd*** [2013] WAIRC 00133; (2013) 93 WAIG 197, Smith AP and Beech CC (Harrison C agreeing) observed [28]:

As Bell J in ***Tomasevic v Travaglini*** [2007] VSC 337 recently observed, it is the function of a judicial decision-maker to find facts on the basis of the evidence and in doing so is to ensure trial fairness and to elicit relevant evidence [127]-[128]. At [139]-[141] he explained:

[139] Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR [International Covenant on Civil and Political Rights]. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

[140] Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

[141] The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

[44] The right to a fair hearing does not entitle an unrepresented litigant to unconfined assistance. As Samuels J in ***Rajski v Scitec Corporation Pty Ltd*** (Unreported, NSWCA, 16 June 1986) remarked (14):

(a) The absence of legal representation on one side ought not to induce a court (or a tribunal) to deprive the other side of one jot of its lawful entitlement.

(b) An unrepresented party is as much subject to the rules as any other litigant. The court (or tribunal) must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status would be unfair to the represented opponent.

[45] The aforementioned principles in ***Rajski*** were considered by E M Heenan J (Murray J and Le Miere J agreeing) in ***Tobin v Dodd*** [2004] WASCA 288 [14]. E M Heenan J considered the observations of the Full Court of the Federal Court in ***Minogue v Human Rights and Equal Opportunity Commission*** [1999] FCA 85; (1999) 166 ALR 129. In ***Minogue***, the Full Court had regard to the general principles in ***Rajski*** and also relevantly observed [27].

27 In *Abram v Bank of New Zealand* (1996) ATPR 41-507 at 42,347, a Full Federal Court, faced with an unrepresented litigant's claim that the trial judge had not given him appropriate assistance to present his case, made this comment:

> 'What a judge must do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case.'

We respectfully agree with this observation. Because the duty of the judge varies according to the factors identified by the Full Court in *Abram*, the duty to assist an unrepresented accused in criminal proceedings is likely to be more extensive than that imposed on a judge hearing civil proceedings in which one or more of the parties are not legally represented: cf *MacPherson* v R (1981) 147 CLR 512; 37 ALR 81; D A Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 ALG 365, at 369-70.

[46] It is elementary that a court (and a tribunal) ought to ensure that a self-represented litigant understands his or her rights so that he or she is not unfairly disadvantaged by being in ignorance of these rights. Notwithstanding this, the court (and a tribunal) should refrain from advising a litigant as to how or when he or she should exercise these rights: ***Trkulja v Markovic*** [2015] VSCA 298 [39]; ***Loftus v Australia and New Zealand Banking Group Ltd (No 2)*** [2016] VSCA 308 [27]-[28].

Consideration

Grounds 1 - 8

17 We will deal with these grounds together as they raise broadly similar issues. They were dealt with by the learned Commissioner under the heading 'Compliance with the Programming Order'. He observed at [25] that there were issues with both parties' compliance with the directions made in the matter, and 'the respondent's non-compliance was more pronounced'. On 8 September 2023, the Commission issued directions in relation to the conduct of the matter: [2023] WAIRC 000739. Those directions were as follows:

1. THAT the parties are to provide informal discovery by 22 September 2023;
2. THAT the evidence in chief in this matter is to be adduced by way of signed witness statements which will stand as the evidence in chief of their maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission;
3. THAT the applicant file his 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 he intends to rely by 13 October 2023;
4. THAT the respondent file 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 3 November 2023;
5. THAT the matter be listed for a further conciliation conference not before 3 November 2023;
6. THAT there be liberty to apply on short notice.

18 As to the request for production of documents, the appellant contended that the respondent did not request documents of the appellant until 7.08 pm on 21 September 2023. It was submitted that the request was for a voluminous amount of material to be produced. In relation to this material, the appellant contended that the learned Commissioner's observations at [27] of his reasons that the appellant did not disclose documents relating to KPIs was incorrect. It was submitted that some 25 documents relating to KPIs were provided to the respondent.

19 A bundle of materials commencing at AB315-376, was described in the appeal book as 'informal discovery documents'. Whilst a body of this material referred to performance data for the business as a whole, and various documents referred to 'KPIs', none of the material referred to specific performance obligations imposed on the respondent as a term of his contract of employment. It is not entirely clear what the learned Commissioner was referring to at [27] of his reasons. However, given the conclusions that he reached in relation to the respondent's claim at first instance, the most likely was the absence of material referring specifically to the respondent's contract of employment containing any reference to the achievement of performance objectives or KPIs as a precondition for the $10,000 quarterly payments under his contract of employment.

20 It should also be observed that when the nature of this material was raised with Mr Hughes in the course of argument in the appeal, especially the 'KPI Dashboard' document, the appellant conceded that none of this material contained any documents that directly linked the respondent's quarterly payments to the achievement of individual performance targets by the respondent (see appeal transcript p 14).

21 As to [30] of the learned Commissioner's reasons, reference is made to contact between the Associate and Mr Hughes on 19 October 2023, to the effect that given the delay in the respondent filing his witness statements, that a similar period of additional time could be afforded to the appellant to file their witness statements.

22 By way of background to this request, in accordance with the programming directions, the appellant's witness statements were due to be filed on 3 November 2023. Given the pregnancy of Mrs Hughes, and what Mr Hughes contended were medical issues in relation to the birth of twins on 6 November 2023, the appellant made a request on 6 November 2023, after the time the witness statements were due, to extend the time for filing by a further three weeks (see AB62).

23 On the same day the Associate, on the learned Commissioner's direction, informed the parties that in light of:

(a) The respondent not providing discovery by 22 September but rather 2 October 2023;

(b) That the respondent filed his witness statement four days late on 17 October 2023;

(c) That the request for an extension of time was made after the date on which the witness statements were due;

(d) That the extension of time was opposed by the respondent; and

(e) That the appellant produced no medical evidence in support of the extension of time, that the respondent would be provided until 10 November 2023 to file its witness statements.

24 A further request by the appellant on the same day, for further time of at least a week beyond 10 November 2023, was refused (see AB61).

25 On 10 November 2023, the appellant again requested an extension of time to provide the outstanding information to 24 November 2023. A letter from Mrs Hughes' obstetrician/gynaecologist Dr Love, dated 9 November 2023 (see AB65) accompanied the request. Dr Love's letter referred to the delivery of twins on 6 November 2023 and that Mrs Hughes would be 'fit and able to commence work from 20 November 2023'. This further request by the appellant was opposed by the respondent.

26 In an email on 10 November 2023 (see AB58-59) the respondent referred to a letter to shareholders from the appellant dated 17 October 2023 and its annual report published on 3 November 2023, stating 'the company is in advanced discussions regarding a potential management buyout, with the buyer purchasing 100% of the business'. The respondent also referred to the initial programming directions being made on 8 September 2023, and that both parties had had ample time to comply.

27 The learned Commissioner reconsidered the further requests by the appellant and the matters raised by the respondent in reply. On 10 November 2023, in an email from his Associate (see AB55-57), the parties were told that the Commission had an obligation under s 22B of the *Industrial Relations Act 1979* (WA) to deal with matters with all due speed. Reference was made to the directions issued on 8 September 2023, the four day delay in the respondent filing his witness statements and, that further time could be provided to the appellant accordingly.

28 It was noted in the 10 November email from the Associate, that three days after the due date for the appellant's witness statements to be filed, which were due on 3 November, on 6 November 2023, a request for a 21 day extension was made by the appellant. Given the additional time afforded to the respondent, it was noted that the appellant was given until 10 November 2023 to file its witness statements.

29 The email further noted the directions issued in September 2023 were issued in the knowledge of Mrs Hughes' advanced pregnancy, which may have an impact on her capacity to meet programming directions. The financial position of the appellant was also noted, as referred to above. Reference was made to the parties' discovery obligations and, whilst noting that the appellant's provision of documents after 22 September 2023 was not intentional, it did have an impact on the respondent's capacity to file his witness statements on time.

30 Taking all of these matters into account, the learned Commissioner extended the time for Mrs Hughes to file her witness statement to 20 November 2023, and other witness statements from the appellant to be filed by 13 November 2023.

31 Whilst the appellant complained about the timetable ultimately imposed, the reality is that the Commission had to take into account not only the appellant's interests, but also the interests of the respondent. The respondent raised a legitimate issue that the business was for sale (which was not contested), which may have impacted his capacity to bring his claim. It must also be noted that both parties had from 8 September 2023 to commence preparing the material they intended to rely on in the hearing of the matter. Coupled with the obligation on the Commission to deal with matters with all due speed under s 22B of the *Act*, we are not persuaded that the additional time granted to the appellant to file its witness statements, which was 17 days for Mrs Hughes and 10 days for other witnesses, was unfair or unreasonable. We are not persuaded that any of these grounds are made out.

32 As to the point raised at ground 7, regarding the reference to the ASX compliance in the email of 10 November 2023, we accept it may have been an unnecessary observation and potentially misleading without full knowledge of the circumstances. However, we do not consider it evidences bias as alleged by the appellant, in the light of our conclusions below in relation to other grounds containing allegations of a similar nature.

33 We are not persuaded that any of these grounds are made out.

Ground 9

34 As to this ground, the appellant complained that the parties were only informed one week or so prior to the date of the hearing, that for the parties' witness statements to be relied upon, those making the statements must be present in the Commission to be cross examined. The appellant complained that this was late notice and it prejudiced the preparation of their case. The learned Commissioner dealt with this at [36] and [47] of his reasons.

35 The week prior to the date of hearing, on 12 January 2024, the appellant sent an email to the Associate requesting information about the procedure for the hearing the following week (see AB18-19). In it, the appellant noted that one witness resided interstate and would be required to appear via video-link and another witness was currently overseas and unavailable on the hearing date. There seemed to have been no advice to this effect to the learned Commissioner's Chambers at any time prior to

this. The appellant queried what procedure should apply. The Associate responded shortly after and informed the appellant that the parties' witnesses will be required to attend at the Commission in order that they may be cross-examined (see AB18).

36 It was further stated by the Associate that if a party did not wish to cross-examine the other party's witnesses, they and the Commission should be informed of this to determine whether witness statements could be tendered in evidence by agreement. As to the request for a witness to give evidence by video-link, the appellant was informed of the need to make an application on a Form 1A, setting out the reasons for such a request and that the application needed to be filed in advance of the hearing and served on the other party, so that they may be heard on the application.

37 At the outset of the hearing, the learned Commissioner enquired of the parties as to whether those who filed witness statements were present at the proceedings. He informed the parties that if witnesses are not present and available to be cross-examined, the witness statements could be tendered, but only if both parties agreed to that course. Neither party did. Accordingly, the only witness statements tendered and relied upon where of the respondent and Mrs Hughes (see AB265).

38 We are not persuaded that there is any basis to the appellant's complaints in this regard. At the outset of the matter, when programming directions were made, the parties were provided with guidance material including relevant fact sheets and Practice Notes in relation to matters of evidence and procedure in proceedings before the Commission. The evidence fact sheet refers to witness evidence and in particular, the preparation of outlines of evidence and documents. It refers to the need for witnesses to be present when giving their evidence. Furthermore, we note that the programming directions were made by the Commission a significant period of time before the hearing date, in September 2023.

39 Both parties had more than adequate time to make any enquiries in relation to the matters that the appellant now complains of. Whilst the Commission does provide procedural advice and assistance, there is an onus on parties to acquaint themselves with the practice and procedure of the Commission, in relation to which, there is an abundance of material available to parties on the Commission's website. We note also, that on 13 November 2023, in response to the appellant's requests for various amendments to the programming directions, the Associate to the learned Commissioner provided information to the appellant regarding the John Curtin Law Clinic, which provides free pro bono legal services to eligible small business owners, to assist in matters of procedure and assessing legal issues etc.

40 This ground is not made out.

Grounds 10 and 11

41 These grounds refer to [63] of the learned Commissioner's reasons, where he noted the respondent's evidence that Mrs Hughes agreed with the respondent not to incorporate his salary increase into his base salary, when the respondent initially assumed the new position of Director of Business Development, from 1 November 2021. The learned Commissioner referred to the respondent's evidence that it was agreed with Mrs Hughes that he would receive a $10,000 additional payment, every three months. Paragraph 63 of the learned Commissioner's reasons are as follows:

> The applicant stated that Mrs Hughes had agreed not to roll the salary increase into his base salary during his probation period in the new position. He said he had agreed with Mrs Hughes that a payment of $10,000 would be made every three months.

42 The appellant contended that being on probation, '[t]o state the obvious', it was a period where the respondent would be closely monitored to ensure his performance, which involved performance expectations under KPIs. It was submitted that as a senior member of the appellant's management team, who was himself responsible for reporting all KPIs every week, he was well aware of this.

43 There are a number of difficulties with this ground. The first is that [63] of the learned Commissioner's reasons was not a specific finding but rather, it was a description of the respondent's evidence. Furthermore, and in any event, the issue raised by the appellant in this regard, being an inference that being on probation necessarily meant that the respondent's performance would be assessed in accordance with KPIs, necessitated the establishment on the evidence, by the appellant, that it was a term of the respondent's contract of employment that the quarterly $10,000 payments were linked to his achievement of performance measures including KPIs. This was the central issue to be determined in the matter at first instance. For the reasons which we will develop further below, there was no such evidence. These grounds are not established.

Ground 12

44 As to [67] of the learned Commissioner's reasons, the appellant contended that this was evidence of bias shown throughout the proceedings. Paragraph 67 of the learned Commissioner's reasons was again a narration of the respondent's evidence and was not a finding. It was in the following terms:

> The applicant stated that on 19 August 2022 his permanent residency was granted. The applicant said he sent an email to Mrs Hughes to confirm this. The applicant also said that he went on annual leave at or around this time.

45 It refers to the respondent's evidence that on 19 August 2022 he received permanent residency. His evidence was that he sent an email to Mrs Hughes to advise her of this and then went on annual leave at about that time. It is unclear as to how the appellant contends this demonstrates any bias. Firstly, as we have said, it is simply a narration of the respondent's evidence and was not a finding. No such finding was made in the learned Commissioner's decision.

46 In any event, the matter of permanent residency, and whether or not the respondent informed Mrs Hughes of this fact, was not a matter relevant to whether it was a term of the respondent's contract of employment that he receive quarterly $10,000 payments subject to meeting all KPIs. This ground is not made out.

Ground 13

47 Paragraph 68 of the learned Commissioner's reasons referred to the respondent's evidence that when he returned from annual leave on 12 September 2022, he had a telephone call with Mrs Hughes to inform her of his permanent residency. The paragraph is as follows:

> The applicant stated that upon his return from annual leave on 12 September 2022, he told Mrs Hughes during a telephone call that he had been granted permanent residency. He also said that during this same phone call, Mrs Hughes said that a number his duties including his management responsibilities had been passed on to his colleague Samuel David.

48 In the same conversation, it was the respondent's evidence that Mrs Hughes informed him that his managerial responsibilities, and a number of other duties, had been transferred to another colleague, Mr David. The appellant asserted in relation to this ground, that it should have been clear to the respondent that a demotion occurred because he was failing to perform in the position, and another employee was required to undertake his management duties. Whilst it was not entirely clear, the inference sought to be drawn seems to be that the respondent was demoted because he was not meeting his (contractually binding, according the appellant) performance benchmarks.

49 However, the learned Commissioner dealt with this issue in part, at [147] - [154] of his reasons. This was in connection with the respondent's claim for a $10,000 payment for the July-September quarter 2022. The learned Commissioner concluded that the effect of the change to the respondent's position whilst he was on annual leave, in about August 2022, effected a return to his previous position as Advertising Manager. The learned Commissioner found that this occurred before the completion of the July-September quarter 2022.

50 On the basis of these findings, the learned Commissioner concluded that the respondent's contract of employment made no provision for partial payment in the event of employment only for an incomplete quarter. He found that for the respondent to be entitled to the $10,000 payment for the July-September quarter 2022, then the contract would have to have provided for this and it did not. It was on this basis, that the respondent's claim for the July-September quarter 2022 payment failed.

51 Viewed in this light, the issue raised by the appellant in relation to this ground actually worked to the advantage to the appellant, as it supported the Commission's finding that the respondent was not entitled to a further payment that he claimed. This ground is not established.

Ground 14

52 The appellant referred to [72] of the learned Commissioner's reasons when referring to the cross-examination of the respondent. This related to the 'New Job Guideline' for the promotion to the position of Director of Business Development from 1 November 2021. The paragraph is as follows:

> The applicant initially denied signing the New Job Role, following which Mrs Hughes provided the applicant with a copy. The applicant then said he could not recall signing the document. He said the New Job Role contained a digital signature and that he did not usually sign official documents in this way.

53 The issue raised was whether the respondent had signed the document. The learned Commissioner referred to the respondent's evidence where he initially denied signing the Guideline document. When presented with a copy of it in cross-examination, the respondent could not recall signing it and, as it contained a digital signature, his evidence was that he would not usually sign documents in this manner.

54 Whilst it was not entirely clear how, the appellant contended that reference to this evidence demonstrated further bias by the Commission. As we understood the argument, it was submitted that the effect of the respondent's evidence in this respect, was an allegation by the respondent that the appellant had fraudulently produced a document with the respondent's signature on it. The appellant said that the learned Commissioner should have addressed this matter, although it is unclear as to how this could have occurred. There are also difficulties with this contention. Firstly, the paragraph referred to at [72], is a narration of the respondent's evidence when being cross-examined by Mrs Hughes. It was not a specific finding.

55 However, later in his reasons, the learned Commissioner under the heading 'Observations about the evidence' made comments as to his view of both the respondent's and Mrs Hughes' evidence. The learned Commissioner stated as follows at [105]-[107]:

> [105] *On some matters, I opted to prefer the evidence Mrs Hughes gave instead of the applicant's because it was more plausible and because the applicant had no recollection of the matter that was being asserted. An example of this was in the applicant's acceptance of the New Job Role which I will deal with the findings below.* I also accepted the applicant held concerns about his immigration status which affected the way in which the parties agreed to vary the applicant's contract of employment. (Our emphasis)
>
> [106] There were instances where I opted to prefer the applicant's testimony ahead of the respondent's evidence, particularly where the applicant's evidence was supported by documentary evidence. From my assessment of the witnesses and the evidence they gave, this case was very much a matter where it was reasonable to conclude the truth of what the witnesses said fell somewhere in the middle.
>
> [107] It is worth noting the respondent was given ample opportunity to provide evidence in support of its case, including by way of documents that established the payment of the quarterly amounts in issue, were either subject to or conditional upon, the applicant meeting particular KPIs. Despite the programming directions that I referred to earlier, the respondent did not discover any documents of this type. Such material could have also been included as attachments to Mrs Hughes' witness statement but were not.

56 Further, the learned Commissioner specifically dealt with the issue of the respondent's change in job role and title. At [124]-[125], he referred to this change and that it was a variation to the second contract between the parties, which second contract had been made in April 2021. Specifically in relation to the issue the appellant now complains about, the learned Commissioner said at [125]:

> I accept the applicant agreed to the change in duties and position even though in cross-examination he said he could not recall signing the New Job Role with an electronic signature or being a party to the email exchange with Mrs Hughes that I have referred to at paragraph [73] as exhibit R2.

57 Therefore, contrary to the assertion of the appellant in this ground, the learned Commissioner found in the appellant's favour, that the respondent had signed the New Job Role document with an electronic signature or by way of email exchange with Mrs Hughes, referred to in exhibit R2 and dealt with at [73] of the learned Commissioner's reasons. This ground is not made out.

Ground 15

58 In relation to this matter, the appellant referred to [99] of the learned Commissioner's reasons, which referred to the respondent's cross-examination of Mrs Hughes. It is as follows:

> The applicant cross-examined Mrs Hughes. He asked Mrs Hughes about KPIs and whether there was a document that outlined the quarterly targets that he was required to meet to receive a quarterly payment. Mrs Hughes said there was a document that contained this information.

59 Questions were asked of Mrs Hughes in relation to KPIs and the existence of any documents referring to the respondent's quarterly targets that he was required to achieve, so as to receive his $10,000 quarterly payment. In response, Mrs Hughes said there was such a document (see AB291). The appellant submitted that this matter was ignored. That is incorrect. The learned Commissioner did not ignore the issue. He considered the issue of whether the respondent's quarterly payment claims were subject to KPIs in some detail in his reasons at [137]-[146]. In particular, when dealing with the evidence of both the respondent and Mrs Hughes, the learned Commissioner made the following findings at [137]-[143]:

> [137] The first of these consequences was in relation to whether the payment of the quarterly amounts was subject to the applicant meeting particular KPIs. This consequence was borne by the respondent.
>
> [138] As indicated, it is reasonable to find the change in remuneration the applicant agreed to with Mrs Hughes was as simple as an agreement the applicant would, in exchange for a payment of $10,000 per quarter, take on the New Job Role.
>
> [139] Proof of this variation to the applicant's contract of employment was in part established with the May 2022 letter. It is reasonable to conclude the May 2022 letter is post contractual conduct of a type that established the applicant's contract of employment was varied. However, the extent to which this letter may be relied upon is limited because it was drafted after the applicant had agreed to take on the New Job Role and would have been influenced by the subjective views that Mr and Mrs Hughes held on what they thought they had agreed to.
>
> [140] While I accept the May 2022 letter may have been prepared for auditing purposes, a reasonable person would expect that an explanation for expenditure a CEO provides to an auditor, will be good for all purposes, meaning that any payments to the applicant would have to be justified by reference to agreed contractual terms. The evidence is that Mr Gundry prepared the May 2022 letter on the information and instructions Mrs Hughes gave him. She also signed the letter.
>
> [141] There was no evidence before the Commission, whether documentary or otherwise that supported the respondent's claim the payment of the quarterly amounts would be conditional upon the applicant meeting KPIs or other performance targets.
>
> [142] Although the May 2022 letter is badly worded and it incorrectly describes the applicant's job title (which was changed when the applicant accepted the New Job Role) the May 2022 letter does state the applicant is entitled to a $10,000 payment, every three months served, as discussed with Mai and Bryan Hughes.
>
> [143] It is reasonable to conclude that what was intended by the words 'as discussed with Mai and Bryan Hughes' is what Mr Gundry had confirmed with Mr and Mrs Hughes; the applicant would be paid $10,000 every three months served. If the respondent had intended the quarterly amounts would be conditional upon the applicant meeting KPIs, Mrs Hughes would have told Mr Gundry to include this information in the May 2023[sic] letter which she signed.

60 The learned Commissioner further found at [145], that Mrs Hughes' evidence about discussions with Mr Hughes, and whether the respondent was entitled to receive the first quarterly payment for January-March 2022, as not being relevant. This was on the basis that it was the subjective views of the appellant as to the meaning of the contract and secondly, in any event, it was evidence as to conduct that post-dated the variation of the respondent's contract of employment and on legal principle, it could not be taken into account.

61 In particular, the learned Commissioner did not accept Mrs Hughes' evidence that the payment of the $10,000 per quarter incorporated a contractual obligation on the respondent to meet any KPI performance indicators, in the absence of any reference to it in the 22 May 2022 letter, which we have set out at [3] above.

62 The learned Commissioner dealt with this issue based upon the evidence that was before him. As noted above, he concluded at [141] of his reasons that there 'was no evidence before the Commission, whether documentary or otherwise that supported the respondent's claim the payment of the quarterly amounts would be conditional upon the applicant meeting KPIs or other performance targets'.

63 Given that on the evidence, the May 2022 letter was prepared by a senior employee of the appellant on the instructions of Mr and Mrs Hughes, and that it was signed by Mrs Hughes, the letter was the ideal opportunity to confirm that the respondent's increase in remuneration by way of the $10,000 quarterly payments, was subject to him achieving performance targets, including KPIs. It did not.

64 It was clearly open therefore, in the context of the evidence as a whole, for the learned Commissioner to conclude that the respondent's contract of employment did not provide for the respondent to personally meet KPIs, to be entitled to receive the $10,000 quarterly payments.

65 It is important to observe that proceedings before the Commission are adversarial in nature. That is, it is not for the Commission to conduct a wide ranging investigation of claims and to follow up and require parties to produce documents to prove or to disprove, as the case may be, a particular contention of a party. It is for the parties to make out their particular cases, whether advancing or defending a claim, and the Commission can only proceed on the evidence and subject to limited exceptions, matters raised before it in the proceedings.

66 This ground is not made out.

Ground 16

67 The appellant referred to [100] of the learned Commissioner's reasons where he comments on the cross-examination of Mrs Hughes. Paragraph [100] is as follows:

> The applicant then asked Mrs Hughes whether the document had been provided to the Commission, to which Mrs Hughes responded that it had not been provided because the applicant had not requested the document.

68 In this particular paragraph he referred to the respondent asking Mrs Hughes whether a document confirming that his quarterly payments were linked to the achievement of quarterly targets, had been provided to the Commission. The learned Commissioner records that Mrs Hughes replied that it had not, because the respondent had not requested it.

69 The appellant contended that this reference to Mrs Hughes' evidence was not complete and that Mrs Hughes also said that the Commission informed her that that evidence would not be able to be provided. The appellant submitted that this was a reference to the learned Commissioner earlier indicating that it was not open to the parties to 'ambush' each other with material provided at the last minute.

70 The exchange between the respondent when cross-examining Mrs Hughes appears at AB291 as follows:

> **TRABELSI, MR:** Yeah. My point is that there is no document.
>
> **KUCERA C:** I see. All right. So are you going to put that to the witness?
>
> **TRABELSI, MR:** The document?
>
> **KUCERA C:** Yes. Are you going to put that as a question to the witness?
>
> **TRABELSI, MR:** Oh, yeah. I did. Um - - -
>
> **KUCERA C:** So put it so that it's on the transcript clearly.
>
> **TRABELSI, MR:** Is there a document that outline the alleged quarterly targets that I was under in order to receive my quarterly payment?---Yes, there is.
>
> **KUCERA C:** Okay.
>
> **TRABELSI, MR:** Has this document been provided to the Commission?---No. Because it hasn't been requested by the applicant.
>
> Paragraph 13 - - -
>
> **KUCERA C:** Yes. But - so her answer is it hasn't been requested. Where do you want to go, now that - - -
>
> **TRABELSI, MR:** Oh, I didn't want - - -
>
> **KUCERA C:** - - - that's her - - -
>
> **TRABELSI, MR:** - - - to make a - - -
>
> **KUCERA C:** - - - answer?
>
> **TRABELSI, MR:** - - - comment. But I did - I don't have to request document. If she wants to clarify something or make a point or provide evidence - - -
>
> **KUCERA C:** Yes.
>
> **TRABELSI, MR:** - - - it's not upon my request.

71 However, earlier at AB290, when questioned by the respondent whether a document existed that outlined KPI's to be met for the quarterly payments to be made, the following exchange took place between the respondent and Mrs Hughes:

> - - - sorry, in a situation of on-target earnings, an employee would have their targets changing every single week?---No. Again, the two KPIs that you're referring to are different. So you've got KPIs that you had to meet that was going to be based on a quarterly basis, and there was a KPI for the team to meet, which was also discussed on a weekly basis.
>
> I think we can agree on that. Is there a document that would outline the KPIs they would need to meet on a quarterly basis in order to allegedly receive my quarterly payment?---Yes. Um, but the Commissioner mentioned that I was not able to provide that evidence anymore.

72 The summary of Mrs Hughes' evidence recorded by the learned Commissioner at [100] was correct. It referred to the exchange above at [70]. It did not include the further evidence of Mrs Hughes immediately above at [71]. But the central issue was whether such a document was in evidence before the Commission, and it was not. Furthermore, and in any event, simply because a document was not requested by the respondent, did not mean that if such a document existed, the appellant

could not have tendered it in evidence itself, including by annexing any relevant documents to the witness statement of Mrs Hughes.

73 In relation to the 'ambush', this arose during the earlier cross-examination of the respondent by Mrs Hughes. At AB278-279, Mrs Hughes was asking the respondent questions about a 'KPI Dashboard' that was used at the business as a part of monitoring the overall performance of the business. These matters were discussed at a weekly senior management meeting. The respondent was asked about this and said he did not previously deny there were KPIs for the business, but staff did not have individual targets. The respondent said that he was responsible for 'filling' the KPI Dashboard.

74 However, when Mrs Hughes requested to tender a copy of the 'KPI Dashboard', the learned Commissioner refused the request because it had not been previously disclosed, despite the earlier programming directions, and he considered it was too late to raise this as a new issue in the course of the hearing. Given the sequence of the evidence referred to above, it is very likely that the document referred to by Mrs Hughes at [71] above, that she said she was not able to provide, was the same 'KPI Dashboard' material.

75 It is clear on the evidence however, that this 'KPI Dashboard' document, was not a document that evidenced that the respondent's entitlement to a $10,000 quarterly payment, was conditional upon him achieving individual performance targets, as a term of his contract of employment. This was a document that was used by the business as a whole, to assess the overall business performance. The learned Commissioner rightly noted that the material had not been disclosed and provided as an annexure to filed witness statements, in accordance with the earlier programming directions. The learned Commissioner was correct to conclude that to this extent, it would involve a degree of 'ambush' of the witness.

76 In any event however, the appellant's complaint as to this issue underscores the central difficulty that the appellant had in the proceedings at first instance. The continual reference to these sorts of documents, which refer to the appellant's overall business performance measures and progress, are not the same thing by any means, as evidence of the appellant and respondent agreeing to a term in the respondent's contract of employment, that any additional payments he would receive, were contingent upon the respondent achieving specified targets as a term of his contract. The appellant has conflated the issue of overall business performance with individual KPI and performance targets, as a term of the respondent's contract of employment. There was simply no evidence of the latter before the Commission, to support the appellant's contention that the respondent failed to achieve what was required of him, to deny him the contractual entitlement of the quarterly payment.

77 This ground is not established.

Ground 17

78 This ground advanced by the appellant was a general assertion that when reviewing the transcript, the learned Commissioner provided coaching and assistance to the respondent in a manner which was 'extraordinary and not balanced', compared to any assistance provided to the appellant. We have already indicated above, the information and assistance provided to the parties by the learned Commissioner. Whilst the ground does not contain any particularity, dealing with it requires a review of the transcript of the proceedings, in terms of interactions between the Commission and the parties.

79 The following references to the appeal book are to the transcript at first instance. At AB264 the learned Commissioner explained the respondent's claim to both parties. At AB265 he explained the use of witness statements for both parties and the need for the presence of witnesses for cross-examination, failing which, the witness statements could be tendered by consent. We have already commented on these observations set out above, and the earlier correspondence between the appellant and the Associate.

80 Further, also at AB265, the learned Commissioner made a separate conference room available to accommodate the appellant's infant children and informed them they could request a break at any time in the proceedings. At AB266, the Commission outlined the procedure to be followed during the course of the hearing. A little further on at AB269, the learned Commissioner offered the appellant some additional time for preparation for cross-examination of the respondent. At AB271, the Commission ensured that the respondent had a copy of Mrs Hughes' witness statement, in order that he was able to respond to questions. At AB274-275, the learned Commissioner requested Mrs Hughes to put questions rather than statements to the respondent. This is a common request of unrepresented parties.

81 Further, at AB278, the Commission made a ruling on the 'KPI Dashboard' that we have referred to above, consistent with the programming directions earlier made. There is nothing at all unusual about this. A little later at AB280-281, the learned Commissioner provided Mrs Hughes with assistance in framing her questions, again a matter not unusual with unrepresented parties. At AB282, at the conclusion of the respondent's cross-examination, the learned Commissioner invited the respondent to say anything further arising from the questions that he was asked by Mrs Hughes. Again, with unrepresented parties, as there is no re-examination by the parties' representatives which would normally follow cross-examination, in which a witness can clarify or expand upon matters raised in cross-examination, the Commission's invitation to the respondent was entirely conventional.

82 A little later in the evidence, at AB284, the appellant was granted a request for an early lunch break. At AB285, on resumption after the luncheon adjournment, the learned Commissioner asked Mrs Hughes whether she needed any more time before recommencing. She remained seated at the bar table for the presentation of the appellant's case and the giving of her evidence. At AB289-290, and also later in the cross-examination, the learned Commissioner had to request Mr Hughes to stop speaking to Mrs Hughes while she was giving her evidence, as in effect, he was attempting to coach the witness.

83 At AB293, the respondent was prevented, as was the appellant, from producing documents and seeking to tender them, that had not been previously disclosed. In doing so, the learned Commissioner observed that 'the rules in relation to both parties regarding documents that were not put on pursuant to the directions apply equally'. At AB296-297, the respondent, when cross-examining Mrs Hughes, confused her. The learned Commissioner assisted by asking the respondent to put the question a different way, which he did. Furthermore, at AB299 in the respondent's cross-examination of Mrs Hughes, the learned

Commissioner prevented the respondent from making submissions rather than asking questions. At AB303, the respondent was prevented from asking questions because they were not relevant.

84 Before making final submissions, the learned Commissioner asked Mrs Hughes whether she wished to have a break before doing so and asked her how much time she needed. She requested and was granted a 30 minute break and was invited to direct any request for further time to the Associate (see AB304). Ultimately, it was Mr Hughes who asked and was permitted to close the appellant's case (see AB305).

85 Nothing in the above exchanges between the learned Commissioner and the parties reveals in any way an unbalanced or inappropriate level of assistance to the respondent. On the contrary, the appellant's requests for time and assistance were granted on every occasion a request was made. There is nothing revealed in the transcript that shows the proceedings took place in other than an orderly and balanced way. In particular, given unrepresented parties were appearing before the Commission, the nature of the interactions between the Commission and the parties was entirely unexceptional.

86 The appellant's contention that the 'level of coaching and assistance the Commissioner provided the applicant is extraordinary and not balanced by a similar level of assistance to the respondent', as set out in this ground, is without foundation.

Ground 18

87 This ground relates to the observations by the learned Commissioner at [107] to the effect that the appellant was given ample opportunity to provide evidence in support of its case including documents, to establish its assertion that the respondent's payments were conditional upon meeting performance targets. The appellant complained that these observations were inaccurate and also complained about a lack of guidance. In our view, for all of the foregoing reasons, there is no substance to this ground of appeal.

Ground 19

88 This ground was a general comment by way of a statement that the respondent had a key performance indicator in relation to 'Active Subscribers' amongst others. It was submitted these are standard in the appellant's industry sector and that the respondent was responsible for monitoring those on behalf of the company. No specific error is identified. We do not repeat what we have said above about the appellant's conflation of the overall performance of the business, and performance measures relevant to that, and the terms of the respondent's contract of employment. This applies with equal force to the matter raised in this ground which is not made out.

Ground 20

89 Whilst in similar terms to ground 19 above, the appellant complained of the loss of an opportunity to adduce critical evidence in the case. It was asserted that this was due to flawed findings and inappropriate guidance during the proceedings. In our view, as with the above grounds, there was no lack of opportunity given to the appellant to advance its case. Furthermore, regarding the asserted lack of opportunity to tender material in relation to KPIs and performance measurement, documents of the kind referred to by the appellant, such as the 'KPI Dashboard' used as a measure of overall business performance, and other similar material contained in the appeal book (see AB319-376), would not have assisted the appellant at first instance. It was not evidence supporting the existence of a specific term in the respondent's contract of employment, to the effect that his quarterly payments were linked to individual performance criteria being satisfied.

90 This ground is not made out.

Overall difficulty with the appellant's case

91 We have already noted above, a fundamental difficulty with the appellant's case at first instance was the absence of any evidence before the Commission, which established that it was a term of the respondent's contract of employment that the additional $10,000 quarterly payments reflected in exhibit A1, the May 2022 letter, were conditional upon the respondent achieving performance targets set out in KPIs for him personally. During the course of argument on the appeal, to his credit, Mr Hughes, when members of the Full Bench raised this with him, conceded that there was no document in existence that established this (see transcript of appeal at pp 30-41). In particular, in response to questions about these matters, the following exchange took place at pp40-41 of the appeal transcript:

> **KENNER CC:** But is there anything in either Ms Hughes' witness statement or the oral evidence given before Commissioner Kucera directly about Ms Hughes' discussion with the respondent, Mr Trabelsi, and what was discussed and what she says was agreed? That's the critical thing.
>
> **HUGHES, MR:** Well, I think that, yes, I accept that, sir. The respondent is saying that this letter reflects that discussion. We're saying - well, you're saying it just reflects this discussion in that it's an amendment to his contract, as agreed at that time, increasing his salary. We're saying that this letter was never for that purpose, should not be taken in the context of that, and should - no weight should have been put on this letter at all. It was just incorrect from the beginning. So - - -
>
> **EMMANUEL C:** But the Chief Commissioner's question is a bit different. He's putting to you, or asking you, where's the evidence you point to about the discussion between Ms Hughes and the then-applicant in relation to that 31 October discussion? So there's a line in there, in the paragraph you pointed to. Those discussions were all about this being performance-based. But what is the other evidence that My Foodie Box put on about that 31 October discussion between Ms Hughes?
>
> **HUGHES, MR:** Fair enough. Exactly, and I think we sort of alluded to that. It's all inferred and circumstantial evidence surrounding the overall performance of the position, what the position was for, the general commercial nature of that, and how this is ordinarily structured in these ways for such positions, that you don't, you know, you - to be probationary and to be provided with a quarterly payment, there had to be some catalyst for why that was like that. And all of that is inferred from the thing. But is there any other direct evidence? No, I can't think we can point to anything that's been put forward.

92 There was nothing specific in Mrs Hughes' witness statement to this effect, other than a general comment in response to the respondent's witness statement, about 'discussions' between Mr and Mrs Hughes and the respondent and those discussions being 'performance based' (see AB72). However, as was noted by the learned Commissioner at [144] of his reasons, the evidence was Mr Hughes did not take part in the October 2021 meeting with the respondent regarding his appointment to the Director of Business Development position (see AB277). Accordingly, the reference in the letter of May 2022, confirming the quarterly payment (albeit that the letter was written well after the event), to these 'discussions' between the three of them, did not support the appellant's contentions.

93 This is also despite the letter of May 2022 being the ideal opportunity to document the alleged link between the respondent's quarterly payments and the need for him to achieve specific targets, as a condition to be met in order to receive any payments. The absence of any reference to such a link in the letter, weighs heavily against the appellant's contentions in this regard. The reference in the letter, to the additional payments, as the learned Commission found at [89] of his reasons, was entirely consistent with additional remuneration being payable to the respondent for the increased responsibility and scope of the new position he was appointed to from 1 November 2021.

94 Additionally, there was no oral evidence from Mrs Hughes referring specifically to an agreement that the respondent's quarterly payments were conditional on him meeting individual and specified KPI or other performance measures. Generalised statements by the appellant that the respondent's new job was 'performance based', were insufficient to establish the appellant's contentions at first instance. They blurred the important distinction between an employee's job responsibilities being for an aspect of a business' overall performance, on the one hand, and an employee being entitled under their contract of employment, to receive part of their remuneration, only conditional on the achievement of particular performance measures of the business, on the other. In the absence of any oral or documentary evidence of this kind, the learned Commissioner's conclusions at [141] of his reasons, set out above, were entirely open to him and indeed, were the only conclusions that the Commission could have reached on the evidence.

Conclusion

95 For the foregoing reasons, the appeal should be dismissed.

2025 WAIRC 00184

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER B 32/2023 GIVEN ON 11 APRIL 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MY FOODIE BOX LIMITED
	APPELLANT
	-v-
	ALAIN TRABELSI
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER C TSANG
DATE	MONDAY, 24 MARCH 2025
FILE NO/S	FBA 14 OF 2024
CITATION NO.	2025 WAIRC 00184

Result	Appeal dismissed
Representation	
Appellant	Mr B Hughes
Respondent	In person

Order

HAVING heard from Mr B Hughes on behalf of the appellant and Mr A Trabelsi on his own behalf, 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.]

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

2025 WAIRC 00188

APPLICATIONS PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

CITATION	:	2025 WAIRC 00188
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
HEARD	:	ON THE PAPERS WRITTEN SUBMISSIONS FILED 24 JANUARY 2025, 11 FEBRUARY 2025 AND 18 FEBRUARY 2025
DELIVERED	:	WEDNESDAY, 26 MARCH 2025
FILE NO.	:	CICS 5 OF 2023
BETWEEN	:	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Applicant THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS Respondent LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) First Intervenor WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION Second Intervenor
FILE NO.	:	CICS 8 OF 2023
BETWEEN	:	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS Applicant AND WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Respondent LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) First Intervenor WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION Second Intervenor
FILE NO.	:	CICS 9 OF 2023
BETWEEN	:	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Applicant AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS Respondent LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) First Intervenor WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION Second Intervenor

Catchwords	:	Industrial Law (WA) – Application for production of documents – Allegation of collusion by parties and representatives – Applications to dismiss in the public interest – Production of documents – Statutory provisions – No property in witnesses – Re-agitation of interlocutory matters – Relevant principles applied – Applications to dismiss upheld
Legislation	:	*Industrial Relations Act 1979* (WA) s 6(c), s 22B, s 26(1)(a), s 27(1)(a), s 27(1)(o) *Industrial Relations Commission Regulations 2005* (WA) reg 20, reg 20(14), reg 21, reg 21(1), reg 21(2) *Interpretation Act 1984* (WA) s 44, s 46, s 47
Result	:	Applications upheld
Representation:		
Applicant	:	Ms R J Webb KC and with her Mr T Lettenmaier on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Respondent	:	Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
First Intervenor	:	Mr K Trainer as agent on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)
Second intervenor	:	Mr K de Kerloy SC of counsel and with him Mr J Creese of counsel on behalf of the Western Australian Local Government Association

Case(s) referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated & Anor (1995) 75 WAIG 1801

AON Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175

Bajramovic v Calubaquib [2015] NSWCA 139; (2015) 71 MVR 15

Clyne v New South Wales Bar Association (1960) 104 CLR 186

Commonwealth Bank of Australia v Cooke [2000] 1 Qd R

GPI Leisure Corporation Ltd v Herdsman Investments Pty Ltd (No 3) (1992) 20 NSWLR 15

Harmony Shipping Co SA v Davis and Ors [1979] 3 All ER 177

Johnson v Gore Wood & Co [2001] 1 All ER 481

Liu v Age Company Ltd [2016] NSWCA 115; (2016) 92 NSWLR 679

Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd [2007] WASCA 151; (2007) 34 WAR 279

Western Australian Municipal, Administrative, Clerical And Services Union of Employees & Ors v (Not Applicable) [2024] WAIRC 00907; (2024) 104 WAIG 2304

Western Australian Municipal, Administrative, Clerical And Services Union of Employees & Ors v (Not Applicable) [2024] WAIRC 01044; (2025) 105 WAIG 45

Reasons for Decision

THE COMMISSION IN COURT SESSION:

Brief background

1 In a decision dated 17 October 2024, the Commission in Court Session dealt with an oral application by the CFMEUW made in the course of proceedings on 16 October 2024, seeking broad ranging orders for the production of documents: ***Western Australian Municipal, Administrative, Clerical And Services Union of Employees & Ors v (Not Applicable)*** [2024] WAIRC 00907; (2024) 104 WAIG 2304. The terms of the orders sought and the grounds for the application by the CFMEUW, were set out in the Commission in Court Session's reasons in that matter at [1]-[2] as follows:

> [1] Towards the end of the proceedings on 16 October 2024, counsel for the CFMEU made an application for an order under reg 21 of the *Industrial Relations Commission Regulations 2005* (WA) requiring the production of documents by each of the WASU and the WALGA in the following terms:
>
> (a) all communications however described between the WASU and the WALGA concerning these proceedings or evidence given or expected to be given in these proceedings;
>
> (b) all communications however described between the WASU and the LGRCEU concerning these proceedings or evidence given or expected to be given in these proceedings; and
>
> (c) all communications however described between the WALGA and the LGRCEU concerning these proceedings or evidence given or expected to be given in these proceedings.
>
> [2] The basis for the application was an assertion of collusion between the WASU and the WALGA, said to be relevant to the question of whether the WASU should continue to be permitted to ask questions of WALGA witnesses. Secondly, it was said they are relevant or potentially relevant to the credit of the WALGA witnesses, as they may disclose whether evidence that has been given is being or has been prepared in collaboration with

the cross-examiner. Thirdly, such documents are said to be relevant in relation to a submission that the CFMEU will ultimately make in these proceedings, that being that the WASU is unable or unwilling to effectively represent local government employees, as it is in a position of conflict due to its close collaboration with local government employers. The application does not extend to documents which have already been produced in these proceedings, or any that involve communications that the CFMEU is a party to.

2 The Commission in Court Session was not persuaded to make the orders in the terms as sought by the CFMEUW. In this respect, at [7]-[9] of its reasons, the Commission observed:

[7] We have considered this matter overnight and have formed the following views. Firstly, we do not consider there is any basis on the evidence for an order for production of documents to be made involving the LGRCEU. Secondly, as to the WASU and the WALGA, we do not consider there is any basis for an order for production of documents of whatever kind in relation to the proceedings generally as, in our opinion, this is far too broad a request. It is to be expected that in the ordinary course, parties involved in proceedings will communicate about various aspects of the proceedings, including for the purpose of narrowing issues, conferring in relation to case management steps, and for settlement of the proceedings. Cooperation and courtesy is to be encouraged, not discouraged.

[8] However, we do consider that there is a basis to make more limited orders in this matter, confined to such documents as relate to the evidence in the proceedings only. That is because we are satisfied such documents are relevant to the first and second issues identified by the CFMEU. We are doubtful that the documents are relevant to the third issue, the foreshadowed submission that WASU has a conflict due to its close collaboration with the WALGA. The CFMEU has not yet demonstrated why the WASU's conduct of an aspect of these proceedings causes its ability to independently represent and advocate for it members in industrial matters is in any way compromised.

[9] We are also very conscious of delay, given the three month delay which has already occurred in the conduct of these proceedings, no doubt causing additional time and costs to be incurred by the parties. We are not prepared to countenance any further delay given the Commission's obligation to hear and determine matters before it with as much speed as the requirements of the *Act* and a proper consideration of the matter permit.

3 In light of these observations, the Commission in Court Session made the following limited orders:

(1) THAT as to the evidence that has been given or is to be given in these proceedings any documents passing between the WASU and the WALGA that relate to that evidence and which are not subject to a claim of legal professional privilege are to be produced by the WASU and the WALGA for inspection by the CFMEU by no later than 4.00 pm Thursday, 24 October 2024.

(2) THAT any claim of legal professional privilege by either the WASU or the WALGA is to be the subject of affidavit evidence identifying by list the documents the subject of the claim of privilege, such affidavit to be put on by 4.00 pm Thursday, 24 October 2024.

(3) THAT otherwise the proceedings will continue to be heard subject to:

(a) the WASU examination of the WALGA remaining witnesses is not to involve leading questions and is to be confined to matters arising in the witnesses' evidence in chief; and

(b) the CFMEU being given liberty to apply to recall any WALGA witness(es).

(4) THAT there be liberty to apply on short notice.

4 On the same day as the Commission delivered its decision in the above matter, on 17 October 2024, the CFMEUW made a further oral application in the course of the proceedings, to extend the scope of the orders made to witnesses called by the WASU, as well as the WALGA to whom the orders applied. The Commission did not make such further orders at the time the application was made. Whilst it was later pressed by the CFMEUW on 22 October 2024, it was overtaken by events set out below at [5] (see transcript of proceedings pp 1095-1098 and p 1147). In compliance with the first orders, the WASU and the WALGA filed affidavits of production on 24 October 2024. Both the WASU and the WALGA claimed litigation privilege in relation to the documents discovered.

5 Subsequently, during the proceedings on 25 October 2024, counsel for the CFMEUW orally foreshadowed a further application for production of documents (see transcript of proceedings pp 117-118). The oral application was formalised in an application filed on 28 October 2024, by which the CFMEUW sought production of documents under reg 21 of the *Industrial Relations Commission Regulations 2005*, against the WASU, the WALGA and the LGRCEU. Relevant parts of the application, set out at Annexure A - Orders Sought are in the following terms:

Production required

1. In these orders:

(a) **CFMEUW** means the Construction, Forestry, Mining and Energy Union of Workers

(b) **LGRCEU** means Local Government, Racing and Cemeteries Employees Union (WA)

(c) **Proponents** means LGRCEU, WALGA and WASU and their representatives

(d) **WALGA** means Western Australian Local Government Association

(e) **WASU** means the applicant

2. Pursuant to regulation 21 of the *Industrial Relations Commission Regulations 2005* (WA), each of WASU, WALGA and the LGRCEU are to produce to the Commission in Court Session and the CFMEUW:

(a) any documents in their power, custody or possession in the categories described at paragraphs 3 to 5 below:

(b) but excluding any communication to which the CFMEU was a party or any document which has been filed in the proceedings.

Categories of documents

3. Any communication between any two or more of the Proponents in relation to these proceedings.

4. Any communication between any two or more Proponents concerning the evidence to be given in these proceedings by any witness called by a Proponent.

5. Any document which records or refers to the content of any discussions between the representatives of one Proponent and a witness or potential witness for another Proponent, including but not limited to:

(a) file notes of the meetings between the legal representatives for WASU and WALGA witnesses Sue Wiltshire, Teresa Cole and Rosemary Miller; and

(b) file notes of the "*general evidence preparation meeting*" referred to in document 58 of Annexure JC-1 to the affidavit of Joseph Creese affirmed on 24 October 2024.

…

6 The grounds advanced by the CFMEUW in support of the further application for production are set out at Annexure B - Grounds of the application which are in the following terms (footnotes omitted):

1. On 3 July 2024 the respondent (**CFMEUW**) sought to be heard in relation to the procedure to be adopted at the hearing of the application. The CFMEUW *inter alia* sought orders that the applicant (**WASU**) and the two intervenors (**WALGA** and **LGRCEU**) (together, the **Proponents**) not be permitted to ask leading questions of one another's witnesses.

2. At a directions hearing convened on 5 July 2024 the CFMEUW submitted that permitting the Proponents to ask leading questions of one another's witnesses would, in effect, risk contravention of the rationale for the prohibition of leading questions in evidence in chief; that is to say, it would undermine the integrity of the evidence led.

3. In successfully resisting the directions sought by the CFMEUW, WASU:

(a) submitted that it suspected that the concerns identified by the CFMEUW were somewhat overstated, and unlikely to eventuate;

(b) embraced the view that there was no identity of interest between the Proponents; and

(c) submitted that there was nothing in what the CFMEUW raised which could not be dealt with by appropriate directions at the time, should that become necessary.

4. WALGA adopted the position advanced by WASU. WALGA also stated that its first witness, Ms Miller, was not a witness of "*relevant events*".

5. The context of these submissions was that WALGA and WASU had in the weeks and months prior to 5 July 2024 collaborated very extensively in relation to the evidence to be called by WALGA witnesses, with more than 100 emails and text messages exchanged on the subject matter and several meetings called. This fact was discovered by happenstance.

6. The collaboration included collaboration in relation to subject matter on which WASU would "*cross-examine*" WALGA witnesses. In at least some instances it appears that the subject matter was introduced by WASU. It appears that senior counsel for WASU conducted conferences with WALGA witnesses. Ms Miller appears to have been the fulcrum of the collaboration.

7. In short, the concerns which the CFMEUW had raised had, to the knowledge of WASU and WALGA, already manifested by 5 July 2024.

8. WALGA in due course led additional evidence in chief in relation to subject matter apparently proposed by WASU. WASU in due course cross-examined in relation to that subject matter including through leading questions. This included evidence in relation to a safety inspection at the Shire of Serpentine-Jarrahdale, management of bullying allegations at the City of Wanneroo and the ratio of inside to outside workers in local government.

9. Both the Full Bench and the CFMEUW were unaware that WASU and WALGA had collaborated in this way, and were unaware that the cross-examination had been previously arranged. By dint of this expedient WASU was able to adduce evidence of matters supportive of its application which were not included in witness outlines filed in accordance with the directions of the Full Bench. At the same time, both WASU and WALGA insisted that the CFMEUW not be permitted to lead evidence beyond that included in its outlines of evidence.

10. In those premises, concerns arise in relation to at least the following matters:

(a) the basis on which it was submitted on 5 July 2024 that the CFMEUW's concerns were overstated and unlikely to eventuate;

(b) the basis on which it was submitted that any of the concerns raised by the CFMEUW could be addressed by directions (bearing in mind that the Full Bench and CFMEUW were unaware of the Proponents' conduct and only became aware of it by happenstance);

(c) the possibility that WASU and WALGA have subverted the directions of the Full Bench in relation to the filing of outlines of evidence, by adducing what is effectively additional evidence in chief through the expedient of "*cross-examination*";

(d) the credibility of the WALGA witnesses and potentially WASU and LGRCEU witnesses, and the risk that those witnesses have been coached, pressured or directed in relation to their evidence;

(e) the integrity of the evidence led by the Proponents generally and by the WALGA witnesses in particular; and

(f) the possibility that the Commission's processes have been abused in the sense that the proceeding has been conducted in a manner which tends to bring the administration of justice into disrepute.

11. The documents sought are potentially relevant to at least the following matters:

(a) the credibility of witnesses called by the Proponents;

(b) the industrial conduct of WASU;

(c) the CFMEUW's submission that WASU is unable to effectively represent workers because of the nature of its relationship with WALGA and its members; and

(d) the potential abuse of the processes of the Commission in Court Session and the steps required to protect those processes from abuse.

12. There is at this stage no direct evidence of collaboration between WASU and the LGRCEU in relation to the evidence of the LGRCEU witnesses. However, there was extensive supplementary evidence in chief led from LGRCEU witnesses Mr Johnson and Ms Ballantyne, and substantial questioning of those witnesses by counsel for WASU. In that context, and having regard to the *modus operandi* now revealed, it is necessary that the Full Bench obtain clarity in relation to the potential of similar collaboration in respect of the LGRCEU witnesses. If there has been collaboration, the Full Bench should know about it; if there has not been, compliance with orders for production will be straightforward.

7 On 12 December 2024, the LGRCEU filed an application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA), seeking orders that the CFMEUW application for production be dismissed. In summary, the grounds in support of the application are that there is no evidentiary basis for the CFMEUW application to produce, and that the orders sought would be oppressive. As the other parties foreshadowed that they may also similarly make applications under s 27(1)(a) to dismiss the CFMEUW application to produce, the Commission listed the matters for directions on 16 December 2024. As a consequence of the conferral of the parties, on 23 December 2024, consent directions were made for the filing of further s 27(1)(a) applications by the WASU and the WALGA, and submissions in support and reply by the CFMEUW. The parties also agreed that these applications be dealt with on the papers.

The s 27(1)(a) applications

8 The thrust of the grounds in the applications brought by the WASU and the WALGA, are that the now third CFMEUW application for production of documents, is a re-agitation of the first application, which was largely refused by the Commission in Court Session on 17 October 2024. Secondly, that the further application, given its scope, is oppressive and will increase costs and cause undue delay in the final determination of the substantive proceedings, contrary to the *Act*. Additionally, the WASU application is grounded on the further proposition that if the requested orders are made, senior counsel for the WASU may become a potential witness in the substantive matter and would have to withdraw from the case, causing significant disruption and cost to the WASU.

9 For all of these reasons, the WASU, the WALGA and the LGRCEU contended that the CFMEUW application should be dismissed as not being in the public interest.

Relevant principles to apply

Production of documents

10 An order for production of documents may be made at any time in the course of proceedings before the Commission. The right in a party to make such an application, is however, not an unconditioned right. It is subject to the terms of reg 21 of the *Regulations*, which provides as follows:

(1) At any stage of the proceedings the Commission may order any party to produce to the Commission any document in the party's possession, custody or power, relating to any matter in question in the proceedings.

(2) No order for production of any documents to the Commission can be made unless the Commission is of the opinion that the order is necessary either for disposing fairly of the matter or for saving costs.

11 Subject to what follows below, importantly, the conditions for making an order of production of the present kind, are firstly, that it must be necessary to dispose fairly of the matter in relation to which the application is made, or secondly, it must be necessary in order to save costs. The CFMEUW does not contend that the order it seeks is necessary on the latter ground, in order to save costs. On the contrary, the WASU, the WALGA and the LGRCEU, all contend that the effect of the orders sought will significantly increase costs.

12 Further, the power in reg 21 for production, is for production to the Commission. It is not an application for production to a party. Regulation 21 is silent in relation to inspection of documents.

13 In addition to the power in reg 21, reg 20 of the *Regulations* deals with 'discovery, production and inspection of documents'. It is provided in reg 20(2), that a party to proceedings before the Commission may make an application under s 27(1)(o) of the *Act*, for discovery. Section 27(1)(o) of the *Act* is a power that deals with steps that may be taken, and the powers that may be

exercised by the Commission, 'before the hearing of any matter', and are seemingly directed, from the subject matter of s 27(1)(o), to interlocutory orders that the Commission may make, for the purposes of enabling a matter to be heard. Subject to reg 20(14), reg 20 appears directed to the same purpose. Regulation 20(14) contemplates an application for production of documents generally, subject to any terms the Commission may impose. Both s 27(1)(o) and reg 20 are to be construed in the context that there is no right to discovery and production in proceedings before the Commission. Such an order may only be made if the Commission is satisfied that it would be 'just': ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated & Anor*** (1995) 75 WAIG 1801 at 1805.

14 If an order is made by the Commission under reg 21, any documents ordered to be produced are to be delivered into the custody of the Commission, and not the party making the application. It would then be for the party seeking the documents, to establish to the satisfaction of the Commission, that the document(s) should be made available to the party who sought the orders.

15 In our view, the approach to be adopted in the circumstances of an order for production (and subsequently inspection) of documents to the Commission under reg 21(1), would require, at least, the Commission to be satisfied of the matters in reg 21(2) and also, that such an order would be consistent with equity, good conscience and the substantial merits of the case, in accordance with s 26(1)(a) of the *Act*, along with the obligations on the Commission to deal with matters with all due speed, and with an eye on the elimination of delay and the containment of costs. This would, of course, also be subject to any proper basis to resist production and inspection, such as a claim for legal professional privilege. The above approach to the *Regulations* is consistent with the general principle that powers exercised by the Commission under the *Regulations*, are taken to be exercised under the *Act*, and the relevant provisions of the *Act*, as to the manner of the exercise of the Commission's jurisdiction and powers apply (see ss 44, 46, and 47 *Interpretation Act 1984* (WA)).

16 Importantly, too, for present purposes, by s 22B of the *Act*, the Commission is obliged, in performing its functions under the *Act*, to proceed with due speed, having regard to the nature of the matter before it. All of the Commission's procedural powers are to be exercised consistent with the objects of the *Act*, in particular s 6(c), requiring the Commission to deal with disputes not resolved by amicable agreement with the maximum expedition and the minimum of legal form and technicality. Provisions of the *Regulations* in relation to the conduct of hearings before the Commission, are directed towards the expeditious and inexpensive determination of proceedings, and the elimination of delay (see Part 3 Divisions 5 and 6).

17 Whilst the present applications are to be determined within the framework of the *Act* and the *Regulations*, the parties referred to several cases in support of their respective contentions. As a matter of general principle, an abuse of process may arise when a party seeks to re-litigate a matter already determined in a proceeding: ***AON Risk Services Australia Ltd v Australian National University*** (2009) 239 CLR 175 per French CJ at [33]-[34]. Similar expressions of view are found in the observations of the House of Lords in ***Johnson v Gore Wood & Co*** [2001] 1 All ER 481 per Lord Bingham at 498-499, to the effect that a party should 'not be vexed twice in the same matter', as an issue of public interest.

18 Specifically in the context of interlocutory applications, the decisions of the New South Wales Court of Appeal in ***Bajramovic v Calubaquib*** [2015] NSWCA 139; (2015) 71 MVR 15 and ***Liu v Age Company Ltd*** [2016] NSWCA 115; (2016) 92 NSWLR 679 were referred to and relied upon in the written submissions. In ***Bajramovic***, Emmett JA (Leeming JA and Adamson J agreeing) held at [40]-[41], that it may be an abuse of process to re-litigate in a second interlocutory application, a matter previously decided adversely to a party. However, it may not be so, if it can be demonstrated that there has been a change of circumstances, with the overriding principle being that it must be in the interests of justice to entertain the second application.

19 To a similar effect, are the observations of McColl JA in ***Liu*** at [199], that the question of whether a second application should be permitted will depend on where the interests of justice lay. Importantly in that respect, in making that assessment, consideration may need to be given to any change in circumstances and whether matters relied upon to demonstrate a change were available to be put in the earlier proceedings.

Dismissal of matter in the public interest

20 In reasons for decision of the Commission in Court Session dealing with an earlier interlocutory application made by the CFMEUW, under s 27(1)(a) of the *Act*, the Commission summarised the approach to the exercise of this power: ***Western Australian Municipal, Administrative, Clerical And Services Union of Employees & Ors v (Not Applicable)*** [2024] WAIRC 01044; (2025) 105 WAIG 45. In that matter, the Commission in Court Session observed at [3]-[6] as follows:

The application

[3] The CFMEUW application was made under s 27(1)(a) of the *Act* which 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 of it or refrain from further hearing or determining the matter or part if it is satisfied —

(i) that the matter or part 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 of it discontinued, as the case may be;

[4] Section 27(1)(a) confers a broad discretion on the Commission to dismiss or refrain from further hearing a matter on various bases as set out. The CFMEUW did not articulate any particular power under s 27(1)(a) upon which it relied, and given that it was contended that the WASU case could not, as advanced, succeed, we take it to be an application under s 27(1)(a)(iv) that the substantive application should be dismissed 'for any other reason'.

[5] The power of the Commission to dismiss a matter or to refrain from further hearing a matter, is a broad power. In ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2013] WAIRC 00754; (2013) 93 WAIG 1431 (***PTA case***) as to s 27(1)(a) of the *Act*, with particular reference to the public interest, Kenner C (as he then was) observed at [21] - [23] as follows:

> [21] 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 of it or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part 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 of it discontinued, as the case may be;
>
> [22] In another context, in *The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the *Act*. In referring to s 27(1)(a)(ii) of the *Act*, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:
>
> 35 Given the construction I have placed on s 36A(1) of the *Act*, it is for the respondent to demonstrate that it would not be in the public interest for the Proposed Award to the made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the *Act* empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the *Conciliation and Arbitration Act 1904* (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:
>
> *"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise of jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1] (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on*

unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."

[23] I adopt what I said in *Skilled Rail Services* for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the *Act*: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

[6] Given that a person who brings proceedings before the Commission is entitled to have the jurisdiction invoked, the statutory power to dismiss a matter under s 27(1)(a) of the *Act* is to be exercised sparingly. Whilst the ***PTA case*** concerned a dismissal application in the public interest under s 27(1)(a)(ii), the same broad approach should be adopted to the other bases of the power in s 27(1)(a)(i), (iii) and (iv), in that the power should only be exercised in a clear case.

Witnesses and potential witnesses

21 It is trite to observe that there is no property in a witness. In ***Harmony Shipping Co SA v Davis and Ors*** [1979] 3 All ER 177, Lord Denning Mr said:

> So far as witnesses of fact are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena. That was laid down by the Law Society in their Guide to the Professional Conduct of Solicitors in 1944. It was affirmed and approved in 1963 by Lord Parker CJ and the judges. It is published in the Law Society's Gazette for February 1963. It says:
>
> > '. . . the Council have always held the view that there is no property in a witness and that so long as there is no question of tampering with the evidence of witnesses it is open to the solicitor for either party in civil or criminal proceedings to interview and take a statement from any witness or prospective witness at any stage in the proceedings, whether or not that witness has been interviewed or called as a witness by the other party.'
>
> That principle is established in the case of a witness of fact: for the plain, simple reason that the primary duty of the court is to ascertain the truth by the best evidence available. Any witness who has seen the facts or who knows the facts can be compelled to assist the court and should assist the court by giving that evidence.

22 (See too: ***Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd*** [2007] WASCA 151; (2007) 34 WAR 279 per McClure JA (Steytler P and Miller JA agreeing) at [31]-[32]).

23 A person who is a potential witness in a legal proceeding and who has prepared a witness statement, is not precluded from informing the other side or the 'world at large' what information has been provided: ***Commonwealth Bank of Australia v Cooke*** [2000] 1 Qd R 7 per Williams J at [27]-[28].

24 As is pointed out in the WALGA submissions in reply, also relevant in this respect are the professional conduct rules applicable to both solicitors and barristers. Both the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and the *Legal Profession Uniform (Barristers) Rules 2015*, contain provisions proscribing a solicitor or barrister from taking any step to 'prevent or discourage prospective witnesses or a witness from conferring with an opponent or *being interviewed by or on behalf of any person involved in the proceedings'*. These are significant matters for the purposes of the present applications (Our emphasis).

Consideration

25 The starting point in this matter is the fact that the CFMEUW now seeks to reagitate an issue already determined by the Commission in Court Session on 17 October 2024. The burden is on it, given the Commission's reasons for refusing the order originally sought, to establish that the Commission in Court Session, in light of that earlier refusal of the broad ranging application made on 16 October 2024, should now effectively revisit its decision and make orders that it has previously declined. If the CFMEUW cannot make out a prima facie case as to why the Commission should be moved to reconsider its earlier decision, then having regard to equity, good conscience and the substantial merits of the case, the s 27(1)(a) applications, seeking dismissal of the application in the public interest, should be granted.

26 The parties made reference in their written submissions to issues arising in July 2024, prior to the substantive hearings commencing. After the parties had filed their materials, including witness outlines and written submissions, in accordance with directions agreed by the parties, an issue was raised by the then solicitors for the CFMEUW in relation to the cross-examination of witnesses, a relatively short time prior to the commencement of the hearing on the merits. This is despite the filing of material having occurred over some months, in accordance with the agreed programming directions and in the knowledge that the WASU, the WALGA and the LGRCEU would each be advancing their own evidentiary cases.

27 The CFMEUW contended that the interests of the WASU, the WALGA and the LGRCEU were in common to such an extent, that each of the parties should not be able to cross-examine each other's witnesses. We note that this is a significant departure

from the usual procedure as set out in reg 33 of the *Regulations*. It was contended by the CFMEUW that only one counsel for the CMFEUW should cross-examine witnesses from the WASU, the WALGA and the LGRCEU. Additionally, it was contended that only counsel for one of either the WASU, the WALGA or the LGRCEU, should cross-examine CFMEUW witnesses. These contentions were advanced in partial reliance on a decision of the New South Wales Supreme Court in ***GPI Leisure Corporation Ltd v Herdsman Investments Pty Ltd (No 3)*** (1992) 20 NSWLR 15.

28 In order to address this issue, the Commission in Court Session listed the applications for directions on 5 July 2024. In response to the issues raised by the parties and interveners in the directions hearing, the Commission was not prepared to depart from its earlier views, expressed in a letter to the parties dated 3 July 2024, to the effect that it would not limit cross-examination as sought by the CFMEUW. The Commission encouraged the parties to avoid overlapping cross-examination and said that it would impose limits if necessary, to avoid unreasonable burdens on witnesses (see letter to parties from Associate to the Commission dated 3 July 2024).

29 It is important to appreciate the context of the 5 July 2024 directions hearing. The issue raised by the CFMEUW concerned the course of the cross-examination of witnesses. Significant reliance was placed by the CFMEUW on ***GPI Leisure***. That case dealt with a party's right to a fair hearing and the examination of witnesses, to that end. In this context, we should observe that up to the point of the correspondence from the CFMEUW dated 1 July 2024, and at all times prior, including from the making of the first directions by the Commission in relation to filing evidence and documents in February 2024, there was no suggestion that the proceedings would be conducted other than in the usual way. Each party and intervenor would call its witnesses and have the right to cross-examine the witnesses of the other party and intervenors.

30 It was quite evident from the material filed, by the time of the directions hearing held on 5 July 2024, that although there may be some overlap, that there was a divergence between the cases of the WASU, the WALGA and especially the LGRCEU. ***GPI Leisure*** is not authority for the proposition that there is a fixed rule preventing parties in the same interest from cross-examining one another's witnesses. The ultimate right in a party is to have a fair hearing. In a complex case such as the present matter, with a multiplicity of issues arising, and where there is a divergence of interests, the matters can and should be appropriately managed by minimising duplication in cross-examination. The object is to ensure that there is no oppression to a witness. It is on that basis that the Commission indicated that it would proceed as initially indicated to the parties.

31 Notably, the proceedings to date, have largely been conducted as was expected to occur. The bulk of the cross-examination has been conducted by senior counsel for the WASU, who has taken a lead role in the proceedings. Counsel for the WALGA did not cross-examine any witnesses called by the WASU and the LGRCEU. Any objections to the adducing of further material in evidence in chief, of which there has been some but not a great deal, have been dealt with as intended by the Commission in Court Session.

32 As a part of this factual background, and leading to its submissions as to the alleged impropriety of the conduct of the WASU, the WALGA and the LGRCEU, the CFMEUW, in its written submissions on these applications, referred to statements made by senior counsel for WASU in the course of the 5 July 2024 directions hearing, to the effect that:

> **BLACKBURN, MR:** Thank you. *The WASU's position is that we suspect the concerns that have been put forward by the CFMEU are somewhat overstated and unlikely to eventuate.* It's unlikely, in our view, that the parties or interveners would seek to cross-examine at length on matters that have already been covered in previous cross-examination or examination-in-chief by another intervener.
>
> There's nothing that, in our view, can't be dealt with by appropriate directions at the time should that be necessary whether that be a direction to curtail any cross- examination that's unnecessarily duplicative or whether it be a direction not to ask leading questions of witnesses perceived to be in a similar interest. (Our emphasis).
>
> (Transcript of proceedings 5 July 2024 at p 12)

33 The CFMEUW's submissions rely on that observation made by senior counsel for the WASU, to assert that despite it, and in WASU's counsel's knowledge, there had already been by that time, 'extraordinary collaboration'; 'abuse of the Commission in Court Sessions processes'; 'that the Commission in Court Session may have been misled'; that there 'is reason to doubt the credibility of all witnesses called by the Proponents', along with further descriptions of the cross-examination of Ms Cole (a WALGA witness), as being 'orchestrated' and a 'charade' along with the evidence of Ms Miller (a WALGA witness) having been the result of a 'surreptitious collaboration' and a 'full blown charade'. Before dealing with the specific categories of documents sought in the reagitated application for production, there are a number of difficulties with the CFMEUW's submissions in this regard.

34 Firstly, the above extracted submission of senior counsel for the WASU, in relation to the CFMEUW's concerns being overstated, was solely related to the mechanics of how cross-examination may be conducted by the parties. This was the only issue that arose concerning the cross-examination of witnesses and it was at the behest of the CFMEUW. The WASU contended, consistent with the Commission's earlier expression of view, that any issues in relation to overlapping or oppressive cross-examination, could be dealt with in the course of proceedings by the making of appropriate directions by the Commission in Court Session. Senior counsel's submissions had nothing to do with and could not be regarded as being responsive to the serious allegations of collusion now raised, as is implied in grounds 6, 7, 9 and 10(a) and (b) of the CFMEUW application for production.

35 Secondly, there is no direct evidence before the Commission in Court Session of any of the matters the subject of the CFMEUW allegations. The affidavit of discovery of Mr Creese, upon which the CFMEUW places almost total reliance, is not evidence by any measure, of the assertions now made by the CFMEUW. The affidavit of Mr Creese refers to, by way of brief descriptions, various categories of communications between representatives of the WALGA and the WASU, in relation to various events and witnesses to be called by the WALGA, including 'questions' and 'meetings' in relation to the same.

36 None of this establishes, in fact, anything other than there has been, mostly in the period May to July 2024 prior to, and also briefly after the commencement of the substantive hearing on 15 July 2024, communications between the WASU, and the WALGA in relation to the preparation for this case. We note, that not only prior to, and in the course of the directions hearing on 5 July 2024, but also subsequently, the Commission in Court Session has encouraged the parties and intervenors to confer and to cooperate in the preparation and presentation of their cases. The intent of such encouragement was directed to the applications being dealt with as efficiently and as expeditiously as possible.

37 The fact that there has been communication, as revealed in the affidavit of discovery made by Mr Creese, which may have included meetings between witnesses to be called by WALGA with senior counsel for WASU, does not constitute collusion, nor it is evidence of it. Given there is no property in a witness, such exchanges, absent any evidence of improper conduct, is in and of itself, unexceptional. What material is presently before the Commission, falls far short of establishing any conspiracy to pervert the process of the Commission, or the engaging in of any improper behaviour by a party or counsel.

38 It is of note that none of the content of Mr Creese's affidavit, or for that matter the affidavit of discovery made by Mr Fogliani on behalf of the WASU, contains any mention of communications between either the WASU or the WALGA and the LGRCEU. The only reference to the LGRCEU made by the CFMEUW application, is to the fact that there was extensive cross-examination of Mr Johnson and Ms Ballantyne, by senior counsel for the WASU. This establishes nothing. Mere supposition and inference is no basis for the wide ranging orders now reagitated and sought against the LGRCEU, which have already been refused by the Commission in Court Session on 17 October 2024. There is no basis for any such order to be made now, as to make such an order against the LGRCEU would clearly be oppressive, speculative and contrary to the public interest.

39 Returning then to the WASU and the WALGA orders sought. The affidavits of both Mr Creese and Mr Fogliani, and the limited orders made on 17 October 2024, arose from the cross-examination by senior counsel for the WASU, of Ms Miller, who was called by the WALGA. It was asserted that Ms Miller was the 'fulcrum' of the impropriety now alleged by the CFMEUW against the WALGA and the WASU. The contention is that there is reference in the affidavit of Mr Creese to various matters, including cross-examination in relation to the issue of 'the ratio of inside workers to outside workers'; to 'evidence of WALGA witness Miller'; and 'further questions regarding events at the City of Wanneroo'.

40 Ms Miller's evidence in chief was in two parts. The first was a witness outline filed on 13 March 2024 which contained a list of all current and former industrial agreements applying to all local governments in Western Australia; some reference to the non-involvement of the CFMEUW in various proceedings before the Commission; and copies of position descriptions for outside employees at various local governments (see exhibit WALGA 3). The second witness outline from Ms Miller contains position descriptions for employees who were referred to in other evidence; and whether persons referred to in a CFMEUW witness outline, on behalf of Mr Fisher, are employed by various local governments in relation to a 'poll', referred to in Mr Fisher's outline of evidence (see exhibit WALGA 4).

41 Some supplementary evidence in chief was led from Ms Miller by counsel for the WALGA, about local government workforces generally, and some further matters of clarification regarding her evidence concerning Mr Fisher's witness outline. In relation to the issue of the local government workforce, Ms Miller was asked about proportions of inside to outside employees in local government. Ms Miller gave some general evidence as to this and referred to looking at registered industrial agreements made by the Commission, publicly available, and which are required to have numbers of employees covered by the agreement specified in it. Ms Miller's evidence was that this was one way that she ascertained how many outside employees in local government there may be (see transcript p 967).

42 Ms Miller was then cross-examined by senior counsel for the WASU. Senior counsel asked Ms Miller some questions about occupations in local government and whether they were in the inside or outside workforces. A document was then put to her, prepared by the WALGA, but submitted for identification by the CFMEUW (see CFMEUW MFI 1, later tendered as exhibit WASU 61). Ms Miller's views were sought in relation to the ratio between the inside and outside workforces in local government and whether it was approximately 80% of the former and 20% of the latter. Ms Miller confirmed that this was generally correct (see transcript pp 970-973).

43 A number of observations may be made in relation to Ms Miller's evidence. Firstly, as noted by the WASU in its written submissions, following the attempted tender of the 'Harrison email', (from Ms Miller to Ms Harrison at the City of Wanneroo exhibit WASU MFI 1), the CFMEUW cross-examined Ms Miller. Ms Miller was asked about the Harrison email and said that the WALGA and the WASU cooperated 'to some extent' in the conduct of the case. Also, her evidence was that the email to the City of Wanneroo was 'but an example' of the collaboration between the WASU and the WALGA, that had been occurring in the context of the proceedings (see transcript at p 984). Ms Miller later retreated somewhat and said that 'collaboration' was too high a word to use, and the relationship between the WALGA and the WASU in the preparation of their cases was 'less than that' and the WALGA was not working 'closely with the WASU' (see transcript at p 1023).

44 Ms Miller further accepted that there were other documents that show cooperation between the WASU and the WALGA (see transcript p 1023). Despite the evidence that Ms Miller gave in these respects, there was no further cross-examination of her by the CFMEUW about any suggestion of collusion or other improper conduct by the WASU, the WALGA or their solicitors or counsel, despite it having every opportunity to do so.

45 As to the issue of Ms Miller remaining in the courtroom as the instructor for WALGA's counsel, it was contended by the CFMEUW that this had not been disclosed. Also, it was submitted that WALGA had previously indicated that Ms Miller would not be a 'witness of fact'. As to these allegations, it was submitted by counsel for the WALGA in the directions hearing on 5 July 2024, that Ms Miller would be present in the courtroom as his instructor, and no objection was taken to this course by the then counsel for the CFMEUW (see transcript at pp 19-20).

46 As to the 'witness of fact' issue, counsel for the WALGA explained in the directions hearing on 5 July 2024, that the substance of Ms Miller's evidence would not relate to 'relevant events' but rather the 'history of regulation of awards and industry and

broader matters of that nature' (see transcript p 19). This was the bulk of the evidence Ms Miller gave. The only 'relevant event', if it can be so described, the subject of Ms Miller's evidence, was the content of the 'poll' referred to in Mr Fisher's outline for the CFMEUW, and whether persons referred to in it were employees of certain local governments. Ms Miller was not cross-examined on this issue.

47 The assertion is made by the CFMEUW that Ms Miller's evidence, reflected material that had been 'workshopped' between the WALGA and the WASU. This assertion is based upon no more than the content of the affidavit of production of Mr Creese, and some evidence from Ms Miller that there had been a degree of co-operation between the WASU and the WALGA in the conduct of the proceedings. There is no other evidence before the Commission in Court Session to support such an allegation. It is tantamount to an allegation of witness coaching or tampering, as referred to by Lord Denning MR in ***Harmony Shipping***, in the extract set out earlier in these reasons. Allegations against solicitors or barristers, that they have engaged in improper or unprofessional conduct, including interfering with the evidence of witnesses, are most serious. Such allegations should not be made unless there is a sound evidentiary basis for them: ***Clyne v New South Wales Bar Association*** (1960) 104 CLR 186 at 201.

48 Unless there is other evidence in the possession of the CFMEUW, of which we are presently unaware, which can be put before the Commission in Court Session to support the allegations, then they should not be maintained.

49 Reference was also made by the CFMEUW, as part of its grounds in support of the application for production, to evidence given by Ms Cole, a management employee of the Shire of Serpentine Jarrahdale, called on behalf of the WALGA, who was interposed on 29 July 2024. It was contended that when Ms Cole was cross-examined by senior counsel for the WASU, in relation to a safety inspection by Mr Fisher, which occurred at the council's premises on 15 February 2024, her evidence about whether employees performed any work on that day was either false or grossly misleading.

50 The exchange which took place in relation to Ms Cole's evidence in this respect appears at pp 716-717 of the transcript as follows:

> **BLACKBURN, MR:** Now, you - you said in your outline that - at paragraph 12(i) that you informed Mr Muller before you went back to telephone all employees and instruct them to return to work. After the employees returned to work, given the power was turned off and the vehicles had first aid kits that were out of commission, was any work able to be performed that day by those employees?
>
> **COLE, Ms** ---Ah, there was some work while we, um - there - there was an electrician coming to site to tag the, um, RCD so that that could be turned back on. Um, we were getting the first aid kits to be replenished so that vehicles could go out. In the meantime, the staff were asked to return so that they could inspect the vehicles again themselves.
>
> **BLACKBURN, MR:** Yes. There will be some evidence that employees were waiting around for most of the rest of the day. Were - were you there at all?
>
> **COLE, Ms** ---No. My understanding is that the vehicles actually went out, um, once first aid kits were - arrived. We actually went and picked up the first aid kits ourselves from our supplier and brought them back, and my understanding is that the vehicles went out that afternoon.
>
> **BLACKBURN, Mr** That afternoon. What time does work usually finish?
>
> **COLE, Ms** ---Um - ah, it would have been summer months, so probably 2.45.
>
> **BLACKBURN, Mr** Work finished at 2.45?
>
> **COLE, Ms** ---Correct.

51 It is unclear how it is said that this evidence was false or misleading. The CFMEUW did not refer to any evidence to suggest that this was so, and nor was this put to Ms Cole when she was cross-examined by counsel for the CFMEUW later on 22 October 2024 (see pp 1153-1163 transcript). When looking at Ms Coles' evidence in its totality, and as submitted by the WALGA in its submissions in reply, given the early finish time of the outside employees of 2.45 pm at that time of year, and an early start of 5.45 am, it is not unreasonable to conclude that most of the working day was taken up dealing with vehicle issues (see transcript at pp 716-717). Such a conclusion is also supported by the evidence of the Acting Manager Operations, Mr Muller, who testified that the 60 odd employees present on that day, spent the 'rest of the day' 'cleaning up the trucks… that is all that was done on that day' (see transcript at pp 1052-1053). This evidence is consistent with employees not leaving the depot to perform their normal duties.

Conclusions

52 The CMFEUW has not established any material change in circumstances to warrant the making of further orders for production. The orders sought in relation to the first two categories of documents, in [3] and [4] of the application for orders, are identical to the orders sought in the first application. There was no basis for the very broad orders then sought, and there is no basis for them now.

53 As we have outlined above, there is no evidence before the Commission of collusion or improper conduct by the WASU, the WALGA or their solicitors or counsel. The affidavit of Mr Creese does not establish the basis for the CFMEUW assertions made. This is the only change in the circumstances relied on. To contend that there is improper collusion between the WASU, the WALGA, and the LGRCEU, would require a substantial evidentiary foundation which is lacking. At its highest, the case advanced by the CFMEUW is based on supposition and speculation.

54 Whilst it was argued by the CFMEUW that the merits of the applications should not be dealt with without a full hearing of the matter, the arguments for and against the making of the additional orders have been well rehearsed in the written submissions and it is difficult to see what further matters could be raised. As noted above at [7], all parties agreed in the consent directions

that issued on 23 December 2024, arising from the directions hearing on 16 December 2024, that these applications be determined on the papers.

55 The grounds for making the first limited order for production on 17 October 2024, were set out in the Commission in Court Session's reasons of 16 October 2024. The orders were made in light of the evidence led up to that stage of the proceedings, especially that of Ms Miller, referred to above, who admitted that there was a degree of cooperation between the WALGA and the WASU in the preparation of their respective cases.

56 In our view, nothing has changed since that time to warrant revisiting of the orders made. The orders sought by the CFMEUW, if made at this stage of the proceedings, would inevitably lead to further substantial delay in the final determination of the matters. They would also involve significant additional costs for the parties and the interveners, all for little or no evident forensic purpose. Furthermore, the making of orders would be at odds with the relevant provisions of the *Act* and the *Regulations,* that we have referred to earlier in these reasons.

57 Moreover, the breadth of the orders sought is oppressive. The category of documents sought in [3] of the application is extraordinarily wide.

58 The CFMEUW has not established a prima facie case that such orders would be 'necessary ... for disposing fairly of the matter', as required by reg 21(2) of the *Regulations.* Regulation 21(2) is clear in that no order can be made unless the Commission in Court Session can be so satisfied. Based on what is before the Commission, the CFMUEW has not demonstrated that it has suffered any unfairness to date, with the persuasive onus being on it to do so.

59 As we have already observed, there is no basis for any orders in relation to the LGRCEU, as nothing has changed since our refusal of orders against the LGRCEU in the first application.

60 The same general conclusions apply to the further category of documents sought at [5] of the application. Not only does this further order sought fail to have regard to the principle, discussed above, that there is no property in a witness, but also, whatever note counsel may have made of a meeting with a witness or a potential witness in the case, it will be opinion evidence, not relevant to the issues to be determined in the substantive proceedings, and will no doubt be the subject of a claim for legal professional privilege.

61 It is not, for all of the foregoing reasons, in the public interest that this further application for production of documents by the CFMEUW proceed any further. We would grant the applications by the LGRCEU, the WASU and the WALGA, that the application for production be dismissed as not being in the public interest. The Commission in Court Session will now re-list the proceedings for further directions to deal with the claim for privilege arising from the orders made on 17 October 2024, and also to set aside dates for the re-listing of the substantive hearing.

2025 WAIRC 00197

APPLICATIONS PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

RESPONDENT

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

FIRST INTERVENOR

WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

SECOND INTERVENOR

FILE NO/S CICS 5 OF 2023

PARTIES THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

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

RESPONDENT

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

FIRST INTERVENOR

WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

SECOND INTERVENOR

FILE NO/S CICS 8 OF 2023

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	FIRST INTERVENOR
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION
	SECOND INTERVENOR
FILE NO/S	CICS 9 OF 2023
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
DATE	FRIDAY, 28 MARCH 2025
FILE NO/S	CICS 5 OF 2023, CICS 8 OF 2023, CICS 9 OF 2023
CITATION NO.	2025 WAIRC 00197

Result	Order issued
Representation	
Applicant	Ms RJ Webb KC of counsel, Mr T Lettenmaier of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Respondent	Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
First Intervenor	Mr K Trainer as agent on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)
Second Intervenor	Mr K De Kerloy SC of counsel and with him Mr J Creese of counsel on behalf of the Western Australian Local Government Association

Order

HAVING heard Ms RJ Webb KC of counsel and Mr T Lettenmaier of counsel on behalf of the WASU, Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the CFMEUW, Mr K Trainer as agent on behalf of the LGRCEU, and Mr K De Kerloy SC of counsel and with him Mr J Creese of counsel on behalf of the WALGA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

(1) THAT the applications by the LGRCEU, the WALGA and the WASU under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) filed on 12 December 2024 and 20 December 2024 respectively be and are hereby upheld.

(2) THAT the application by the CFMEUW for orders for production of documents under reg 21 of the *Industrial Relations Commission Regulations 2005* (WA) filed on 28 October 2024 be and is hereby dismissed.

By the Commission in Court Session

(Sgd.) S J KENNER,
[L.S.] Chief Commissioner.

2025 WAIRC 00226

APPLICATIONS PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	FIRST INTERVENOR
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION
	SECOND INTERVENOR
FILE NO/S	CICS 5 OF 2023
PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	RESPONDENT
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	FIRST INTERVENOR
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION
	SECOND INTERVENOR
FILE NO/S	CICS 8 OF 2023
PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	FIRST INTERVENOR
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION
	SECOND INTERVENOR
FILE NO/S	CICS 9 OF 2023
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
DATE	MONDAY, 7 APRIL 2025
CITATION NO.	2025 WAIRC 00226

Result	Direction issued
Representation	
Applicant	Mr T Lettenmaier of counsel and with him Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Respondent	Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Second	

Intervenor	Mr K De Kerloy SC of counsel and with him Mr J Creese of counsel on behalf of the Western Australian Local Government Association

Direction

HAVING heard Mr T Lettenmaier of counsel and with him Mr C Fogliani of counsel on behalf of the WASU, Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the CFMEUW, and Mr K De Kerloy SC of counsel and with him Mr J Creese of counsel on behalf of the WALGA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby directs –

(1) THAT by 4.00 pm on 11 April 2025, the WASU file any further affidavit identifying by list the documents subject to the claim of privilege.

(2) THAT by 4.00 pm on 30 April 2025, the CFMEUW file any affidavit evidence in opposition to the WASU and the WALGA's respective claims of privilege, together with an outline of submissions.

(3) THAT by 4.00 pm on 7 May 2025, the WASU and the WALGA file an outline of submissions in reply.

(4) THAT the matters be listed for hearing for one day on a date to be fixed.

(5) THAT there be liberty to apply on short notice.

By the Commission in Court Session

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

COMMISSION IN COURT SESSION—Unions—Declarations made under Section 71—

2025 WAIRC 00215

APPLICATION FOR A DECLARATION AND CERTIFICATE PURSUANT TO SECTION 71 IN ACCORDANCE WITH SECTION 52A(2)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

CITATION	:	2025 WAIRC 00215
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T KUCERA
HEARD	:	THURSDAY, 3 APRIL 2025
DELIVERED	:	FRIDAY, 4 APRIL 2025
FILE NO.	:	CICS 4 OF 2025
BETWEEN	:	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH Applicant AND (NOT APPLICABLE) Respondent

Catchwords	:	Industrial Law (WA) – Application pursuant to s 71 – Declaration sought – Qualifications of persons for memberships of a State branch of a federal organisation and offices that exist within the State organisation – Declaration issued
Legislation	:	*Industrial Relations Act 1979* (WA) s 52A, s 62, s 66, s 71(2), s 71(3), s 71(4)
Result	:	Declaration issued
Representation:		
Counsel:		
Applicant	:	Mr C Fogliani of counsel
Solicitors:		
Applicant	:	Fogliani Lawyers

Case(s) referred to in reasons:

Jones v Civil Service Association Inc [2003] WASCA 321; (2003) 84 WAIG 4

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v (Not applicable) [2012] WAIRC 01004; (2012) 92 WAIG 1882

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v (Not Applicable) [2024] WAIRC 00713; (2024) 104 WAIG 1593

Western Australian Police Union of Workers v (Not applicable) [2018] WAIRC 00725; (2023) 98 WAIG 1111

Reasons for Decision

THE COMMISSION IN COURT SESSION:

Background

1 The applicant is a registered organisation under the *Industrial Relations Act 1979* (WA). It seeks declarations that the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, known as the Australian Manufacturing Workers' Union – Western Australian Branch, is its counterpart federal body for the purposes of s 52A of the *Act*. Such a declaration is sought to enable a certificate under s 71 of the *Act* to be issued by the Registrar. A certificate will mean that persons elected to office in the applicant's Federal branch will be taken to be elected to the corresponding office in the applicant, without the need for a separate State election.

2 The matter was heard by the Commission in Court Session on 3 April 2025. At the conclusion of the proceedings the Commission indicated that for reasons to be published in due course, it was satisfied that the requirements of the *Act* were met and declarations were made. These are our reasons for so deciding.

3 The proceedings have some history. That history was set out in the July 2024 decision of the Commission in Court Session in ***The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v (Not Applicable)*** [2024] WAIRC 00713; (2024) 104 WAIG 1593. Those proceedings concerned an application under s 62 of the *Act* for an alteration of the applicant's rules in relation to its eligibility for membership. Relevantly, in relation to the background, the Commission in Court Session observed at [6] as follows:

> [6] The background to the present application was set out by Kenner CC in ***Steven McCartney v The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers, Western Australian Branch*** [2022] WAIRC 00877; (2022) 103 WAIG 18. That matter was an application under s 66 of the *Act*, seeking orders for the establishment of an Interim Branch Executive to conduct the affairs of the applicant, pending the process of alteration of its Rules to update and align them with the relevant Rules of the AMWU, and to enable the obtaining of a new s 71 certificate under the *Act*. The Chief Commissioner set out the relevant background at [2]-[10] as follows:
>
> > 2 In short, the grounds for the application are that in November 1999 the Full Bench of the Commission made a declaration that prescribed offices of the respondent and the respondent's counterpart federal body, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, were the same, as were the rules for eligibility for membership. The declaration led to the grant of a certificate under s 71 of the *Act* by the Registrar. Since that time, the federal WA Branch has had many changes made to its registered Rules.
> >
> > 3 In support of the application, evidence was adduced by affidavit from the applicant and Mr Andrew Dettmer, the National President of the federal union. Mr Dettmer set out in his affidavit in some detail, the history of rule changes over the past 23 years or so, in the federal WA Branch and in the federal union generally. I do not need to traverse all the changes set out in Mr Dettmer's evidence. Suffice to say, some key changes which have been made to the federal WA Branch Rules now likely mean that the s 71 certificate no longer has any operative effect. Some of these include changes to the composition of offices within the federal WA Branch, which are inconsistent with the respondent's office structure. For example, only one Assistant State Secretary position exists in the federal WA Branch under rule 5H3(1)(a) of its Rules. However, by rule 9 of the respondent's Rules, three Assistant State Secretary positions remain.
> >
> > 4 Furthermore, the divisional structure of the federal WA Branch and the respondent is different. The respondent has a Technical and Supervisory Division and a Printing Division, along with relevant offices. No such divisions exist in the federal WA Branch. Also, the respondent retains a structure of State zones, from which officers from each zone were represented at the respondent's State Conference. No such zone structure exists in the Rules of the federal WA Branch.
> >
> > 5 As set out in Mr Dettmer's affidavit, other significant changes have occurred to the structure of the federal WA Branch in relation to the constitution of its State Conference and its State Council. The changes made to these decision making organs of the federal WA Branch have not been replicated in the same decision making organs of the respondent. Furthermore, significant changes have been made to the Administrative Committee structure within the federal WA Branch, which is now different to the Administrative Committee of the respondent.
> >
> > 6 Additionally, as Mr Dettmer deposed, there are several offices within the federal WA Branch which do not exist within the respondent. These include Western Australian Branch Delegates to the union's National Conference and Western Australian Branch Woman Delegates to the National Conference. The numbers of these delegates are variable.

7 In addition to the significant changes to the offices within the federal WA Branch, not reflected within the respondent, as set out in Mr Dettmer's affidavit, there have also been changes to the eligibility rules of the federal WA Branch. For example, by rule 1G(a) of the federal WA Branch eligibility rules, the union can enrol employees who are employed in or in connection with the food industry in Western Australia. There is no corresponding eligibility within the respondent. The same applies to employees engaged in the confectionery industry in Western Australia, and those engaged in work in preparing motor vehicles for sale and related activity. The federal WA Branch Rules also enable it to enrol as members, persons who are engaged as independent contractors who, if they were employees, would be entitled to become a member of the federal WA Branch. No such rule exists within the respondent.

8 The applicant gave evidence that he has been a member of the respondent for many years and commenced employment as an organiser with the respondent and the federal WA Branch in February 2001. It was his view that during his time with the respondent, both organisations operated as one entity. The applicant subsequently became the President of the federal WA Branch and maintained his understanding that both the State and federal organisations operated as one. In September 2008, the applicant became the Secretary of the federal WA Branch and assumed office in January 2009. He has remained in that position and was most recently re-elected in July 2019. Whilst by this stage the applicant said he understood that both the State and federal organisations were separate legal entities, he believed that the s 71 certificate, issued in 1999, enabled the organisations to be conducted jointly.

9 It was the applicant's evidence that since taking up the position of State Secretary, and until recently, he understood that the effect of the s 71 certificate was that the elected office holders elected to office in the federal WA Branch became elected to corresponding offices within the respondent, and the business of the respondent was conducted on that understanding. The applicant's evidence was that he had no reason to doubt the effectiveness of the s 71 certificate and assumed that it operated according to its terms.

10 In early 2022 queries were raised by the Registrar of the Commission in relation to annual returns filed by the respondent, including that the annual returns did not report on several positions which are contained within the respondent's Rules. The applicant gave evidence that he engaged the union's National office in correspondence with the Registrar and took independent legal advice. The applicant's evidence was that based on this legal advice, it now appears that the s 71 certificate issued in 1999, given the number of changes made to the federal WA Branch Rules, is likely to be no longer effective. Accordingly, the applicant said that he has brought this application to create an Interim Branch Executive.

4 As a consequence of the Commission in Court Session's decision and orders in the above proceedings, the present application was brought, seeking a fresh s 71 certificate. The application was accompanied by a statutory declaration made by the Secretary of the applicant, Mr Steven McCartney made on 5 February 2025. Mr McCartney's declaration set out a comparison, in table form, of the offices of the applicant and the Federal branch. Additionally, both in that declaration, and in a supplementary statutory declaration made by Mr McCartney on 2 April 2025, and tendered as exhibit A1 in these proceedings, reference was made to the eligibility for membership rules of both the applicant and the Federal branch.

5 The effect of the eligibility for membership rules is that whilst the vast majority of callings and classifications in the applicant's eligibility rule are also contained in the eligibility rule of the Federal branch, there are some callings and classifications that are unique to the applicant, and which were set out at annexure SM-3 to Mr McCartney's supplementary declaration. Mr McCartney also said that the Federal branch is in the process of preparing rule alterations, to incorporate those few classifications and callings which are not presently contained in the Federal branch Rules, and that process will continue. Despite this, it was Mr McCartney's evidence that there is no practical difference between the membership of the applicant and the Federal branch, and that every person who is a member of the applicant is also a member of the Federal branch. As at 31 December 2024, both the applicant and the Federal branch had 6,834 members.

Statutory scheme

6 For the purposes of these proceedings, ss 52A, 71(2) and 71(4) of the *Act* are relevant. They are as follows:

52A. Counterpart federal body

(1) In this section —

rules, of a branch of a federal organisation, means —

(a) rules relating to the qualifications of persons for membership; and

(b) rules prescribing the offices that exist within the branch.

(2) A Western Australian branch of a federal organisation is a ***counterpart federal body*** in relation to a State organisation if the rules of the branch are, or in accordance with section 71(2) or (4) are taken to be, the same as the rules of the State organisation relating to the corresponding subject matter.

…

(7) A State organisation may apply to the Commission in Court Session for a declaration that, for the purposes of subsection (2) or (3), a Western Australian branch of a federal organisation, or a federal organisation, is a counterpart federal body in relation to the State organisation.

71. Rules of State and federal organisations as to membership and offices

[(1) deleted]

(2) The rules of a State organisation and a counterpart federal body described in section 52A(2) are taken to be the same if the rules of the organisation and the body —

(a) relate to the qualifications of persons for membership; and

(b) are, in the opinion of the Commission in Court Session, substantially the same.

…

(4) The rules of a State organisation and a counterpart federal body described in section 52A(2) are taken to be the same if —

(a) the rules prescribe the offices existing in the body; and

(b) for every office in the organisation there is a corresponding office in the body.

…

Eligibility for membership

7 Section 71(2) requires that the eligibility rules of the applicant and the Federal branch be, in the opinion of the Commission in Court Session, substantially the same. There is no requirement under the *Act* for complete alignment. What is required, is that there exists significant similarity of coverage under the eligibility for membership rules of the applicant and the Federal branch: ***The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v (Not applicable)*** [2012] WAIRC 01004; (2012) 92 WAIG 1882. Furthermore, in the context of s 71(2), 'substantial', means 'real or of substance as distinct from ephemeral or nominal' or 'considerable' or 'in the main or essentially': ***Western Australian Police Union of Workers v (Not applicable)*** [2018] WAIRC 00725; (2023) 98 WAIG 1111 (citing and applying ***Re an application by the Civil Service Association*** (1993) 73 WAIG 2931 at [293] and also ***Re Bonny*** [1986] 2 Qld R 80 at [82]).

8 As a consequence of changes made to the eligibility for membership rule of the applicant in July 2024, as referred to above, the vast majority of classifications as set out in rules 3.1 to 3.5 of the Rules, are also contained in the eligibility rule of the Federal branch. There are a few exceptions. These were set out in a table at Annexure 1 to the applicant's submissions. However, the fact that there are some classifications in the applicant's eligibility rule which do not fall within the Federal branch's eligibility rule, is no barrier to a declaration issuing. This is because by s 71(3) of the *Act*, it is open for the Commission in Court Session to find that the eligibility rules of the applicant and the Federal branch are substantially the same, despite some persons who are eligible to be a member of the applicant, not being eligible to be a member of the Federal branch.

9 On all of the material before the Commission in Court Session, we were satisfied that the rules of the applicant and the Federal branch in relation to qualifications of persons for membership are substantially the same. Accordingly, the requirements of s 71(2) of the *Act* were met.

Offices

10 Section 71(4) of the *Act,* dealing with offices in both the applicant and the Federal branch is satisfied if, for every office in the applicant there is a corresponding office in the Federal branch. Further, having regard to the functions and powers of the offices in both organisations, the content of the relevant rules of the applicant and the Federal branch are similar: ***Jones v Civil Service Association Inc*** [2003] WASCA 321; (2003) 84 WAIG 4 per Pullin J at [35].

11 Helpfully, both the first declaration made by Mr McCartney and Annexure 2 to the applicant's written submissions, included a table setting out and comparing the offices of both the applicant and the Federal branch as follows:

AFMEPKIU Rules	AMWU - WA Branch Rules
State President	
Office Holders: (1) **Rule 12.1** The State President shall: a. preside at all meetings of the State Conference, State Council, State Administrative Committee and meetings convened by these bodies during his/her period of office and shall have the same voting and other rights as other delegates to the Council and Conference; and b. take all necessary steps to ensure the proper conduct of the business of such meetings, upon adoption sign the minutes and initial all accounts passed for payment Holds seats on: State Conference, State Council, State Administrative Committee	Office Holders: (1) **Rule 5H4.1** The State President shall: (a) preside at all meetings of the State Conference, State Council, State Administrative Committee and meetings convened by these bodies during his/her period of office and shall have the same voting and other rights as other delegates to the Council and Conference; and (b) take all necessary steps to ensure the proper conduct of the business of such meetings, upon adoption sign the minutes and initial all accounts passed for payment. Holds seats on: State Conference, State Council, State Administrative Committee
State Vice President	
Office Holders: (1) **Rules 12.2 to 12.5** 12.2. The State Vice-President shall officiate at meetings of the State Conference, State Council, State Administrative Committee or any meetings convened by those bodies where the State President is unable or unwilling to be present. 12.3. In the absence of the State President the State Vice-President shall be responsible to ensure the proper conduct of	Office Holders: (1) **Rule 5H4.2** The State Vice-President shall officiate at meetings of the State Conference, State Council, State Administrative Committee or any meetings convened by those bodies where the State President is unable or unwilling to be present. In the absence of the State President the State Vice-President shall be responsible to ensure the proper conduct of the business

AFMEPKIU Rules	AMWU - WA Branch Rules
the business of any meetings, upon adoption sign the minutes dealt with at such meetings.	of any meetings, upon adoption sign the minutes dealt with at such meetings.
12.4. The State Vice President shall place before each meeting all motions which personally concern the State President and assist the State President to carry out all duties quickly and efficiently.	He or she shall place before the meeting all motions which personally concern the State President and assist that Official to carry out all duties quickly and efficiently.
12.5. When the State President and the State Vice-President are absent or unable to attend State Conference, State Council, State Administrative Committee and meetings convened by these bodies the members in attendance shall elect a chairperson from amongst their number to conduct the proceedings.	When the State President and the State Vice-President are absent or unable to attend State Conference, State Council, State Administrative Committee and meetings convened by these bodies the members in attendance shall elect a Chairperson from amongst their number to conduct the proceedings.
Holds seats on: State Conference, State Council, State Administrative Committee	Holds seats on: State Conference, State Council, State Administrative Committee
State Secretary	
Office Holders: (1) **Rules 12.6 to 12.15** 12.6. The State Secretary shall be entrusted and authorised to act on all matters concerning the activities of the Union subject to these rules. The State Secretary shall be responsible for the co-ordination of the work of the State Organisers and shall for all purposes be the main Executive and Administrative Officer of the Union.	Office Holders: (1) **Rule 5H4.3** The State Secretary shall be entrusted and authorised to act on all matters concerning the activities of the Union in the State, subject to these Rules. He or she shall be responsible for the co-ordination of the work of the State Organisers and shall for all purposes be the main Executive and Administrative Officer of the Union in the State.
12.7. The State Secretary shall be entitled to attend and speak at any meeting of members, but shall have the power to move and second motions and cast a vote only at the State Conference and at meetings of the State Council, the State Administrative Committee and the State Steering Committee.	Power to Speak He or she shall be entitled to attend and speak at any meeting of members in the State, but shall have the power to move and second motions and cast a vote only at the State Conference and at meetings of the State Council, the State Administrative Committee and the State Steering Committee.
12.8. The State Secretary shall be responsible, in consultation with the State Council, for the engagement and supervision of the work of the staff at the State office, for the maintenance of all necessary records of the Union, for the maintenance of complete record of the names, addresses and financial standing of all members in the State, and he or she shall forward an account to each member at least quarterly.	Control of Staff He or she shall be responsible, in consultation with the State Council and subject to rule 5B2 of these rules, for the engagement and supervision of the work of the staff at the State office, for the maintenance of all necessary records of the Union, for the maintenance of complete record of the names, addresses and financial standing of all members in the State, and he or she shall forward an account to each member at least quarterly.
12.9. The State Secretary shall report to each meeting of the State Council and the State Conference on the affairs of the Union in the State and on all matters of which he or she has information concerning the welfare of the Union and its members.	Reports He or she shall report to each meeting of the State Council and the State Conference on the affairs of the Union in the State and on all matters of which he or she has information concerning the welfare of the Union and its members.
12.10. The State Secretary shall carry out such other duties as are allocated to him or her by the National Conference, National Council, State Conference or State Council.	He or she shall carry out such other duties as are allocated to him or her by the National Conference, National Council, State Conference or State Council.
12.11. The State Secretary shall deposit all money received for use by the Council to the credit of the Union in a Bank Account as directed by the National Council.	Accounts He or she shall deposit all money received for use by the Council to the credit of the Union in a Bank Account as directed by the National Council.
12.12. The State Secretary shall maintain a strict and accurate record of all moneys received and expended by the State Council and shall account for these to the National Council and State Council.	He or she shall maintain a strict and accurate record of all moneys received and expended by the State Council and shall account for these to the National Council and State Council.
12.13. The State Secretary shall arrange for an audit of the books and records of the State Council annually and at such	He or she shall arrange for an audit of the books and records of the State Council annually and at such other times as directed.

AFMEPKIU Rules	AMWU - WA Branch Rules
other times as directed. 12.14. The State Secretary shall submit to the State Conference and to the National Council an audited statement of the financial transactions of the State Council and shall publish this to members. 12.15. Subject to any policies determined by and/or decisions of National Conference or National Council relating to Union publications (including their content, timing, and manner of distribution) the State Secretary shall edit and arrange for the distribution of any publication to be issued by the State Council and State Conference. Holds seats on: State Conference, State Council, State Administrative Committee, State Steering Committee	He or she shall submit to the State Conference and to the National Council an audited statement of the financial transactions of the State Council and shall publish this to members. *Publications* Subject to any policies determined by and/or decisions of National Conference or National Council relating to Union publications (including their content, timing, and manner of distribution) the Secretary shall edit and arrange for the distribution of any publication to be issued by the State Council, State Conference, National Council or National Conference. Holds seats on: State Conference, State Council, State Administrative Committee, State Steering Committee
Assistant State Secretary	
Office Holders: (1) **Rule 12.16** The Assistant State Secretary shall generally assist the State Secretary and carry out such duties as are allocated to him or her by the State Council and State Conference. Holds seats on: State Conference, State Council, State Administrative Committee, State Steering Committee	Office Holders: (1) **Rule 5H4.4** (a) Each Assistant State Secretary shall generally assist the State Secretary and carry out such duties as are allocated to him or her by the State Council, State Conference, National Council or National Conference. Holds seats on: State Conference, State Council, State Administrative Committee, State Steering Committee
Rank and File Delegates to State Conference	
Office Holders: **Rule 5.2(a)** i. if the Union has 5,000 financial members or fewer: 15 delegates; ii. if the Union has more than 5,000 financial members: 15 delegates plus one additional delegate for each 1,000 additional financial members or part thereof. Holds a seat on: State Conference	Office Holders: **Rule 5D1.2(a)** (i) In State Branches with 5,000 financial members or fewer: 15 Delegates; (ii) In State Branches with more than 5,000 financial members: 15 Delegates plus one additional Delegate for each 1,000 additional financial members or part thereof; Holds a seat on: State Conference
Rank and File Women Delegates to State Conference	
Office Holders: **Rule 5.2(b)** Additional Rank and File women delegates – the Union shall be entitled to elect additional Rank and File women delegates such that the number of additional Rank and File women delegates shall be equal to either 10% of the Rank and File delegates entitled to be elected under sub-rule 5.2(a) or the proportion of women financial members to total financial members in the Union, whichever is the greater, rounded up to the nearest whole number. Holds a seat on: State Conference	Office Holders: **Rule 5D1.2(b)** Additional rank and file women Delegates - each State shall be entitled to elect additional rank and file women delegates such that the number of additional rank and file women delegates shall be equal to either 10% of the rank and file delegates entitled to be elected under paragraph (a) of this subrule or the proportion of women financial members to total financial members in the State, whichever is the greater, rounded up to the nearest whole number. Holds a seat on: State Conference
Rank and File Delegates to State Conference from Apprentices or Members under 30	
Office Holders: (1) Holds a seat on: State Conference	Office Holders: (1) Holds a seat on: State Conference
Rank and File Female State Councillors	
Office Holders: **Rule 6.2(b)** Rank and File female State Councillors – the Union shall be entitled to elect such Rank and File female State Councillors such that the number shall be equal to 10% of the Rank and File State Councillors in sub-rule 6.2(a) or the proportion of financial women members to total financial members in the State, whichever is the greater, rounded up to the nearest whole	Office Holders: **Rule 5E1(1)(b)** Rank and file female State Councillors - each State shall be entitled to elect such rank and file female State Councillors such that the number shall be equal to 10% of the rank and file State Councillors in sub-rule (a) or the proportion of financial women members to total financial members in the State, whichever is the greater, rounded up to the nearest whole number

AFMEPKIU Rules	AMWU - WA Branch Rules
number Holds a seat on: State Council	 Holds a seat on: State Council
Employed State Councillors	
Office Holders: **Rule 6.2(h)** members of the Union who are employed by the Union calculated at 20% of the number of Rank and File State Councillors entitled to be elected under sub-rule 6.2(a) and rounded up to the nearest whole number; Holds a seat on: State Council	Office Holders: **Rule 5E1(1)(h)** Members of the Union who are employed by the Union calculated at 20% of the number of Rank and File State Councillors entitled to be elected under paragraph (a) of this subrule and rounded up to the nearest whole number except in Tasmania where the number shall be one Holds a seat on: State Council
Rank and File Delegates to State Administrative Committee	
Office Holders: (2) Holds a seat on: State Administrative Committee (as well as State Conference)	Office Holders: (2) Holds a seat on: State Administrative Committee (as well as State Conference)
Rank and File State Councillors	
Office Holders: **Rule 6.2(a)** Rank and File State Councillors – the Union shall be entitled to elect such number of Rank and File State Councillors being half the number of the Rank and File delegates entitled to be elected to the State Conference rounded up to the nearest whole number. Holds a seat on: State Council	Office Holders: **Rule 5E1(1)(a)** Rank and file State Councillors - each State with the exception of Tasmania shall be entitled to elect such number of rank and file State Councillors being half the number of the rank and file delegates entitled to be elected to the State Conference rounded up to the nearest whole number. In Tasmania, there shall be eight rank and file State Councillors Holds a seat on: State Council
Rank and File Apprentice State Councillor or Member under 30 years	
Office Holders: (1) Holds a seat on: State Council	Office Holders: (1) Holds a seat on: State Council

12 It is evident from the above table, that for each office in the applicant, there is a corresponding office in the Federal branch. Furthermore, the functions and powers of the respective offices are the same. For these reasons, we were satisfied that the requirements of s 71(4) of the *Act* were met.

2025 WAIRC 00209

APPLICATION FOR A DECLARATION AND CERTIFICATE PURSUANT TO SECTION 71 IN ACCORDANCE WITH SECTION 52A(2)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSION IN COURT SESSION
CHIEF COMMISSIONER S J KENNER
SENIOR COMMISSIONER R COSENTINO
COMMISSIONER T KUCERA

DATE THURSDAY, 3 APRIL 2025

FILE NO/S CICS 4 OF 2025

CITATION NO. 2025 WAIRC 00209

Result Declaration issued

Representation

Applicant Mr C Fogliani of counsel

Declaration

THIS matter having come on for hearing before the Commission in Court Session on 3 April 2025, and having heard Mr C Fogliani of counsel on behalf of the applicant, the Commission in Court Session, being of the opinion on the evidence and matters before it, that rules of the applicant and its counterpart federal body relating to the qualifications of persons for membership of each such body are substantially the same, and the Commission in Court Session also being of the opinion that the rules of the counterpart federal body prescribe the offices which exist in the body and that for every such office there is a corresponding office in the applicant, it is this day, 3 April 2025, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), declared as follows –

(1) THAT the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union - Western Australian Branch is the counterpart federal body of the applicant.

(2) THAT in accordance with s 71(2) of the *Act* the rules of the applicant and its counterpart federal body relating to the qualifications of persons for membership are hereby taken to be the same.

(3) THAT in accordance with s 71(4) of the *Act* the rules of the applicant and the counterpart federal body in relation to offices are hereby taken to be the same.

By the Commission in Court Session

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2025 WAIRC 00159

REVIEW OF THE CATERING EMPLOYEES AND TEA ATTENDANTS (GOVERNMENT) AWARD 1982 PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2025 WAIRC 00159
CORAM	:	SENIOR COMMISSIONER R COSENTINO
HEARD	:	TUESDAY, 11 MARCH 2025
DELIVERED	:	WEDNESDAY, 12 MARCH 2025
FILE NO.	:	APPL 41 OF 2023
BETWEEN	:	COMMISSION'S OWN MOTION Applicant AND (NOT APPLICABLE) Respondent

CatchWords	:	Industrial Law (WA) – Commission's own motion – Section 40B(1) of the *Industrial Relations Act 1979* (WA) – Award variation – *Catering Employees and Tea Attendants (Government) Award* – To ensure award does not contain wages that are less than statutory minimum wages – Removal of obsolete, out of date and discriminatory provisions – Variations to ensure award facilitates efficient organisation and performance of work balanced with fairness – Award varied
Legislation	:	*Equal Opportunity Act 1984* (WA) *Fair Work Act 2009* (Cth) *Industrial Arbitration Act 1979* (WA) *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA) *Labour Relations Reform Act 2002* (WA) *Industrial Relations Act 1979* (WA) *Minimum Conditions of Employment Act 1993* (WA) *Public and Bank Holidays Act 1972* (WA) *Public Sector Management Act 1994* (WA)
Result	:	Award varied

Representation

Ms C Fuentes Beltran and Ms A Dyer on behalf of the named employer respondents to the Award

Ms E Orman on behalf of the United Workers Union (WA)

Case(s) referred to in reasons:

Commission's Own Motion v (Not Applicable) [2024] WAIRC 00013

Reasons for Decision

1 The Western Australian Industrial Relations **Commission** of its own motion, initiated this matter for variation of the *Catering Employees and Tea Attendants (Government)* ***Award*** *1982* under s 40B of the *Industrial Relations Act 1979* (WA) (**IR Act**). Section 40B allows the Commission to vary an award for any one or more of the following purposes:

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

(b) to ensure that the award does not contain conditions of employment that are less favourable than those provided by the *Minimum Conditions of Employment Act 1993* (WA) (**MCE Act**);

(c) to ensure that the award does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984* (WA);

(d) to ensure that the award does not contain provisions that are obsolete or need updating; and

(e) to ensure that the award is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises.

2 Many of the Award's provisions were outdated or obsolete, or were less favourable than the MCE Act.

3 The Commission provided notice of its intention to vary the Award to UnionsWA, the Chamber of Commerce and Industry WA, the Australian Resources and Energy Employers Association, the Minister for Industrial Relations, the public sector employer parties to the Award and the United Workers **Union** (WA) as the union party to the Award.

4 The Commission then sought input from interested parties about the issues with the Award, and the appropriate revisions to address them. The Government Sector Labour Relations Division of the **Department** of Energy, Mines, Industry Regulation and Safety represented the employers who are parties to the Award.

5 The Department and the Union participated in a conference convened by the Commission to work through variations to the Award. The Department and the Union reached a consensus in relation to the proposed variations.

6 Following publication of the notice of proposed variations to the Award, pursuant to s 40B(2) of the IR Act, a hearing was convened on 11 March 2025 for the purpose of affording interested persons an opportunity to be heard in relation to those proposed variations.

7 The Department and the Union both confirmed the parties' support for the proposed variations with some minor further variations for accuracy and to align with the most recent amendments to the MCE Act.

8 Accordingly I have determined that it is appropriate to vary the Award in accordance with the Schedule to these reasons.

9 In the following paragraphs, I set out briefly the rationale for the variations contained in the Schedule.

Clause 1 – Title

10 The year of the Award has been removed from its title consistent with contemporary practice.

Clause 2 – Arrangement

11 Like clauses have been grouped together under functional headings in a standard arrangements clause.

Clause 4 – Scope

12 Reference to the *Industrial Arbitration Act 1979* has been corrected to refer to the *Industrial Relations Act 1979* (WA). Cross-referencing to other clauses has been corrected and updated.

Clause 5 – Term

13 This clause is deleted as it is obsolete. The term expired in 1982.

Clause 6 – Definitions

14 The clause is renumbered to clause 5.

15 The definition of Catering Establishment has been expanded by the addition of canteens and restaurants.

16 The definitions of 'Casual Employee' and 'part time employee' previously contained elsewhere in the Award have been moved to the definitions clause 6.

17 The reference to 'Her Majesty's Armed Forces' has been changed to 'the Armed Forces'.

18 The definition of 'Cashier' has been amended by substituting 'receiving payment' for 'receiving monies'.

19 The definitions are re-ordered in alphabetical order.

Clause 7 – Contract of Employment

20 The clause is renumbered to clause 6.

21 Provisions concerning termination of employment have been separated out and are now located in clause 7.

New Clause 7 – Termination of Employment and Stand Down

22 This new clause has been updated to make it easier to follow and for consistency with the National Employment Standards of the *Fair Work Act 2009* (Cth) (**FW Act**), Division 3 of Part 6-3 which requires non-national system employers (including employers in the state industrial relations system) to provide notice of termination or payment in lieu to employees.

Clause 9 – Additional Rates for Ordinary Hours

23 The minimum payment referred to at the end of clause 9(1) has been deleted. As there is no circumstance where the payment under the clause would be less than the minimum specified, that part of the clause is obsolete.

24 The meal allowance in clause 9(2) has been adjusted commensurate with increases in the takeaway and fast foods subcategory of the consumer price index.

Clause 11 – Casual Employees

25 The casual penalty provision at clause 11(2) has been relocated to clause 22 - Wages, but the rate remains unchanged.

26 The list of the Award's provisions from which casual employees are exempt has been updated to remove entitlements which extend to casual employees by operation of legislation.

Clause 12 – Part-Time Employees

27 The part-time loading has been relocated to clause 22 - Wages.

Clause 14 – Meal Money

28 The clause has been renamed 'Meal Allowance' The allowance has been increased commensurate with increases in the takeaway and fast foods subcategory of the consumer price index.

Clause 15 – Sick Leave

29 The previous clause was inconsistent with or less favourable than the MCE Act in several respects.

30 References to 'sick pay' and 'sick leave' have been replaced with 'personal leave', reflecting the provisions of the MCE Act.

31 The provisions of this clause have been amended to ensure the Award is not less favourable than the statutory entitlements currently applying.

32 Evidentiary requirements for applications for personal leave are aligned with the MCE Act.

Clause 16 – Compassionate Leave

33 The clause has been updated to align with the provisions of the MCE Act, including by renaming the clause 'Bereavement Leave'.

Clause 17 – Parental Leave

34 The Award made no provision for parental leave, but clause 17 provided for Maternity Leave.

35 The varied clause refers to parental leave being provided in accordance with the FW Act. State system employers and employees are subject to the provisions of Division 5 of Part 2-2 of the FW Act.

New Clause 17A – Family and Domestic Violence Leave

36 This is a new clause. The Award made no provision for family and domestic violence leave.

37 The clause refers to the provisions of the FW Act for paid family and domestic violence leave which apply to state system employers and employees, as well as relevant provisions of the MCE Act.

Clause 18 – Public Holidays

38 The key provisions of this clause are largely unchanged. The main changes of note are:

(a) Easter Sunday has been included as a public holiday in the Award, reflecting the provisions of s 3(2) and s 3(3) of the *Public and Bank Holidays Act 1972* (WA). To achieve consistency with that Act, it is necessary to stipulate Easter Sunday is not substituted for another day because it falls on a weekend.

(b) 'Foundation Day' has been changed to 'Western Australia Day'.

(c) The provision regarding special public holidays has been replaced with provisions reflecting the provisions of the MCE Act which entitle employees to be absent from work on a day or part of a day that is a public holiday as defined in the MCE Act.

(d) Additional clauses reflect the provisions of s 30 of the MCE Act.

Clause 19 – Annual Leave

39 The clause has been updated to reflect the scheme of annual leave provided for in the MCE Act and contemporary terminology. The entitlement to travel time in addition to annual leave for employees who work in the North West has been updated to remove reference to the ports of Fremantle and Geraldton, given that travel for the purpose of taking annual leave is now unlikely to be via ports. The outdated reference to the Commonwealth Bureau of Statics has been replaced with the Australian Bureau of Statistics

Clause 21 – Payment of Wages

40 The ability to pay wages by cheque has been removed. Clause 21(5) has been removed as the obligation to provide payslips is provided for in clause 31.

Clause 22 – Wages

41 The column indicating the Arbitrated Safety Net Adjustment component of the rates of pay has been removed as it is unnecessary.

42 Rates of pay that were less than the statutory minimum have been increased to the current statutory minimum rate.

Clause 31 – Records

43 The previous clause was out of date and did not correspond with Division 2F of the IR Act with respect to the time and wages records that must now be kept by employers, as well as current provisions regarding right of entry by authorised representatives.

44 The amended clause makes reference to the requirements of Division 2F of Part 2 of the IR Act.

Clause 32 – Rosters

45 Minor changes have been made to ensure consistency of terminology used in other updated clauses. For example, 'occupation' has been changed to 'classification', and 'sickness' changed to 'personal leave'.

Clause 35 – Posting of Award and Union Notices

46 Given the Award is available on the Commission's website, an addition has been made to the clause, to enable provision of the Award by electronic means.

47 The limitation on Union officials' entering workplaces has been removed as being inconsistent with the provisions of Part II Division 2G of the IR Act.

Clause 37 – District Allowance

48 The clause's definition of 'de facto Spouse' has been deleted, and the definition of 'spouse' has been amended to refer to a de facto partner.

Clause 39 – Grievance Procedures

49 This clause has been renamed 'Dispute Resolution Procedures' to reflect the terminology used in the IR Act. The inaccurate reference to 'this Agreement' has been changed to 'this award'.

Clause 42 – Trade Union Training Leave

50 This is now clause 40. Reference to the defunct 'Australian Trade Union Training Authority' has been replaced with the 'Australian Trade Union Institute'.

Clause 44 – Enterprise Flexibility

51 The Award's current Clause 44 Enterprise Flexibility is the same type as the clause I considered in APPL 27 of 2023: ***Commission's Own Motion v (Not Applicable)*** [2024] WAIRC 00013. The clause is contrary to the scheme of the Act and invalid. It has, therefore, been deleted.

Appendix – Resolution of Disputes Requirements

52 This appendix is outdated, being inserted in the Award in 1996 pursuant to the *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA) and to comply with what was then contained in s 49B of the IR Act, which was repealed pursuant to s 145 of the *Labour Relations Reform Act 2002* (WA). The information in the appendix is therefore outdated and does not reflect the current statutory provisions regarding inspection of records.

53 The appendix has been removed in its entirety.

Schedule A – Named Union Party

54 The name of the union party has been updated from United Voice WA to United Workers Union (WA).

Schedule B – Respondents

55 The names of the respondents have been updated to reflect the current names of the relevant employing authorities under the *Public Sector Management Act 1994* (WA).

Other changes

56 Gendered language has been removed.

57 Percentages expressed as in words have been expressed numerically and with symbols.

58 Some clauses have been renumbered as a result of the deletion of other clauses.

Order

59 The variations contained in the schedule to these reasons shall take immediate effect, and an order will issue accordingly.

SCHEDULE

Current Award	**Variations**
Catering Employees and Tea Attendants (Government) Award 1982	Catering Employees and Tea Attendants (Government) Award

1. - TITLE This award shall be known as the Catering Employees and Tea Attendants (Government) Award 1982, and replaces Award No. 21 of 1972, as varied.	1. – TITLE This award shall be known as the Catering Employees and Tea Attendants (Government) Award.
1B. - MINIMUM ADULT AWARD WAGE (1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause. (2) The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38-hour week is $918.60 per week. The minimum adult award wage for full-time employees aged 21 or more working under awards that provide for other than a 38-hour week is calculated as follows: divide $918.60 by 38 and multiply by the number of ordinary hours prescribed for a full-time employee under the award. The minimum adult award wage is payable from the beginning of the first pay period commencing on or after 1 July 2024. (3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case decisions. (4) Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by results, shall not be paid less than pro rata the minimum adult award wage according to the hours worked. (5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*. (6) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*. (7) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage. (8) Subject to this clause the minimum adult award wage shall – (a) Apply to all work in ordinary hours. (b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave	NO VARIATIONS

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and for all purposes of this award.

(9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2024 State Wage order. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.
Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.

(10) Adult Apprentices

(a) Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a fulltime apprentice aged 21 years or more working under an award that provides for a 38-hour week is $762.80 per week.

(b) The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38-hour week is calculated as follows: divide $762.80 by 38 and multiply by the number of ordinary hours prescribed for a full-time apprentice under the award.

(c) The minimum adult apprentice wage is payable from the beginning of the first pay period commencing on or after 1 July 2024.

(d) Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.

(e) The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on superannuation and during any period of paid leave prescribed by this award.

(f) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.
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<u>2. - ARRANGEMENT</u>

1. Title
1B. Minimum Adult Award Wage
2. Arrangement
3. Area
4. Scope
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<u>2. – ARRANGEMENT</u>

PART 1 – APPLICATION AND OPERATION
1. Title
1B. Minimum Adult Award Wage
2. Arrangement
3. Area
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<td>
5. Term
6. Definitions
7. Contract of Service
8. Hours
9. Additional Rates for Ordinary Hours
10. Overtime
11. Casual Employees
12. Part-Time Employees
13. Meal Breaks
14. Meal Money
15. Sick Leave
16. Compassionate Leave
17. Maternity Leave
18. Public Holidays
19. Annual Leave
20. Long Service Leave
21. Payment of Wages
22. Wages
23. Jury Service
24. Apprentices
25. Bar Work
26. Higher Duties
27. Uniforms and Laundering
28. Protective Clothing
29. Employee’s Equipment
30. Travelling Facilities
31. Record
32. Roster
33. Change and Rest Rooms
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35. Posting of Award and Union Notices
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40. Leave to Attend Union Business
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42. Trade Union Training Leave
43. Paid Leave for English Language Training
44. Enterprise Flexibility

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Schedule A - Named Union Party
Schedule B - Respondents
Appendix - S.49B - Inspection Of Records Requirements
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4. Scope
5. Definitions

PART 2 – CONTRACT OF EMPLOYMENT

6. Contract of Employment
7. Termination of Employment and Stand Down

PART 3 – HOURS OF WORK
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35. Posting of Award and Union Notices
36. Breakdowns
37. District Allowance
38. Dispute Resolution Procedures
39. Leave to Attend Union Business
40. Trade Union Training Leave
41. Paid Leave for English Language Training

Schedule A – Named Union Party
Schedule B - Respondents
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3. - AREA

This award shall have effect throughout the State of Western Australia.
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NO VARIATIONS
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4. - SCOPE

This award shall apply to all employees employed in the calling described in Clause 22. - Wages of this award and who are employed by the respondents to this award in catering establishments and as Tea Attendants, as defined in Clauses 6. - Definitions and 23. - Tea Attendants of this award, provided that this award shall not apply to any employee who at the date of this award is covered by any other award registered or
</td>
<td>
4. – SCOPE

This award shall apply to all employees employed in the calling described in Clause 22. – Wages of this award and who are employed by the respondents to this award in catering establishments and as Tea Attendants, as defined in Clauses 5. – Definitions and 24.- Apprentices of this award, provided that this award shall not apply to any employee who at the date of this award is covered by any other award registered or issued
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issued under the provisions of the Industrial Arbitration Act, 1979.	under the provisions of the *Industrial Relations Act 1979* (WA).
5. - TERM The term of this award shall be for a period of one year as from the beginning of the first pay period commencing on or after the 19th day of November, 1982.	CLAUSE DELETED
6. - DEFINITIONS (1) "Catering Establishment" shall mean any meal room, dining room, coffee shop, tea shop, or cafeteria, and includes any place, building, or part thereof, in or from which food is sold or served for consumption on the premises or elsewhere. (2) "Bar Attendant" shall mean an employee over the age of 18 years who serves liquor for sale from behind a bar counter. (3) "Chef" shall mean an employee who is a "Qualified Cook", (as defined in subclause (4) hereof), and who is appointed as such by the employer. (4) "Qualified Cook" shall mean an employee who has completed and can produce appropriate documentary evidence to their employer to the effect that the employee has successfully completed an apprenticeship in cooking at an approved or recognised school or college, or who can provide documentary evidence of having served at least six years in Her Majesty's Armed Forces in the classification of Cook. (5) "Cook Employed Alone" shall mean an employee who is employed when no other cook is employed during the employee's shift. (6) "Cashier" shall mean an employee who is principally engaged upon receiving monies in a dining room or restaurant area. (7) "Daily Spread of Shift" shall mean the time which elapses from the employee's actual starting time to the employee's actual finishing time for the day or shift. (8) "Tea Attendant" shall mean an employee engaged either wholly or for the major and substantial part of working time making and/or servicing morning and/or afternoon teas, washing up and other duties in connection with such work.	5. – DEFINITIONS (1) "Bar Attendant" shall mean an employee over the age of 18 years who serves liquor for sale from behind a bar counter. (2) "Cashier" shall mean an employee who is principally engaged upon receiving payment in a dining room or restaurant area. (3) "Casual employee" shall mean an employee engaged on an hourly basis for a period not exceeding four weeks in any workplace. (4) "Catering Establishment" shall mean any meal room, dining room, coffee shop, tea shop, canteen, restaurant or cafeteria, and includes any place, building, or part thereof, in or from which food is sold or served for consumption on the premises or elsewhere. (5) "Chef" shall mean an employee who is a "Qualified Cook", (as defined in subclause (9) hereof), and who is appointed as such by the employer. (6) "Cook Employed Alone" shall mean an employee who is employed when no other cook is employed during the employee's shift. (7) "Daily Spread of Shift" shall mean the time which elapses from the employee's actual starting time to the employee's actual finishing time for the day or shift. (8) "Part time employee" shall mean an employee engaged to work for not less than three or more than seven ordinary rostered hours per day, and not less than 15 or more than 35 hours each week. (9) "Qualified Cook" shall mean an employee who has completed and can produce appropriate documentary evidence to their employer to the effect that the employee has successfully completed an apprenticeship in cooking at an approved or recognised school or college, or who can provide documentary evidence of having served at least six years in the Armed Forces in the classification of Cook. (10) "Tea Attendant" shall mean an employee engaged either wholly or for the major and substantial part of working time making and/or servicing morning and/or afternoon teas, washing up and other duties in connection with such work.
	Insert the following as a heading before clause 6 'Contract of Employment': PART 2 – CONTRACT OF EMPLOYMENT

7. - CONTRACT OF SERVICE (1) Except for casual employees the contract of service shall be on a weekly basis, provided that one week's notice of termination may be given on either side on any working day, or in the event of such notice not being given by the payment by the employer or the forfeiture by the employee as the case may be, of one week's pay. (2) This shall not affect the right of the employer to dismiss any employee without notice for misconduct and in such cases wages shall be paid up to the time of dismissal only. (3) (a) The foregoing provisions shall not affect the right of an employer to stand down employees without pay during all vacation periods when no work is available. In respect to the Tertiary Education Institutions the vacation periods will extend to include those weeks which are calendarised as non-teaching weeks and not requiring student attendance on campus. (b) The employer shall advise the employee before the stand-down period has commenced the date of resumption of work. Employees who fail to advise the employer at least 48 hours before the date of resumption that they are ready, willing and available for work shall be deemed to have terminated their contract of employment. (4) (a) An employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training, including work which is incidental or peripheral to the employee's main tasks or functions, provided that such duties are not designed to promote de-killing. (b) An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been properly trained in the use of such tools and equipment. (c) Any direction issued by an employer pursuant to paragraphs (a) and (b) of this subclause shall be consistent with the provisions of the Occupational Health, Safety and Welfare Act 1984-1987 as amended.	6. - CONTRACT OF EMPLOYMENT (1) An employee may be employed on a full time, part time or casual basis. (2) (a) An employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training, including work which is incidental or peripheral to the employee's main tasks or functions, provided that such duties are not designed to promote de-skilling. (b) An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been properly trained in the use of such tools and equipment. (c) Any direction issued by an employer pursuant to paragraphs (a) and (b) of this subclause shall be consistent with the provisions of the *Work Health and Safety Act 2020* (WA) as amended.
	7. TERMINATION OF EMPLOYMENT AND STAND DOWN (1) In order to terminate the employment of a full time or part time employee the employer must give the employee the following notice in writing:

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<tr><th>Period of continuous service with the employer</th><th>Minimum Period of Notice</th></tr>
<tr><td>Not more than 1 year</td><td>At least 1 week</td></tr>
<tr><td>More than 1 year but less than 3 years</td><td>At least 2 weeks</td></tr>
<tr><td>More than 3 years but less than 5 years</td><td>At least 3 weeks</td></tr>
<tr><td>More than 5 years</td><td>At least 4 weeks</td></tr>
</table>

(2) An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer, is entitled to one week's notice in addition to the notice prescribed in clause 7(1).

(3) Payment in lieu of the notice prescribed in clause 7(1) and (2) must be made if the prescribed notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu.

(4) The period of notice in this subclause does not apply to those employees who are exempt from receiving notice under Subdivision A of Division 11 of Part 2-2 of the Fair Work Act 2009 (Cth), as amended from time to time.

(5) For the purpose of this clause an employee's continuity of service has the same meaning as prescribed in section 22 of the Fair Work Act 2009 (Cth).

(6) A full time or part time employee must give the employer one week's notice of termination.

(7) Nothing in this clause shall affect the right of the employer to dismiss any employee without notice for misconduct and in such cases wages shall be paid up to the time of dismissal only.

(8) (a) The provisions of this clause shall not affect the right of an employer to stand down employees without pay during all vacation periods when no work is available.

(b) The employer shall advise the employee before the stand-down period has commenced the date of resumption of work.
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<td>Insert the following as a heading before clause 8 'Hours':

PART 3 – HOURS OF WORK</td>
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<tr>
<td>8. - HOURS</td>
<td>NO VARIATION</td>
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</table>

(1) The ordinary hours of work shall be an average of 38 per week provided that: (a) In no case are more than forty ordinary hours worked in any week; (b) No more than eight ordinary hours are worked in any one day; (c) Ordinary hours are worked on not more than five days in any week; (d) Ordinary hours are worked within a daily spread of 11 hours. (2) Except as provided in subclause (4) hereof, employees shall not be required to work ordinary hours on more than 19 days in each four week roster cycle. (3) Employee shall be rostered such that in each four week roster cycle, rostered days off are consecutive on at least two occasions. (4) Notwithstanding the provisions of subclause (2) hereof, one rostered day off in each four week roster cycle may be accumulated to a maximum of ten days in any one year. Such accumulated rostered days off may be taken at a time mutually convenient to the employer and the employee.	
9. - ADDITIONAL RATES FOR ORDINARY HOURS (1) A full-time or part-time employee who is required to work any ordinary hours between 7.00 pm and 7.00 am Monday to Friday, inclusive, shall be paid, in addition to the appropriate wage set out in Clause 22. - Wages, an additional payment equivalent to 15% of the wages paid for the time so worked with a minimum payment of $3.65 per day. (2) An employee who is required to work any of his ordinary hours on any day in more than one period of employ and other than for meal breaks as prescribed by Clause 13. - Meal Breaks of this award, shall be paid an allowance of $3.20 per day, for such broken work period worked. (3) All work performed during ordinary hours on a Saturday shall be paid at the rate of time and one half. (4) All work performed during ordinary hours on a Sunday shall be paid at the rate of double time. (5) Provided that any employee who was receiving a greater rate of penalty for Saturday and/or Sunday work at the 29 October 1991 shall continue to receive that greater rate of benefit. (6) Where an employee's rostered hours of duty in any day of the weekend are extended by an early start or a late finish the weekend rates as the case may be shall be paid for such additional time worked in addition to any overtime payable under Clause 10. - Overtime of this Award.	9. - ADDITIONAL RATES FOR ORDINARY HOURS (1) A full-time or part-time employee who is required to work any ordinary hours between 7.00 pm and 7.00 am Monday to Friday, inclusive, shall be paid, in addition to the appropriate wage set out in Clause 22. - Wages, an additional payment equivalent to 15% of the wages paid for the time so worked. (2) An employee who is required to work any of their ordinary hours on any day in more than one period of employ and other than for meal breaks as prescribed by Clause 13. - Meal Breaks of this award, shall be paid an allowance of $4.50 per day, for such broken work period worked. (3) All work performed during ordinary hours on a Saturday shall be paid at the rate of time and one half. (4) All work performed during ordinary hours on a Sunday shall be paid at the rate of double time. (5) Provided that any employee who was receiving a greater rate of penalty for Saturday and/or Sunday work at the 29 October 1991 shall continue to receive that greater rate of benefit. (6) Where an employee's rostered hours of duty in any day of the weekend are extended by an early start or a late finish the weekend rates as the case may be shall be paid for such additional time worked in addition to any overtime payable under Clause 10. - Overtime of this Award.

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10. - OVERTIME

(1) All work performed at a time when according to an employee's roster that employee is not rostered to work, be overtime. Without limiting the generality of the foregoing all work done outside the daily spread of 11 hours, or in excess of eight hours in one day, or in excess of 40 hours in one week, or in excess of 152 hours in a four week roster cycle shall be overtime provided that where rostered days off are accumulated pursuant to Clause 8(4), 160 ordinary hours may be worked in a four week roster cycle in which one rostered day off is accumulated to be taken at a later, mutually convenient time.

(2) Subject to the provisions of subclause (3) hereof, all overtime worked between Monday to Friday, both inclusive, and prior to 12 noon on a Saturday shall be paid for at the rate of time and a half for the first two hours and double time thereafter. All overtime worked after 12 noon on a Saturday and all day on a Sunday, shall be paid for at the rate of double time.

(3) All work done on an employee's rostered day off shall be paid for at the rate of double time with a minimum payment as for three hours' work.

(4) Notwithstanding anything contained in this award:

(a) an employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirements;

(b) no organisation party to this award or employee or employees covered by this award, shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of this subclause.

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NO VARIATION

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11. - CASUAL EMPLOYEES

(1) A casual employee shall mean an employee engaged on an hourly contract of service.

(2) Casual employees shall not be engaged for less than two consecutive hours per time.

(3) Casual employees shall be paid at the rate of time and a half, provided that this rate shall be increased to double time and a half for all work performed on the holidays referred to in subclause (1)(a) of Clause 18. - Public Holidays of this award.

(4) The provisions of clauses

9. - Additional Rates for Ordinary Hours,
15. - Sick Leave,
16. - Compassionate Leave,
17. - Maternity Leave,
18. - Public Holidays,
19. - Annual leave and
20. - Long Service Leave

shall not apply to a casual employee.

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11. – CASUAL EMPLOYEES

(1) Casual employees shall not be engaged for less than two consecutive hours per time.

(2) Casual employees shall be paid at the rate double time and a half for all work performed on the public holidays referred to in subclause (1)(a) of Clause 18. – Public Holidays of this award.

(3) The provisions of Clause 9. – Additional Rates for Ordinary Hours and Clause 19 – Annual Leave, shall not apply to a casual employee.

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12. - PART-TIME EMPLOYEES (1) A part-time employee shall mean an employee engaged on a weekly contract of service, who works regularly from week to week for not less than three or more than seven ordinary hours per day, and not less than 15 or more than 35 hours each week over any five days. (2) Part-time employees shall be paid 15% in addition to the rates prescribed in Clause 22. - Wages. The provisions of Clause 9. - Additional Rates for Ordinary Hours shall also apply to part-time employees. (3) All work performed at times when, according to an employee's roster, that employee is not rostered to work shall be overtime. Without limiting the generality of the foregoing, all time worked by a part-time employee beyond seven ordinary hours per day, 35 ordinary hours per week and/or five days per week, shall be overtime and paid for at the appropriate overtime rates prescribed in Clause 10. - Overtime of this award.	12. – PART-TIME EMPLOYEES (1) The provisions of Clause 9. – Additional Rates for Ordinary Hours shall also apply to part-time employees. (2) All work performed at times when, according to an employee's roster, that employee is not rostered to work shall be overtime. Without limiting the generality of the foregoing, all time worked by a part-time employee beyond seven ordinary hours per day, 35 ordinary hours per week and/or five days per week, shall be overtime and paid for at the appropriate overtime rates prescribed in Clause 10. – Overtime of this award.
13. - MEAL BREAKS (1) Every employee shall be entitled to a meal break of not less than one half hour nor more than one hour, after not more than five hours of work. Where it is not possible for the employer to grant a meal break on any day, the said meal break shall be treated as time worked and the employee shall be paid at the rate applicable to the employee at the time such meal break is due, plus 50 per cent of the ordinary hourly rate applying to such employee, until such time as the employee is released for a meal. (2) In addition to breaks for a meal, there may be one other break of at least two hours during each shift. Such break of two hours may include a meal break.	13. – MEAL BREAKS (1) Every employee shall be entitled to a meal break of not less than one half hour nor more than one hour, after not more than five hours of work. Where it is not possible for the employer to grant a meal break on any day, the said meal break shall be treated as time worked and the employee shall be paid at the rate applicable to the employee at the time such meal break is due, plus 50% of the ordinary hourly rate applying to such employee, until such time as the employee is released for a meal. (2) In addition to breaks for a meal, there may be one other break of at least two hours during each shift. Such break of two hours may include a meal break.
14. - MEAL MONEY When an employee is required to work overtime for more than one hour on any day, he or she will either be supplied with a substantial meal by the employer or be paid $12.65 meal money.	14. – MEAL ALLOWANCE When an employee is required to work overtime for more than one hour on any day, the employee will either be supplied with a substantial meal by the employer or be paid $16.53 meal allowance.
	Insert the following as a heading before clause 15 'Personal Leave': PART 4 – LEAVE AND PUBLIC HOLIDAYS
15. - SICK LEAVE (1) (a) An employee other than a casual employee shall be entitled to payment for non-attendance on the grounds of personal ill health or injury of one sixth of a week's pay for each completed month of service. (b) Payment hereunder may be adjusted at the end of each accruing year, or at the time the employee leaves the service of the	15. – PERSONAL LEAVE Entitlement to paid personal leave: (1) An employee, other than a casual employee, is entitled for each year of service to paid personal leave for the number of hours the employee is required ordinarily to work in a 2 week period during that year.

employer, in the event of the employee being entitled by service subsequent to the sickness in that year to a greater allowance than that made at the time the sickness occurred.

(2) The unused portion of the entitlement prescribed in paragraph (a) hereof in any accruing year shall be allowed to accumulate and may be availed of in the next or any succeeding year.

(3) In order to acquire entitlement to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of their inability to attend for work, the nature of their illness or injury and the estimated duration of the absence. Provided that such advice other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.

(4) No employee shall be entitled to the benefit of this clause unless they produce proof to the satisfaction of the employer or representative of such sickness provided that the employer shall not be entitled to a medical certificate for absences of less than three consecutive working days unless the total of such absences exceeds five days in any one accruing year.

(5) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when the employee is absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.

(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to his/her place of residence or a hospital as a result of personal ill health or injury for a period of seven consecutive days or more and produces a certificate from a registered medical practitioner that states that the employee was so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if unable to attend for work on the working day next following his annual leave.

(c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day.

(d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the

(2) A year of service excludes periods of unpaid leave.

(3) Paid personal leave accrues pro rata on a weekly basis.

(4) The entitlement to personal leave is cumulative, and any leave not taken in one year is carried over to the next year.

(5) An employee may take paid personal leave if the employee is unable to work –

(a) because of a personal illness or injury affecting the employee; or

(b) to provide care or support to a member of the employee's family or household because of

(i) a personal illness or injury; or

(ii) an unexpected emergency

Notice and Evidence

(6) In order to acquire entitlement to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of their inability to attend for work and the estimated duration of the absence. Provided that such advice other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.

(7) No employee shall be entitled to the benefit of this clause unless they provide the employer with evidence that would satisfy a reasonable person of the entitlement. Provided that the employer shall not be entitled to a medical certificate for absences of less than three consecutive working days unless the total of such absences exceeds five days in any one accruing year.

(8) Replacement of personal leave during annual leave:

(a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when the employee is absent on annual leave and an employee may apply for and the employer shall grant paid personal leave in place of paid annual leave.

(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to their place of residence or a hospital as a result of personal ill health or injury for a period of seven consecutive days or more and produces a certificate from a registered medical practitioner that states that the employee was so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in

replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 19. - Annual Leave. (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 19. - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave. (6) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation Act nor to employees whose illness or injury is the result of the employee's own misconduct.	accordance with subclause (6) of this clause if unable to attend for work on the working day next following their annual leave. (c) Replacement of paid annual leave by paid personal leave shall not exceed the period of paid personal leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day. (d) Where paid personal leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid personal leave is hereby replaced by the paid personal leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 19. – Annual Leave. (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 19. – Annual Leave shall be deemed to have been paid with respect to the replaced annual leave. (9) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the *Workers' Compensation and Injury Management Act 2023* (WA) nor to employees whose illness or injury is the result of the employee's own misconduct. (10) Entitlement to unpaid personal leave: An employee, including a casual employee, is entitled to unpaid personal leave of up to 2 days in accordance with the *Minimum Conditions of Employment Act 1993* (WA).
<u>16. - COMPASSIONATE LEAVE</u> (1) An employee shall, on the death within Australia of a spouse, de facto spouse, father, mother, brother, sister, child or stepchild be entitled on notice of leave up to and including the day of the funeral of such relation and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the employee to two ordinary working days. Proof of such death shall be furnished by the employee to the satisfaction of the employer. (2) Provided that payment in respect of compassionate leave is to be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned would have been off duty in accordance with his roster, or on long service leave, annual leave, sick	<u>16. – BEREAVEMENT LEAVE</u> (1) An employee shall, on the death of a member of the employee's family or household (as defined in the *Minimum Conditions of Employment Act 1993* (WA)), be entitled to paid bereavement leave of up to 2 days. (2) The 2 days need not be consecutive. (3) An employee who claims to be entitled to paid bereavement leave is to provide the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to - (a) the death that is the subject of the leave sought; and (b) the relationship of the employee to the

<table>
<tr><td>leave, worker's compensation, leave without pay or on a public holiday.</td><td>deceased person.</td></tr>
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17. - MATERNITY LEAVE

(1) Eligibility for Maternity Leave

An employee who becomes pregnant shall, upon production to her employer of a certificate from a duly qualified medical practitioner stating the presumed date of her confinement, be entitled to maternity leave provided that she has had not less than 12 months' continuous service with that employer immediately preceding the date upon which she proceeds upon such leave.

For the purposes of this clause:

(a) An employee shall include a part-time employee but shall not include an employee engaged upon casual or seasonal work.

(b) Maternity leave shall mean unpaid maternity leave.

(2) Period of Leave and Commencement of Leave

(a) Subject to subclauses (3) and (6) hereof, the period of maternity leave shall be for an unbroken period of from 12 to 52 weeks and shall include a period of six weeks' compulsory leave to be taken immediately before the presumed date of confinement and a period of six weeks' compulsory leave to be taken immediately following confinement.

(b) An employee shall, not less than 10 weeks prior to the presumed date of confinement, give notice in writing to her employer stating the presumed date of confinement.

(c) An employee shall give not less than four weeks' notice in writing to her employer of the date upon which she proposes to commence maternity leave, stating the period of leave to be taken.

(d) An employee shall not be in breach of this order as a consequence of failure to give the stipulated period of notice in accordance with paragraph (c) hereof if such failure is occasioned by the confinement occurring earlier than the presumed date.

(3) Transfer to a Safe-Job

Where in the opinion of a duly qualified medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of maternity leave.

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17. – PARENTAL LEAVE

Parental leave is as provided for in accordance with Division 5 of Part 2-2 of *the Fair Work Act 2009* (Cth).

17A. FAMILY AND DOMESTIC VIOLENCE LEAVE

Family and domestic violence leave is as provided for in Division 7 of Part 2-2 of the *Fair Work Act 2009* (Cth) and the *Minimum Conditions of Employment Act 1993* (WA).

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If the transfer to a safe job is not practicable, the employee may, or the employer may require the employee to, take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as maternity leave for the purposes of subclauses (7), (8), (9) and (10) hereof.

(4) Variation of Period of Maternity Leave

(a) Provided the addition does not extend the maternity leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be lengthened.

(b) The period of leave may, with the consent of the employer, be shortened by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be shortened.

(5) Cancellation of Maternity Leave

(a) Maternity leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee terminates other than by the birth of a living child.

(b) Where the pregnancy of an employee then on maternity leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that she desires to resume work.

(6) Special Maternity Leave and Sick Leave

(a) Where the pregnancy of an employee not then on maternity leave terminates after 28 weeks other than by the birth of a living child then -

(i) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work, or

(ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a duly qualified medical practitioner certifies as necessary before her return to work.

(b) Where an employee not then on maternity

leave suffers illness related to her pregnancy, she may take such paid sick leave as to which she is then entitled and such further unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed 52 weeks.

(c) For the purposes of subclauses (7), (8) and (9) hereof, maternity leave shall include special maternity leave.

(d) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (3), to the position she held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which she is capable of performing, she shall be entitled to a position as nearly comparable in status and salary or wage to that of her former position.

(7) Maternity Leave and Other Leave Entitlements

Provided the aggregate of leave including leave taken pursuant to subclauses (3) and (6) hereof does not exceed 52 weeks.

(a) An employee may, in lieu of or in conjunction with maternity leave, take any annual leave or long service leave or any part thereof to which she is then entitled.

(b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during her absence on maternity leave.

(8) Effect of Maternity Leave on Employment

Notwithstanding any award, or other provision to the contrary, absence on maternity leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of the award.

(9) Termination of Employment

(a) An employee on maternity leave may terminate her employment at any time during the period of leave by notice given in accordance with this award.

(b) An employer shall not terminate the employment of an employee on the ground

of her pregnancy or of her absence on maternity leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected. (10) Return to Work After Maternity Leave (a) An employee shall confirm her intention of returning to her work by notice in writing to the employer given not less than four weeks prior to the expiration of her period of maternity leave.	
18. - PUBLIC HOLIDAYS (1) (a) The following days or the days observed in lieu shall, subject as hereinafter provided be allowed as holidays without deduction of pay namely, New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in the subclause. (b) When any of the days mentioned in paragraph (a) hereof falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday, and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday. (2) Whenever any of the days referred to in subclause (1)(a) hereof falls on an employee's ordinary working day and the employee is not required to work on such a day, the employee shall be paid for the ordinary hours the employee would have worked on such day had it not been a holiday. Where an employee's rostered day off coincides with any of the holidays referred to in subclause (1)(a) hereof, such employee shall receive one day's additional pay at ordinary rates from the employer. (3) Any employee required to work on a holiday shall be paid for the time worked at the rate of double time and one half. (4) When an employee is off duty owing to leave without pay, any holiday falling during such absence shall not be treated as a paid holiday. Where the employee is on duty or is available on the whole of the working day immediately preceding a holiday or resumes duty or is available on the whole of the working day immediately following a holiday, as prescribed in this clause, the employee shall be entitled to a paid holiday on all such holidays. (5) Whereas - (a) a day is proclaimed as a public holiday or	18. – PUBLIC HOLIDAYS (1) (a) The following days are recognised as public holidays for the purpose of this Award: New Year's Day, Australia Day, Good Friday, Easter Sunday, Easter Monday, Anzac Day, Labour Day, Western Australia Day, Sovereign's Birthday, Christmas Day and Boxing Day. (b) An employee is entitled to be absent from work on a day or part of a day that is a public holiday for the purpose of this award, or a public holiday as defined in the *Minimum Conditions of Employment Act 1993* (WA). (c) When any of the days mentioned in paragraph (a) hereof other than Easter Sunday falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday, and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday. (2) Whenever any of the days referred to in subclause (1)(a) hereof falls on an employee's ordinary working day and the employee is not required to work on such a day, the employee shall be paid for the ordinary hours the employee would have worked on such day had it not been a holiday. Where an employee's rostered day off coincides with any of the holidays referred to in subclause (1)(a) hereof, such employee shall receive one day's additional pay at ordinary rates from the employer. (3) The employer may request that an employee work on a day or part of a day that is a public holiday if the request is reasonable. (4) If the employer makes a request, the employee may refuse the request if — (a) the request is not reasonable; or (b) the refusal is reasonable. (5) In determining whether a request or refusal is reasonable, the following must be taken into account —

as a public half-holiday under section 7 of the Public and Bank Holidays Act, 1972; and (b) that proclamation does not apply throughout the State or to the metropolitan area of the State, that day shall be a whole holiday or, as the case may be, a half holiday for the purpose of this award within the district or locality specified in the proclamation.	(a) the nature and conduct of the employer's business or operations; (b) the nature of the employee's work; (c) the employee's personal circumstances, including family responsibilities (d) whether the employee could reasonably expect that the employer might request work on the public holiday; (e) whether the employee is entitled to receive overtime payments, penalty rates or other compensation (including compensation in the form of an annualised salary) for, or a level of remuneration that reflects an expectation of, work on the public holiday; (f) the type of employment of the employee (for example, whether full-time, part-time, casual or shift work); (g) the amount of notice in advance of the public holiday given (i) by the employer when making the request; or (ii) by the employee when refusing the request. (6) Any employee required to work on a public holiday shall be paid for the time worked at the rate of double time and one half. (7) When an employee is off duty owing to leave without pay, any public holiday falling during such absence shall not be treated as a paid public holiday. Where the employee is on duty or is available on the whole of the working day immediately preceding a public holiday or resumes duty or is available on the whole of the working day immediately following a public holiday, as prescribed in this clause, the employee shall be entitled to a paid public holiday on all such public holidays. (8) Where – (a) a day is proclaimed as a public holiday or as a public half-holiday under section 7 of the *Public and Bank Holidays Act 1972* (WA); and (b) that proclamation applies either throughout the State or within a district or locality as specified in the proclamation; that day shall be a whole holiday or, as the case may be, a half holiday for the purpose of this award within the district or locality specified in the proclamation.
<u>19. - ANNUAL LEAVE</u> (1) Except as hereinafter provided, a period of four consecutive weeks' leave with payment of ordinary wages as prescribed shall be allowed annually to an employee by the employer after a period of twelve months' continuous service with such employer. (2) "Ordinary wages" for an employee shall mean the rate of wage including service pay the employee has received for the greatest proportion of the calendar	<u>19. – ANNUAL LEAVE</u> (1) An employee, other than a casual employee, is entitled for each year of service to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year. (2) Annual leave accrues pro rata on a weekly basis. (3) Annual leave is cumulative, and any leave not taken

month prior to his taking the leave.	in one year is carried over to the next year.
(3) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day being an ordinary working day for each such holiday observed as aforesaid. (4) If after one month's continuous service in any qualifying twelve monthly period an employee lawfully terminates his/her employment or the employment is terminated by the employer through no fault of the employee, the employee shall be paid 2.92 hours' pay at the ordinary rate of wage in respect of each completed week of continuous service in that qualifying period.	(4) If any award public holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, the employee: (a) is taken not to be on paid annual leave or paid personal leave on that public holiday; and (b) is entitled to be absent from work on that public holiday; and (c) is entitled to be paid for that public holiday in accordance with clause 18.
(5) In addition to any payment to which the employee may be entitled under subclause (4) of this clause, an employee whose employment terminates after he/she has completed a twelve monthly qualifying period and who has not been allowed leave prescribed under this award in respect of that qualifying period, shall be given payment in lieu of that leave unless:- (a) the employee has been justifiably dismissed for misconduct; and (b) the misconduct for which the employee has been dismissed occurred prior to the completion of that qualifying period.	(5) If an employee lawfully leaves their employment or the employment is terminated by the employer through no fault of the employee, the employee shall be paid for any untaken annual leave to which the employee is entitled. (6) If an employee leaves employment or the employment is terminated by the employer in circumstances other than those referred to in clause 19(5) the employee is to be paid for any untaken leave that relates to a completed year of service, except that if the employee is dismissed for misconduct, the employee is not entitled to be paid or any untaken leave that relates to a year of service that was completed after the misconduct occurred.
(6) An employee may be rostered off and granted annual leave with payment of ordinary wages as prescribed prior to having completed a period of twelve months' continuous service, in which case should the services of such employee terminate or be terminated prior to the completion of twelve months' continuous service, the said employee shall refund to the employer the difference between the amount received for wages in respect of the period of their annual leave and the amount which would have accrued to the employee by reason of the length of service up to the date of the termination of their services.	(7) An employee may be rostered off and granted annual leave with payment of ordinary wages as prescribed prior to having accrued the leave, in which case should the services of such employee terminate or be terminated prior to the completion of sufficient service to have accrued the leave, the said employee shall refund to the employer the difference between the amount received for wages in respect of the period of their annual leave and the amount which would have accrued to the employee by reason of the length of service up to the date of the termination of their services.
(7) (a) Subject to subclause (3) of this clause, when computing the annual leave due under this clause, no deduction shall be made from such leave in respect of the period that an employee is on annual leave and/or holidays. Provided that no deduction shall be made for any approved period an employee is absent from duty through sickness, with or without pay, unless the absence exceeds three calendar months, in which case deduction may be made for such excess only. (b) Approved periods of absence from work caused through accident sustained in the course of employment shall not be considered breaks in continuity of service, but the first six months only of any such period shall count as service for the purpose of computing annual leave.	(8) (a) Subject to subclause (3) of this clause, when computing the annual leave due under this clause, no deduction shall be made from such leave in respect of the period that an employee is on annual leave and/or public holidays, nor for any approved period of personal leave, with or without pay. (b) Approved periods of absence from work caused through accident sustained in the course of employment shall not be considered breaks in continuity of service. (9) When work is closed down for the purpose of allowing annual leave to be taken, employees with less than a full year's service shall only be entitled to payment during such period for the number of days' leave due to them. Provided that nothing herein contained shall deprive the employer's right to retain such employees during the close down period as

(8) When work is closed down for the purpose of allowing annual leave to be taken, employees with less than a full year's service shall only be entitled to payment during such period for the number of days' leave due to them. Provided that nothing herein contained shall deprive the employer's right to retain such employees during the close down period as may be required. (9) Employees regularly working for the Government north of south latitude 26 shall be paid 1 (one) week additional leave per year and allowed to accumulate annual leave for two years, subject to the convenience of the Department. Such employees who proceed to Fremantle and Geraldton during the period of such leave shall be allowed once in each two years reasonable travelling time on the forward and return journeys between the place of their employment and either of the said ports. (10) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee. Annual Leave Loading (11) During the period of annual leave an employee shall receive a loading calculated on the rate of wage prescribed by subclause (2) hereof. This loading shall be 17-1/2 per cent provided that in no case shall the loading for four weeks' leave exceed the amount set out in the Commonwealth Bureau of Census and Statistics publication for "Average Weekly Earnings per Male Employed Unit" in W.A. for the September quarter immediately preceding the date of accrual of such leave. The loading prescribed by this subclause shall not apply to proportionate leave on termination.	may be required. (10) Employees regularly working north of south latitude 26 shall be paid 1 (one) week additional leave per year and allowed to accumulate annual leave for two years, subject to the convenience of the Department. Such employees shall be allowed once in each two years reasonable travelling time for travel between the place of their employment and Perth or Geraldton for the purpose of taking annual leave. (11) Where an employee and employer have not agreed when the employee is to take annual leave, subject to the employee giving the employer at least 2 weeks' notice, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than 12 months before that time. Annual Leave Loading (12) During the period of annual leave an employee shall receive a 17.5% loading calculated on the rate of pay the employee would have received under clause 22 at the time the employee takes the leave, provided that in no case shall the loading for four weeks' leave exceed the amount set out in the Australian Bureau of Statistics publication for "Average Weekly Earnings Full Time Males Western Australia" in W.A. for the November quarter immediately preceding the date of accrual of such leave. The loading prescribed by this subclause shall not apply to proportionate leave on termination.
20. - LONG SERVICE LEAVE The conditions governing the granting of Long Service Leave to government wages employees generally shall apply to employees covered by this award.	NO VARIATIONS
	Insert the following as a heading before clause 21. 'Payment of Wages' PART 5 – WAGES, ALLOWANCES AND FACILITIES
21. - PAYMENT OF WAGES (1) (a) The employer may elect to pay employees in cash, by cheque or by means of a credit transfer to a bank, building society or credit union account in the name of the employee. The day that the credit transfer is credited to the employee's account shall be deemed to be the date of payment. (b) Payment shall be made within three working days from the last day of the pay period and if in cash or by cheque shall be made during the employee's ordinary working hours.	21. – PAYMENT OF WAGES (1) (a) The employer may elect to pay employees in cash or by electronic funds transfer to a bank, building society or credit union account in the name of the employee. The day that the electronic funds transfer is credited to the employee's account shall be deemed to be the date of payment. (b) Payment shall be made within three working days from the last day of the pay period and if in cash shall be made during the employee's ordinary working hours.

(c) No employer shall change its method of payment to employees without first giving them at least four weeks' notice of such change.	(c) No employer shall change its method of payment to employees without first giving them at least four weeks' notice of such change.
(d) No employee shall be required to accept a change in the method of payment if such change causes hardship. Any dispute concerning hardship in a particular case shall be referred to the Industrial Relations Commission.	(d) No employee shall be required to accept a change in the method of payment if such change causes hardship. Any dispute concerning hardship in a particular case shall be referred to the Western Australian Industrial Relations Commission.
(2) (a) The employer may elect to pay employees weekly or fortnightly in accordance with subclause (1) of this clause.	(2) (a) The employer may elect to pay employees weekly or fortnightly in accordance with subclause (1) of this clause.
(b) No employer shall change the frequency of payment to employees without first giving them and the Union at least four weeks' notice of such change.	(b) No employer shall change the frequency of payment to employees without first giving them and the Union at least four weeks' notice of such change.
(c) The method of introducing a fortnightly pay system shall be by the payment of an additional week's wages in the last weekly pay before the change to fortnightly pays to be repaid by equal fortnightly deduction made from the next and subsequent pays provided the period for repayment shall not be less than 20 weeks or some other method agreed upon by the Union and employer.	(c) The method of introducing a fortnightly pay system shall be by the payment of an additional week's wages in the last weekly pay before the change to fortnightly pays to be repaid by equal fortnightly deduction made from the next and subsequent pays provided the period for repayment shall not be less than 20 weeks or some other method agreed upon by the Union and employer.
(3) For the purpose of effecting the rostering off of workers as provided by this award, such wages may be either for the actual hours worked each week; or an amount being the calculated weekly average of the wages accruing over the two or three or four as the case may be, consecutive weekly period.	(3) For the purpose of effecting the rostering off of workers as provided by this award, such wages may be either for the actual hours worked each week; or an amount being the calculated weekly average of the wages accruing over the two or three or four as the case may be, consecutive weekly period.
(4) An employee who lawfully terminates their employment or is dismissed by the employer for reasons other than misconduct, shall be paid all wages due to them by the employer on the day of termination of employment	(4) An employee who lawfully terminates their employment or is dismissed by the employer for reasons other than misconduct, shall be paid all wages due to them by the employer on the day of termination of employment.
(5) At the time of being paid, each employee shall be issued with a statement by the employer showing the gross wages and allowances due to them and all deductions made therefrom.	
22. - WAGES	22. – WAGES
It is a term of this Award that the Union undertakes for the duration of the Principles determined by the Commission in Court Session in Matter No. 1940 of 1989 not to pursue any extra claim, award or over award except where consistent with the State Wage Principles. The following shall be the minimum rates of wage payable to employees covered by this award:- (1) (a) Classifications: | Base Rate (per week) $ | Arbitrated Safety Net Adjustments (per week) $ | Total Award Rate (per week) $	The following shall be the minimum rates of wage payable to employees covered by this award:- (1) (a) Classifications: Minimum Weekly Rate (per week) $ (1) Chef 989.30 (2) Qualified Cook 955.30 (3) Cook Employed Alone 932.50

(1)	Chef	351.20	578.60	929.80
(2)	Qualified Cook	325.40	572.50	897.90
(3)	Cook Employed Alone	307.90	568.20	876.10
(4)	Other Cooks	304.60	567.40	872.00
(5)	Bar Attendant	307.40	568.20	875.60
(6)	Waiter/ Waitress	300.20	566.40	866.60
(7)	Steward/ Stewardess	300.20	566.40	866.60
(8)	Cashier	307.40	568.20	875.60
(9)	Counterhand	300.20	566.40	866.60
(10)	Tea Attendant	297.20	565.80	863.00
(11)	Kitchenhand	297.20	565.80	863.00
(12)	General Hand	297.20	565.80	863.00

(b) Arbitrated Safety Net Adjustments

(i) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(2) In addition to the above wage rates service pay will be paid for each year of service at the following rates per week:

Year 1	$ 95.30
Year 2	$ 104.00
Year 3 and thereafter	$ 111.80

(3) Leading Hands -

An employee (other than a Chef) who is appointed and placed in charge of other employees by the employer shall be paid the following rates in

(4)	Other Cooks	928.20
(5)	Bar Attendant	932.00
(6)	Waiter	922.50
(7)	Steward	922.50
(8)	Cashier	932.00
(9)	Counterhand	922.50
(10)	Tea Attendant	918.60
(11)	Kitchenhand	918.60
(12)	General Hand	918.60

(2) A casual employee must be paid a loading of 50% for each hour worked.

(3) A part-time employee must be paid a loading of 15% for each hour worked.

(4) In addition to the above wage rates service pay will be paid for each year of service at the following rates per week:

Year 1	$95.30
Year 2	$104.00
Year 3 and thereafter	$111.80

(5) Leading Hands –

An employee (other than a Chef) who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to his or her normal wage per week:-

(a)	If placed in charge of less than six employees	$15.80
(b)	If placed in charge of sex to ten employees	$21.30
(c)	If placed in charge of 11 to 20 employees	$24.50
(d)	If placed in charge of more than 20 employees	$41.00

addition to his or her normal wage per week:- (a) If placed in charge of less than six employees $15.80 (b) If placed in charge of six to ten employees $21.30 (c) If placed in charge of 11 to 20 employees $24.50 (d) If placed in charge of more than 20 employees $41.00	
23. - JURY SERVICE (1) Any employee required to serve on a jury shall as soon as possible after being summoned to serve, notify the employer. The summons to serve must be produced when making an application to obtain this leave. (2) Any employee required to serve on a jury shall be granted by the employer leave of absence without loss of pay, but only for such a period as is required to enable the employee to carry out his/her duties as a juror. (3) An employee granted leave of absence on full pay as prescribed in subclause (2) of this clause is not entitled to retain any juror's fees but shall pay all fees received to the employer.	23. – JURY SERVICE (1) Any employee required to serve on a jury shall as soon as possible after being summoned to serve, notify the employer. The summons to serve must be produced when making an application to obtain this leave. (2) Any employee required to serve on a jury shall be granted by the employer leave of absence without loss of pay, but only for such a period as is required to enable the employee to carry out their duties as a juror. (3) An employee granted leave of absence on full pay as prescribed in subclause (2) of this clause is not entitled to retain any juror's fees but shall pay all fees received to the employer.
24. - APPRENTICES (1) Apprentices may be taken to the trade of cooking in the ratio of one apprentice for every one qualified cook employed and shall not be taken in excess of that ratio unless: (a) the union so agrees; or (b) the Commission so determines. (2) Wages (per week) expressed as a percentage of the "Tradesman's Rates" - (a) Four Year Term - % First year 42 Second year 55 Third year 75 Fourth year 88 (b) Three and a Half Year Term - First six months 42 Next year 55 Next following year 75 Final year 88 (c) Third Year Term - % First year 55 Second year 75 Third year 88 (d) For the purposes of this subclause the term "Tradesman's Rate" means the total rate payable to a "Qualified Cook", as prescribed in Clause 22. - Wages, of this award.	24. – APPRENTICES (1) Apprentices may be taken to the trade of cooking in the ratio of one apprentice for every one qualified cook employed and shall not be taken in excess of that ratio unless: (a) the Union so agrees; or (b) the Commission so determines. (2) Wages (per week) expressed as a percentage of the "Qualified Cook Rates" – (a) Four Year Term - % First year 42 Second year 55 Third year 75 Fourth year 88 (b) Three and a Half Year Term – First six months 42 Next year 55 Next following year 75 Final year 88 (c) Third Year Term – % First Year 55 Second year 75 Third year 88
25. - BAR WORK Any employee other than a Bar Attendant, who in addition to their normal duties is required to dispense liquor from a bar,	NO VARIATIONS

shall be paid a flat rate of $1.25 cents per day in addition to the rate prescribed for such normal duties.	
26. - HIGHER DUTIES (1) Any employee performing work for two or more hours in any day on duties carrying a higher prescribed rate of wage than that in which they are engaged, shall be paid the higher wage for the time so employed, provided that where an employee is engaged for more than half of one day or shift on duties carrying a higher rate the employee shall be paid the higher rate for such day or shift. (2) Any employee who is required to perform duties carrying a lower prescribed rate of wage, shall do so without any loss of pay.	NO VARIATIONS
27. - UNIFORMS AND LAUNDERING Where uniforms are required to be worn by the employer they shall be supplied and laundered by the employer and remain the property of the employer, provided that in lieu of the employer laundering same, the employee shall be paid $4.80 per week for such laundering. Provided further, that any employee employed as a Cook shall be paid $7.20 per week for laundering.	NO VARIATIONS
28. - PROTECTIVE CLOTHING (1) Employees who are required to wash dishes. or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid an allowance of $2.40 per week in lieu. (2) Where the conditions of work are such that employees are unable to avoid their clothing becoming dirty or wet, they shall be supplied with suitable protective clothing free of charge by the employer. (3) Where the conditions of work are such that employees are unable to avoid their feet becoming wet, they shall be supplied by the employer free of charge with suitable protective footwear. (4) All articles supplied shall remain the property of the employer and shall be returned when required, in good order and condition, fair wear and tear excepted. (5) Where any of the above protective equipment is provided the employee shall use the equipment for the purpose for which it is intended.	28. - PROTECTIVE CLOTHING (1) Employees who are required to wash dishes. or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid an allowance of $2.54 per week in lieu. NO OTHER VARIATIONS
29. – EMPLOYEE'S EQUIPMENT All knives, choppers, tools, brushes. towels and other utensils, implements and material which may be required to be used by the employee for the purpose of carrying out their duties, shall be supplied by the employer free of charge. Provided that where an employee is required by the employer to use his own knives he shall be paid an allowance of $11.50 per week.	29. – EMPLOYEE'S EQUIPMENT All knives, choppers, tools, brushes. towels and other utensils, implements and material which may be required to be used by the employee for the purpose of carrying out their duties, shall be supplied by the employer free of charge. Provided that where an employee is required by the employer to use their own knives they shall be paid an allowance of $11.50 per week.

30. - TRAVELLING FACILITIES	NO VARIATIONS
(1) Where an employee is detained at work until it is too late to travel by the last ordinary bus, train or other regular public conveyance to their usual place of residence the employer shall provide proper conveyance free of charge. (2) If an employee is required to start work before the first ordinary means of public conveyance (hereinbefore described) is available to convey them from their usual place of residence to the place of employment, the employer shall provide a conveyance free of charge. (3) The provisions of subclauses (1) and (2) of this clause do not apply to an employee who usually has their own means of conveyance.	
	Insert the following as a heading before clause 31 'Records': PART 6 – OTHER MATTERS
31. - RECORD (1) The employer shall keep, or cause to be kept, a time and wages record wherein shall be entered the following information: . (a) The full name, and occupation of each employee employed and whether the employee is being employed on a full-time, part-time or casual contract of service; (b) The time each employee commences and finishes work each day, including any breaks in shift; (c) The number of hours worked each day by each employee and the total hours worked each pay period; (d) The wages and (if any) overtime and allowances paid to each employee each pay period; (e) The age of any employee employed on junior rates of pay. (2) The record shall be open for inspection to a duly accredited representative of the union during ordinary office hours. Such representative shall be permitted time to inspect the record and, if he requires shall be allowed to take any extract or copy of any of the information contained in the record. Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the employer	31. – RECORDS An employer must keep employment records and provide pay slips in accordance with Part II, Division 2F – Keeping of and access to employment records and pay slips of the *Industrial Relations Act 1979* (WA). Conditions regarding right of entry by authorised representatives of the Union for the purpose of inspection of records are dealt with in Part II, Division G – Right of entry and inspection by authorised representatives of the *Industrial Relations Act 1979* (WA).
32. - ROSTER (1) A roster of the working hours of each employee shall be exhibited in such place by the employer so as it may be conveniently and readily seen by each employee.	32. – ROSTERS (1) A roster of the working hours of each employee shall be exhibited in such place by the employer so as it may be conveniently and readily seen by each employee, or provided by electronic means

(2) Such roster shall show: (a) the name and occupation of each employee; (b) the hours to be worked by each employee each day and the breaks in shift to be taken. (3) The roster shall be open for inspection to a duly accredited representative of the union at such time as the "record" is so open for inspection. (4) Such rosters shall be drawn up in such a manner as to show the working hours of each employee for at least one week in advance of the date of the roster and may only be altered on account of the sickness of an employee, or by mutual consent between the employee and the employer concerned. (5) In addition to the roster of working hours as prescribed by subclauses (1)-(4) of this clause, a roster of working days and rostered days off for each employee shall be maintained by the employer and exhibited in such a place so as it may be conveniently and readily seen by each employee. Such a roster shall show working days and rostered day off at least four weeks in advance and shall only be varied at the request of an employee with respect to whom the variation is sought.	reasonably accessible to all employees. (2) Such roster shall show: (a) the name and classification of each employee; (b) the hours to be worked by each employee each day and the breaks in shift to be taken. (3) The roster shall be available for inspection to a duly accredited representative of the Union in accordance with clause 31. (4) Such rosters shall be drawn up in such a manner as to show the working hours of each employee for at least one week in advance of the date of the roster and may only be altered on account of the personal leave of an employee, or by mutual consent between the employee and the employer concerned. (5) In addition to the roster of working hours as prescribed by subclauses (1)-(4) of this clause, a roster of working days and rostered days off for each employee shall be maintained by the employer and either made accessible electronically or exhibited in such a place so as it may be conveniently and readily seen by each employee. Such a roster shall show working days and rostered day off at least four weeks in advance and shall only be varied at the request of an employee with respect to whom the variation is sought.
33. - CHANGE AND REST ROOMS Adequate change and rest rooms shall be provided by the employer where such are reasonably practicable.	NO VARIATIONS
34. - FIRST AID KIT In each establishment the employer shall provide and continuously maintain at a place easily accessible to all employees an adequate First Aid Kit.	NO VARIATIONS
35. - POSTING OF AWARD AND UNION NOTICES (1) A copy of this award shall be exhibited by the employer on the business premises in such a place where it may be conveniently and readily seen by each employee. (2) The Secretary of the Union, or any other duly accredited representative of the union, shall be permitted to post notices relating to union business in such a place where it may be conveniently and readily seen by each employee. Provided that nothing in this subclause shall empower a duly accredited official of the union to enter any part of the premises of the employer, pursuant to this subclause, unless the employer is the employer or former employer of a member of the Union.	35. – POSTING OF AWARD AND UNION NOTICES (1) A copy of this award shall be exhibited by the employer on the business premises in such a place where it may be conveniently and readily seen by each employee or made accessible electronically. (2) The Secretary of the Union, or any other duly accredited representative of the Union, shall be permitted to post notices relating to Union business in such a place where it may be conveniently and readily seen by each employee.
36. - DELETED	CLAUSE DELETED

37. - BREAKDOWNS The employer shall be entitled to deduct payment for any day or portion of a day upon which the employee cannot be usefully employed, because of any strike by the union or unions affiliated with it, or by any other association or union, or through the breakdown of the employer's machinery or any stoppage of work by any cause which the employer cannot reasonably prevent.	RENUMBERED TO CLAUSE 36
38. - DISTRICT ALLOWANCE (1) For the purposes of this clause the following terms shall have the following meaning: “Dependant” in relation to an employee means: (a) a spouse; or(b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support; who does not receive a district or location allowance of any kind. “Partial Dependant” in relation to an employee means: (a) a spouse; or (b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support; who receives a district or location allowance of any kind less than that applicable to an employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant. “Spouse” means an employee's spouse including de facto spouse. “De facto Spouse” means a person of the opposite sex to the employee who lives with the employee as the husband or wife of the employee on a bona fide domestic basis, although not legally married to that person. (2) For the purpose of this clause, the boundaries of the various districts shall as described hereunder and as delineated on the plan at subclause (16) of this clause. District: 1. The area within a line commencing on coast; thence east along latitude 28 to a point north of Tallering Peak; thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of latitude 32 and longitude 119; thence south along longitude 119 to coast. 2. That area within a line commencing on the south coast at longitude 119 then east along the coast to longitude 123; then	37. – DISTRICT ALLOWANCE 1) For the purposes of this clause the following terms shall have the following meaning: “Dependant” in relation to an employee means: (a) a spouse; or (b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support; who does not receive a district or location allowance of any kind. “Partial Dependant” in relation to an employee means: (a) a spouse; or (b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support; who receives a district or location allowance of any kind less than that applicable to an employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant. “Spouse” means an employee's spouse including de facto partner. (2) For the purpose of this clause, the boundaries of the various districts shall as described hereunder and as delineated on the plan at subclause (16) of this clause. District: 1. The area within a line commencing on the coast; thence east along latitude 28 to a point north of Tallering Peak; thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of latitude 32 and longitude 119; thence south along longitude 119 to coast. … 3. The area within a line commencing on the coast at latitude 26; thence along latitude 26 to longitude 123; thence south along longitude 123 to the boundary of No. 2 District. …

north along longitude 123 to a point on latitude 30; thence west along latitude 30 to the boundary of No. 1 District.

3. The area within a line commencing on coast at latitude 26; thence along latitude 26 to longitude 123; thence south along longitude 123 to the boundary of No. 2 District.

4. The area within a line commencing on the coast at latitude 24; thence east to the South Australian border; thence south to the coast; thence along the coast to longitude 123; thence north to the intersection of latitude 26; thence west along latitude 26 to the coast.

5. That area of the State situated between the latitude 24 and a line running east from Carnot Bay to the Northern Territory border.

6. That area of the State north of a line running east from Carnot Bay to the Northern Territory border.

(3) An employee shall be paid a district allowance at the standard rate prescribed in Column II of subclause (6) of this clause, for the district in which the employee’s headquarters is located. Provided that where the employee's headquarters is situated in a town or place specified in Column III of subclause (6), the employee shall be paid a district allowance at the rate appropriate to that town or place as prescribed in Column IV of subclause (6).

(4) An employee who has a dependant shall be paid double the district allowance prescribed by subclause (3) of this clause for, the district, town or place in which the employee’s headquarters is located.

(5) Where an employee has a partial dependant the total district allowance payable to the employee shall be the district allowance prescribed by subclause (3) of this clause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if he or she was employed in a full time capacity under the Award, Agreement or other provision regulating the employment of the partial dependant.

(6) The weekly rate of district allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO STANDARD RATE	COLUMN IV RATE
	$ per week	Town or Place	$ per week
6	50.40	Nil	Nil
5	41.20	Fitzroy Crossing	55.40
		Halls Creek	

(5) Where an employee has a partial dependant the total district allowance payable to the employee shall be the district allowance prescribed by subclause (3) of this clause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if they were employed in a full time capacity under the Award, Agreement or other provision regulating the employment of the partial dependant.

…

(9) When an employee leaves their district on duty, payment of any district allowance to which the employee would ordinarily be entitled shall cease after the expiration of two weeks unless the employee's dependant/s or partial dependant/s remain in the district or as otherwise approved by the employer.

NO OTHER VARIATIONS

		Turner River Camp Nullagine	
		Liveringa (Camballin) Marble Bar	51.60
		Wittenoom	
		Karratha	48.60
		Port Hedland	45.10
4	20.70	Warburton Mission	55.90
		Carnarvon	19.50
3	13.10	Meekatharra	20.70
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	9.30	Kalgoorlie	3.10
		Boulder	
		Ravensthorpe	12.40
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after 1 January 1991.

(7) When an employee is on approved annual recreation leave, the employee shall for the period of such leave, be paid the district allowance to which the employee would ordinarily be entitled.

(8) When an employee is on long service leave or other approved leave with pay (other than annual recreational leave), the employee shall only be paid district allowance for the period of such leave if the employee, dependants or partial dependants remain in the district in which the employee's headquarters is situated.

(9) When an employee leaves his or her district on duty, payment of any district allowance to which the employee would ordinarily be entitled shall cease after the expiration of two weeks unless the employee's dependant/s or partial dependant/s remain in the district or as otherwise approved by the employer.

(10) Except as provided in subclause (9) of this clause, a district allowance shall be paid to any employee ordinarily entitled thereto in addition to reimbursement of any travelling transfer or relieving expenses or camping allowance.

(11) Where an employee whose headquarters is located in a district in respect of which no allowance is prescribed in subclause (6) of this clause, is required to travel or temporarily reside for any period in excess of one month in any district or districts in

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respect of which such allowance is so payable, the employee shall be paid for the whole of such period a district allowance at the appropriate rate pursuant to subclauses (3), (4) or (5) of this clause, for the district in which the employee spends the greater period of time.

(12) When an employee is provided with free board and lodging by the employer or a Public Authority the allowance shall be reduced to two-thirds of the allowance the employee would ordinarily be entitled to under this clause.

(13) An employee who is employed on a part-time basis shall be entitled to district allowance on a pro-rata basis. The allowance shall be determined by calculating the hours worked by the employee as a proportion of the full-time hours prescribed by the Award under which the employee is employed. That proportion of the appropriate district allowance shall be payable to the employee.

(14) An employee who immediately prior to the 1st day of July, 1988 was in receipt of district allowance at a rate which was greater than the amount to which the employee is entitled under this clause shall have the difference reduced in accordance with the following:

(i) As from the first pay period commencing on or after July 1, 1988 the difference shall be reduced by thirty-three and one third (33 1/3%) per cent; and

(ii) As from the first pay period commencing on or after January 1, 1989 the difference remaining between the amount being paid pursuant to (i) above and that to which the employee is otherwise entitled under this clause shall be reduced by fifty (50%) per cent; and

(iii) As from the first pay period commencing on or after July 1, 1989 payment shall be in accordance with the employee's entitlement under this clause.

(15) The rates expressed in subclause (6) of this clause shall be adjusted every twelve (12) months ending on December 31 in accordance with the official “Consumer Price Index” for Perth as published by the Australian Bureau of Statistics.

The adjustment of rates shall be effective from the beginning of the first pay period to commence on or after the first day of January each year.

(16) Plan - District Allowance Boundaries
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<u>39. - GRIEVANCE PROCEDURES</u>

It is the intention of this Agreement to eliminate disputes which are liable to cause stoppages for work and loss of earnings and it is agreed between the parties that every endeavour will be made to amicably settle any disputes which may arise.
</td>
<td>
<u>38. - DISPUTE RESOLUTION PROCEDURES</u>

It is the intention of this award to eliminate disputes which are liable to cause stoppages for work and loss of earnings and it is agreed between the parties that every endeavour will be made to amicably settle any disputes which may arise.
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(1) (a) Where any grievance, dispute or claim arises an employee is entitled to raise the matter with the appropriate Manager.	(1) (a) Where any grievance, dispute or claim arises an employee is entitled to raise the matter with the appropriate Manager.
(b) If a resolution of the grievance, dispute or claim is not achieved under subclause (1)(a) hereof, the employee concerned may refer the matter to his/her union representative who will discuss it with the Manager. At this point all disputes and replies must be recorded in the Record of Grievance book by the Manager or Union Representative and signed by both the parties. The Union Representative shall receive a copy.	(b) If a resolution of the grievance, dispute or claim is not achieved under subclause (1)(a) hereof, the employee concerned may refer the matter to their Union representative who will discuss it with the Manager. At this point all disputes and replies must be recorded in the Record of Grievance book by the Manager or Union Representative and signed by both the parties. The Union Representative shall receive a copy.
(c) If the matter is not satisfactorily resolved at subclause (1)(b) the Union Representative may discuss the matter with Senior Management or other officer nominated by the Manager to deal with such matters. Further comments should be added to the Record of Grievance Book when appropriate.	(c) If the matter is not satisfactorily resolved at subclause (1)(b) the Union Representative may discuss the matter with Senior Management or other officer nominated by the Manager to deal with such matters. Further comments should be added to the Record of Grievance Book when appropriate.
(d) If the matter is not resolved by the foregoing discussions the Union Representative shall notify his/her union and shall thenceforth leave the conduct of negotiations in the hands of the union. (The Union Representative may be employed by the union to continue negotiations).	(d) If the matter is not resolved by the foregoing discussions the Union Representative shall notify their Union and shall thenceforth leave the conduct of negotiations in the hands of the Union. (The Union Representative may be employed by the Union to continue negotiations).
(e) Where a matter has been referred to the union by the Union Representative the union shall promptly take all steps necessary under its rules and under the Industrial Relations Act for the resolution of this matter. Prior to raising the matter with the Industrial Relations Commission, the Union shall contact the Department's or Authority's, industrial relations branch, to try and resolve the dispute.	(e) Where a matter has been referred to the Union by the Union Representative the union shall promptly take all steps necessary under its rules and under the *Industrial Relations Act 1979* (WA) for the resolution of this matter. Prior to raising the matter with the Industrial Relations Commission, the Union shall contact the Department's or Authority's, industrial relations branch, to try and resolve the dispute.
(2) (a) Where any grievance, dispute or claim arises, the employer is entitled to raise the matter with the appropriate employees.	(2) (a) Where any grievance, dispute or claim arises, the employer is entitled to raise the matter with the appropriate employees.
(b) If a resolution of the grievance, dispute or claim is not achieved under subclause (2)(a) the employer shall refer the matter to the Union Representative.	(b) If a resolution of the grievance, dispute or claim is not achieved under subclause (2)(a) the employer shall refer the matter to the Union Representative.
(c) The Union Representative may discuss with the employee any grievance referred to him/her by the employer, and if the matter is not satisfactorily resolved, he/she may discuss the matter with the union.	(c) The Union Representative may discuss with the employee any grievance referred to them by the employer, and if the matter is not satisfactorily resolved, they may discuss the matter with the Union.
(d) If the matter is not resolved by the foregoing discussions the shop steward shall notify his/her union and shall thenceforth leave the conduct and negotiations in the hands of the union. (The Union Representative may be empowered by the union to continue	(d) If the matter is not resolved by the foregoing discussions the shop steward shall notify their Union and shall thenceforth leave the conduct and negotiations in the hands of the Union. (The Union Representative may be empowered by the Union to continue

negotiations). (e) Where a matter has been referred to the union by the Union Representative, the union shall promptly take the steps necessary under its rules and the Industrial Relations Act for a resolution of the matter. (3) Where any dispute cannot be resolved by negotiation or conciliation between the parties it is agreed that either party may refer the matter to the Western Australian Industrial Relations Commission. (4) Initial replies to all written grievances and disputes must be given within 24 hours.	negotiations). (e) Where a matter has been referred to the union by the Union Representative, the union shall promptly take the steps necessary under its rules and the *Industrial Relations Act 1979* (WA) for a resolution of the matter. (3) Where any dispute cannot be resolved by negotiation or conciliation between the parties it is agreed that either party may refer the matter to the Western Australian Industrial Relations Commission. (4) Initial replies to all written grievances and disputes must be given within 24 hours.
<u>40. - LEAVE TO ATTEND UNION BUSINESS</u> (1) The employer shall grant paid leave during working hours to an employee: (a) who is required to give evidence before any Industrial Tribunal; (b) who as a Union-nominated representative is required to attend negotiations and/or conferences between the Union and the employer. (c) when prior agreement between the Union and the employer has been reached for the officer to attend official Union meetings preliminary to negotiations or industrial hearings; (d) who as a Union-nominated representative is required to attend joint Union/management consultative committees or working parties. (2) The granting of leave pursuant to paragraph (a) of this subclause shall only be approved: (a) where an application for leave has been submitted by an employee a reasonable time in advance; (b) for the minimum period necessary to enable the Union business to be conducted or evidence to be given; (c) for those employees whose attendance is essential; (d) when the operation of the organisation is not being unduly affected and the convenience of the employer is not impaired. (3) (a) A leave of absence provided under this clause will be granted at the ordinary rate of pay; (b) the employer shall not be liable for any expenses associated with an employee attending the Union office on business;	<u>RENUMBERED TO CLAUSE 39</u>

(c) leave of absence provided under this clause shall include any necessary travelling time in normal working hours. (4) (a) Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for Union business. (b) The provisions of this clause shall not apply to special arrangements made between the parties which provide for unpaid leave for employees to conduct Union business. (5) The provisions of this clause shall not apply when an employee is absent from work without the approval of the employer.	
41. – DELETED	CLAUSE DELETED
42. - TRADE UNION TRAINING LEAVE (1) Subject to the provisions of this clause: (a) The employer shall grant paid leave of absence to employees who are nominated by their Union to attend short courses conducted by the Australian Trade Union Training Authority. (b) Paid leave of absence shall also be granted to attend similar courses or seminars as from time to time approved by agreement between the parties. (2) An employee shall be granted up to a maximum of five days' paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five days and up to ten days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten days. (3) (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime. (b) Where a public holiday or rostered day off (including a rostered day off as a result of working a 38 hour week) falls during the duration of a course, a day off in lieu of that day will not be granted. (4) Subject to subclause (3) of this clause shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course. (5) The granting of leave pursuant to the provisions of subclause (1) of this clause is subject to the operation of the organisation not being unduly affected and to the convenience of the employer. (6) (a) Any application by an employee shall be submitted to the employer for approval at least four weeks before the commencement of the course, provided	RENUMBERED TO CLAUSE 40 Change the reference to 'Australian Trade Union Training Authority' in subclause (1)(a) to 'Australian Trade Union Institute'.

that the employer may agree to a lesser period of notice. (b) All applications for leave shall be accompanied by a statement from the relevant Union indicating that the employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the Authority which is conducting the course. (7) A qualifying period of 12 months in government employment shall be served before an employee is eligible to attend courses or seminars of more than one-half day duration. An employer may, where special circumstances exist, approve an application to attend a course or seminar where an employee has less than 12 months' government service. (8) (a) The employer shall not be liable for any expenses associated with an employee's attendance at trade union training courses. (b) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.	
<u>43. - PAID LEAVE FOR ENGLISH LANGUAGE TRAINING</u> (1) Leave during normal working hours without loss of pay shall be granted to employees from a non-English speaking background, who are unable to meet standards of communication to advance career prospects, or who constitute a safety hazard or risk to themselves and/or fellow workers, or are not able to meet the accepted production requirements of that particular occupation or industry, to attend English training conducted by an approved and authorised Authority. The selection of employees for training will be determined by consultation between the employer and the appropriate Union(s). (2) Leave will be granted to enable employees selected to achieve an acceptable level or vocational English proficiency. In this respect the tuition content with specific aims and objectives incorporating the pertinent factors at subclause (3) hereof shall be agreed between the employer, the Union(s), and the Adult Migrant Education Service or other approved Authority conducting the training. (3) Subject to appropriate needs assessment participation in training will be on the basis of minimum of 100 hours per employee per year. The agreed desired proficiency level will take account of the vocational needs of an employee in respect of communication, safety, welfare, and productivity within his/her current position as well as those positions to which he/she may be considered for promotion or redeployment. It will also take account of issues in relation to training, retraining and multi-skilling, award restructuring, industrial relations and safety provisions, and equal opportunity employment legislation.	<u>RENUMBERED TO CLAUSE 41</u> <u>…</u> (3) Subject to appropriate needs assessment participation in training will be on the basis of minimum of 100 hours per employee per year. The agreed desired proficiency level will take account of the vocational needs of an employee in respect of communication, safety, welfare, and productivity within the employees' current position as well as those positions to which the employee may be considered for promotion or redeployment. It will also take account of issues in relation to training, retraining and multi-skilling, award restructuring, industrial relations and safety provisions, and equal opportunity employment legislation.

44. - ENTERPRISE FLEXIBILITY (1) Employers and employees covered by this award may establish/negotiate and reach agreement to apply to vary any provision of this award so as to make the enterprise or workplace operate more efficiently according to its particular needs. (2) To facilitate this process, each enterprise or workplace shall establish consultative mechanisms and procedures appropriate to the organisation comprising representatives of the employer and the employees. (3) Employees may seek advice from, or request to be represented by, the union party to this award during the negotiations. (4) Where agreement is reached at an enterprise or workplace and where giving effect to such agreement requires this award, as it applies at the enterprise or workplace, to be varied, an application to vary the award shall be made to the Commission. (5) A copy of the agreement shall be made available in writing to all employees at the enterprise or workplace and to the union party to this award. (6) The union shall not unreasonably oppose the application to vary the award to give effect to the terms of the agreement. (7) When this award is varied to give effect to an agreement made pursuant to this clause the variation shall become a schedule to this award and the variation shall take precedence over any provision of this award to the extent of any expressly identified inconsistency. (8) The agreement must meet the following requirements to enable the Commission to vary this award to give effect to it - (a) that the purpose of the agreement is to make the enterprise or workplace operate more efficiently according to its particular needs; (b) that the majority of employees covered by the agreement genuinely agree to it; (c) that the award variation necessitated by the agreement meets the requirements of the Industrial Relations Act, 1979 and relevant Wage Fixing Principles. (9) Nothing in this clause shall be taken as limiting the right of any party to apply to give effect to an enterprise agreement under any other provisions of the Industrial Relations Act, 1979.	CLAUSE DELETED
APPENDIX - RESOLUTION OF DISPUTES REQUIREMENTS (1) This Appendix is inserted into the award/industrial agreement as a result of legislation which came into effect on 16 January 1996 (Industrial Relations	APPENDIX DELETED

<table>
<tr><td>Legislation Amendment and Repeal Act 1995) and further varied by legislation which came into effect on 23 May 1997 (Labour Relations Legislation Amendment Act 1997).

(2) Any dispute or grievance procedure in this award/industrial agreement shall also apply to any questions, disputes or difficulties which may arise under it.

(3) With effect from 22 November 1997 the dispute or grievance procedures in this award/industrial agreement is hereby varied to include the requirement that persons involved in the question, dispute or difficulty will confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.</td><td></td></tr>
<tr><td>SCHEDULE A - NAMED UNION PARTY

United Voice WA</td><td>SCHEDULE A - NAMED UNION PARTY

United Workers Union (WA)</td></tr>
<tr><td>SCHEDULE B - RESPONDENTS

The Minister for Primary Industry
The Minister for Community Development
The Minister for Education
The Minister for Health
The Minister for Labour Relations
The Minister for Lands
The Minister for Environment
The Minister for Police
The Minister for Planning
The Minister for Transport
The Minister for Works
The Minister for Water Resources
The Minister for Aboriginal Affairs
The Attorney General
Commissioner for Main Roads
The State Government Printer
State Government Insurance Commission
Western Australian Fire Brigades Board
Western Australian Museum Board</td><td>SCHEDULE B – RESPONDENTS

Department of Primary Industry and Regional Development
Department of Communities
Department of Education
Department of Health
Department of Premier and Cabinet
Department of Water and Environmental Regulation
Department of Finance
Department of Treasury
The Minister for Lands
Department of Local Government Sports and Cultural Industries
Department of Fire and Emergency Services
Department of Transport
Department of Planning Lands and Heritage
Department of Justice
Western Australia Police Force
Commissioner of Main Roads
State Law Publisher
Insurance Commission of Western Australia</td></tr>
<tr><td>APPENDIX - S.49B - INSPECTION OF RECORDS REQUIREMENTS

(1) Where this award, order or industrial agreement empowers a representative of an organisation of employees party to this award, order or industrial agreement to inspect the time and wages records of an employee or former employee, that power shall be exercised subject to the Industrial Relations (General) Regulations 1997 (as may be amended from time to time) and the following:

(a) The employer may refuse the representative access to the records if: -

(i) the employer is of the opinion</td><td>APPENDIX DELETED</td></tr>
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that access to the records by the representative of the organisation would infringe the privacy of persons who are not members of the organisation; and (ii) the employer undertakes to produce the records to an Industrial Inspector within 48 hours of being notified of the requirement to inspect by the representative. (b) The power of inspection may only be exercised by a representative of an organisation of employees authorised for the purpose in accordance with the rules of the organisation. (c) Before exercising a power of inspection, the representative shall give reasonable notice of not less than 24 hours to an employer.	

2025 WAIRC 00178

REVIEW OF THE CATERING EMPLOYEES AND TEA ATTENDANTS (GOVERNMENT) AWARD 1982 PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE THURSDAY, 20 MARCH 2025

FILE NO/S APPL 41 OF 2023

CITATION NO. 2025 WAIRC 00178

Result Award varied

Representation

Ms C Fuentes Beltran and Ms A Dyer on behalf of the named employer respondents to the Award

Ms E Orman on behalf of the United Workers Union (WA)

Order

HAVING heard from Ms C Fuentes Beltran and Ms A Dyer on behalf of the named employer respondents to the Award, and Ms Orman on behalf of the United Workers Union, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA)*,* the Commission hereby orders –

THAT the *Catering Employees and Tea Attendants (Government) Award 1982* be varied in accordance with the attached Schedule.

(Sgd.) R COSENTINO,

[L.S.] Senior Commissioner.

SCHEDULE

Current Award	**Variations**

Catering Employees and Tea Attendants (Government) Award 1982	Catering Employees and Tea Attendants (Government) Award
1. - TITLE This award shall be known as the Catering Employees and Tea Attendants (Government) Award 1982, and replaces Award No. 21 of 1972, as varied.	1. – TITLE This award shall be known as the Catering Employees and Tea Attendants (Government) Award.
1B. - MINIMUM ADULT AWARD WAGE (1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause. (2) The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38-hour week is $918.60 per week. The minimum adult award wage for full-time employees aged 21 or more working under awards that provide for other than a 38-hour week is calculated as follows: divide $918.60 by 38 and multiply by the number of ordinary hours prescribed for a full-time employee under the award. The minimum adult award wage is payable from the beginning of the first pay period commencing on or after 1 July 2024. (3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case decisions. (4) Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by results, shall not be paid less than pro rata the minimum adult award wage according to the hours worked. (5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*. (6) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*. (7) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage. (8) Subject to this clause the minimum adult award wage shall – (a) Apply to all work in ordinary hours. (b) Apply to the calculation of overtime and	NO VARIATIONS

all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award. (9) Minimum Adult Award Wage The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2024 State Wage order. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage. (10) Adult Apprentices (a) Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a fulltime apprentice aged 21 years or more working under an award that provides for a 38-hour week is $762.80 per week. (b) The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38-hour week is calculated as follows: divide $762.80 by 38 and multiply by the number of ordinary hours prescribed for a full-time apprentice under the award. (c) The minimum adult apprentice wage is payable from the beginning of the first pay period commencing on or after 1 July 2024. (d) Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked. (e) The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on superannuation and during any period of paid leave prescribed by this award. (f) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.	
<u>2. - ARRANGEMENT</u> 1. Title 1B. Minimum Adult Award Wage 2. Arrangement	<u>2. – ARRANGEMENT</u> PART 1 – APPLICATION AND OPERATION 1. Title 1B. Minimum Adult Award Wage

3. Area 4. Scope 5. Term 6. Definitions 7. Contract of Service 8. Hours 9. Additional Rates for Ordinary Hours 10. Overtime 11. Casual Employees 12. Part-Time Employees 13. Meal Breaks 14. Meal Money 15. Sick Leave 16. Compassionate Leave 17. Maternity Leave 18. Public Holidays 19. Annual Leave 20. Long Service Leave 21. Payment of Wages 22. Wages 23. Jury Service 24. Apprentices 25. Bar Work 26. Higher Duties 27. Uniforms and Laundering 28. Protective Clothing 29. Employee's Equipment 30. Travelling Facilities 31. Record 32. Roster 33. Change and Rest Rooms 34. First Aid Kit 35. Posting of Award and Union Notices 36. Deleted 37. Breakdowns 38. District Allowance 39. Grievance Procedures 40. Leave to Attend Union Business 41. Deleted 42. Trade Union Training Leave 43. Paid Leave for English Language Training 44. Enterprise Flexibility Appendix - Resolution of Disputes Requirements Schedule A - Named Union Party Schedule B - Respondents Appendix - S.49B - Inspection Of Records Requirements	2. Arrangement 3. Area 4. Scope 5. Definitions PART 2 – CONTRACT OF EMPLOYMENT 6. Contract of Employment 7. Termination of Employment and Stand Down PART 3 – HOURS OF WORK 8. Hours 9. Additional Rates for Ordinary Hours 10. Overtime 11. Casual Employees 12. Part-Time Employees 13. Meal Breaks 14. Meal Allowance PART 4 – LEAVE AND PUBLIC HOLIDAYS 15. Personal Leave 16. Bereavement Leave 17. Parental Leave 17A. Family and Domestic Violence Leave 18. Public Holidays 19. Annual Leave 20. Long Service Leave PART 5 – WAGES, ALLOWANCES AND FACILITIES 21. Payment of Wages 22. Wages 23. Jury Service 24. Apprentices 25. Bar Work 26. Higher Duties 27. Uniforms and Laundering 28. Protective Clothing 29. Employee's Equipment 30. Travelling Facilities PART 6 – OTHER MATTERS 31. Records 32. Rosters 33. Change and Rest Rooms 34. First Aid Kit 35. Posting of Award and Union Notices 36. Breakdowns 37. District Allowance 38. Dispute Resolution Procedures 39. Leave to Attend Union Business 40. Trade Union Training Leave 41. Paid Leave for English Language Training Schedule A – Named Union Party Schedule B - Respondents
3. - AREA This award shall have effect throughout the State of Western Australia.	NO VARIATIONS
4. - SCOPE This award shall apply to all employees employed in the calling described in Clause 22. - Wages of this award and who are employed by the respondents to this award in catering establishments and as Tea Attendants, as defined in Clauses 6. - Definitions and 23. - Tea Attendants of this award, provided	4. – SCOPE This award shall apply to all employees employed in the calling described in Clause 22. – Wages of this award and who are employed by the respondents to this award in catering establishments and as Tea Attendants, as defined in Clauses 5. – Definitions and 24.- Apprentices of this award, provided that

that this award shall not apply to any employee who at the date of this award is covered by any other award registered or issued under the provisions of the Industrial Arbitration Act, 1979.	this award shall not apply to any employee who at the date of this award is covered by any other award registered or issued under the provisions of the *Industrial Relations Act 1979* (WA).
5. - TERM The term of this award shall be for a period of one year as from the beginning of the first pay period commencing on or after the 19th day of November, 1982.	CLAUSE DELETED
6. - DEFINITIONS (1) "Catering Establishment" shall mean any meal room, dining room, coffee shop, tea shop, or cafeteria, and includes any place, building, or part thereof, in or from which food is sold or served for consumption on the premises or elsewhere. (2) "Bar Attendant" shall mean an employee over the age of 18 years who serves liquor for sale from behind a bar counter. (3) "Chef" shall mean an employee who is a "Qualified Cook", (as defined in subclause (4) hereof), and who is appointed as such by the employer. (4) "Qualified Cook" shall mean an employee who has completed and can produce appropriate documentary evidence to their employer to the effect that the employee has successfully completed an apprenticeship in cooking at an approved or recognised school or college, or who can provide documentary evidence of having served at least six years in Her Majesty's Armed Forces in the classification of Cook. (5) "Cook Employed Alone" shall mean an employee who is employed when no other cook is employed during the employee's shift. (6) "Cashier" shall mean an employee who is principally engaged upon receiving monies in a dining room or restaurant area. (7) "Daily Spread of Shift" shall mean the time which elapses from the employee's actual starting time to the employee's actual finishing time for the day or shift. (8) "Tea Attendant" shall mean an employee engaged either wholly or for the major and substantial part of working time making and/or servicing morning and/or afternoon teas, washing up and other duties in connection with such work.	5. – DEFINITIONS (1) "Bar Attendant" shall mean an employee over the age of 18 years who serves liquor for sale from behind a bar counter. (2) "Cashier" shall mean an employee who is principally engaged upon receiving payment in a dining room or restaurant area. (3) "Casual employee" shall mean an employee engaged on an hourly basis for a period not exceeding four weeks in any workplace. (4) "Catering Establishment" shall mean any meal room, dining room, coffee shop, tea shop, canteen, restaurant or cafeteria, and includes any place, building, or part thereof, in or from which food is sold or served for consumption on the premises or elsewhere. (5) "Chef" shall mean an employee who is a "Qualified Cook", (as defined in subclause (9) hereof), and who is appointed as such by the employer. (6) "Cook Employed Alone" shall mean an employee who is employed when no other cook is employed during the employee's shift. (7) "Daily Spread of Shift" shall mean the time which elapses from the employee's actual starting time to the employee's actual finishing time for the day or shift. (8) "Part time employee" shall mean an employee engaged to work for not less than three or more than seven ordinary rostered hours per day, and not less than 15 or more than 35 hours each week. (9) "Qualified Cook" shall mean an employee who has completed and can produce appropriate documentary evidence to their employer to the effect that the employee has successfully completed an apprenticeship in cooking at an approved or recognised school or college, or who can provide documentary evidence of having served at least six years in the Armed Forces in the classification of Cook. (10) "Tea Attendant" shall mean an employee engaged either wholly or for the major and substantial part of working time making and/or servicing morning and/or afternoon teas, washing up and other duties in connection with such work.
	Insert the following as a heading before clause 6 'Contract of Employment':

	PART 2 – CONTRACT OF EMPLOYMENT
7. - CONTRACT OF SERVICE (1) Except for casual employees the contract of service shall be on a weekly basis, provided that one week's notice of termination may be given on either side on any working day, or in the event of such notice not being given by the payment by the employer or the forfeiture by the employee as the case may be, of one week's pay. (2) This shall not affect the right of the employer to dismiss any employee without notice for misconduct and in such cases wages shall be paid up to the time of dismissal only. (3) (a) The foregoing provisions shall not affect the right of an employer to stand down employees without pay during all vacation periods when no work is available. In respect to the Tertiary Education Institutions the vacation periods will extend to include those weeks which are calendarised as non-teaching weeks and not requiring student attendance on campus. (b) The employer shall advise the employee before the stand-down period has commenced the date of resumption of work. Employees who fail to advise the employer at least 48 hours before the date of resumption that they are ready, willing and available for work shall be deemed to have terminated their contract of employment. (4) (a) An employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training, including work which is incidental or peripheral to the employee's main tasks or functions, provided that such duties are not designed to promote de-killing. (b) An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been properly trained in the use of such tools and equipment. (c) Any direction issued by an employer pursuant to paragraphs (a) and (b) of this subclause shall be consistent with the provisions of the Occupational Health, Safety and Welfare Act 1984-1987 as amended.	6. - CONTRACT OF EMPLOYMENT (1) An employee may be employed on a full time, part time or casual basis. (2) (a) An employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training, including work which is incidental or peripheral to the employee's main tasks or functions, provided that such duties are not designed to promote de-skilling. (b) An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been properly trained in the use of such tools and equipment. (c) Any direction issued by an employer pursuant to paragraphs (a) and (b) of this subclause shall be consistent with the provisions of the *Work Health and Safety Act 2020* (WA) as amended.
	7. TERMINATION OF EMPLOYMENT AND STAND DOWN (1) In order to terminate the employment of a full time or part time employee the employer must give the

employee the following notice in writing:

Period of continuous service with the employer	**Minimum Period of Notice**
Not more than 1 year	At least 1 week
More than 1 year but less than 3 years	At least 2 weeks
More than 3 years but less than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

(2) An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer, is entitled to one week's notice in addition to the notice prescribed in clause 7(1).

(3) Payment in lieu of the notice prescribed in clause 7(1) and (2) must be made if the prescribed notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu.

(4) The period of notice in this subclause does not apply to those employees who are exempt from receiving notice under Subdivision A of Division 11 of Part 2-2 of the *Fair Work Act 2009* (Cth), as amended from time to time.

(5) For the purpose of this clause an employee's continuity of service has the same meaning as prescribed in section 22 of the *Fair Work Act 2009* (Cth).

(6) A full time or part time employee must give the employer one week's notice of termination.

(7) Nothing in this clause shall affect the right of the employer to dismiss any employee without notice for misconduct and in such cases wages shall be paid up to the time of dismissal only.

(8) (a) The provisions of this clause shall not affect the right of an employer to stand down employees without pay during all vacation periods when no work is available.

(b) The employer shall advise the employee before the stand-down period has commenced the date of resumption of work.

Insert the following as a heading before clause 8 'Hours':

PART 3 – HOURS OF WORK

8. - HOURS	NO VARIATION
(1) The ordinary hours of work shall be an average of 38 per week provided that: (a) In no case are more than forty ordinary hours worked in any week; (b) No more than eight ordinary hours are worked in any one day; (c) Ordinary hours are worked on not more than five days in any week; (d) Ordinary hours are worked within a daily spread of 11 hours. (2) Except as provided in subclause (4) hereof, employees shall not be required to work ordinary hours on more than 19 days in each four week roster cycle. (3) Employee shall be rostered such that in each four week roster cycle, rostered days off are consecutive on at least two occasions. (4) Notwithstanding the provisions of subclause (2) hereof, one rostered day off in each four week roster cycle may be accumulated to a maximum of ten days in any one year. Such accumulated rostered days off may be taken at a time mutually convenient to the employer and the employee.	
9. - ADDITIONAL RATES FOR ORDINARY HOURS (1) A full-time or part-time employee who is required to work any ordinary hours between 7.00 pm and 7.00 am Monday to Friday, inclusive, shall be paid, in addition to the appropriate wage set out in Clause 22. - Wages, an additional payment equivalent to 15% of the wages paid for the time so worked with a minimum payment of $3.65 per day. (2) An employee who is required to work any of his ordinary hours on any day in more than one period of employ and other than for meal breaks as prescribed by Clause 13. - Meal Breaks of this award, shall be paid an allowance of $3.20 per day, for such broken work period worked. (3) All work performed during ordinary hours on a Saturday shall be paid at the rate of time and one half. (4) All work performed during ordinary hours on a Sunday shall be paid at the rate of double time. (5) Provided that any employee who was receiving a greater rate of penalty for Saturday and/or Sunday work at the 29 October 1991 shall continue to receive that greater rate of benefit. (6) Where an employee's rostered hours of duty in any day of the weekend are extended by an early start or a late finish the weekend rates as the case may be shall be paid for such additional time worked in addition to any overtime payable under Clause 10. -	9. - ADDITIONAL RATES FOR ORDINARY HOURS (1) A full-time or part-time employee who is required to work any ordinary hours between 7.00 pm and 7.00 am Monday to Friday, inclusive, shall be paid, in addition to the appropriate wage set out in Clause 22. - Wages, an additional payment equivalent to 15% of the wages paid for the time so worked. (2) An employee who is required to work any of their ordinary hours on any day in more than one period of employ and other than for meal breaks as prescribed by Clause 13. - Meal Breaks of this award, shall be paid an allowance of $4.50 per day, for such broken work period worked. (3) All work performed during ordinary hours on a Saturday shall be paid at the rate of time and one half. (4) All work performed during ordinary hours on a Sunday shall be paid at the rate of double time. (5) Provided that any employee who was receiving a greater rate of penalty for Saturday and/or Sunday work at the 29 October 1991 shall continue to receive that greater rate of benefit. (6) Where an employee's rostered hours of duty in any day of the weekend are extended by an early start or a late finish the weekend rates as the case may be shall be paid for such additional time worked in addition to any overtime payable under Clause 10. - Overtime of this Award.

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<u>10. - OVERTIME</u>

(1) All work performed at a time when according to an employee's roster that employee is not rostered to work, be overtime. Without limiting the generality of the foregoing all work done outside the daily spread of 11 hours, or in excess of eight hours in one day, or in excess of 40 hours in one week, or in excess of 152 hours in a four week roster cycle shall be overtime provided that where rostered days off are accumulated pursuant to Clause 8(4), 160 ordinary hours may be worked in a four week roster cycle in which one rostered day off is accumulated to be taken at a later, mutually convenient time.

(2) Subject to the provisions of subclause (3) hereof, all overtime worked between Monday to Friday, both inclusive, and prior to 12 noon on a Saturday shall be paid for at the rate of time and a half for the first two hours and double time thereafter. All overtime worked after 12 noon on a Saturday and all day on a Sunday, shall be paid for at the rate of double time.

(3) All work done on an employee's rostered day off shall be paid for at the rate of double time with a minimum payment as for three hours' work.

(4) Notwithstanding anything contained in this award:

(a) an employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirements;

(b) no organisation party to this award or employee or employees covered by this award, shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of this subclause.

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<u>NO VARIATION</u>

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<u>11. - CASUAL EMPLOYEES</u>

(1) A casual employee shall mean an employee engaged on an hourly contract of service.

(2) Casual employees shall not be engaged for less than two consecutive hours per time.

(3) Casual employees shall be paid at the rate of time and a half, provided that this rate shall be increased to double time and a half for all work performed on the holidays referred to in subclause (1)(a) of Clause 18. - Public Holidays of this award.

(4) The provisions of clauses

9. - Additional Rates for Ordinary Hours,
15. - Sick Leave,
16. - Compassionate Leave,
17. - Maternity Leave,
18. - Public Holidays,
19. - Annual leave and
20. - Long Service Leave

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<u>11. – CASUAL EMPLOYEES</u>

(1) Casual employees shall not be engaged for less than two consecutive hours per time.

(2) Casual employees shall be paid at the rate double time and a half for all work performed on the public holidays referred to in subclause (1)(a) of Clause 18. – Public Holidays of this award.

(3) The provisions of Clause 9. – Additional Rates for Ordinary Hours and Clause 19 – Annual Leave, shall not apply to a casual employee.

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shall not apply to a casual employee.	
12. - PART-TIME EMPLOYEES (1) A part-time employee shall mean an employee engaged on a weekly contract of service, who works regularly from week to week for not less than three or more than seven ordinary hours per day, and not less than 15 or more than 35 hours each week over any five days. (2) Part-time employees shall be paid 15% in addition to the rates prescribed in Clause 22. - Wages. The provisions of Clause 9. - Additional Rates for Ordinary Hours shall also apply to part-time employees. (3) All work performed at times when, according to an employee's roster, that employee is not rostered to work shall be overtime. Without limiting the generality of the foregoing, all time worked by a part-time employee beyond seven ordinary hours per day, 35 ordinary hours per week and/or five days per week, shall be overtime and paid for at the appropriate overtime rates prescribed in Clause 10. - Overtime of this award.	12. – PART-TIME EMPLOYEES (1) The provisions of Clause 9. – Additional Rates for Ordinary Hours shall also apply to part-time employees. (2) All work performed at times when, according to an employee's roster, that employee is not rostered to work shall be overtime. Without limiting the generality of the foregoing, all time worked by a part-time employee beyond seven ordinary hours per day, 35 ordinary hours per week and/or five days per week, shall be overtime and paid for at the appropriate overtime rates prescribed in Clause 10. – Overtime of this award.
13. - MEAL BREAKS (1) Every employee shall be entitled to a meal break of not less than one half hour nor more than one hour, after not more than five hours of work. Where it is not possible for the employer to grant a meal break on any day, the said meal break shall be treated as time worked and the employee shall be paid at the rate applicable to the employee at the time such meal break is due, plus 50 per cent of the ordinary hourly rate applying to such employee, until such time as the employee is released for a meal. (2) In addition to breaks for a meal, there may be one other break of at least two hours during each shift. Such break of two hours may include a meal break.	13. – MEAL BREAKS (1) Every employee shall be entitled to a meal break of not less than one half hour nor more than one hour, after not more than five hours of work. Where it is not possible for the employer to grant a meal break on any day, the said meal break shall be treated as time worked and the employee shall be paid at the rate applicable to the employee at the time such meal break is due, plus 50% of the ordinary hourly rate applying to such employee, until such time as the employee is released for a meal. (2) In addition to breaks for a meal, there may be one other break of at least two hours during each shift. Such break of two hours may include a meal break.
14. - MEAL MONEY When an employee is required to work overtime for more than one hour on any day, he or she will either be supplied with a substantial meal by the employer or be paid $12.65 meal money.	14. – MEAL ALLOWANCE When an employee is required to work overtime for more than one hour on any day, the employee will either be supplied with a substantial meal by the employer or be paid $16.53 meal allowance.
	Insert the following as a heading before clause 15 'Personal Leave': PART 4 – LEAVE AND PUBLIC HOLIDAYS
15. - SICK LEAVE (1) (a) An employee other than a casual employee shall be entitled to payment for non-attendance on the grounds of personal ill health or injury of one sixth of a week's pay for each completed month of service. (b) Payment hereunder may be adjusted at the	15. – PERSONAL LEAVE Entitlement to paid personal leave: (1) An employee, other than a casual employee, is entitled for each year of service to paid personal leave for the number of hours the employee is required ordinarily to work in a 2 week period

end of each accruing year, or at the time the employee leaves the service of the employer, in the event of the employee being entitled by service subsequent to the sickness in that year to a greater allowance than that made at the time the sickness occurred. (2) The unused portion of the entitlement prescribed in paragraph (a) hereof in any accruing year shall be allowed to accumulate and may be availed of in the next or any succeeding year. (3) In order to acquire entitlement to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of their inability to attend for work, the nature of their illness or injury and the estimated duration of the absence. Provided that such advice other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence. (4) No employee shall be entitled to the benefit of this clause unless they produce proof to the satisfaction of the employer or representative of such sickness provided that the employer shall not be entitled to a medical certificate for absences of less than three consecutive working days unless the total of such absences exceeds five days in any one accruing year. (5) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when the employee is absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave. (b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to his/her place of residence or a hospital as a result of personal ill health or injury for a period of seven consecutive days or more and produces a certificate from a registered medical practitioner that states that the employee was so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if unable to attend for work on the working day next following his annual leave. (c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day. (d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave	during that year. (2) A year of service excludes periods of unpaid leave. (3) Paid personal leave accrues pro rata on a weekly basis. (4) The entitlement to personal leave is cumulative, and any leave not taken in one year is carried over to the next year. (5) An employee may take paid personal leave if the employee is unable to work – (a) because of a personal illness or injury affecting the employee; or (b) to provide care or support to a member of the employee's family or household because of (i) a personal illness or injury; or (ii) an unexpected emergency Notice and Evidence (6) In order to acquire entitlement to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of their inability to attend for work and the estimated duration of the absence. Provided that such advice other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence. (7) No employee shall be entitled to the benefit of this clause unless they provide the employer with evidence that would satisfy a reasonable person of the entitlement. Provided that the employer shall not be entitled to a medical certificate for absences of less than three consecutive working days unless the total of such absences exceeds five days in any one accruing year. (8) Replacement of personal leave during annual leave: (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when the employee is absent on annual leave and an employee may apply for and the employer shall grant paid personal leave in place of paid annual leave. (b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to their place of residence or a hospital as a result of personal ill health or injury for a period of seven consecutive days or more and produces a certificate from a registered medical practitioner that states that the employee was so confined. Provided that the provisions of this

equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 19. - Annual Leave. (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 19. - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave. (6) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation Act nor to employees whose illness or injury is the result of the employee's own misconduct.	paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (6) of this clause if unable to attend for work on the working day next following their annual leave. (c) Replacement of paid annual leave by paid personal leave shall not exceed the period of paid personal leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day. (d) Where paid personal leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid personal leave is hereby replaced by the paid personal leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 19. – Annual Leave. (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 19. – Annual Leave shall be deemed to have been paid with respect to the replaced annual leave. (9) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the *Workers' Compensation and Injury Management Act 2023* (WA) nor to employees whose illness or injury is the result of the employee's own misconduct. (10) Entitlement to unpaid personal leave: An employee, including a casual employee, is entitled to unpaid personal leave of up to 2 days in accordance with the *Minimum Conditions of Employment Act 1993* (WA).
<u>16. - COMPASSIONATE LEAVE</u> (1) An employee shall, on the death within Australia of a spouse, de facto spouse, father, mother, brother, sister, child or stepchild be entitled on notice of leave up to and including the day of the funeral of such relation and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the employee to two ordinary working days. Proof of such death shall be furnished by the employee to the satisfaction of the employer. (2) Provided that payment in respect of compassionate leave is to be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned	<u>16. – BEREAVEMENT LEAVE</u> (1) An employee shall, on the death of a member of the employee's family or household (as defined in the *Minimum Conditions of Employment Act 1993* (WA)), be entitled to paid bereavement leave of up to 2 days. (2) The 2 days need not be consecutive. (3) An employee who claims to be entitled to paid bereavement leave is to provide the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to - (a) the death that is the subject of the leave sought; and

would have been off duty in accordance with his roster, or on long service leave, annual leave, sick leave, worker's compensation, leave without pay or on a public holiday.	(b) the relationship of the employee to the deceased person.
<u>17. - MATERNITY LEAVE</u> (1) Eligibility for Maternity Leave An employee who becomes pregnant shall, upon production to her employer of a certificate from a duly qualified medical practitioner stating the presumed date of her confinement, be entitled to maternity leave provided that she has had not less than 12 months' continuous service with that employer immediately preceding the date upon which she proceeds upon such leave. For the purposes of this clause: (a) An employee shall include a part-time employee but shall not include an employee engaged upon casual or seasonal work. (b) Maternity leave shall mean unpaid maternity leave. (2) Period of Leave and Commencement of Leave (a) Subject to subclauses (3) and (6) hereof, the period of maternity leave shall be for an unbroken period of from 12 to 52 weeks and shall include a period of six weeks' compulsory leave to be taken immediately before the presumed date of confinement and a period of six weeks' compulsory leave to be taken immediately following confinement. (b) An employee shall, not less than 10 weeks prior to the presumed date of confinement, give notice in writing to her employer stating the presumed date of confinement. (c) An employee shall give not less than four weeks' notice in writing to her employer of the date upon which she proposes to commence maternity leave, stating the period of leave to be taken. (d) An employee shall not be in breach of this order as a consequence of failure to give the stipulated period of notice in accordance with paragraph (c) hereof if such failure is occasioned by the confinement occurring earlier than the presumed date. (3) Transfer to a Safe-Job Where in the opinion of a duly qualified medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the	<u>17. – PARENTAL LEAVE</u> Parental leave is as provided for in accordance with Division 5 of Part 2-2 of *the Fair Work Act 2009* (Cth). <u>17A. FAMILY AND DOMESTIC VIOLENCE LEAVE</u> Family and domestic violence leave is as provided for in Division 7 of Part 2-2 of the *Fair Work Act 2009* (Cth) and the *Minimum Conditions of Employment Act 1993* (WA).

conditions attaching to that job until the commencement of maternity leave.

If the transfer to a safe job is not practicable, the employee may, or the employer may require the employee to, take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as maternity leave for the purposes of subclauses (7), (8), (9) and (10) hereof.

(4) Variation of Period of Maternity Leave

(a) Provided the addition does not extend the maternity leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be lengthened.

(b) The period of leave may, with the consent of the employer, be shortened by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be shortened.

(5) Cancellation of Maternity Leave

(a) Maternity leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee terminates other than by the birth of a living child.

(b) Where the pregnancy of an employee then on maternity leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that she desires to resume work.

(6) Special Maternity Leave and Sick Leave

(a) Where the pregnancy of an employee not then on maternity leave terminates after 28 weeks other than by the birth of a living child then -

(i) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work, or

(ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a duly qualified medical practitioner certifies as necessary before her return to work.

(b) Where an employee not then on maternity leave suffers illness related to her pregnancy, she may take such paid sick leave as to which she is then entitled and such further unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed 52 weeks.

(c) For the purposes of subclauses (7), (8) and (9) hereof, maternity leave shall include special maternity leave.

(d) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (3), to the position she held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which she is capable of performing, she shall be entitled to a position as nearly comparable in status and salary or wage to that of her former position.

(7) Maternity Leave and Other Leave Entitlements

Provided the aggregate of leave including leave taken pursuant to subclauses (3) and (6) hereof does not exceed 52 weeks.

(a) An employee may, in lieu of or in conjunction with maternity leave, take any annual leave or long service leave or any part thereof to which she is then entitled.

(b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during her absence on maternity leave.

(8) Effect of Maternity Leave on Employment

Notwithstanding any award, or other provision to the contrary, absence on maternity leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of the award.

(9) Termination of Employment

(a) An employee on maternity leave may terminate her employment at any time during the period of leave by notice given in accordance with this award.

(b) An employer shall not terminate the employment of an employee on the ground of her pregnancy or of her absence on maternity leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected. (10) Return to Work After Maternity Leave (a) An employee shall confirm her intention of returning to her work by notice in writing to the employer given not less than four weeks prior to the expiration of her period of maternity leave.	
<u>18. - PUBLIC HOLIDAYS</u> (1) (a) The following days or the days observed in lieu shall, subject as hereinafter provided be allowed as holidays without deduction of pay namely, New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in the subclause. (b) When any of the days mentioned in paragraph (a) hereof falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday, and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday. (2) Whenever any of the days referred to in subclause (1)(a) hereof falls on an employee's ordinary working day and the employee is not required to work on such a day, the employee shall be paid for the ordinary hours the employee would have worked on such day had it not been a holiday. Where an employee's rostered day off coincides with any of the holidays referred to in subclause (1)(a) hereof, such employee shall receive one day's additional pay at ordinary rates from the employer. (3) Any employee required to work on a holiday shall be paid for the time worked at the rate of double time and one half. (4) When an employee is off duty owing to leave without pay, any holiday falling during such absence shall not be treated as a paid holiday. Where the employee is on duty or is available on the whole of the working day immediately preceding a holiday or resumes duty or is available on the whole of the working day immediately following a holiday, as prescribed in this clause, the employee shall be entitled to a paid holiday on all such holidays. (5) Whereas -	<u>18. – PUBLIC HOLIDAYS</u> (1) (a) The following days are recognised as public holidays for the purpose of this Award: New Year's Day, Australia Day, Good Friday, Easter Sunday, Easter Monday, Anzac Day, Labour Day, Western Australia Day, Sovereign's Birthday, Christmas Day and Boxing Day. (b) An employee is entitled to be absent from work on a day or part of a day that is a public holiday for the purpose of this award, or a public holiday as defined in the *Minimum Conditions of Employment Act 1993* (WA). (c) When any of the days mentioned in paragraph (a) hereof other than Easter Sunday falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday, and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday. (2) Whenever any of the days referred to in subclause (1)(a) hereof falls on an employee's ordinary working day and the employee is not required to work on such a day, the employee shall be paid for the ordinary hours the employee would have worked on such day had it not been a holiday. Where an employee's rostered day off coincides with any of the holidays referred to in subclause (1)(a) hereof, such employee shall receive one day's additional pay at ordinary rates from the employer. (3) The employer may request that an employee work on a day or part of a day that is a public holiday if the request is reasonable. (4) If the employer makes a request, the employee may refuse the request if — (a) the request is not reasonable; or (b) the refusal is reasonable. (5) In determining whether a request or refusal is

(a) a day is proclaimed as a public holiday or as a public half-holiday under section 7 of the Public and Bank Holidays Act, 1972; and (b) that proclamation does not apply throughout the State or to the metropolitan area of the State, that day shall be a whole holiday or, as the case may be, a half holiday for the purpose of this award within the district or locality specified in the proclamation.	reasonable, the following must be taken into account — (a) the nature and conduct of the employer's business or operations; (b) the nature of the employee's work; (c) the employee's personal circumstances, including family responsibilities (d) whether the employee could reasonably expect that the employer might request work on the public holiday; (e) whether the employee is entitled to receive overtime payments, penalty rates or other compensation (including compensation in the form of an annualised salary) for, or a level of remuneration that reflects an expectation of, work on the public holiday; (f) the type of employment of the employee (for example, whether full-time, part-time, casual or shift work); (g) the amount of notice in advance of the public holiday given (i) by the employer when making the request; or (ii) by the employee when refusing the request. (6) Any employee required to work on a public holiday shall be paid for the time worked at the rate of double time and one half. (7) When an employee is off duty owing to leave without pay, any public holiday falling during such absence shall not be treated as a paid public holiday. Where the employee is on duty or is available on the whole of the working day immediately preceding a public holiday or resumes duty or is available on the whole of the working day immediately following a public holiday, as prescribed in this clause, the employee shall be entitled to a paid public holiday on all such public holidays. (8) Where – (a) a day is proclaimed as a public holiday or as a public half-holiday under section 7 of the *Public and Bank Holidays Act 1972* (WA); and (b) that proclamation applies either throughout the State or within a district or locality as specified in the proclamation; that day shall be a whole holiday or, as the case may be, a half holiday for the purpose of this award within the district or locality specified in the proclamation.
19. - ANNUAL LEAVE (1) Except as hereinafter provided, a period of four consecutive weeks' leave with payment of ordinary wages as prescribed shall be allowed annually to an employee by the employer after a period of twelve months' continuous service with such employer. (2) "Ordinary wages" for an employee shall mean the	19. – ANNUAL LEAVE (1) An employee, other than a casual employee, is entitled for each year of service to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year. (2) Annual leave accrues pro rata on a weekly basis.

rate of wage including service pay the employee has received for the greatest proportion of the calendar month prior to his taking the leave.

(3) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day being an ordinary working day for each such holiday observed as aforesaid.

(4) If after one month's continuous service in any qualifying twelve monthly period an employee lawfully terminates his/her employment or the employment is terminated by the employer through no fault of the employee, the employee shall be paid 2.92 hours' pay at the ordinary rate of wage in respect of each completed week of continuous service in that qualifying period.

(5) In addition to any payment to which the employee may be entitled under subclause (4) of this clause, an employee whose employment terminates after he/she has completed a twelve monthly qualifying period and who has not been allowed leave prescribed under this award in respect of that qualifying period, shall be given payment in lieu of that leave unless:-

(a) the employee has been justifiably dismissed for misconduct; and

(b) the misconduct for which the employee has been dismissed occurred prior to the completion of that qualifying period.

(6) An employee may be rostered off and granted annual leave with payment of ordinary wages as prescribed prior to having completed a period of twelve months' continuous service, in which case should the services of such employee terminate or be terminated prior to the completion of twelve months' continuous service, the said employee shall refund to the employer the difference between the amount received for wages in respect of the period of their annual leave and the amount which would have accrued to the employee by reason of the length of service up to the date of the termination of their services.

(7) (a) Subject to subclause (3) of this clause, when computing the annual leave due under this clause, no deduction shall be made from such leave in respect of the period that an employee is on annual leave and/or holidays. Provided that no deduction shall be made for any approved period an employee is absent from duty through sickness, with or without pay, unless the absence exceeds three calendar months, in which case deduction may be made for such excess only.

(b) Approved periods of absence from work caused through accident sustained in the course of employment shall not be considered breaks in continuity of service, but the first six months only of any such

(3) Annual leave is cumulative, and any leave not taken in one year is carried over to the next year.

(4) If any award public holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, the employee:

(a) is taken not to be on paid annual leave or paid personal leave on that public holiday; and

(b) is entitled to be absent from work on that public holiday; and

(c) is entitled to be paid for that public holiday in accordance with clause 18.

(5) If an employee lawfully leaves their employment or the employment is terminated by the employer through no fault of the employee, the employee shall be paid for any untaken annual leave to which the employee is entitled.

(6) If an employee leaves employment or the employment is terminated by the employer in circumstances other than those referred to in clause 19(5) the employee is to be paid for any untaken leave that relates to a completed year of service, except that if the employee is dismissed for misconduct, the employee is not entitled to be paid or any untaken leave that relates to a year of service that was completed after the misconduct occurred.

(7) An employee may be rostered off and granted annual leave with payment of ordinary wages as prescribed prior to having accrued the leave, in which case should the services of such employee terminate or be terminated prior to the completion of sufficient service to have accrued the leave, the said employee shall refund to the employer the difference between the amount received for wages in respect of the period of their annual leave and the amount which would have accrued to the employee by reason of the length of service up to the date of the termination of their services.

(8) (a) Subject to subclause (3) of this clause, when computing the annual leave due under this clause, no deduction shall be made from such leave in respect of the period that an employee is on annual leave and/or public holidays, nor for any approved period of personal leave, with or without pay.

(b) Approved periods of absence from work caused through accident sustained in the course of employment shall not be considered breaks in continuity of service.

(9) When work is closed down for the purpose of allowing annual leave to be taken, employees with less than a full year's service shall only be entitled to payment during such period for the number of days' leave due to them. Provided that nothing herein

period shall count as service for the purpose of computing annual leave. (8) When work is closed down for the purpose of allowing annual leave to be taken, employees with less than a full year's service shall only be entitled to payment during such period for the number of days' leave due to them. Provided that nothing herein contained shall deprive the employer's right to retain such employees during the close down period as may be required. (9) Employees regularly working for the Government north of south latitude 26 shall be paid 1 (one) week additional leave per year and allowed to accumulate annual leave for two years, subject to the convenience of the Department. Such employees who proceed to Fremantle and Geraldton during the period of such leave shall be allowed once in each two years reasonable travelling time on the forward and return journeys between the place of their employment and either of the said ports. (10) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee. Annual Leave Loading (11) During the period of annual leave an employee shall receive a loading calculated on the rate of wage prescribed by subclause (2) hereof. This loading shall be 17-1/2 per cent provided that in no case shall the loading for four weeks' leave exceed the amount set out in the Commonwealth Bureau of Census and Statistics publication for "Average Weekly Earnings per Male Employed Unit" in W.A. for the September quarter immediately preceding the date of accrual of such leave. The loading prescribed by this subclause shall not apply to proportionate leave on termination.	contained shall deprive the employer's right to retain such employees during the close down period as may be required. (10) Employees regularly working north of south latitude 26 shall be paid 1 (one) week additional leave per year and allowed to accumulate annual leave for two years, subject to the convenience of the Department. Such employees shall be allowed once in each two years reasonable travelling time for travel between the place of their employment and Perth or Geraldton for the purpose of taking annual leave. (11) Where an employee and employer have not agreed when the employee is to take annual leave, subject to the employee giving the employer at least 2 weeks' notice, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than 12 months before that time. Annual Leave Loading (12) During the period of annual leave an employee shall receive a 17.5% loading calculated on the rate of pay the employee would have received under clause 22 at the time the employee takes the leave, provided that in no case shall the loading for four weeks' leave exceed the amount set out in the Australian Bureau of Statistics publication for "Average Weekly Earnings Full Time Males Western Australia" in W.A. for the November quarter immediately preceding the date of accrual of such leave. The loading prescribed by this subclause shall not apply to proportionate leave on termination.
<u>20. - LONG SERVICE LEAVE</u> The conditions governing the granting of Long Service Leave to government wages employees generally shall apply to employees covered by this award.	<u>NO VARIATIONS</u>
	Insert the following as a heading before clause 21. 'Payment of Wages' PART 5 – WAGES, ALLOWANCES AND FACILITIES
<u>21. - PAYMENT OF WAGES</u> (1) (a) The employer may elect to pay employees in cash, by cheque or by means of a credit transfer to a bank, building society or credit union account in the name of the employee. The day that the credit transfer is credited to the employee's account shall be deemed to be the date of payment. (b) Payment shall be made within three working days from the last day of the pay period and if in cash or by cheque shall be made during the employee's ordinary	<u>21. – PAYMENT OF WAGES</u> (1) (a) The employer may elect to pay employees in cash or by electronic funds transfer to a bank, building society or credit union account in the name of the employee. The day that the electronic funds transfer is credited to the employee's account shall be deemed to be the date of payment. (b) Payment shall be made within three working days from the last day of the pay period and if in cash shall be made during

working hours.	the employee's ordinary working hours.
(c) No employer shall change its method of payment to employees without first giving them at least four weeks' notice of such change.	(c) No employer shall change its method of payment to employees without first giving them at least four weeks' notice of such change.
(d) No employee shall be required to accept a change in the method of payment if such change causes hardship. Any dispute concerning hardship in a particular case shall be referred to the Industrial Relations Commission.	(d) No employee shall be required to accept a change in the method of payment if such change causes hardship. Any dispute concerning hardship in a particular case shall be referred to the Western Australian Industrial Relations Commission.
(2) (a) The employer may elect to pay employees weekly or fortnightly in accordance with subclause (1) of this clause.	(2) (a) The employer may elect to pay employees weekly or fortnightly in accordance with subclause (1) of this clause.
(b) No employer shall change the frequency of payment to employees without first giving them and the Union at least four weeks' notice of such change.	(b) No employer shall change the frequency of payment to employees without first giving them and the Union at least four weeks' notice of such change.
(c) The method of introducing a fortnightly pay system shall be by the payment of an additional week's wages in the last weekly pay before the change to fortnightly pays to be repaid by equal fortnightly deduction made from the next and subsequent pays provided the period for repayment shall not be less than 20 weeks or some other method agreed upon by the Union and employer.	(c) The method of introducing a fortnightly pay system shall be by the payment of an additional week's wages in the last weekly pay before the change to fortnightly pays to be repaid by equal fortnightly deduction made from the next and subsequent pays provided the period for repayment shall not be less than 20 weeks or some other method agreed upon by the Union and employer.
(3) For the purpose of effecting the rostering off of workers as provided by this award, such wages may be either for the actual hours worked each week; or an amount being the calculated weekly average of the wages accruing over the two or three or four as the case may be, consecutive weekly period.	(3) For the purpose of effecting the rostering off of workers as provided by this award, such wages may be either for the actual hours worked each week; or an amount being the calculated weekly average of the wages accruing over the two or three or four as the case may be, consecutive weekly period.
(4) An employee who lawfully terminates their employment or is dismissed by the employer for reasons other than misconduct, shall be paid all wages due to them by the employer on the day of termination of employment	(4) An employee who lawfully terminates their employment or is dismissed by the employer for reasons other than misconduct, shall be paid all wages due to them by the employer on the day of termination of employment.
(5) At the time of being paid, each employee shall be issued with a statement by the employer showing the gross wages and allowances due to them and all deductions made therefrom.	
22. - WAGES	22. – WAGES
It is a term of this Award that the Union undertakes for the duration of the Principles determined by the Commission in Court Session in Matter No. 1940 of 1989 not to pursue any extra claim, award or over award except where consistent with the State Wage Principles. The following shall be the minimum rates of wage payable to employees covered by this award:- (1)	The following shall be the minimum rates of wage payable to employees covered by this award:- (1) (a) Classifications: — Minimum Weekly Rate (per week) $ (1) Chef — 989.30 (2) Qualified Cook — 955.30

(a)

	Classifications:	Base Rate (per week) $	Arbitrated Safety Net Adjustments (per week) $	Total Award Rate (per week) $
(1)	Chef	351.20	578.60	929.80
(2)	Qualified Cook	325.40	572.50	897.90
(3)	Cook Employed Alone	307.90	568.20	876.10
(4)	Other Cooks	304.60	567.40	872.00
(5)	Bar Attendant	307.40	568.20	875.60
(6)	Waiter/ Waitress	300.20	566.40	866.60
(7)	Steward/ Stewardess	300.20	566.40	866.60
(8)	Cashier	307.40	568.20	875.60
(9)	Counterhand	300.20	566.40	866.60
(10)	Tea Attendant	297.20	565.80	863.00
(11)	Kitchenhand	297.20	565.80	863.00
(12)	General Hand	297.20	565.80	863.00

(b) Arbitrated Safety Net Adjustments

(i) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(2) In addition to the above wage rates service pay will be paid for each year of service at the following rates per week:

Year 1	$ 95.30
Year 2	$ 104.00
Year 3 and thereafter	$ 111.80

(3)	Cook Employed Alone	932.50
(4)	Other Cooks	928.20
(5)	Bar Attendant	932.00
(6)	Waiter	922.50
(7)	Steward	922.50
(8)	Cashier	932.00
(9)	Counterhand	922.50
(10)	Tea Attendant	918.60
(11)	Kitchenhand	918.60
(12)	General Hand	918.60

(2) A casual employee must be paid a loading of 50% for each hour worked.

(3) A part-time employee must be paid a loading of 15% for each hour worked.

(4) In addition to the above wage rates service pay will be paid for each year of service at the following rates per week:

Year 1	$95.30
Year 2	$104.00
Year 3 and thereafter	$111.80

(5) Leading Hands –

An employee (other than a Chef) who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to his or her normal wage per week:-

(a)	If placed in charge of less than six employees	$15.80
(b)	If placed in charge of sex to ten employees	$21.30
(c)	If placed in charge of 11 to 20 employees	$24.50
(d)	If placed in charge of more than 20 employees	$41.00

(3) Leading Hands - An employee (other than a Chef) who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to his or her normal wage per week:- (a) If placed in charge of less than six employees $15.80 (b) If placed in charge of six to ten employees $21.30 (c) If placed in charge of 11 to 20 employees $24.50 (d) If placed in charge of more than 20 employees $41.00	
23. - JURY SERVICE (1) Any employee required to serve on a jury shall as soon as possible after being summoned to serve, notify the employer. The summons to serve must be produced when making an application to obtain this leave. (2) Any employee required to serve on a jury shall be granted by the employer leave of absence without loss of pay, but only for such a period as is required to enable the employee to carry out his/her duties as a juror. (3) An employee granted leave of absence on full pay as prescribed in subclause (2) of this clause is not entitled to retain any juror's fees but shall pay all fees received to the employer.	23. – JURY SERVICE (1) Any employee required to serve on a jury shall as soon as possible after being summoned to serve, notify the employer. The summons to serve must be produced when making an application to obtain this leave. (2) Any employee required to serve on a jury shall be granted by the employer leave of absence without loss of pay, but only for such a period as is required to enable the employee to carry out their duties as a juror. (3) An employee granted leave of absence on full pay as prescribed in subclause (2) of this clause is not entitled to retain any juror’s fees but shall pay all fees received to the employer.
24. - APPRENTICES (1) Apprentices may be taken to the trade of cooking in the ratio of one apprentice for every one qualified cook employed and shall not be taken in excess of that ratio unless: (a) the union so agrees; or (b) the Commission so determines. (2) Wages (per week) expressed as a percentage of the “Tradesman’s Rates” - (a) Four Year Term - % First year 42 Second year 55 Third year 75 Fourth year 88 (b) Three and a Half Year Term - First six months 42 Next year 55 Next following year 75 Final year 88 (c) Third Year Term - % First year 55 Second year 75 Third year 88 (d) For the purposes of this subclause the term “Tradesman’s Rate” means the total rate payable to a “Qualified Cook”, as prescribed in Clause 22. - Wages, of this award.	24. – APPRENTICES (1) Apprentices may be taken to the trade of cooking in the ratio of one apprentice for every one qualified cook employed and shall not be taken in excess of that ratio unless: (a) the Union so agrees; or (b) the Commission so determines. (2) Wages (per week) expressed as a percentage of the “Qualified Cook Rates” – (a) Four Year Term - % First year 42 Second year 55 Third year 75 Fourth year 88 (b) Three and a Half Year Term – First six months 42 Next year 55 Next following year 75 Final year 88 (c) Third Year Term – % First Year 55 Second year 75 Third year 88

25. - BAR WORK Any employee other than a Bar Attendant, who in addition to their normal duties is required to dispense liquor from a bar, shall be paid a flat rate of $1.25 cents per day in addition to the rate prescribed for such normal duties.	NO VARIATIONS
26. - HIGHER DUTIES (1) Any employee performing work for two or more hours in any day on duties carrying a higher prescribed rate of wage than that in which they are engaged, shall be paid the higher wage for the time so employed, provided that where an employee is engaged for more than half of one day or shift on duties carrying a higher rate the employee shall be paid the higher rate for such day or shift. (2) Any employee who is required to perform duties carrying a lower prescribed rate of wage, shall do so without any loss of pay.	NO VARIATIONS
27. - UNIFORMS AND LAUNDERING Where uniforms are required to be worn by the employer they shall be supplied and laundered by the employer and remain the property of the employer, provided that in lieu of the employer laundering same, the employee shall be paid $4.80 per week for such laundering. Provided further, that any employee employed as a Cook shall be paid $7.20 per week for laundering.	NO VARIATIONS
28. - PROTECTIVE CLOTHING (1) Employees who are required to wash dishes. or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid an allowance of $2.40 per week in lieu. (2) Where the conditions of work are such that employees are unable to avoid their clothing becoming dirty or wet, they shall be supplied with suitable protective clothing free of charge by the employer. (3) Where the conditions of work are such that employees are unable to avoid their feet becoming wet, they shall be supplied by the employer free of charge with suitable protective footwear. (4) All articles supplied shall remain the property of the employer and shall be returned when required, in good order and condition, fair wear and tear excepted. (5) Where any of the above protective equipment is provided the employee shall use the equipment for the purpose for which it is intended.	28. - PROTECTIVE CLOTHING (1) Employees who are required to wash dishes. or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid an allowance of $2.54 per week in lieu. NO OTHER VARIATIONS
29. – EMPLOYEE’S EQUIPMENT All knives, choppers, tools, brushes. towels and other utensils, implements and material which may be required to be used by the employee for the purpose of carrying out their duties, shall be supplied by the employer free of charge.	29. – EMPLOYEE’S EQUIPMENT All knives, choppers, tools, brushes. towels and other utensils, implements and material which may be required to be used by the employee for the purpose of carrying out their duties, shall be supplied by the employer free of charge.

Provided that where an employee is required by the employer to use his own knives he shall be paid an allowance of $11.50 per week.	Provided that where an employee is required by the employer to use their own knives they shall be paid an allowance of $11.50 per week.
30. - TRAVELLING FACILITIES (1) Where an employee is detained at work until it is too late to travel by the last ordinary bus, train or other regular public conveyance to their usual place of residence the employer shall provide proper conveyance free of charge. (2) If an employee is required to start work before the first ordinary means of public conveyance (hereinbefore described) is available to convey them from their usual place of residence to the place of employment, the employer shall provide a conveyance free of charge. (3) The provisions of subclauses (1) and (2) of this clause do not apply to an employee who usually has their own means of conveyance.	NO VARIATIONS
	Insert the following as a heading before clause 31 'Records': PART 6 – OTHER MATTERS
31. - RECORD (1) The employer shall keep, or cause to be kept, a time and wages record wherein shall be entered the following information: . (a) The full name, and occupation of each employee employed and whether the employee is being employed on a full-time, part-time or casual contract of service; (b) The time each employee commences and finishes work each day, including any breaks in shift; (c) The number of hours worked each day by each employee and the total hours worked each pay period; (d) The wages and (if any) overtime and allowances paid to each employee each pay period; (e) The age of any employee employed on junior rates of pay. (2) The record shall be open for inspection to a duly accredited representative of the union during ordinary office hours. Such representative shall be permitted time to inspect the record and, if he requires shall be allowed to take any extract or copy of any of the information contained in the record. Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the employer	31. – RECORDS An employer must keep employment records and provide pay slips in accordance with Part II, Division 2F – Keeping of and access to employment records and pay slips of the *Industrial Relations Act 1979* (WA). Conditions regarding right of entry by authorised representatives of the Union for the purpose of inspection of records are dealt with in Part II, Division G – Right of entry and inspection by authorised representatives of the *Industrial Relations Act 1979* (WA).
32. - ROSTER	32. – ROSTERS

(1) A roster of the working hours of each employee shall be exhibited in such place by the employer so as it may be conveniently and readily seen by each employee. (2) Such roster shall show: (a) the name and occupation of each employee; (b) the hours to be worked by each employee each day and the breaks in shift to be taken. (3) The roster shall be open for inspection to a duly accredited representative of the union at such time as the "record" is so open for inspection. (4) Such rosters shall be drawn up in such a manner as to show the working hours of each employee for at least one week in advance of the date of the roster and may only be altered on account of the sickness of an employee, or by mutual consent between the employee and the employer concerned. (5) In addition to the roster of working hours as prescribed by subclauses (1)-(4) of this clause, a roster of working days and rostered days off for each employee shall be maintained by the employer and exhibited in such a place so as it may be conveniently and readily seen by each employee. Such a roster shall show working days and rostered day off at least four weeks in advance and shall only be varied at the request of an employee with respect to whom the variation is sought.	(1) A roster of the working hours of each employee shall be exhibited in such place by the employer so as it may be conveniently and readily seen by each employee, or provided by electronic means reasonably accessible to all employees. (2) Such roster shall show: (a) the name and classification of each employee; (b) the hours to be worked by each employee each day and the breaks in shift to be taken. (3) The roster shall be available for inspection to a duly accredited representative of the Union in accordance with clause 31. (4) Such rosters shall be drawn up in such a manner as to show the working hours of each employee for at least one week in advance of the date of the roster and may only be altered on account of the personal leave of an employee, or by mutual consent between the employee and the employer concerned. (5) In addition to the roster of working hours as prescribed by subclauses (1)-(4) of this clause, a roster of working days and rostered days off for each employee shall be maintained by the employer and either made accessible electronically or exhibited in such a place so as it may be conveniently and readily seen by each employee. Such a roster shall show working days and rostered day off at least four weeks in advance and shall only be varied at the request of an employee with respect to whom the variation is sought.
<u>33. - CHANGE AND REST ROOMS</u> Adequate change and rest rooms shall be provided by the employer where such are reasonably practicable.	<u>NO VARIATIONS</u>
<u>34. - FIRST AID KIT</u> In each establishment the employer shall provide and continuously maintain at a place easily accessible to all employees an adequate First Aid Kit.	<u>NO VARIATIONS</u>
<u>35. - POSTING OF AWARD AND UNION NOTICES</u> (1) A copy of this award shall be exhibited by the employer on the business premises in such a place where it may be conveniently and readily seen by each employee. (2) The Secretary of the Union, or any other duly accredited representative of the union, shall be permitted to post notices relating to union business in such a place where it may be conveniently and readily seen by each employee. Provided that nothing in this subclause shall empower a duly accredited official of the union to enter any part of the premises of the employer, pursuant to this subclause, unless the employer is the employer or former employer of a member of the Union.	<u>35. – POSTING OF AWARD AND UNION NOTICES</u> (1) A copy of this award shall be exhibited by the employer on the business premises in such a place where it may be conveniently and readily seen by each employee or made accessible electronically. (2) The Secretary of the Union, or any other duly accredited representative of the Union, shall be permitted to post notices relating to Union business in such a place where it may be conveniently and readily seen by each employee.

36. - DELETED	CLAUSE DELETED
37. - BREAKDOWNS The employer shall be entitled to deduct payment for any day or portion of a day upon which the employee cannot be usefully employed, because of any strike by the union or unions affiliated with it, or by any other association or union, or through the breakdown of the employer's machinery or any stoppage of work by any cause which the employer cannot reasonably prevent.	RENUMBERED TO CLAUSE 36
38. - DISTRICT ALLOWANCE (1) For the purposes of this clause the following terms shall have the following meaning: "Dependant" in relation to an employee means: (a) a spouse; or(b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support; who does not receive a district or location allowance of any kind. "Partial Dependant" in relation to an employee means: (a) a spouse; or (b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support; who receives a district or location allowance of any kind less than that applicable to an employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant. "Spouse" means an employee's spouse including de facto spouse. "De facto Spouse" means a person of the opposite sex to the employee who lives with the employee as the husband or wife of the employee on a bona fide domestic basis, although not legally married to that person. (2) For the purpose of this clause, the boundaries of the various districts shall as described hereunder and as delineated on the plan at subclause (16) of this clause. District: 1. The area within a line commencing on coast; thence east along latitude 28 to a point north of Tallering Peak; thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of latitude 32 and longitude 119; thence south along longitude 119 to coast.	37. – DISTRICT ALLOWANCE 1) For the purposes of this clause the following terms shall have the following meaning: "Dependant" in relation to an employee means: (a) a spouse; or (b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support; who does not receive a district or location allowance of any kind. "Partial Dependant" in relation to an employee means: (a) a spouse; or (b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support; who receives a district or location allowance of any kind less than that applicable to an employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant. "Spouse" means an employee's spouse including de facto partner. (2) For the purpose of this clause, the boundaries of the various districts shall as described hereunder and as delineated on the plan at subclause (16) of this clause. District: 1. The area within a line commencing on the coast; thence east along latitude 28 to a point north of Tallering Peak; thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of latitude 32 and longitude 119; thence south along longitude 119 to coast. … 3. The area within a line commencing on the coast at latitude 26; thence along latitude 26 to longitude 123; thence south along longitude 123 to the boundary of No. 2

2. That area within a line commencing on the south coast at longitude 119 then east along the coast to longitude 123; then north along longitude 123 to a point on latitude 30; thence west along latitude 30 to the boundary of No. 1 District.

3. The area within a line commencing on coast at latitude 26; thence along latitude 26 to longitude 123; thence south along longitude 123 to the boundary of No. 2 District.

4. The area within a line commencing on the coast at latitude 24; thence east to the South Australian border; thence south to the coast; thence along the coast to longitude 123; thence north to the intersection of latitude 26; thence west along latitude 26 to the coast.

5. That area of the State situated between the latitude 24 and a line running east from Carnot Bay to the Northern Territory border.

6. That area of the State north of a line running east from Carnot Bay to the Northern Territory border.

(3) An employee shall be paid a district allowance at the standard rate prescribed in Column II of subclause (6) of this clause, for the district in which the employee’s headquarters is located. Provided that where the employee's headquarters is situated in a town or place specified in Column III of subclause (6), the employee shall be paid a district allowance at the rate appropriate to that town or place as prescribed in Column IV of subclause (6).

(4) An employee who has a dependant shall be paid double the district allowance prescribed by subclause (3) of this clause for, the district, town or place in which the employee’s headquarters is located.

(5) Where an employee has a partial dependant the total district allowance payable to the employee shall be the district allowance prescribed by subclause (3) of this clause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if he or she was employed in a full time capacity under the Award, Agreement or other provision regulating the employment of the partial dependant.

(6) The weekly rate of district allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO STANDARD RATE	COLUMN IV RATE
	$ per week	Town or Place	$ per week
6	50.40	Nil	Nil

District.

…

(5) Where an employee has a partial dependant the total district allowance payable to the employee shall be the district allowance prescribed by subclause (3) of this clause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if they were employed in a full time capacity under the Award, Agreement or other provision regulating the employment of the partial dependant.

…

(9) When an employee leaves their district on duty, payment of any district allowance to which the employee would ordinarily be entitled shall cease after the expiration of two weeks unless the employee's dependant/s or partial dependant/s remain in the district or as otherwise approved by the employer.

NO OTHER VARIATIONS

5	41.20	Fitzroy Crossing	55.40
		Halls Creek	
		Turner River Camp Nullagine	
		Liveringa (Camballin) Marble Bar	51.60
		Wittenoom	
		Karratha	48.60
		Port Hedland	45.10
4	20.70	Warburton Mission Carnarvon	55.90 19.50
3	13.10	Meekatharra	20.70
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	9.30	Kalgoorlie	3.10
		Boulder	
		Ravensthorpe	12.40
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after 1 January 1991.

(7) When an employee is on approved annual recreation leave, the employee shall for the period of such leave, be paid the district allowance to which the employee would ordinarily be entitled.

(8) When an employee is on long service leave or other approved leave with pay (other than annual recreational leave), the employee shall only be paid district allowance for the period of such leave if the employee, dependants or partial dependants remain in the district in which the employee's headquarters is situated.

(9) When an employee leaves his or her district on duty, payment of any district allowance to which the employee would ordinarily be entitled shall cease after the expiration of two weeks unless the employee's dependant/s or partial dependant/s remain in the district or as otherwise approved by the employer.

(10) Except as provided in subclause (9) of this clause, a district allowance shall be paid to any employee ordinarily entitled thereto in addition to reimbursement of any travelling transfer or relieving expenses or camping allowance.

(11) Where an employee whose headquarters is located in a district in respect of which no allowance is prescribed in subclause (6) of this clause, is required

to travel or temporarily reside for any period in excess of one month in any district or districts in respect of which such allowance is so payable, the employee shall be paid for the whole of such period a district allowance at the appropriate rate pursuant to subclauses (3), (4) or (5) of this clause, for the district in which the employee spends the greater period of time. (12) When an employee is provided with free board and lodging by the employer or a Public Authority the allowance shall be reduced to two-thirds of the allowance the employee would ordinarily be entitled to under this clause. (13) An employee who is employed on a part-time basis shall be entitled to district allowance on a pro-rata basis. The allowance shall be determined by calculating the hours worked by the employee as a proportion of the full-time hours prescribed by the Award under which the employee is employed. That proportion of the appropriate district allowance shall be payable to the employee. (14) An employee who immediately prior to the 1st day of July, 1988 was in receipt of district allowance at a rate which was greater than the amount to which the employee is entitled under this clause shall have the difference reduced in accordance with the following: (i) As from the first pay period commencing on or after July 1, 1988 the difference shall be reduced by thirty-three and one third (33 1/3%) per cent; and (ii) As from the first pay period commencing on or after January 1, 1989 the difference remaining between the amount being paid pursuant to (i) above and that to which the employee is otherwise entitled under this clause shall be reduced by fifty (50%) per cent; and (iii) As from the first pay period commencing on or after July 1, 1989 payment shall be in accordance with the employee's entitlement under this clause. (15) The rates expressed in subclause (6) of this clause shall be adjusted every twelve (12) months ending on December 31 in accordance with the official "Consumer Price Index" for Perth as published by the Australian Bureau of Statistics. The adjustment of rates shall be effective from the beginning of the first pay period to commence on or after the first day of January each year. (16) Plan - District Allowance Boundaries	
<u>39. - GRIEVANCE PROCEDURES</u> It is the intention of this Agreement to eliminate disputes which are liable to cause stoppages for work and loss of earnings and it is agreed between the parties that every	<u>38. - DISPUTE RESOLUTION PROCEDURES</u> It is the intention of this award to eliminate disputes which are liable to cause stoppages for work and loss of earnings and it is agreed between the parties that every endeavour will be made

endeavour will be made to amicably settle any disputes which may arise.	to amicably settle any disputes which may arise.
(1) (a) Where any grievance, dispute or claim arises an employee is entitled to raise the matter with the appropriate Manager.	(1) (a) Where any grievance, dispute or claim arises an employee is entitled to raise the matter with the appropriate Manager.
(b) If a resolution of the grievance, dispute or claim is not achieved under subclause (1)(a) hereof, the employee concerned may refer the matter to his/her union representative who will discuss it with the Manager. At this point all disputes and replies must be recorded in the Record of Grievance book by the Manager or Union Representative and signed by both the parties. The Union Representative shall receive a copy.	(b) If a resolution of the grievance, dispute or claim is not achieved under subclause (1)(a) hereof, the employee concerned may refer the matter to their Union representative who will discuss it with the Manager. At this point all disputes and replies must be recorded in the Record of Grievance book by the Manager or Union Representative and signed by both the parties. The Union Representative shall receive a copy.
(c) If the matter is not satisfactorily resolved at subclause (1)(b) the Union Representative may discuss the matter with Senior Management or other officer nominated by the Manager to deal with such matters. Further comments should be added to the Record of Grievance Book when appropriate.	(c) If the matter is not satisfactorily resolved at subclause (1)(b) the Union Representative may discuss the matter with Senior Management or other officer nominated by the Manager to deal with such matters. Further comments should be added to the Record of Grievance Book when appropriate.
(d) If the matter is not resolved by the foregoing discussions the Union Representative shall notify his/her union and shall thenceforth leave the conduct of negotiations in the hands of the union. (The Union Representative may be employed by the union to continue negotiations).	(d) If the matter is not resolved by the foregoing discussions the Union Representative shall notify their Union and shall thenceforth leave the conduct of negotiations in the hands of the Union. (The Union Representative may be employed by the Union to continue negotiations).
(e) Where a matter has been referred to the union by the Union Representative the union shall promptly take all steps necessary under its rules and under the Industrial Relations Act for the resolution of this matter. Prior to raising the matter with the Industrial Relations Commission, the Union shall contact the Department's or Authority's, industrial relations branch, to try and resolve the dispute.	(e) Where a matter has been referred to the Union by the Union Representative the union shall promptly take all steps necessary under its rules and under the *Industrial Relations Act 1979* (WA) for the resolution of this matter. Prior to raising the matter with the Industrial Relations Commission, the Union shall contact the Department's or Authority's, industrial relations branch, to try and resolve the dispute.
(2) (a) Where any grievance, dispute or claim arises, the employer is entitled to raise the matter with the appropriate employees.	(2) (a) Where any grievance, dispute or claim arises, the employer is entitled to raise the matter with the appropriate employees.
(b) If a resolution of the grievance, dispute or claim is not achieved under subclause (2)(a) the employer shall refer the matter to the Union Representative.	(b) If a resolution of the grievance, dispute or claim is not achieved under subclause (2)(a) the employer shall refer the matter to the Union Representative.
(c) The Union Representative may discuss with the employee any grievance referred to him/her by the employer, and if the matter is not satisfactorily resolved, he/she may discuss the matter with the union.	(c) The Union Representative may discuss with the employee any grievance referred to them by the employer, and if the matter is not satisfactorily resolved, they may discuss the matter with the Union.
(d) If the matter is not resolved by the foregoing discussions the shop steward shall notify his/her union and shall thenceforth leave the conduct and negotiations in the hands of the union.	(d) If the matter is not resolved by the foregoing discussions the shop steward shall notify their Union and shall thenceforth leave the conduct and negotiations in the hands of the Union.

(The Union Representative may be empowered by the union to continue negotiations). (e) Where a matter has been referred to the union by the Union Representative, the union shall promptly take the steps necessary under its rules and the Industrial Relations Act for a resolution of the matter. (3) Where any dispute cannot be resolved by negotiation or conciliation between the parties it is agreed that either party may refer the matter to the Western Australian Industrial Relations Commission. (4) Initial replies to all written grievances and disputes must be given within 24 hours.	(The Union Representative may be empowered by the Union to continue negotiations). (e) Where a matter has been referred to the union by the Union Representative, the union shall promptly take the steps necessary under its rules and the *Industrial Relations Act 1979* (WA) for a resolution of the matter. (3) Where any dispute cannot be resolved by negotiation or conciliation between the parties it is agreed that either party may refer the matter to the Western Australian Industrial Relations Commission. (4) Initial replies to all written grievances and disputes must be given within 24 hours.
40. - LEAVE TO ATTEND UNION BUSINESS (1) The employer shall grant paid leave during working hours to an employee: (a) who is required to give evidence before any Industrial Tribunal; (b) who as a Union-nominated representative is required to attend negotiations and/or conferences between the Union and the employer. (c) when prior agreement between the Union and the employer has been reached for the officer to attend official Union meetings preliminary to negotiations or industrial hearings; (d) who as a Union-nominated representative is required to attend joint Union/management consultative committees or working parties. (2) The granting of leave pursuant to paragraph (a) of this subclause shall only be approved: (a) where an application for leave has been submitted by an employee a reasonable time in advance; (b) for the minimum period necessary to enable the Union business to be conducted or evidence to be given; (c) for those employees whose attendance is essential; (d) when the operation of the organisation is not being unduly affected and the convenience of the employer is not impaired. (3) (a) A leave of absence provided under this clause will be granted at the ordinary rate of pay; (b) the employer shall not be liable for any expenses associated with an employee	RENUMBERED TO CLAUSE 39

attending the Union office on business; (c) leave of absence provided under this clause shall include any necessary travelling time in normal working hours. (4) (a) Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for Union business. (b) The provisions of this clause shall not apply to special arrangements made between the parties which provide for unpaid leave for employees to conduct Union business. (5) The provisions of this clause shall not apply when an employee is absent from work without the approval of the employer.	
<u>41. – DELETED</u>	<u>CLAUSE DELETED</u>
<u>42. - TRADE UNION TRAINING LEAVE</u> (1) Subject to the provisions of this clause: (a) The employer shall grant paid leave of absence to employees who are nominated by their Union to attend short courses conducted by the Australian Trade Union Training Authority. (b) Paid leave of absence shall also be granted to attend similar courses or seminars as from time to time approved by agreement between the parties. (2) An employee shall be granted up to a maximum of five days' paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five days and up to ten days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten days. (3) (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime. (b) Where a public holiday or rostered day off (including a rostered day off as a result of working a 38 hour week) falls during the duration of a course, a day off in lieu of that day will not be granted. (4) Subject to subclause (3) of this clause shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course. (5) The granting of leave pursuant to the provisions of subclause (1) of this clause is subject to the operation of the organisation not being unduly affected and to the convenience of the employer. (6) (a) Any application by an employee shall be submitted to the employer for approval at	<u>RENUMBERED TO CLAUSE 40</u> Change the reference to 'Australian Trade Union Training Authority' in subclause (1)(a) to 'Australian Trade Union Institute'.

least four weeks before the commencement of the course, provided that the employer may agree to a lesser period of notice. (b) All applications for leave shall be accompanied by a statement from the relevant Union indicating that the employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the Authority which is conducting the course. (7) A qualifying period of 12 months in government employment shall be served before an employee is eligible to attend courses or seminars of more than one-half day duration. An employer may, where special circumstances exist, approve an application to attend a course or seminar where an employee has less than 12 months' government service. (8) (a) The employer shall not be liable for any expenses associated with an employee's attendance at trade union training courses. (b) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.	
43. - PAID LEAVE FOR ENGLISH LANGUAGE TRAINING (1) Leave during normal working hours without loss of pay shall be granted to employees from a non-English speaking background, who are unable to meet standards of communication to advance career prospects, or who constitute a safety hazard or risk to themselves and/or fellow workers, or are not able to meet the accepted production requirements of that particular occupation or industry, to attend English training conducted by an approved and authorised Authority. The selection of employees for training will be determined by consultation between the employer and the appropriate Union(s). (2) Leave will be granted to enable employees selected to achieve an acceptable level or vocational English proficiency. In this respect the tuition content with specific aims and objectives incorporating the pertinent factors at subclause (3) hereof shall be agreed between the employer, the Union(s), and the Adult Migrant Education Service or other approved Authority conducting the training. (3) Subject to appropriate needs assessment participation in training will be on the basis of minimum of 100 hours per employee per year. The agreed desired proficiency level will take account of the vocational needs of an employee in respect of communication, safety, welfare, and productivity within his/her current position as well as those positions to which he/she may be considered for promotion or redeployment. It will also take account of issues in relation to training, retraining and multi-skilling, award restructuring,	RENUMBERED TO CLAUSE 41 … (3) Subject to appropriate needs assessment participation in training will be on the basis of minimum of 100 hours per employee per year. The agreed desired proficiency level will take account of the vocational needs of an employee in respect of communication, safety, welfare, and productivity within the employees' current position as well as those positions to which the employee may be considered for promotion or redeployment. It will also take account of issues in relation to training, retraining and multi-skilling, award restructuring, industrial relations and safety provisions, and equal opportunity employment legislation.

industrial relations and safety provisions, and equal opportunity employment legislation.	
<u>44. - ENTERPRISE FLEXIBILITY</u> (1) Employers and employees covered by this award may establish/negotiate and reach agreement to apply to vary any provision of this award so as to make the enterprise or workplace operate more efficiently according to its particular needs. (2) To facilitate this process, each enterprise or workplace shall establish consultative mechanisms and procedures appropriate to the organisation comprising representatives of the employer and the employees. (3) Employees may seek advice from, or request to be represented by, the union party to this award during the negotiations. (4) Where agreement is reached at an enterprise or workplace and where giving effect to such agreement requires this award, as it applies at the enterprise or workplace, to be varied, an application to vary the award shall be made to the Commission. (5) A copy of the agreement shall be made available in writing to all employees at the enterprise or workplace and to the union party to this award. (6) The union shall not unreasonably oppose the application to vary the award to give effect to the terms of the agreement. (7) When this award is varied to give effect to an agreement made pursuant to this clause the variation shall become a schedule to this award and the variation shall take precedence over any provision of this award to the extent of any expressly identified inconsistency. (8) The agreement must meet the following requirements to enable the Commission to vary this award to give effect to it - (a) that the purpose of the agreement is to make the enterprise or workplace operate more efficiently according to its particular needs; (b) that the majority of employees covered by the agreement genuinely agree to it; (c) that the award variation necessitated by the agreement meets the requirements of the Industrial Relations Act, 1979 and relevant Wage Fixing Principles. (9) Nothing in this clause shall be taken as limiting the right of any party to apply to give effect to an enterprise agreement under any other provisions of the Industrial Relations Act, 1979.	<u>CLAUSE DELETED</u>
<u>APPENDIX - RESOLUTION OF DISPUTES REQUIREMENTS</u> (1) This Appendix is inserted into the award/industrial	<u>APPENDIX DELETED</u>

<table>
<tr><td>agreement as a result of legislation which came into effect on 16 January 1996 (Industrial Relations Legislation Amendment and Repeal Act 1995) and further varied by legislation which came into effect on 23 May 1997 (Labour Relations Legislation Amendment Act 1997).

(2) Any dispute or grievance procedure in this award/industrial agreement shall also apply to any questions, disputes or difficulties which may arise under it.

(3) With effect from 22 November 1997 the dispute or grievance procedures in this award/industrial agreement is hereby varied to include the requirement that persons involved in the question, dispute or difficulty will confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.</td><td></td></tr>
<tr><td>SCHEDULE A - NAMED UNION PARTY

United Voice WA</td><td>SCHEDULE A - NAMED UNION PARTY

United Workers Union (WA)</td></tr>
<tr><td>SCHEDULE B - RESPONDENTS

The Minister for Primary Industry
The Minister for Community Development
The Minister for Education
The Minister for Health
The Minister for Labour Relations
The Minister for Lands
The Minister for Environment
The Minister for Police
The Minister for Planning
The Minister for Transport
The Minister for Works
The Minister for Water Resources
The Minister for Aboriginal Affairs
The Attorney General
Commissioner for Main Roads
The State Government Printer
State Government Insurance Commission
Western Australian Fire Brigades Board
Western Australian Museum Board</td><td>SCHEDULE B – RESPONDENTS

Department of Primary Industry and Regional Development
Department of Communities
Department of Education
Department of Health
Department of Premier and Cabinet
Department of Water and Environmental Regulation
Department of Finance
Department of Treasury
The Minister for Lands
Department of Local Government Sports and Cultural Industries
Department of Fire and Emergency Services
Department of Transport
Department of Planning Lands and Heritage
Department of Justice
Western Australia Police Force
Commissioner of Main Roads
State Law Publisher
Insurance Commission of Western Australia</td></tr>
<tr><td>APPENDIX - S.49B - INSPECTION OF RECORDS REQUIREMENTS

(1) Where this award, order or industrial agreement empowers a representative of an organisation of employees party to this award, order or industrial agreement to inspect the time and wages records of an employee or former employee, that power shall be exercised subject to the Industrial Relations (General) Regulations 1997 (as may be amended from time to time) and the following:

(a) The employer may refuse the representative access to the records if: -</td><td>APPENDIX DELETED</td></tr>
</table>

(i) the employer is of the opinion that access to the records by the representative of the organisation would infringe the privacy of persons who are not members of the organisation; and (ii) the employer undertakes to produce the records to an Industrial Inspector within 48 hours of being notified of the requirement to inspect by the representative. (b) The power of inspection may only be exercised by a representative of an organisation of employees authorised for the purpose in accordance with the rules of the organisation. (c) Before exercising a power of inspection, the representative shall give reasonable notice of not less than 24 hours to an employer.	

2025 WAIRC 00174

REVIEW OF THE VEHICLE BUILDERS' AWARD 1971 PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE WEDNESDAY, 19 MARCH 2025

FILE NO/S APPL 51 OF 2023

CITATION NO. 2025 WAIRC 00174

Result Application discontinued

Order

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

THAT this matter be and is hereby discontinued.

(Sgd.) R COSENTINO,

[L.S.] Senior Commissioner.

NOTICES—Application for General Order—

2025 WAIRC 00205

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

111 St Georges Terrace, Perth

Submissions for the 2025 WA Minimum Wage

The Western Australian Industrial Relations Commission is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee is $918.60 per week.

The Commission invites interested persons and organisations to make a submission to the Commission on what minimum wage should be set in 2025. The Commission will hear oral submissions on Wednesday, 21 May 2025 and if necessary, a half day on Thursday, 22 May 2025. The proceedings are open to the public and will be webcast.

Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Wednesday, 14 May 2025.

Written submissions are also welcome. Any person or organisation who wishes to make a written submission should do so by Wednesday, 14 May 2025. Copies of written submissions will be made public. Anonymous submissions will not be considered.

In making its decision, the Commission is required to consider the need to —

- ensure that Western Australians have a system of fair wages and conditions of employment; and
- meet the needs of the low paid; and
- provide fair wage standards in the context of living standards generally prevailing in the community; and
- contribute to improved living standards for employees; and
- protect employees who may be unable to reach an industrial agreement; and
- encourage ongoing skills development.

It is also required to consider:

- the state of the economy of Western Australia and the likely effect of its decision on; and
- that economy and, in particular, on the level of employment, inflation and productivity in Western Australia; and
- to the extent that it is relevant, the state of the national economy; and
- to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances, and other remuneration; and
- the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment; and
- relevant decisions of other industrial courts and tribunals; and
- any other relevant matters.

People interested in making a submission are invited to address those issues.

Further particulars may be obtained from the Registry of the Commission and from the Commission's website at http://www.wairc.wa.gov.au.

All submissions should be addressed to the Registrar at the above address or by email to registry@wairc.wa.gov.au, quoting matter number CICS 1 of 2025.

DATED at Perth Tuesday, 1 April 2025

(Sgd.) S BASTIAN,
[L.S.] Registrar.

NOTICES—Award/Agreement matters—

2025 WAIRC 00203

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 16 OF 2025

APPLICATION FOR A NEW AGREEMENT TITLED
"ARTS AND CULTURE TRUST VENUES MANAGEMENT MEAA AND UWU AGREEMENT 2024"

NOTICE is given that an application has been made to the Commission by the *Arts And Culture Trust* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

1. Title

1.1 The Agreement shall be known as the Arts and Culture Trust Venues Management MEAA and UWU Agreement 2024, which cancels and replaces the Arts and Culture Trust Venues Management MEAA Agreement 2022 (AG 23 of 2023).

6. Application and parties bound

6.1 The Agreement is binding upon:

(a) the Employer;

(b) the Unions; and

(c) all Employees who are members, or who are eligible to be members of the Unions.

6.2 The Agreement shall be read in conjunction with the:

(a) *Theatrical Employees (Perth Theatre Trust) Award No. 9 of1983* for Back of House, Front of House, and Presentation Services employees; and

(b) *Restaurant, Tearoom and Catering Workers' Award* for Hospitality Services employees.

6.3 Where the provisions of the Awards and the Agreement are inconsistent, the provisions of the Agreement prevail.

7. Term of the Agreement

7.1 The Agreement operates from the date of registration and expires on 31 December 2026.

7.2 Upon expiration of the Agreement, the provisions of the Agreement will continue to apply until replaced by a new Agreement.

7.3 The number of Employees bound by the Agreement is approximately 349 including casuals.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

21 MARCH 2025

2025 WAIRC 00230

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION No. APPL 19 of 2025

Review of Bakers' (Metropolitan) Award No. 13 of 1987 scope clause pursuant to s 37D of the Industrial Relations Act 1979 (WA)

Notice is given of an application on the motion of the Western Australian Industrial Relations Commission to review the scope clause of the *Bakers' (Metropolitan)* ***Award*** *No. 13 of 1987 w*ith a view to varying the Award in accordance with s 37D of the *Industrial Relations Act 1979* (WA).

Sections 37D(1) to (4) and (7) provide that the Commission may vary the scope of private sector awards of its own motion as follows:

(1) Except as provided in this section, the Commission may vary the scope of a private sector award of its own motion.

(2) A variation must not be made in relation to —

(a) an application under section 50(2) that does not seek the variation of the scope of the private sector award; or

(b) a State Wage order under section 50A.

(3) A variation must specify that the scope of the private sector award extends to and binds —

(a) employers of a class or classes specified in the award, whether or not the employers are also specified by name in the award; and

(b) employees —

(i) of employers referred to in paragraph (a); and

(ii) of a class or classes specified in the award.

(4) For the purposes of subsection (3)(a) and (b)(ii), the class may be described by reference to —

(a) a particular industry or part of an industry; or

(b) a particular kind of work.

…

(7) If the Commission varies the scope of a private sector award under this section, the Commission may also make other changes to the award that are consequential on the variation of the scope.

The purpose of the scope review is to determine whether the scope of the Award should be expanded to cover the scope of the following 2 awards with a view to those awards then being cancelled:

1. *Bakers (Country) Award No 18 of 1977*
2. *Pastrycooks' Award No. 24 of 1981*

A For Mention and Directions hearing has been listed before the Commission for the purpose of ascertaining who might seek to be heard in relation to the proposed variations to the Award, and what steps should be taken to ensure such parties may be heard in relation to the proposed variations. The hearing will take place:

AT: 10:30AM

ON: Monday, the 28th day of April 2025

AT: 111 St Georges Terrace, Perth, on Level 18.

Any person wishing to appear at this hearing should provide notice to the Senior Commissioner's Associate on (08) 9420 4455 or at chambers-cosentino@wairc.wa.gov.au by no later than **21 April 2025.** For further information, please contact the Senior Commissioner's Associate.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

8 April 2025

2025 WAIRC 00218

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION No. APPL 20 of 2025

Review of Children's Services (Private) Award 2006 scope clause pursuant to s 37D of the Industrial Relations Act 1979 (WA)

Notice is given of an application on the motion of the Western Australian Industrial Relations Commission to review the scope clause of the *Children's Services (Private)* ***Award*** *2006 w*ith a view to varying the Award in accordance with s 37D of the *Industrial Relations Act 1979* (WA).

Sections 37D(1) to (4) and (7) provide that the Commission may vary the scope of private sector awards of its own motion as follows:

(1) Except as provided in this section, the Commission may vary the scope of a private sector award of its own motion.

(2) A variation must not be made in relation to —

(a) an application under section 50(2) that does not seek the variation of the scope of the private sector award; or

(b) a State Wage order under section 50A.

(3) A variation must specify that the scope of the private sector award extends to and binds —

(a) employers of a class or classes specified in the award, whether or not the employers are also specified by name in the award; and

(b) employees —

(i) of employers referred to in paragraph (a); and

(ii) of a class or classes specified in the award.

(4) For the purposes of subsection (3)(a) and (b)(ii), the class may be described by reference to —

(a) a particular industry or part of an industry; or

(b) a particular kind of work.

...

(7) If the Commission varies the scope of a private sector award under this section, the Commission may also make other changes to the award that are consequential on the variation of the scope.

The purpose of the scope review is to determine whether the scope of the Award should be expanded to cover the scope of the following 4 awards with a view to those awards then being cancelled:

1. *Child Care (Out of School Care - Playleaders) Award*
2. *Child Care (Subsidised Centres) Award*
3. *Children's Services Consent Award 1984*
4. *Family Day Care Co-ordinators' and Assistants' Award, 1985*

A For Mention and Directions hearing has been listed before the Commission for the purpose of ascertaining who might seek to be heard in relation to the proposed variations to the Award, and what steps should be taken to ensure such parties may be heard in relation to the proposed variations. The hearing will take place:

AT: 11:00AM

ON: Monday, the 28th day of April 2025

AT: 111 St Georges Terrace, Perth, on Level 18.

Any person wishing to appear at this hearing should provide notice to the Senior Commissioner's Associate on (08) 9420 4455 or at chambers-cosentino@wairc.wa.gov.au by no later than **21 April 2025.** For further information, please contact the Senior Commissioner's Associate.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

4 April 2025

INDUSTRIAL MAGISTRATE—Claims before—

2025 WAIRC 00229

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	:	2025 WAIRC 00229
CORAM	:	INDUSTRIAL MAGISTRATE C. TSANG
HEARD	:	MONDAY, 3 FEBRUARY 2025
DELIVERED	:	TUESDAY, 8 APRIL 2025
FILE NO.	:	M 116 OF 2024
BETWEEN	:	CHRISTOPHER APLIN **CLAIMANT** AND ARC HOLDINGS (WA) PTY LTD **FIRST RESPONDENT** MR THOMAS JOHN GRIFFITHS **SECOND RESPONDENT**
CatchWords	:	INDUSTRIAL LAW - Application for imposition of civil penalties for a contravention of s 84T(1) of the *Industrial Relations Act 1979* (WA) requiring a person to comply with a compliance notice – Whether there is a reasonable excuse under s 84T(3) of the *Industrial Relations Act 1979* (WA)
Legislation	:	*Industrial Relations Act 1979* (WA), ss 83E, 84T, 84U
Cases referred to in reasons:	:	***Callan v Smith*** [2021] WAIRC 00216 ***Community and Public Sector Union v Telstra Corporation Inc*** [2001] FCA 1364 ***Dixon v Stojic*** [2024] WAIRC 00177 ***Fair Work Ombudsman v ANSA Finance Pty Ltd*** [2022] FedCFamC2G 833 ***Fair Work Ombudsman v Kentwood Industries Pty Ltd*** [2011] FCA 579 ***Fair Work Ombudsman v Offshore Marine Services Pty Ltd*** [2012] FCA 498 ***Fair Work Ombudsman v Pacific Security Services Pty Ltd*** [2021] FedCFamC2G 111 ***Fair Work Ombudsman v Viper Industries Pty Ltd*** [2015] FCCA 492 ***Gardos v Baker*** [2024] WAIRC 00128 ***Potter v Fair Work Ombudsman*** [2014] FCA 187
Result	:	Penalties imposed with costs
Representation:		
Claimant	:	Mr J Carroll (of counsel)
Respondent	:	Mr K Bowyer (of counsel)

REASONS FOR DECISION

Background

1 On 28 August 2024, the claimant (**Inspector**) filed an Originating Claim, stating:

PARTICULARS OF CLAIM

1. The Claimant, Chris Aplin, is employed as a public service officer in the Department of Energy, Mines, Industry Regulation and Safety (**the Department**) and is designated as an industrial inspector pursuant to section 98(1) of the *Industrial Relations Act 1979* [(WA) (**Act**)].
2. The Minister for Industrial Relations has directed designated industrial inspectors 'to carry out such duties and exercise such powers as may lawfully be required to secure the observance of the provisions of the [Act]'.
3. This claim is made pursuant to sections 83E(1) and 84T(2) of the [Act].
4. material times [*sic*], Since at least April 2000, the First Respondent, a body corporate, has operated a business trading as ARC Switchboards or ARC SWITCHBOARDS.
5. Since 14 April 1999, Mr Thomas John Griffiths, the Second Respondent, has been sole Director and Company Secretary of the First Respondent.
6. Ms Chiara Catalucci is employed as a public service officer in the Department and was, at all material times, that is, up to and including 8 May 2023, designated as an industrial inspector pursuant to section 98(1) of the [Act].
7. Accompanied by a covering letter to the Second Respondent, Ms Catalucci issued the First Respondent with a compliance notice dated 8 May 2023 (**the Compliance Notice**) requiring the First Respondent to take the actions specified in the Compliance Notice.
8. Ms Catalucci personally served the Compliance Notice on the First Respondent on 8 May 2023 at the First Respondent's offices at [*redacted*], by handing the Compliance Notice to the Second Respondent.
9. The Compliance Notice required the payment of $9,345.21 to Mr Patrick McCormick, a former employee of the First Respondent. It also required the provision of reasonable evidence of the First Respondent's compliance with the notice to Ms Catalucci.
10. The First Respondent was required to comply with the Compliance Notice, and provide evidence of compliance, on or before 6 June 2023.
11. The First Respondent did not comply with the Compliance Notice by the date required for compliance or at all.
12. The First Respondent has not complied with the Compliance Notice since that date:
    a) Mr McCormick has not received any payment from the First Respondent;
    b) The Department has not received evidence of any payment.

ALLEGED CONTRAVENTIONS

13. The First Respondent has not taken the actions required by the Compliance Notice, namely:
    a) Paid Mr McCormick $9,345.21;
    b) provided the Department with evidence of compliance.
14. The First Respondent has therefore contravened section 84T(1) of the [Act], which requires compliance with a compliance notice; this is a civil penalty provision for the purposes of section 83E of the [Act] with the penalties in section 84T of the [Act] applying to the contravention.
15. The Second Respondent is a person involved in the contravention of the civil penalty provision. The Second Respondent did aid, abet, counsel or procure the contravention pursuant to section 83E(1B)(a) of the [Act], and/or was by, act or omission, directly or indirectly, knowingly concerned in or party to the contravention pursuant to section 83E(1B)(c) of the [Act], as:
    (i) The Second Respondent was served with the Compliance Notice and therefore has knowledge of it;
    (ii) The Compliance Notice was not complied with;
    (iii) As the sole Director of the First Respondent, the Second Respondent was served with the Compliance Notice and where the Compliance Notice was not complied with, he has the knowledge that it was not complied with.
    (iv) The Second Respondent omitted to comply with the Compliance Notice, or to arrange compliance with the Compliance Notice.

ORDERS SOUGHT

1. The First Respondent, ARC Holdings (WA) Pty Ltd, pay a penalty for the contravention of a civil penalty provision, such penalty to be determined and imposed by the Court pursuant to sections 83E(1) and 84T(2)(a) of the [Act].
2. The Second Respondent, Mr Thomas John Griffiths, pay a penalty as a person taken to have contravened a civil penalty provision pursuant to sections 83E(1A) and 83E(1B)(a) or (c) of the [Act], such penalty to be determined and imposed by the Court pursuant to sections 83E(1) and 84T(2)(b) of the [Act].
3. Pursuant to section 83E(11) of the [Act], the Respondents to pay the disbursements incurred by the Claimant in relation to the proceedings.

2 On 25 September 2024, the respondents filed a Response, stating:

1. At all material times, since at least April 2000, the First Respondent, a body corporate, has operated a business trading as ARC Switchboards [or] ARC SWITCHBOARDS.
2. Since 14 April 1999, Mr Thomas John Griffiths, the Second Respondent, has been the Sole Director and Company

Secretary of the First Respondent.

3. The Respondents have at all times been ready, willing and able to make payment of the sum in the Compliance Notice to Patrick McCormick.
4. Solicitors for the Respondents have requested the details of where to make payment of the sum.
5. The Claimant has not provided the details of where to make payment of the sum.
6. Solicitors for the Claimant confirmed the details of where to make the payment of the sum on 18 September 2024.
7. The Respondent has made the payment in full for the sum owed under the compliance notice to Patrick McCormick on 23 September 2024.
8. The Respondents therefore oppose any orders sought. The proceedings ought to be dismissed.

3 The matter was listed for a directions hearing on 1 November 2024.

4 At the directions hearing, I observed that the Response did not appear to dispute the fact that the Compliance Notice had not been complied with. The Response indicated that the amount required to be paid under the Compliance Notice was paid after the filing of the Originating Claim. Consequently, it appeared that the only issue in dispute was the reasoning behind the non-payment in accordance with the Compliance Notice requirements.

5 Counsel for the Inspector stated that the Inspector's stance was that the Response essentially admitted to a contravention, in substance, if not in form.[1]

6 Counsel for the respondents stated[2]:

> **FARAH, MS**: Yes, your Honour. I tend to agree that, in – it's a matter of form, at this point, that's in contest. We say that if your Honour wishes to proceed to list the matter, just for a hearing on the degree of a penalty that should be invoked, we're in your Honour's hands, at this point in time.

7 As a result, I heard from counsel for the parties on the Orders that should be made, and issued Orders on the following terms:

1. The matter is to be listed for a half-day penalty hearing not before 28 January 2025.
2. The parties are to file any statement of agreed facts and a bundle of any agreed documents by 4:00pm on 15 November 2024.
3. The claimant is to file and serve any witness statements, and any documents which are not agreed documents, upon which he intends to rely by 4:00pm on 29 November 2024.
4. The respondents are to file and serve any witness statements, and any documents which are not agreed documents, upon which they intend to rely by 4:00pm on 13 December 2024.
5. The claimant is to file and serve a written outline of submissions and list of authorities upon which he intends to rely by 4:00pm on 3 January 2025.
6. The respondents are to file and serve a written outline of submissions and list of authorities upon which they intend to rely by 4:00pm on 17 January 2025.
7. If a party intends to rely upon documents as evidence at the trial, that party must lodge those documents with the Court, together with a *Form 29 – Multipurpose Form* under the heading 'Copies of Records', and then provide a stamped copy of the documents to the other party in accordance with the dates set out in orders 3 and 4 above.
8. Each witness statement shall –
   (a) be written and attached to a *Form 29 – Multipurpose Form* under the heading 'Witness Statement';
   (b) be written in numbered paragraphs;
   (c) identify at the beginning of the statement the identity of the person making the statement and the nature of that person's relationship to the parties to the claim;
   (d) detail the evidence to be given by the person at trial; and
   (e) have attached copies of any documents referred to in the witness statement that are in the possession or control of the person making the statement.
9. Evidence in chief in this matter be adduced by way of witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statement may only be adduced by leave of the Industrial Magistrate.
10. The parties have liberty to apply.

8 On 22 January 2025, the respondents filed their written outline of submissions, stating:

2. The Respondents were held to have committed the contraventions without being provided the opportunity to be heard as to any defence in relation to the claim. The Respondents still object to this course of action.

…

29. The Respondents were not afforded the opportunity to be heard on any such potential points of defence at the Initial Hearing.

9 It is therefore necessary to note at this point in these reasons that the respondents' submissions at [8] above are rejected, for the following reasons:

(a) The respondents were represented by counsel at the directions hearing who actively participated in the directions hearing, as outlined at [6] and [7] above.

(b) On 1 November 2024, the Orders at [7] above were issued to the parties.

(c) On 11 November 2024, the parties were notified that the penalty hearing was listed on Monday, 3 February 2025 at 10:00am.

(d) Despite Order 10 (at [7] above) expressly providing the parties with liberty to apply, the respondents did not file an application to have the Orders varied.

(e) The respondents were receiving legal advice at all times[3].

(f) Contrary to the respondents' submissions at [8] above, the respondents concede to the contravention in their written submissions: (emphasis added)

> 46. *The Respondents failure to comply with the compliance notice* has resulted in Mr McCormick being delayed in receiving his long service leave entitlements in the sum of $9,345.21. The Respondents accept this is a significant sum of money.
>
> …
>
> 50. *This is the first contravention of its kind by either the First or Second Respondents.*
>
> …
>
> 52. *There was only one breach.* This consideration is therefore irrelevant.
>
> …
>
> 58. *Senior management was involved in the breaches* in that Mr Griffiths as director of Arc was involved in the decision.

The evidence

10 On 11 November 2024, the parties filed a statement of agreed facts, stating: [**Exhibit 3**]

The parties agree as follows:

1. The first respondent (**ARC Holdings**) is a body corporate and at all material times has operated a business trading as ARC Switchboards or ARC SWITCHBOARDS.
2. ARC Holdings' registered office is [*redacted*].
3. The second respondent (**Mr Griffiths**) has been the sole director and secretary of ARC Holdings since 14 April 1999.
4. On 8 May 2023, Ms Chiara Catalucci, a public service officer designated as an industrial inspector pursuant to [s 98(1) of the Act], served a compliance notice (**Compliance Notice**) and covering letter on ARC Holdings by handing the Compliance Notice and cover letter to Mr Griffiths at ARC Holdings' registered office at [*redacted*].
5. *Agreed Document 1* is a copy of the covering letter accompanying the Compliance Notice.
6. *Agreed Document 2* is a copy of the Compliance Notice.
7. The Compliance Notice required ARC Holdings to do the following on or before 6 June 2023:
   (a) pay $9,345.21 to Mr Patrick McCormick, a former employee of ARC Holdings; and
   (b) provide evidence of such payment to Ms Catalucci.
8. ARC Holdings did not pay $9,345.21 to Mr Patrick McCormick and provide evidence of such to Ms Catalucci on or before 6 June 2023.
9. ARC Holdings paid $9,345.21 to Mr Patrick McCormick on or around 18 September 2024.
10. Mr Griffiths:
    (a) as the sole director and secretary of ARC Holdings, was the person responsible for ensuring ARC Holdings complied with the Compliance Notice;
    (b) as the person who received service of the Compliance Notice for and on behalf of ARC Holdings was aware of the requirements in the Compliance Notice on and from 8 May 2023;
    (c) did not take sufficient steps to ensure that ARC Holdings complied with the Compliance Notice on or before 6 June 2023;
    (d) knew that ARC Holdings did not comply with the Compliance Notice on or before 6 June 2023; and
    (e) at all times from 8 May 2023 to 6 June 2023, as sole director and secretary of ARC Holdings, had the power to ensure that ARC Holdings complied with the Compliance Notice.
11. By application accepted for filing on 2 June 2023, ARC Holdings applied to the Industrial Magistrates Court (**IMC**) for a review of the Compliance Notice under s 84U(1)(a) of the [Act]. The proceedings were given court number M 72 of 2023.
12. On 5 June 2023, ARC Holdings lodged a Form 6 Application with the IMC in M 72 of 2023 applying for an order under s 84U(2) of the [Act] that the operation of the Compliance Notice be stayed (**Form 6 Application**). The Form 6 Application was accepted for filing on 6 June 2023.

13. The respondent to M 72 of 2023 undertook not to enforce the Compliance Notice whilst M 72 of 2023 remained on foot and as a consequence ARC Holdings withdrew the Form 6 Application.
14. On 22 December 2023, the IMC delivered its decision in M 72 of 2023 dismissing the application for review. On 16 January 2024 ARC Holdings lodged an appeal to the Full Bench of the WA Industrial Relations Commission seeking an extension of time in which to appeal against the decision in M 72 of 2023. The proceedings were numbered FBA 2 of 2024. By decision delivered on 28 May 2024, the Full Bench dismissed FBA 2 of 2024.

11 On 20 November 2024, the Inspector filed a witness statement of Chiara Catalucci signed on 18 November 2024, stating: [**Exhibit 1**]

1. My name is Chiara Catalucci.
2. I am employed as a public service officer in [the Department].
3. At all material times, until 4 August 2023, I had been designated as an industrial inspector pursuant to [s 98(1) of the Act] by the CEO of the Department.
4. Attached and marked "CC01" is a true copy of designations dated 28 February 2020, 8 February 2021, 09 March 2021, 2 February 2022, 16 June 2022, 25 August 2022, 13 January 2023 and 4 August 2023. [**Exhibit 2**]
5. I am no longer designated as an industrial inspector as I have been appointed to a different position within the Department.
6. The Compliance Notice I issued on 8 May 2023 and served on Mr Thomas John Griffiths that day required ARC Holdings (WA) Pty Ltd to:
   a) pay $9,345.21 to Mr Patrick McCormick;
   b) provide evidence to me of the payment by 6 June 2023, via post to Private Sector Labour Relations, [*redacted*] or email to [*redacted*].
7. My email address, [*redacted*] did not change when I ceased to be an industrial inspector and I continue to receive emails that are sent to that address.
8. As at today's date, I have not received any evidence of payment by mail or by email.
9. I have checked the Department's document management system today and confirmed no mail has been received from either Respondent relating to the payment.
10. I declare that this statement is true to the best of my knowledge and belief and that I have made this statement knowing that if it is tendered in evidence I will be guilty of a crime if I have wilfully included in this statement anything which I know to be false or that I do not believe to be true.

12 On 8 January 2025, the respondents filed an affidavit of the second respondent, John Griffiths affirmed on 7 January 2024, stating: [**Exhibit 5**]

1. On or about 8 May 2023, I was served with a Compliance Notice issued by Senior Industrial Inspector Chiara Catalucci on behalf of Mr Patrick McCormick.
2. I instructed my legal representatives to file an Originating Claim seeking to set aside the Compliance Notice which was filed with Industrial Magistrates Court on 2 June 2023.
3. On 22 December 2023, the matter was determined by IM Tsang and orders were made confirming the Compliance Notice.
4. I instructed my solicitors to appeal the decision of IM Tsang, such Notice of Appeal was filed on 16 January 2024.
5. On 28 May 2024, Orders were made dismissing the Appeal.
6. On 24 June 2024, I instructed my solicitors that I did not wish to challenge the Orders that were made. I telephoned my legal representative, Kyle Kutasi. We had the following conversation:

   JG: I need to pay [McCormick]. I need to confirm payment details?

   KK: No worries. Leave it with me.
7. I have not received any further notice from my legal representative, from Mr McCormick or from any Industrial Inspector as to where payment was to be made.
8. Despite being ready and willing to pay since 24 June 2024, I did not receive any confirmation of the correct details to make payment.
9. On 5 September 2024, I was served with the Originating Claim commencing these proceedings.
10. I immediately made arrangements to make payment in accordance with the Compliance Notice by paying into the trust account of my solicitors. *A copy of a receipt of payment is annexed and marked "JG-1".*

The law and relevant principles

13 The version of the Act that applies to these proceedings is the version current from 1 July 2022 to 12 November 2024.

14 Section 84T of the Act states:

84T. Person must comply with compliance notice

(1) A person must comply with a compliance notice.

(2) A contravention of subsection (1) is not an offence but the subsection is a civil penalty provision for the purposes of section 83E, except that the pecuniary penalty cannot exceed –

(a) in the case of a body corporate – $30 000;

(b) in the case of an individual – $6 000.

(3) Subsection (1) does not apply if the person has a reasonable excuse.

15 Sections 83E(1), (1A), (1B), (6)(d), (10) and (11) of the Act state:

83E. Civil penalty provision, proceedings for contravening

(1) If a person contravenes a civil penalty provision, the industrial magistrate's court may, on an application to the court, make an order imposing a pecuniary penalty on the person …

(1A) A person who is involved in a contravention of a civil penalty provision is taken to contravene that provision.

(1B) A person is ***involved in*** a contravention of a civil penalty provision if, and only if, the person –

(a) aids, abets, counsels or procures the contravention; or

(b) induces the contravention, whether by threats or promises or otherwise; or

(c) is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) conspires with others to effect the contravention.

…

(6) Except as provided in subsections (6a) and (7A), an application for an order under this section may be made by –

…

(d) an industrial inspector.

…

(10) Where, on an application under subsection (6), the industrial magistrate's court does not make an order under subsection (1) or (2), the court may, by order, dismiss the application.

(11) An order under subsection (1), (2) or (10) may be made in any case with or without costs, but in no case can any costs be given against the Registrar, the deputy registrar, or an industrial inspector.

16 On 18 December 2024 and 22 January 2025, the Inspector and the respondents filed their written submissions. They agreed that the factors set out in ***Callan v Smith*** [2021] WAIRC 00216 (***Callan***) [90] are relevant to the determination of any penalty that ought to be imposed.

17 At the penalty hearing, both counsel relied on their written submissions. Counsel for the Inspector made oral submissions that addressed the issues in the respondents' written submissions.

Consideration – Reasonable excuse

18 The respondents argue that s 84T(3) of the Act states that the requirement for a person to comply with a compliance notice under s 84T(1) does not apply if the person has a reasonable excuse. In relation to their reasonable excuse, the respondents submit: (footnotes omitted)

9. The [Act] does not provide a definition of the term 'reasonable excuse'. However, it is intended to provide a potential defence to a non-complying employer [***Gardos v Baker*** [2024] WAIRC 00128 (***Gardos***) [35]].

10. This court has indicated that interpretation of these words can be assisted by reference to case law which has interpreted and applied subsections 716(5) and (6) of the *Fair Work Act 2009* (Cth) [**FW Act**] which are cast in near identical terms to subsections 84T(1) and 84T(3) [***Gardos*** [36]–[37]].

11. In ***Fair Work Ombudsman v ANSA Finance Pty Ltd*** [2022] FedCFamC2G 833 [(***ANSA***)] at [49] and [109], Forbes J held the [excuse] provided must be one which would be regarded as reasonable, by the reasonable person in all the relevant circumstances. It is a matter to be determined objectively by the court having regard to all the evidence.

12. In ***Fair Work Ombudsman v Pacific Security Services Pty Ltd*** [2021] FedCFamC2G 111 at [49] citing ***Potter v Fair Work Ombudsman*** [2014] FCA 187 [(***Potter***)] at [72], Blake J, held that a person seeking to argue that they have a reasonable excuse for noncompliance with a compliance notice, bears the onus of proof.

The Respondents' Reasonable Excuse

13. The Respondents were served with the compliance notice on or about 8 May 2023.

14. The Respondents instructed their legal representatives to file an application pursuant to s 84U(1) in relation to the Compliance Notice on 2 June 2023.

15. The Respondents subsequently instructed their legal representatives to file an application seeking the stay of the compliance notice on 6 June 2023.

16. The Applicant provided an undertaking not to enforce the compliance notice 'unless and until the application for review is determined' on 9 June 2023.

17. The application was not finally determined until Friday, 22 December 2023, when the compliance notice was

confirmed.

18. Upon being notified of the matter, the Respondents then instructed their legal representatives to file an appeal against the decision.
19. The appeal was lodged on 16 January 2024.
20. The appeal was ultimately dismissed on 27 May 2024 on the basis that the Full Bench of the Industrial Relations Commission was not satisfied that it was appropriate to grant an extension of time for the filing of the appeal.
21. The Respondents decided not to challenge the decision any further and proceeded to instruct their legal representatives to make payment in accordance with the compliance notice. These instructions were given on or about 24 June 2024.
22. The Respondents legal representatives had a phone conversation in June or July 2024 with the Applicant's legal representative, in which it was communicated to same that the only reason that payment had not yet been made was that the Respondents were awaiting confirmation of the relevant payment details.
23. The Respondents should not be blamed for not making payment without confirmation of the correct transaction details. The Court would accept on judicial notice that it is common practice in today's day and age to seek confirmation of the payment details prior to making a payment by way of electronic funds transfer. It could not have been expected of the Respondents to make a payment to an account without first confirming the details. Particularly so when the only payment details available were details provided in the compliance notice which was dated more than thirteen (13) months prior.
24. Between the date of the telephone conversation and 29 August 2024, the date of service of the Originating Claim, the Applicant did not provide any confirmation of the payment details which were requested to be confirmed in order to comply.
25. Additionally, the Applicant made no demand of the Respondents. Much can be made of this, particularly when the First Respondent made an application to have the Compliance Notice stayed and the response to that application was for the Applicant to offer a consent position in which they undertook not to enforce the Compliance Notice until a determination was made (which was accepted). It is contrary to that position (and that undertaking) to now claim that there has been a failure to comply where the enforcement power to the Compliance Notice was voluntarily surrendered by the Applicant.
26. The Respondents made payment into their legal representative's trust account on 16 September 2024.
27. It is not in dispute that the Respondents' legal representatives have since made payment on behalf of the Respondents in accordance with the compliance notice.
28. The Respondents should not be blamed for pursuing their legal entitlement to have the compliance notice reviewed and to appeal the determination.

19 The Inspector submits:

(a) The obligation to comply with the Compliance Notice arose on 6 June 2023. Thus, any reasonable excuse must have existed at that time to be a valid defence.

(b) The respondents' evidence of events in 2024 cannot serve as a reasonable excuse and is relevant only for mitigating penalties. However, it is not mitigatory because ARC Holdings' contravention caused the delay in Mr McCormick being paid. Accepting the respondents' reasons for the delay would create a perverse incentive for recipients of compliance notices to delay compliance, citing outdated bank account details as an excuse. This undermines public policy.

(c) Mr Griffiths' evidence does not rise to a reasonable excuse for the following reasons:

(i) Firstly, the evidence relates to the wrong time period and does not address the time when non-compliance occurred.

(ii) Secondly, ARC Holdings was obliged to comply with the terms of the Compliance Notice, which specified payment into Mr McCormick's bank account. Any error in the account details is a matter for the Inspector to resolve, not the respondents. The Compliance Notice required ARC Holdings to make payment to the specified account, regardless of whether it was actually Mr McCormick's account.

(iii) Thirdly, there is no evidence before the Court that suggests the respondents took reasonable steps to clarify the payment details. Mr Griffiths' evidence indicates that he spoke with his solicitor on 24 June 2024 and said, 'I need to confirm payment details' and did not receive any further notice 'as to where payment was to be made' before being served with the Originating Claim on 5 September 2024. There is nothing in Mr Griffiths' evidence to demonstrate that reasonable steps were taken to clarify the payment details, in circumstances where the onus lies upon the respondents to establish such facts.

20 The respondents rely upon ***ANSA***, a decision of Judge Forbes of the Federal Circuit and Family Court of Australia (Division 2), delivered on 14 October 2022, involving Ansa Finance's contraventions of ss 716(5) and 536(1) of the FW Act.

21 Sections 716(5) and (6) of the FW Act state:

Person must not fail to comply with notice

(5) A person must not fail to comply with a notice given under this section.

Note: This subsection is a civil remedy provision (see Part 4-1).

(6) Subsection (5) does not apply if the person has a reasonable excuse.

22 In relation to s 716(5) and an employer's reasonable excuse, Forbes J says: ***ANSA*** [146]–[152]: (footnotes omitted)

Reasonable excuse

146. Pursuant to s 716(5) of the FW Act, a failure to comply with a compliance notice is a contravention of the [FW Act]. However, that provision does not apply if a person has a 'reasonable excuse'. Where a reasonable excuse is demonstrated the civil remedy provision relating to failure to comply is not engaged.

147. An employer who seeks to rely on the exception of 'reasonable excuse' bears the onus of proof. The excuse proffered must be one which would be regarded as reasonable by a reasonable person in the relevant circumstances. It is a matter to be determined objectively by the Court having regard to all the evidence.

148. The Court's consideration of whether there is a 'reasonable excuse' is properly directed to the steps required to be taken under the compliance notice. It is not an enquiry into whether the alleged substantive contravention of fair work instruments has been made out by the Ombudsman or whether the respondents have a proper basis to contest the Inspector's reasonable belief. The relevant question is whether objectively the respondent had a reasonable excuse for not doing what the compliance notice required it to do.

149. The Ombudsman submits that under the statutory scheme any legal or merit challenge to the validity of a compliance notice should be made by way of an application for review under s 717 of the Act. Counsel for the Ombudsman likened that to an avenue for judicial review that would normally be available in relation to administrative decisions. There is some force in this submission.

150. The thrust of the Ombudsman's submission is that the statutory compliance scheme can be likened to the framework around other summary statutory infringements such as parking or traffic fines. In like situations a person who receives an infringement notice usually faces a binary choice – either comply with the notice or challenge the basis of it by initiating some kind of judicial review. If review is not sought, the infringement notice presumptively stands as a valid instrument and requires the recipient to take the steps required by the notice. So too it is with a compliance notice under the FW Act. In the absence of an application for review pursuant to s 717, the recipient is required to take the steps specified in the notice unless it has a 'reasonable excuse'.

151. In my view it is implicit from the text of the legislative scheme that a disagreement with the alleged substantive contravention or the form of the notice does not constitute a reasonable excuse unless an application for review has been made. If an application for review is made the Court has power to stay its operation on terms it considers appropriate. Parliament cannot have intended that an employer's disagreement with a notice, without more, could nullify the operation of s 716(5).

152. In my view the question for the Court is whether Ansa Finance can establish a reasonable excuse for not being able to do the things that the Compliance Notices required it to do. It is a question properly directed to the recipient's capacity or ability, rather than its will.

23 Sections 716(5) and (6) of the FW Act are in effectively the same terms as ss 84T(1) and (3) of the Act:

Fair Work Act 2009 (Cth) – s 716	*Industrial Relations Act 1979* (WA) – s 84T
Person must not fail to comply with notice (5) A person must not fail to comply with a notice given under this section. Note: This subsection is a civil remedy provision (see Part 4-1). (6) Subsection (5) does not apply if the person has a reasonable excuse.	**Person must comply with compliance notice** (1) A person must comply with a compliance notice. … (3) Subsection (1) does not apply if the person has a reasonable excuse.

24 As such, and applying ***ANSA*** [151]–[152], I find that the respondents have not established that they have a reasonable excuse for ARC Holdings not complying with the Compliance Notice, for the following reasons.

25 While the Compliance Notice contains attachments, it is in effect a two-page document stating:

This Compliance Notice requires the employer to:

a) take the specified actions described in this notice to remedy the direct effects of the contravention outlined below; and

b) provide reasonable evidence of compliance with this notice to me by 6 June 2023.

…

Required action under this Compliance Notice

The employer is required to take the following actions to remedy the direct effects of the contravention.

1. Rectify the identified underpayment by making payment in full of the relevant amount to the employee listed in the table above.

Mr Patrick McCormick's bank account details:

BSB [*redacted*]

Account [*redacted*]

2. Produce reasonable evidence to me of compliance with the action specified in point [1] above, such as a pay slip which sets out gross and net payment; and a bank transfer receipt showing the net payment made to the employee.
3. Evidence of compliance must be provided to me on or before 6 June 2023 via post or email:

Mail	Private Sector Labour Relations [*redacted*]
Email	[*redacted*]

4. The employer's rights and obligations under this Compliance Notice are attached. The Department encourages the employer to seek independent advice from a lawyer, accountant or employer association in relation to this Compliance Notice.
5. Please contact me on [*redacted*] if you have any questions regarding this notice.

26 A cover letter accompanied the Compliance Notice. The cover letter is a one-and-a-half-page document stating:

What do you need to do now?

This is the Employer's opportunity to fix these issues without going to court. If the Employer complies with the Compliance Notice by 31 May 2023, the Department will not take further action in relation to the contravention set out in the Compliance Notice.

ACTION REQUIRED	**DUE DATE**
1. Read the attached Compliance Notice	
2. Make payment in full to the employee	06/06/2023
3. Provide evidence to me of payment to the employee	06/06/2023
I will review the evidence to determine the Employer's compliance with this Notice	

If the Employer does not comply with the Compliance Notice by 6 June 2023, the Department may take the Employer to court. Failing to comply with a Compliance Notice attracts a maximum civil penalty of $30,000 for a body corporate and $6,000 for an individual. In addition to an order from the Industrial Magistrates Court to make the payment to the employee.

What if the Employer doesn't agree with the Compliance Notice?

The Employer can apply to the Industrial Magistrates Court for a review of the Compliance Notice on the following grounds:

a) the contravention set out in the Compliance Notice did not occur; and/or

b) the Compliance Notice does not comply with the *Industrial Relations Act 1979*.

You will need to contact the Industrial Magistrates Court on 9420 4467 or at www.imc.wa.gov.au for information on applying for a review of the Compliance Notice before the due date.

The Department also encourages the Employer to seek independent advice in relation to this Compliance Notice.

You may contact me on [*redacted*] or at [*redacted*] to discuss the Compliance Notice. There is also additional information regarding Compliance Notices and our Compliance and Enforcement Policy on the Department's website at https://www.commerce.wa.gov.au/publications/private-sector-labour-relations-division-compliance-and-enforcement-policy.

Yours sincerely

Chiara Catalucci

SENIOR INDUSTRIAL INSPECTOR

PRIVATE SECTOR LABOUR RELATIONS

ATTENTION

To avoid legal proceedings, the Employer must complete all of the actions required in the attached Compliance Notice before 6 June 2023.

27 As outlined in [25]–[26] above, ARC Holdings' obligations under the Compliance Notice could not have been made more plain.

28 By the statement of agreed facts, the parties agree on the following facts:

(a) ARC Holdings disputed the alleged substantive contravention and applied to the Court for a review of the Compliance Notice (M 72/2023).

(b) Shortly afterwards, ARC Holdings applied to the Court for an order that the operation of the Compliance Notice be stayed. The respondent to M 72/2023 undertook not to enforce the Compliance Notice while M 72/2023 remained on foot, and consequently ARC Holdings withdrew its application for a stay.

(c) On 22 December 2023, the decision in M 72/2023 was delivered, dismissing ARC Holdings' application for review.

29 Despite seeking a stay in M 72/2023, the respondents have not produced any evidence explaining why ARC Holdings neither complied with the Compliance Notice nor pursued a stay of its operation following the decision in M 72/2023 being delivered

on 22 December 2023.

30 Mr Griffiths deposes to instructing his solicitors to appeal the decision in M 72/2023, and the Full Bench issuing Orders dismissing the appeal on 28 May 2024. However, he has not provided any evidence explaining why ARC Holdings did not comply with the Compliance Notice on 28 May 2024.

31 Mr Griffiths deposes to instructing ARC Holdings' solicitors on 24 June 2024 that he did not wish to challenge the Full Bench's orders dismissing the appeal. This is 27 days after the Full Bench issued its orders. Any appeal to the Industrial Appeal Court 'must be instituted within 21 days from the date of the decision against which the appeal is brought'[4]. The respondents have not provided any evidence explaining the reason for the delay in instructing their solicitors following the Full Bench issuing orders on 28 May 2024.

32 While Mr Griffiths deposes to having the following conversation with his solicitor, and the respondents' submissions request the court take judicial notice that 'it is common practice in today's day and age to seek confirmation of the payment details prior to making a payment by way of electronic funds transfer', the respondents have not provided any evidence of Arc Holdings' inability to comply with the Compliance Notice on 24 June 2024:

JG: I need to pay [McCormick]. I need to confirm payment details?

KK: No worries. Leave it with me.[5]

33 The respondents have not provided any evidence to suggest that they made attempts to comply with the Compliance Notice.

34 This is in circumstances where the respondents accept that they bear the onus of proof: respondents' submissions [12] (at [18] above).

35 As outlined in [25]–[27] above, the details regarding when payment was to be made and where payment was to be made were clearly stipulated in the Compliance Notice.

36 I agree with the Inspector's submissions that the Compliance Notice required ARC Holdings to make payment to Mr McCormick's bank account. If there was any error in this regard, it was an issue for the Inspector to address.

37 Relevantly, the Compliance Notice specified a two-step process that ARC Holdings needed to follow to achieve compliance. The first step was to make payment to Mr McCormick, and the second step was to provide the Inspector with confirmation that the payment had indeed been made to Mr McCormick.

38 It is an agreed fact that ARC Holdings belatedly fulfilled the first step of this process by making the payment to Mr McCormick on or around 18 September 2024.

39 However, the respondents have not provided any evidence to demonstrate that ARC Holdings complied with the second step of the process.

40 The respondents have not provided any evidence to suggest that they held any reasonable belief as to why payment could not have been made to the bank account stipulated in the Compliance Notice.

41 Relevantly, there is no dispute that ARC Holdings ultimately made the payment to Mr McCormick's bank account stipulated in the Compliance Notice.

42 The respondents bear the onus to prove a reasonable excuse: ***Potter*** [72]. They have not provided evidence of incapacity or inability to comply with the Compliance Notice, failing to meet this burden. Seeking a review under s 84U does not suspend the Compliance Notice's operation, absent a stay. ARC Holdings' choice to appeal the decision in M 72/2023 without securing a stay, does not constitute a reasonable excuse: ***ANSA*** [151].

43 The respondents argue (at [23] of their written submissions at [18] above), it was reasonable to delay payment until confirming bank details, given the Compliance Notice's age. However, this resembles a disagreement with the ***form*** of the Compliance Notice, which ***ANSA*** [151] holds 'does not constitute a reasonable excuse unless an application for review has been made'.

44 The Compliance Notice clearly stated Mr McCormick's bank details. Seeking confirmation of Mr McCormick's bank details in June 2024 – over a year after the 6 June 2023 deadline, more than six months after the IMC decision in M 72/2023 was delivered on 22 December 2023, and despite the Full Bench dismissing ARC Holdings' appeal on 28 May 2024 – does not constitute a reasonable excuse, as the Compliance Notice provided clear bank details, and the respondents have provided no evidence of their inability to make payment to this bank account.

45 It is evident from ***ANSA*** [151]–[152], that the 'reasonable excuse' exception to compliance with a compliance notice, requires objective inability to comply with the compliance notice, not subjective disagreement with either the contravention alleged in the compliance notice or the form of the compliance notice.

46 The respondents' failure to provide any evidence to suggest that they were unable to make payment to the bank account stipulated in the Compliance Notice, undermines their defence.

47 In these circumstances, I find that the respondents have not established a reasonable excuse for ARC Holdings 'not being able to do the things that the [Compliance Notice] required it to do': ***ANSA*** [152].

48 I am not satisfied the respondents have established a reasonable excuse as to non-compliance that is directed to ARC Holdings' 'capacity or ability' to comply with the Compliance Notice: ***ANSA*** [152].

49 Therefore, I find ARC Holdings to have contravened s 84T(1) of the Act.

50 As outlined in the statement of agreed facts [10] (at [10] above), Mr Griffiths, as sole director and secretary, received the Compliance Notice, was aware of its requirements, was the person responsible for ensuring ARC Holdings' compliance with the Compliance Notice, knew of ARC Holdings' non-compliance, and had the power to ensure ARC Holdings' compliance.

51 In the circumstances of the agreed facts (at [10] and [50] above), Mr Griffiths' conduct, whether characterised as his act of not

ensuring ARC Holdings' compliance, or his omission in ensuring ARC Holdings' compliance, renders him ***involved in*** ARC Holdings' contravention of s 84T(1) under s 83E(1B)(c) of the Act. As a person ***involved in*** a contravention of s 84T(1), Mr Griffiths is taken to have contravened s 84T(1) under s 83E(1A) of the Act.

52 Consequently, it is necessary to consider whether penalties should be imposed on the respondents, considering the factors outlined in ***Callan*** [90].

Consideration – Penalty

***Callan* [90(a)] and [90(b)]: the nature and extent of the conduct which led to the breaches; the circumstances in which that conduct took place**

53 The Inspector submits:

17. There was a single contravention by each of the respondents. ARC Holdings' failure to comply with the compliance notice and Mr Griffiths' involvement in that contravention.

18. The factual circumstances of the contraventions are set out in the agreed facts.

19. The notice of compliance was served on 8 May 2023 with the date for compliance being 6 June 2023. The notice required ARC Holdings to pay Mr Patrick McCormick, a former employee of ARC Holdings, $9,345.21, and to provide the industrial inspector evidence of such payment. The sum of money was calculated on the basis of the industrial inspector's reasonable belief that such sum was owed by ARC Holdings to Mr McCormick under the *Long Service Leave Act 1958* (WA), with the sum becoming due under that Act on 29 October 2020.

20. ARC Holdings paid Mr McCormick the sum identified in the compliance notice on 23 September 2024, over 15 months after the due date for compliance. ARC Holdings did not provide evidence of the payment to the industrial inspector however the industrial inspector accepts the payment has been made.

21. The context of the non-compliance is as follows:

    (a) The compliance notice identified the bank account where the sum of money the subject of the compliance notice needed to be paid. Accordingly, at all times ARC Holdings and Mr Griffiths had sufficient information to enable ARC Holdings to comply with the notice.

    (b) On 2 June 2023 ARC Holdings applied to this Court for review of the compliance notice (proceedings M 72 of 2023).

    (c) On 5 June 2023 ARC Holdings applied to this Court for an order that the operation of the compliance notice be stayed.

    (d) Before that application could be dealt with, the industrial inspector agreed not to enforce the compliance notice until the conclusion of M 72 of 2023 and ARC Holdings withdrew its application for a stay of the operation of the compliance notice.

    (e) M 72 of 2023 was dismissed on 22 December 2023.

    (f) On 16 January 2024 ARC Holdings lodged a notice of appeal against the decision in M 72 of [2023] (proceedings FBA 2 of 2024). No application was made to stay the operation of the compliance notice.

    (g) FBA 2 of 2024 was dismissed on 28 May 2024.

    (h) The present proceedings were commenced on 28 August 2024.

    (i) ARC Holdings paid the sum of money identified in the compliance notice to Mr McCormick [on] 23 September 2024, after having been served with the originating claim in these proceedings.

22. The facts supporting Mr Griffiths' involvement in the contravention are also set out in the agreed facts. He has at all material times been the sole director and secretary of ARC Holdings. He received the compliance notice, was responsible for making sure it was complied with, and had the power to ensure it was compiled with. He also knew ARC Holdings did not comply with the compliance notice and did not take sufficient steps to ensure it was complied with. These facts establish his 'involvement' in the contravention under s 83E(1B)(c) of the [Act], and by virtue of s 83E(1A), is taken to have contravened s 84T(1).

23. The nature and circumstances of the contraventions are significant:

    (a) The money the subject of the compliance notice was not paid until some 15 months after the date for compliance.

    (b) The sum of money was only paid after these proceedings were commenced. It can be inferred that the sum of money would not have been paid if these proceedings were not commenced.

    (c) The sum of money is significant. Just under $10,000 is a significant sum for any employee, and on the inspector's reasonable belief, the sum was owed to the employee at the end of October 2020.

    (d) The respondents were aware that it was necessary to obtain a stay of the operation of the compliance notice to be relieved from the obligation to comply with the notice.

    (e) Even if the respondents were labouring under a mistaken belief that the money did not need to be paid until the conclusion of the Full Bench proceedings (which belief would not have been a reasonable belief), ARC Holdings did not take steps to make the payment immediately after those proceedings were dismissed.

24. The facts and circumstances demonstrate knowing and intentional non-compliance.

25. The present contravention is a very serious example of a contravention of a compliance notice as the circumstances

undermine the purpose of the compliance notice regime.

54 The respondents submit:

37. This matter involves a single contravention of the [Act]. The contravention was made by the First Respondent, and the Claimant is seeking that the Second Respondent be held personally responsible for his specific involvement in the solitary contravention.

38. The maximum penalty that may be imposed for the contravention is a fine of $30,000 on the First Respondent and a fine of $6,000 on the Second Respondent.

39. The Respondents received the compliance notice and proceeded to engage with the Compliance Notice by seeking its review. The Compliance Notice was not ignored.

40. It would be a mischaracterisation of the Respondents actions to find that a deliberate choice was made not to comply with the notice. Rather, the Respondents pursued their entitlement to seek to have the compliance notice reviewed and set aside. Once the Respondents accepted that their legal view was wrong, the only delay in making payment arose out of either a failure on behalf of the Claimant to confirm the payment information or a miscommunication between the legal representatives concerning the payment details.

41. The Respondents never intended to avoid or obfuscate their legal responsibilities and duties.

42. The resources expended by the Department, its legal advisors, and the Court could have been avoided by simply following up with the Respondents once the review proceedings concluded.

43. The circumstances in which the conduct took place are set out in paragraphs 13 to 27 of these submissions.

44. However, it should be noted that the conduct the subject matter of the Compliance Notice arose initially from the Respondents having taken the view that they had complied with the requirements of long service leave entitlements because they formed the view that his service was not continuous.

45. Although ultimately this view was found to be incorrect, this should not be held against the Respondents.

55 In response to the respondents' written submissions [25] (at [18] above) that the Inspector made no demand of the respondents, the Inspector submits:

(a) The lack of demand is not relevant to this matter. This matter does not involve a civil debt, where a demand might typically be made prior to the commencement of proceedings. Instead, this matter involved the issuance of a compliance notice, which required compliance on the pain of civil penalties. Therefore, no demands were necessary.

(b) The respondents' argument that a demand was required further demonstrates their lack of understanding and insight into their obligations in relation to compliance notices. This highlights the need for specific deterrence to reinforce the importance of compliance with the State's industrial laws, particularly in relation to compliance notices.

56 I reject the respondents' submissions [25] (at [18] above) that 'much can be made of' the Inspector not making a demand for ARC Holdings to comply with the Compliance Notice before enforcing it. Unlike a civil debt which may require a demand, a compliance notice is a statutory directive with a fixed time for compliance (in this case, 6 June 2023). The Compliance Notice stipulated what steps ARC Holdings was required to take in compliance with it. The cover letter to the Compliance Notice reinforced that if ARC Holdings does not comply with the Compliance Notice that the Department may take it to court, seeking penalties for non-compliance. The Inspector is not required to make a demand that ARC Holdings comply with the Compliance Notice before seeking to enforce it. The terms of the Compliance Notice and the accompanying cover letter warned of penalties for non-compliance, negating any need for further demand.

57 I do not accept the respondents' submissions [40]–[41] (at [54] above) that they never intended to avoid or obfuscate their legal responsibilities and duties, and did not deliberately choose to not comply with the Compliance Notice but rather pursued their entitlement to have the Compliance Notice reviewed. It is undisputed that Arc Holdings applied to have the Compliance Notice reviewed. However, in circumstances where the respondents were aware of the requirement to obtain a stay of the operation of the Compliance Notice for ARC Holdings to be relieved from the obligation to comply with it, yet they failed to take the necessary steps to apply for a stay once the IMC decision was handed down, and failed to make the payment even after the Full Bench proceedings were dismissed, their submission that non-compliance with the Compliance Notice was not deliberate cannot be accepted.

58 As outlined at [29]–[46] above, the respondents have not provided any evidence of any attempts to make the payment to the bank account stipulated in the Compliance Notice, nor provided any evidence as to why they held a reasonable belief that payment could not be made to the bank account stipulated in the Compliance Notice. Relevantly, it is an agreed fact that ARC Holdings paid the amount stipulated in the Compliance Notice to the bank account stipulated in the Compliance Notice shortly after being served with the Originating Claim.

***Callan* [90(c)]: the nature and extent of any loss or damage sustained as a result of the breaches**

59 The Inspector submits:

26. ARC Holdings' failure to comply with the compliance notice has resulted in a continued non-payment of Mr McCormick's alleged lawful entitlement in circumstances where the alleged entitlement arose at the end of October 2020. For any employee the loss of $9,345.21 is considerable.

27. Additionally, enforcement proceedings require the dedication of considerable time and resources by the Department, its legal advisors, and the Court. ARC Holdings and Mr Griffiths knowingly did not comply with the compliance notice, thus requiring the commencement of these proceedings. Litigation and the associated cost to the public would have been avoided if ARC Holdings had complied with the compliance notice.

60 The respondents submit:

46. The Respondents failure to comply with the compliance notice has resulted in Mr McCormick being delayed in receiving his long service leave entitlements in the sum of $9,345.21. The Respondents accept this is a significant sum of money.

47. However, the nature of the entitlement, being long service leave, should be distinguished from that of underpayments of entitlements such as wages or superannuation. The entitlement is one that he would have received at a discrete period in time as opposed to seeing regular shortfall in his income throughout his employment or having suffered the detrimental impact of not having had his superannuation entitlements potentially growing in his superannuation fund over the course of his employment. Instead, he has received his lump sum later than at the date of his termination.

48. This is not to minimise the significance of the sum that Mr McCormick was ultimately required to wait for, but to point out that it was not a loss that occurred over the course of his employment and does not have the same consequential impact as underpayment of superannuation.

49. Any damage suffered by Mr [McCormick] is limited to a small sum of interest.

61 In response to the respondents' written submissions [47] (at [60] above), which suggests that the delay in payment of long service leave is less serious because it is paid upon termination of employment, unlike wages which are paid weekly or fortnightly, the Inspector submits it should not be accepted as:

(a) Firstly, the Compliance Notice required ARC Holdings to pay Mr McCormick the amount that equated to the long service leave payment that was due to him upon the termination of his employment, which took place in October 2020. The payment was not made until almost four years later, in September 2024.

(b) Secondly, the respondents' submission reveals their lack of understanding and appreciation of the serious nature and potential consequences of failing to comply with industrial laws.

62 I find that ARC Holdings' failure to comply with the Compliance Notice resulted in a considerable loss for Mr McCormick, as he was deprived of his long service leave entitlement of $9,345.21 from the end of October 2020 until the payment was made in September 2024.

63 While the respondents argue that the nature of long service leave is different from other entitlements such as wages or superannuation, the delay in payment still caused financial harm to Mr McCormick, and there is no evidence that any damage suffered is limited to a small sum of interest.

64 Furthermore, ARC Holdings' non-compliance with the Compliance Notice led to the commencement of enforcement proceedings, which required the dedication of considerable time and resources by the Department, its legal advisors, and the Court.

65 Litigation and the associated costs to the public could have been avoided if ARC Holdings had complied with the Compliance Notice.

***Callan* [90(d)]: whether there had been similar previous conduct by the respondent**

66 The Inspector submits:

28. There is no evidence either respondent has previously been found by a Court to have engaged in similar conduct. Although the WAIRC has previously found ARC Holdings to have denied an employee a contractual benefit.

67 The respondents submit:

50. This is the first contravention of its kind by either the First or Second Respondents.

51. The Respondents have always endeavoured to meet their obligations as employers.

68 While the Inspector has referred to the Commission previously finding ARC Holdings to have denied an employee a contractual benefit, there is no evidence that either respondent has been found to have contravened a civil penalty provision of an industrial law. Therefore, I agree with the respondents that this is the first contravention of its kind by either respondent.

***Callan* [90(e)]: whether the breaches are properly distinct or arose out of the one course of conduct**

69 The respondents submit:

52. There was only one breach. This consideration is therefore irrelevant.

70 I agree with the respondents that there is a single breach.

***Callan* [90(f)]: the size of the business enterprise involved**

71 The Inspector submits:

29. The claimant has no information about the size of ARC Holdings' business.

30. However, and in any event, for the reasons identified by Kucera IM in [***Gardos***] [86]–[87] (and the cases cited therein), even if ARC Holdings is a small business, that factor is of little relevance in the present case.

72 The respondents submit:

53. This consideration held to have little bearing other than that, in some cases, the fact that a business is small may be reason to show some leniency on penalty. There is no evidence before the Court as to Arc's size. The Court, however, would take it on judicial notice that ARC Holdings is not a large corporation such as Telstra or Sanitarium who are well known across the nation upon whom penalties for the purpose of general deterrence have greater effect

due to their publicity.

73 In response to the respondents' written submissions [53] (at [72] above), which suggests that penalties imposed on larger corporations have a greater deterrent effect, the Inspector submits it should not be accepted as:

(a) Firstly, the submission is not supported by any evidence.

(b) Secondly, the submission is not inherently obvious. For instance, there is no reason why the Inspector cannot make public statements about the imposition of penalties on small companies or sole traders to emphasise the general deterrent effect of a penalty.

74 I find that the size of ARC Holdings is not a significant factor in determining the penalties for non-compliance of the Compliance Notice.

75 While the respondents suggest that the size of the business may warrant some leniency in penalty, there is no evidence before the Court to support this assertion.

76 Furthermore, the deterrent effect of penalties is not inherently dependent on the size of the business, as the Inspector can make public statements regarding the imposition of penalties on small companies or sole traders to emphasise the general deterrent effect of a penalty.

***Callan* [90(g)]: whether or not the breaches were deliberate**

77 The Inspector submits:

31. It is open to find that the contraventions were deliberate in the sense that they were knowing and intentional. This can be inferred from the fact that ARC Holdings was aware it needed to obtain a stay of the operation of the compliance notice to be excused from not complying with the notice. Despite not obtaining any such stay, ARC Holdings did not comply, and it knew that it had not complied.

32. The fact that ARC Holdings promptly paid the sum of money after these proceedings were commenced demonstrate it was financially able to comply if it wanted to comply.

78 The respondents submit:

54. The alleged breaches were not deliberate.

55. The Respondents had turned their mind to Mr McCormick's entitlements and had formed the decision that he was not entitled to long service leave. This can be distinguished from refusing to pay Mr McCormick long service leave with the knowledge that Mr McCormick was entitled to be paid such a sum. This is clear from the Respondents' choice to make an application to review the Compliance Notice and to consequently seek to appeal the determination of the application.

56. Once it was clear to the Respondents that a mistake had been made at law, the Respondents took steps to make the required payment including confirming that they had the correct payment details to ensure there were no further issues.

57. If the Claimant's had clearly confirmed the payment details as they did on 18 September 2024, then payment would have been made much earlier.

79 In response to the respondents' written submissions [55] (at [78] above), which suggests that the respondents considered Mr McCormick's entitlements and determined that he was not owed long service leave, the Inspector submits it should not be accepted as:

(a) Firstly, this matter is not an enforcement claim relating to underpaid long service leave, but rather a claim involving non-compliance with a compliance notice. Unless the Compliance Notice is set aside or withdrawn, it must be complied with, regardless of whether the underlying entitlement is owed.

(b) Secondly, the submission highlights the respondents' lack of understanding of their obligations in relation to compliance notices.

80 I find that the breaches were deliberate. The respondents were aware that ARC Holdings needed to obtain a stay of the operation of the Compliance Notice to be excused from complying with it, but they did not take the necessary steps to obtain such a stay. Furthermore, despite not obtaining a stay, ARC Holdings did not comply with the Compliance Notice, and its sole director knew that it had not complied.

81 The fact that ARC Holdings promptly paid the sum of money after the commencement of these proceedings demonstrates that it was financially able to comply with the Compliance Notice if it had chosen to do so.

82 The respondents' argument that they had formed the decision that Mr McCormick was not entitled to long service leave does not absolve ARC Holdings of the responsibility to comply with the Compliance Notice. Once ARC Holdings' application for review of the Compliance Notice was dismissed on 22 December 2023, and absent a stay of the Compliance Notice, compliance was required regardless of the respondents' position on whether or not the underlying entitlement is owed.

***Callan* [90(h)]: whether senior management was involved in the breaches**

83 The Inspector submits:

33. The agreed facts establish Mr Griffiths, the second respondent, was at all times the sole director and secretary of ARC Holdings and involved in the contraventions.

84 The respondents submit:

58. Senior management was involved in the breaches in that Mr Griffiths as director of Arc was involved in the

decision.

59. However, as set out above, senior management was only involved to the extent that an error was made in identifying Mr McCormick's entitlements. This was not due to improper systems or a failure to put mitigating steps in place.

85 In response to the respondents' written submissions [59] (at [84] above), the Inspector submits:

(a) The respondents' submissions falls into the same error as their written submissions [55]. The respondents' focus on whether long service leave was owed is irrelevant. The focus needs to be on compliance with the Compliance Notice.

(b) The respondents have not provided any justifiable explanation or evidence as to why compliance was not achieved, either on the dates required by compliance, or at least when the IMC proceedings were complete.

86 I find that senior management was involved in the breaches, as Mr Griffiths, the sole director and secretary of ARC Holdings, was involved in the decision-making process and had knowledge of the Compliance Notice.

87 The respondents' argument that senior management was only involved to the extent that an error was made in identifying Mr McCormick's entitlements does not absolve ARC Holdings' responsibility to comply with the Compliance Notice.

88 I agree with the Inspector that the focus should be on compliance with the Compliance Notice, rather than on whether long service leave was owed.

89 The respondents have not provided any justifiable explanation nor evidence as to why compliance was not achieved, either on the date required by the Compliance Notice or at least when the IMC proceedings were complete.

***Callan* [90(i)] and [90(j)]: whether the party committing the breach had exhibited contrition; whether the party committing the breach had taken corrective action**

90 The Inspector submits:

34. ARC Holdings has now paid the sum the subject of the compliance notice, however payment was only made after these proceedings were commenced.

35. The purpose of the compliance notice regime is defeated if recipients of compliance notices refuse to comply until being forced to the door of the courtroom by way of civil penalty proceedings.

36. Accordingly, such conduct (delayed payment after these proceedings were commenced) does not demonstrate contrition.

37. It provides some modest corrective action, but little weight should be given to that factor given the delay in paying the sum of money and given the apparent impetus for paying the money was the commencement of these proceedings.

38. Additionally, the response to the claim in these proceedings demonstrates a profound lack of insight into the fact of, and seriousness of, the contraventions. The respondents consider the fact that the sum has now been paid means these proceedings ought to be dismissed. That response suggests the respondents misunderstand the obligation that arose under the compliance notice.

39. Accordingly, specific deterrence is a significant factor in the determination of an appropriate penalty.

91 The respondents submit:

60. The Respondents have exhibited their contrition by taking corrective action as set out below.

61. The Respondents have made the payment of long service leave required of them. It is not disputed that this occurred soon after confirmation of the correct payment details was provided on 18 September 2024.

62. This confirmation was only provided after these enforcement proceedings were brought.

92 It is an agreed fact that ARC Holdings made payment to Mr McCormick after these proceedings were commenced. As such, I do not accept that payment to Mr McCormick demonstrates the respondents' contrition.

93 At no time, either in their evidence or written submissions, have the respondents expressed any remorse for ARC Holdings' non-compliance with the Compliance Notice.

***Callan* [90(k)]: whether the party committing the breach had cooperated with the enforcement authorities**

94 The respondents submit:

63. The Respondents have been cooperative and have actively engaged with the industrial inspectors.

64. In fact, it was the Claimant's failure to confirm the payment details of Mr McCormick that has led to these proceedings being brought.

95 In response to the respondents' written submissions [63]–[64] (at [94] above), the Inspector submits that the respondents' submissions are not borne out by either the agreed facts or the respondents' evidence.

96 I agree with the Inspector that there is no evidence of the respondents' cooperation with the industrial inspectors. Cooperation might have included promptly contacting the Inspector to resolve payment concerns or providing partial evidence of intent to comply. No such steps are evidenced here.

***Callan* [90(l)]: the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements**

97 The Inspector submits:

40. In ***Fair Work Ombudsman v Viper Industries Pty Ltd*** [2015] FCCA 492 [42], Judge Emmett noted that:

> [an] intentional failure to comply with a mandatory notice issued by the workplace regulator is 'conduct … [which] undermines the utility and effectiveness of a fundamental object' of the FW Act. The failure to comply undermines and frustrates the powers conferred on the Fair Work Inspectors, which are conferred for the purposes of providing an effective means of enforcing compliance with lawful minimum entitlements. There is a significant cost to the public by reason of the need to bring this matter before the court to enforce compliance.

41. As explained above, the purpose of the compliance notice regime is to provide industrial inspectors with an efficient means of achieving compliance with the provisions of industrial awards and employment laws and to provide employees with their unpaid lawful entitlements as soon as possible. Compliance notices are an alternative to enforcement proceedings under section 83 of the [Act].

42. In ***Fair Work Ombudsman v Kentwood Industries Pty Ltd*** [2011] FCA 579 [35] it was held that, in imposing a penalty against the respondents, it is necessary for the Court to set the penalty in a range that reinforces the fundamental importance of compliance with the employment standards enshrined in Commonwealth workplace laws.

43. It is similarly important that a penalty be set that reinforces the importance of compliance with the [Act].

98 The respondents submit:

65. The purpose of the compliance notice was achieved from the outset. The compliance notice was responded to and engaged with by the Respondents and the proper procedure for resolving the dispute as to compliance was followed.

66. Upon the confirmation of the compliance notice, the Respondents have shown themselves to be ready and willing to comply. There is no need to reinforce to the Respondents that they need to engage with and comply with compliance notices and determination by the Court.

99 In response to the respondents' written submissions [65] (at [98] above), the Inspector submits:

(a) The respondents' submission, to the effect that the purpose of the Compliance Notice was achieved, illustrates their misunderstanding of the compliance notice regime.

(b) The purpose of the Compliance Notice was to have Mr McCormick paid by 6 June 2023, and that was not achieved.

100 I find that the need to ensure compliance with lawful minimum entitlements by providing an effective means for investigation and enforcement of employee entitlements is a crucial factor in this case.

101 ARC Holdings' failure to comply with the Compliance Notice undermined the utility and effectiveness of the compliance notice regime, as it frustrated the powers conferred on the industrial inspectors to enforce compliance with lawful minimum entitlements.

102 The purpose of the compliance notice regime is to provide industrial inspectors with an efficient means of achieving compliance with the provisions of industrial awards and employment laws, and to provide employees with their unpaid lawful entitlements as soon as possible. In this case, the purpose of the Compliance Notice was not achieved, as Mr McCormick was not paid until September 2024.

103 The imposition of penalties against the respondents is necessary to reinforce the fundamental importance of compliance with the employment standards enshrined in the State's industrial laws and to ensure that the compliance notice regime serves its intended purpose.

***Callan* [90(m)]: the need for specific and general deterrence**

104 The Inspector submits:

44. As explained above, specific deterrence is a significant factor in the present matter.

45. General deterrence is also significant. The respondents' conduct significantly undermines the effectiveness and purpose of the compliance notice regime. While a recipient of a compliance notice is entitled to seek review of the notice, the recipient is required to comply with the notice unless a stay is granted or the notice is withdrawn.

46. In ***Community and Public Sector Union v Telstra Corporation Inc*** [2001] FCA 1364 [9], Finkelstein J observed that 'even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct'.

47. As noted by Gilmore J in ***Fair Work Ombudsman v Offshore Marine Services Pty Ltd*** [2012] FCA 498 [(***Offshore***)] the imposition of a monetary penalty carries the greatest impact in terms of general deterrence.

48. In this case, general deterrence looms large as well as specific deterrence.

49. It is necessary that the penalty imposed be sufficient to deter others who might be likely to contravene the [Act] (and in particular the compliance notice regime).

105 The respondents submit:

67. There is no need for specific deterrence as the Respondents have accepted the Court's determination that McCormick's employment was continuous.

68. Mr McCormick's case was a unique one and a similar contravention will not be repeated now that the legal question of such an employee's entitlements in Mr McCormick's circumstances has now been determined.

106 I find that both specific and general deterrence are significant factors in this case.

107 ARC Holdings' non-compliance with the Compliance Notice not only requires specific deterrence to prevent further contraventions by the respondents but also necessitates general deterrence to discourage others from engaging in similar conduct.

108 The imposition of a monetary penalty carries the greatest impact in terms of general deterrence, as noted by Gilmore J in ***Offshore***: Inspector's submissions [47] at [104] above.

109 In this case, the need for deterrence is paramount, requiring that the penalty imposed be sufficient to discourage contraventions of the Act, especially the compliance notice regime.

110 The respondents' argument that there is no need for specific deterrence, as they have accepted the Court's determination that Mr McCormick's employment was continuous, does not absolve them of their responsibility to comply with the Compliance Notice.

111 Furthermore, the respondents' contention that Mr McCormick's case was unique and a similar contravention will not be repeated does not negate the need for both specific and general deterrence to ensure compliance with the Act and the compliance notice regime.

The parties' submissions on quantum

112 As to the quantum of the penalty to be imposed, the Inspector submits:

> 50. The claimant submits the contraventions of s 84T are at the upper end of seriousness for contraventions. Given the objective seriousness of the contraventions evidenced by the nature and circumstances of the contraventions, the involvement of senior management, the lack of contrition which requires specific deterrence, and the significant need for general deterrence to ensure that the compliance notice regime is effective and fulfils its purpose, a penalty in the upper range is appropriate (in excess of $20,000 for ARC Holdings, and in excess of $4,000 for Mr Griffiths).

113 As to the quantum of the penalty to be imposed, the respondents submit: (footnotes omitted)

> **Comparable cases and request for comity**
>
> 69. In the recent case of [***Dixon v Stojic*** [2024] WAIRC 00177], where the Respondents had only made partial repayments $8,000 of a larger underpayment of $11,251.34, the respondents were found to have shown contrition despite failing to make full repayments and breaching a payment plan. The respondents were issued a fine of $1,000 each for failing to comply with the compliance notice. In that case, after the compliance notice was not complied with, the Department's General Manager of Compliance wrote to either comply with the notice or provide a reasonable excuse for any non-compliance. This correspondence was responded to with a plea of financial difficulty by the respondents who, once rejected, proceeded to ignore further correspondence from the Department. The objective seriousness of this offence rises above that of the present matter, even if the Claimant's submissions are taken at their highest.
>
> 70. [***Gardos***] concerned an offence where no contrition was shown by the respondent, no repayment was made, and the respondent sought to excuse himself by way of unsubstantiated financial difficulty, for which a penalty at the high end of the range was imposed at $5,000, the respondent being an individual.
>
> 71. The court ought to have consideration to such decisions when considering what penalty to apply in this matter, if any.
>
> **Conclusion**
>
> 72. In all of the circumstances, it would not be appropriate to impose a penalty on either of the Respondents. The primary objective of having Mr McCormick's entitlements paid has been met. While it is unfortunate that the legal dispute concerning Mr McCormick's entitlement led to a delay in him receiving his entitlement, this should not be held against the Respondents as all parties engaged actively and promptly with procedures set out below.
>
> 73. That the Claimant would seek a penalty in the high range is not appropriate considering that the Claimant failed to provide the confirmation that the Respondent had reasonably requested and made no demand for payment after the court hearings had been exhausted.
>
> 74. The Claimant brings these proceedings on an assumption that the Respondents were hoping to avoid payment until enforcement proceedings were brought, despite there having been recent communication between the parties concerning facilitating payment and avoiding an administrative error.
>
> 75. The court would therefore not err if the proceedings were disposed of pursuant to section 83E(1) of the [Act].

114 In determining the appropriate penalties, I have considered the parties' submissions on quantum. The Inspector submits that a penalty in the upper range is appropriate: $20,000 for ARC Holdings and $4,000 for Mr Griffiths. The respondents, on the other hand, argue that it would not be appropriate to impose a penalty on either of them, citing various reasons such as the primary objective of having Mr McCormick's entitlements paid having been met, the lack of demand for payment from the Inspector, and the assumption of the Inspector that the respondents were hoping to avoid payment until enforcement proceedings were brought.

115 While ARC Holdings paid Mr McCormick in September 2024, this occurred only after these proceedings began, diminishing its weight as evidence of contrition and reducing its weight against the need for deterrence.

116 After considering the submissions made by both parties and the relevant factors outlined in ***Callan***, I find that the respondents' contraventions are at the mid-point of seriousness for contraventions, given the objective seriousness of the contraventions evidenced by the nature and circumstances of the contraventions, its duration, deliberate nature, impact on Mr McCormick, the involvement of senior management, the lack of contrition which requires specific deterrence, and the significant need for general deterrence to ensure that the compliance notice regime is effective and fulfils its purpose.

117 A mid-range penalty reflects the breach's seriousness, tempered by the respondents' first contravention and eventual payment.

Conclusion

118 The contravention's mid-range seriousness warrants penalties at 50% of the statutory maximum under s 84T(2) of the Act (at [14] above), of $15,000 for ARC Holdings and $3,000 for Mr Griffiths.

119 These penalties reflect the need for both specific and general deterrence, the seriousness of the contraventions, and the involvement of senior management, while noting this is a first contravention for the respondents. The penalties imposed are intended to serve as a deterrent and reinforce the importance of compliance with the State's industrial laws, particularly in relation to compliance notices.

120 Having found that an order imposing a pecuniary penalty should issue in accordance with s 83E(1) of the Act, I also find that an order for costs should be made under s 83E(11).

121 In the Originating Claim, the Inspector sought an order for the respondents to pay the disbursements they had incurred in relation to the proceedings. Following the penalty hearing, the Inspector confirmed that the incurred disbursements are $123.75 for a process server serving the Originating Claim on Mr Griffiths. An order for this amount will issue.

Orders

122 For the preceding reasons, I will issue the following orders:

(a) The first respondent pay the claimant a pecuniary penalty of $15,000 for a contravention of s 84T(1) of the Act.

(b) The second respondent pay the claimant a pecuniary penalty of $3,000 for being taken to contravene s 84T(1) of the Act by virtue of s 83E(1A) of the Act.

(c) The first respondent pay the claimant's costs of $123.75 pursuant to s 83E(11) of the Act.

C. TSANG
INDUSTRIAL MAGISTRATE

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[1] Transcript, *Aplin v ARC Holdings (WA) Pty Ltd*, Industrial Magistrates Court of Western Australia, 1 November 2024, 3.
[2] Ibid.
[3] Transcript, *Aplin v ARC Holdings (WA) Pty Ltd*, Industrial Magistrates Court of Western Australia, 3 February 2025, 10.
[4] Section 90(2) of the Act.
[5] Exhibit 5 – Affidavit of John Griffiths filed 8 January 2025, [6].

2025 WAIRC 00165

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	:	2025 WAIRC 00165
CORAM	:	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	:	WEDNESDAY, 26 FEBRUARY 2025
DELIVERED	:	FRIDAY, 14 MARCH 2025
FILE NO.	:	M 61 OF 2024
BETWEEN	:	CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION **CLAIMANT** AND QUBE PORTS PTY LTD **RESPONDENT**
CatchWords	:	INDUSTRIAL LAW – Construction of a clause of an enterprise agreement – Failure to call for volunteers one month in advance of a Closed Port Day – Whether cl 33.3.7(a) of the enterprise agreement imposes an enforceable obligation on the employer
Legislation	:	*Fair Work Act 2009* (Cth) *Acts Interpretation Act 1901* (Cth)
Instrument	:	*Qube Ports Pty Ltd Port of Bunbury Enterprise Agreement 2020*
Case(s) referred to in reasons:	:	***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813; 153 IR 426 ***Transport Workers' Union of Australia v Linfox Australia Pty Ltd*** [2014] FCA 829; (2014) 318 ALR 54 ***Kucks v CSR Ltd*** [1996] IRCA 166; (1996) 66 IR 182

Amcor Limited v Construction, Forestry, Mining and Energy Union [2005] HCA 10; (2005) 222 CLR 241

Avard v Australian Capital Territory [2024] FCA 690

WorkPac Pty Ltd v Skene [2018] FCAFC 131; (2018) 264 FCR 536

Result : Claim is dismissed

Representation:

Claimant : Mr K. Sneddon (of counsel)

Respondent : Ms S. Millen (of counsel) and with her, Ms A. Hatzisarantinos (of counsel) as instructed by Allens

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REASONS FOR DECISION

Introduction

1 On 13 May 2024, the Construction, Forestry and Maritime Employees Union (the claimant) lodged a claim alleging Qube Ports Pty Ltd (the respondent) failed to call for volunteers one month in advance of a Closed Port Day (CPD) on 6 March 2023, 29 March 2024 and 25 April 2024 (the Claim).

2 In failing to call for volunteers one month in advance of a CPD, the claimant alleges that the respondent has contravened s 50 of the *Fair Work Act 2009* (Cth) (FWA) in that the respondent has contravened cl 33.3.7(a) of the *Qube Ports Pty Ltd Port of Bunbury Enterprise Agreement 2020* (the Agreement).

3 The claimant claims the payment of a civil penalty for the alleged contravention and for the penalty to be paid to the claimant pursuant to ss 546(1) and (3) of the FWA.

4 The respondent denies the alleged contravention and says the controversy between the parties involves interpreting the relevant clause in the Agreement.

5 Schedule I of these reasons outlines the jurisdiction, standard of proof and practice and procedure of the Industrial Magistrates Court (IMC).

6 Schedule II of these reasons outlines the principles applicable to the construction of an industrial agreement.

Agreed Facts

7 The parties provided a statement of agreed facts.

8 In summary, the claimant has standing to commence the Claim, and the respondent is a national system employer under the FWA. The Fair Work Commission approved the Agreement on 2 February 2021, and it came into operation on 9 February 2021 with a nominal expiry date of 30 June 2024. The Agreement applies to stevedoring employees in the classifications set out in cl 11.1 and Schedule 2 and who are employed by the respondent at the Port of Bunbury.

9 Pursuant to cl 33.2.1(b) of the Agreement, the following days were allocated as a CPD:

- 6 March 2023 where a call for volunteers to work was sent by the respondent on 28 February 2023;
- 29 March 2024 where a call for volunteers to work was sent by the respondent on 18 March 2024; and
- 25 April 2024 where a call for volunteers to work was sent by the respondent on 5 April 2024.

10 To those agreed facts, I would also add there is no evidence that any employee at the Port of Bunbury was compelled to work on 6 March 2023, 29 March 2024 or 25 April 2024.

The Parties' Contentions

11 The principles applicable to the interpretation of industrial agreements are well known. In summary, the interpretation of an industrial instrument begins with consideration of the natural and ordinary meaning of the words used.[1] An industrial instrument is to be interpreted in light of its industrial context and purpose and must not be interpreted in a vacuum divorced from industrial realities.[2] An industrial agreement must make sense according to the basic conventions of the English language.[3] The circumstances of the origin and use of a clause is relevant to an understanding of what is likely to have been intended by its use.[4] Narrow and pedantic approaches to the interpretation of an industrial agreement are misplaced.[5]

The claimant's submissions

12 The claimant says the requirement for the respondent to call for volunteers one month in advance of a CPD is unambiguous, easily understood and needs no additional words to its meaning.

13 The clause is not qualified in any manner and sets an objective measure for the call of volunteers. The term 'one month' is not defined in the Agreement, and the claimant appears to refer to three different ways to interpret a month (common understanding of a minimum of 28 days, the Cambridge online dictionary, and s 2G of the *Acts Interpretation Act 1901* (Cth)). With respect to the claimant, the appropriate definition and that which is relevant to an industrial instrument made under the FWA is s 2G of the *Acts Interpretation Act 1901*, namely:

(1) In any Act, ***month*** means a period:

(a) starting at the start of any day of one of the calendar months; and

(b) ending:

(i) immediately before the start of the corresponding day of the next calendar month; or

(ii) if there is no such day—at the end of the next calendar month.

14 Relevant to the Claim, the call for volunteers was made at 6, 10 and 20 days in advance of the respective CPD. In that sense, it matters not whether a *month* was defined as 28 days or as a calendar month where the longest call period was 20 days, which the claimant says was less than the period cl 33.3.7(a) of the Agreement requires.

15 The claimant expanded its submissions at the hearing to include that the use of the word '*will*' in cl 33.3.7(a) is an 'imperative command' necessary for employees to understand their obligations and entitlements under the Agreement. The imperative command is not qualified and there is no discretion.

16 The clause cannot be rewritten to give a meaning that does not exist on the plain reading of the clause where both parties agreed to its inclusion.

17 The claimant maintains that the word '*will*' used in its context creates a binding obligation on the respondent. The claimant accepts that cl 33.3.7(a) is part of a broader framework (in rostering) but it requires planning and certainty by both parties. The claimant says its construction does this.

18 In reply to the respondent's oral submissions the claimant says there is nothing in cl 33.3.7(a) of the Agreement that says employees cannot volunteer before, during, or after the call for volunteers, or otherwise prevents an employee from 'putting their hand up' to volunteer. The claimant disputes cl 33.3.7(a) being an enabling clause and says the clause could have been drafted in a way consistent with it being such a clause but it was not.

The respondent's submissions

19 The respondent contends that cl 33.3.7(a) of the Agreement forms part of a framework which enables it to allocate employees to work on a CPD, as part of that framework cl 33.3.7(a) enables, but does not require, the respondent to call for volunteers one month in advance, and an impractical outcome in an unpredictable industry would result if the respondent was required to strictly call for volunteers in the manner suggested by the claimant.

20 Having regard to the context and purpose of cl 33.3.7(a) of the Agreement, there is no basis to adopt the literal interpretation agitated by the claimant.

21 The purpose of the clauses relevant to working on public holidays and CPDs generally is to allocate and determine employee entitlements as a consequence of being allocated to work on those days. Thus, cl 33.3.7(a) of the Agreement ought to be read and construed in light of this overall purpose and within the framework it applies.

22 The respondent suggests that the preferred construction of cl 33.3.7(a) of the Agreement is that in circumstances where the respondent determines that it required employees to work on a CPD, it *can* from one month before that date call for volunteers. However, there is no absolute obligation to do so. The terms of cl 33.3.7(a) of the Agreement reduces the need for the respondent to compel employees to work on CPDs by ascertaining employees' interest and availability to work CPDs and only if required enliven the respondent's right to compel employees to work on a CPD.

23 The respondent submits that its principal obligation is to provide employees with certainty about whether they will or will not be allocated to work on a CPD by providing them four days' notice of the 'final requirement' to work in accordance with Part A, cl 33.3.7(c) of the Agreement, and paying them accordingly if they are required to work on a CPD. The call for volunteers at one month in advance has no impact on an employees' rights and entitlements, nor does the failure not to call for volunteers one month in advance, where the final allocation requirements have been met.

24 Support for this is found in the factors relating to final allocation, including: the order of allocation on CPD; the availability of work; and skill required for the vessel or kind of vessel berthed: Part A, cl 33.3.8 of the Agreement. Support is also found in cl 33.3.3, where there is no difference in remuneration for an employee who volunteers or is compelled to work on a CPD.

25 In the context of the purpose of the call for volunteers, the use of the word '*will*' in cl 33.3.7 of the Agreement does not create an obligation on the respondent but enables the respondent to call for volunteers to work on a CPD from one month before the date. However, this does not impose an absolute requirement to do so. The clause is part of the 'machinery provisions' that achieve the purpose of the overall provision, and where the primary obligation of the clause is otherwise met, there is no contravention of merely facilitative provisions.

26 The language in cl 33.3.7 of the Agreement permits something to be done, rather than requiring it to be done such that the taking of action, or not taking of action, 'does not contravene any express or implied obligation under the agreement'.[6]

27 The nature of stevedoring work is variable and inconsistent requiring less than one month's notice of work where the skills required may also vary at short notice. As a result, cl 33.3.7(a) of the Agreement cannot be construed, as a matter of industrial practicality, to require a call for volunteers to work on a CPD in all circumstances.

28 The respondent also expanded its submission at the hearing. The respondent contends the claimant's submission asks the Court to find one sentence in the abstract capable of being contravened where the respondent did not call for volunteers within one month. The respondent says the claimant's construction makes no industrial or business common sense in an unreliable industry.

29 The respondent highlighted its submission with two examples:

(1) a seasonal port or a port with no known vessels expected on a CPD; and

(2) the respondent does not call for volunteers and does not roster as it believes there is no likelihood of a vessel berthing on a CPD, but a vessel arrives unexpectedly.

30 Based on the claimant's suggested construction, in the first scenario the respondent must still call for volunteers one month prior to a CPD because it will be susceptible to a civil penalty notwithstanding it has no intention of engaging employees to

work. The respondent says this is an impractical and an 'absurd' outcome and one which creates uncertainty for employees for reasons explained below.

31 In the second scenario, the respondent says the claimant's construction disadvantages employees who may want to work on a CPD at shorter notice (for example, for financial reasons or where the employee has missed the notice for some reason), fails to consider the industrial reality and, again, makes the respondent susceptible to a civil penalty where employees suffer no detriment or prejudice.

32 The respondent explained that the preferred construction for cl 33.3.7(a), when read as a whole and in context, is that it is an enabling clause 'unlocking' the respondent's power to compel employees to work on CPDs. The respondent's suggested construction is:

- where the respondent calls for volunteers one month in advance of a CPD (first sentence), if there are no volunteers or insufficient unskilled or skilled volunteers the respondent is empowered to compel available employees to work on a CPD (second sentence); and
- where the respondent calls for volunteers less than one month in advance of a CPD, the respondent cannot compel available employees to work on a CPD but can accept volunteers at shorter notice.

33 The respondent contends that its construction gives effect to the following:

- the inherent unpredictable nature of stevedoring inferred from the ordinary rostering procedure referred to in cl 29.2 of the Agreement;
- the order of allocation to be applied on public holidays and CPDs provided in cl 33.3.8 of the Agreement;
- the purpose of the clause in making provision for 'special days';
- providing certainty to employees such that if there is no call for volunteers one month in advance of a CPD, employees know they cannot be compelled to work but equally they will not suffer a disadvantage if they apply to or are asked to volunteer at short notice and wish to do so; and
- the built-in protection where under cl 33.3.7(c) of the Agreement the respondent is to provide four days' notice of the final requirement to work on a CPD.

What is the Preferred Construction of Clause 33.3.7(a)?

34 Clause 33.3.7 of the Agreement provides:

a. The Company will call for volunteers one month in advance of a Closed Port Day. If there is insufficient labour and/or skills to work a vessel, available Employees may be compelled to work.

b. Nothing prevents an Employee from initially declining or volunteering to work on Closed Port Days. Employees who have not expressly made themselves unavailable may be required to work.

c. The Company will provide four days' notice of the final requirement to work on a Closed Port Day.

35 Clause 33.3.7 is within the clause that deals with public holidays where employees are required to be reasonably available for work on public holidays: cl 33.1 of the Agreement. The Agreement provides for two types of public holidays: Normal Public Holidays; and CPDs: cl 33.2.1 of the Agreement.

36 CPDs are: Good Friday; Anzac Day; Labour Day on the day it is celebrated in the relevant State or Territory; Christmas Day; and another day as agreed between the respondent and the majority of employees (for example, Picnic Day): cl 33.2.1(b)(i) to (iv) of the Agreement.

37 Clauses 33.3.1 to 33.3.6 of the Agreement outlines, amongst other things, the payment and annualised hours for public holidays with CPD attracting a higher rate and credit to annualised hours, including where the CPD is not worked but where certain employees are available to work.

38 Clause 33.3.8(a) of the Agreement provides the order of allocation of employees on CPDs, which, subject to skill, is in order of employee type who have volunteered, not volunteered and available and then Guaranteed Wage Employees and Supplementary Employees.[7]

39 Clause 33.3.8(b) provides that Full-Time Salaried Employee (FSE) and Provisional Full-Time Salaried Employee (PFSE) who have been granted Planned Time Off (PTO) or made themselves unavailable on any public holiday cannot be compelled to work.

40 There is additional provision made for the CPD which is also Christmas Day, but also for Christmas Eve and New Year's Eve: cl 33.4 of the Agreement. In essence, cl 33.4.1 of the Agreement foreshadows the possibility that where unforeseen circumstances arise, the intended cessation of work at 3.00 pm on Christmas Eve and New Year's Eve may be extended to a maximum of 12 hours. This clause is intended to apply where the vessel would be completed inside the extension period.

41 Following on from this, cl 33.4.2 of the Agreement provides:

Employees will not be compelled to work on Christmas Eve, Christmas Day or New Year's Eve. However, the Company may conduct operations at these times by calling for volunteers for work as required between:

(a) 1500 hours on Christmas Eve and the nominal commencement of the day shift on Boxing Day; and

(b) 1500 hours on New Year's Eve and the nominal commencement of the day shift on New Year's Day.

42 The respondent says that one sentence in cl 33.3.7(a) cannot be viewed in isolation to create an obligation susceptible to a civil penalty, particularly where, on the evidence, no employee suffered any disadvantage or prejudice or was subject to compulsion

as a result of the shorter notice periods. The claimant points to cl 33.3.7(c) of the Agreement and says one sentence is capable of an obligation attracting a civil penalty if contravened. The claimant leans into the use of the word '*will*' in both clauses.

43 To approach the task of construction in the limited manner suggested by the claimant would not be consistent with the authorities: see ***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131; (2018) 264 FCR 536 at [197], the essence of which is summarised at paragraph 11 above.

44 That is, the first sentence of cl 33.3.7(a) is not divorced from the second sentence, nor is it divorced from the whole of cl 33 or the whole of the Agreement. An interpretation that facilitates a harmonious, sensible outcome is preferred to one that does not. Accordingly, and notwithstanding the use of the word '*will*', the context is important.

Context and Purpose

45 The starting point in the Agreement is that employees are required to be reasonably available for work on public holidays. Thereafter, the Agreement divides the two types of public holidays defined under cl 33.2.1 and treats CPDs differently to Normal Public Holidays.

46 That is, working on a CPD attracts a higher rate of pay, all hours worked are credited to the employees' annualised hours, and it is predicated on a preference of employees volunteering to work on a CPD. This also extends to *unforeseen circumstances* on Christmas Eve referred to in cl 33.4.1 of the Agreement where employees may volunteer to work beyond 3.00 pm on Christmas Eve.

47 Thus, contextually, the purpose of cl 33.3.7 of the Agreement appears to recognise CPDs as holding a 'special' significance for employees (over that held for other public holidays) and crafts a regime that balances the needs of the business with the employees' interests in not working on those days or if required, or volunteer, to work on those days and be properly compensated for doing so.[8]

48 To that end, employees who have expressly made themselves unavailable will not be required to work: cl 33.3.7(b) and cl 33.3.8(b) of the Agreement. FSE and PFSE who have been granted and approved PTO cannot be compelled to work, and employees will not be compelled to work on Christmas Day: cl 33.4.2 of the Agreement.

49 However, cl 33.3.7(b) of the Agreement, in the second sentence, provides that nothing prevents an employee from *initially* declining or volunteering to work on CPDs. The use of the word '*initially*' implies that employees can change their mind and express an alternative preference with the respondent's final notice to be given four days before the CPD.

50 Thereafter, there is a prescribed order of allocation for CPDs but not for Normal Public Holidays, based principally on the status of employment and whether the employee has volunteered or has been required to work: cl 33.3.8 of the Agreement.

51 Further provision is made for working on Christmas Eve, Christmas Day and New Year's Eve, which is based solely on calling for volunteers at the time. That is, it is not tied to any notice requirement or timing of any notice: cl 33.4.2 of the Agreement.

52 The notion of volunteering to work on CPDs permeates cl 33.3.7 to cl 33.4.2 and, therefore, must have some relevance both to the respondent and to employees. Given the 'special' treatment afforded to CPDs, it can reasonably be inferred that the respondent may prefer for employees to want to work on CPDs rather than being forced to do so. Equally, there may be employees who want to work on CPDs and other employees who are content for them to do so. Further, the respondent may anticipate a reduction in work requirements on CPDs but may also want some flexibility to engage employees at short notice. Employees may want to preserve time off on CPDs but may also want the option of earning increased pay and time to annualised hours if the work is on offer, even at short notice.

53 In circumstances where both the respondent and the employees are on equal footing in terms of the need for workers and the desire to do the work, the *timing* of any call for volunteers is less important than the actual call itself. That much can be seen in cl 33.4.2 of the Agreement.

54 The real difference between the respondent and employees is where the respondent requires workers on CPDs and there are insufficient or no volunteers to do the work. That is, the issue is one of compulsion to work on CPDs.

Determination on Preferred Construction

55 For the following reasons, the respondent's suggested construction of cl 33.3.7(a) of the Agreement is preferred. That is, the first sentence of cl 33.3.7(a) of the Agreement is facilitative whereupon it enables the respondent to compel employees to work on CPDs provided it has first given sufficient notice by calling for volunteers.

56 Notwithstanding the use of the word '*will*' in the first sentence of cl 33.3.7(a) of the Agreement, I do not accept that the intention behind the use of the word '*will*' in the first sentence was to constrain the respondent to a specific time frame within which volunteers could be asked to volunteer to work if required or if they wanted to.

57 The intention was likely two-fold:

(1) give employees sufficient notice that they may be required to work on CPDs; and

(2) ensure the respondent could not force employees to work on CPDs without first giving them sufficient notice.

58 When seen this way, the respondent assumes all of the risk that it may have no employees available to work on a CPD unless it properly organises itself in advance.

59 When seen this way, the respondent's suggested construction provides certainty, rather than uncertainty, for the employees in that if the respondent does not call for volunteers one month in advance the employees know they cannot be forced to work on a CPD. But if the employees thereafter volunteer to work on a CPD, they are *freely* choosing to do so reflecting the meaning of volunteering.

60 This is consistent with: the lack of notice required in cl 33.4.2 of the Agreement but the option to volunteer in specified circumstances; the possibility of a change of mind contained in cl 33.3.7(b); the order of allocation in cl 33.3.8; and the 'special' treatment afforded to CPDs over and above that to Normal Public Holidays.

61 In addition, this construction does not infringe upon, and works harmoniously with, other protections built into:

- cl 33.3.7(c), where the respondent is to provide four days' notice of the final requirement to work on a CPD;
- cl 33.3.8(b), where FSE and PFSE are unavailable and unable to be compelled in certain circumstances; and
- cl 33.4.2, where employees cannot be compelled to work on Christmas Eve, Christmas Day or New Year's Eve, but they can volunteer to work.

62 Noting cl 33.3.7(a) of the Agreement is contained in Part A, the generic part of the Agreement, to accept the claimant's literal construction would, as suggested by the respondent, expose the respondent to the risk of civil penalty if it did not one month in advance call for volunteers to work on each and every CPD at each and every port whether there was an intention or requirement for work to be undertaken at the port or not.

63 The claimant's suggested construction does not reflect the reality of the protection afforded by the whole of cl 33.3.7(a) or the context in which it appears. Further, it pays little attention to the industrial realities of the stevedoring industry and adopts an overly inflexible approach which has no apparent advantage for employees.

Conclusion

64 I am not satisfied that the first sentence in cl 33.3.7(a) of the Agreement imposes an enforceable obligation on the respondent punishable by the imposition of pecuniary penalties under the FWA in the event of non-compliance with the obligation.

65 The Claim is dismissed.

D. SCADDAN

INDUSTRIAL MAGISTRATE

SCHEDULE I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (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.

[2] The IMC, being a Court constituted by an industrial magistrate, is 'an eligible State or Territory court': FWA, s 12 (see definitions of 'eligible State or Territory court' and 'magistrates court'); *Industrial Relations Act 1979* (WA), s 81 and s 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include the terms of an enterprise agreement where the agreement applies to give an entitlement to a person and to impose an obligation upon a respondent employer: FWA, s 51(2). The agreement applies if it covers the employee or the employee organisation and the employer, the agreement is in operation and no other provision of the FWA provides that the agreement does not apply: FWA, s 52(1) (when read with s 53 of the FWA).

[5] An obligation upon an 'employer' covered by an agreement is an obligation upon a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FWA, s 42, s 53, s 14 and s 12. An entitlement of an employee covered by an agreement is an entitlement of 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': FWA, s 42, s 53 and s 13.

Contravention

[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: FWA, s 545(3)(a).

[7] The civil penalty provisions identified in s 539 of the FWA include:

- Contravening a term of an enterprise agreement: FWA, s 50.

[8] 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': FWA, s 14 and s 12. 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': FWA, s 13

[9] 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 FWA: FWA, s 545(3).
- A person to pay a pecuniary penalty: FWA, s 546.

[10] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[11] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. 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.

[12] 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)

SCHEDULE II: Construction of Industrial Instruments

[1] This case involves, in part, construing industrial agreements. 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].

[2] 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.

[3] 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*** at [53] - [57] (French J).
- 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).

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[1] ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813; 153 IR 426, 438 (***City of Wanneroo***).

[2] ***City of Wanneroo*** 438, 440.

[3] ***City of Wanneroo*** 440.

[4] ***Transport Workers' Union of Australia v Linfox Australia Pty Ltd*** [2014] FCA 829; (2014) 318 ALR 54.

[5] ***Kucks v CSR Ltd*** [1996] IRCA 166; (1996) 66 IR 182; ***Amcor Limited v Construction, Forestry, Mining and Energy Union & Ors*** [2005] HCA 10; (2005) 222 CLR 241.

[6] Respondent's submissions, [20] referring to ***Avard v Australian Capital Territory*** [2024] FCA 690, [96]

[7] Clause 2.1 of the Agreement defines a Guaranteed Wage Employee as one who is irregularly engaged and who is guaranteed a minimum wage under the Agreement. A Supplementary Employee is a non-permanent casual.

[8] Notably, not all employees will necessarily have a particular interest in the religious holidays of Good Friday and Christmas Day or observe Anzac Day. However, it is likely there is a historical basis for treating these days differently and the Agreement provides for that difference.

2025 WAIRC 00176

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	:	2025 WAIRC 00176
CORAM	:	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	:	THURSDAY, 6 MARCH 2025
DELIVERED	:	FRIDAY, 21 MARCH 2025
FILE NO.	:	M 113 OF 2024
BETWEEN	:	JINCHAO YU **CLAIMANT** AND BAI WEI XIANG PTY LTD **RESPONDENT**
CatchWords	:	INDUSTRIAL LAW – Small claims procedure under *Fair Work Act 2009* (Cth) – Whether the claimant is an employee or an independent contractor – Failure to pay in full for performance of work under *Fair Work Act 2009* (Cth) – Failure to pay hourly rates applicable under *Restaurant Industry Award 2020*
Legislation	:	*Fair Work Act 2009* (Cth) *Taxation Administration Act 1953* (Cth)
Instrument	:	*Restaurant Industry Award 2020*
Case(s) referred to in reasons:	:	***Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*** [2022] HCA 1; (2022) 275 CLR 165 ***EFEX Group Pty Ltd v Bennett*** [2024] FCAFC 35 ***Jin v Premium Travel Solutions Pty Ltd*** [2023] FedCFamC2G 22 ***Metropolitan Health Service Board v Australian Nursing Federation*** [2000] FCA 784; (2000) 176 ALR 46 ***Kronen v Commercial Motor Industries Pty Ltd (CMI Toyota)*** [2008] FCAFC 171; (2008) 171 FCR 521 ***Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd*** [2002] FCA 1406; (2002) 121 IR 250 ***Regional Express Holdings Ltd v Clarke*** [2007] FCA 957; (2007) 165 IR 251 ***Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd*** [2014] FCCA 1115
Result	:	The Claim is proven
Representation:		
Claimant	:	Self-represented
Respondent	:	Ms P. Tan on behalf of the respondent (as a director)

REASONS FOR DECISION

1 Jinchao Yu (the claimant) was engaged as a kitchenhand at a restaurant, King Kong Bar & Restaurant (King Kong), operated by Bai Wei Xiang Pty Ltd (the respondent) from 24 January 2024 to 25 March 2024 (the Employment Period).

2 The primary issue for resolution is the character of the legal relationship between the claimant and the respondent in the Employment Period.

3 The claimant contends he was a casual employee, and the respondent contravened the *Fair Work Act 2009* (Cth) (FWA) by failing to pay him in full the wages for time worked at King Kong.

4 The claimant seeks an order under the FWA for the payment of all monies owed for time worked, being $4,360.

5 The claimant elected to commence his claim using the small claims procedure under s 548 of the FWA.

6 The respondent denies the claimant was an employee of the respondent. The respondent contends the claimant was an independent contractor who worked at King Kong for a short period during Chinese New Year. The respondent further says that it has discharged its obligations to the claimant by paying him for all the work done up to 3 March 2024. In respect of the period 4 March 2024 to 25 March 2024, the respondent says the claimant agreed to compensate the respondent for broken equipment and, accordingly, the respondent withheld $2,200 for work done by the claimant during that period.

Procedure of the Industrial Magistrates Court

7 Schedule I of these reasons outlines the law governing the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC or Court) under the FWA.

8 *If* the claimant proves on the balance of probabilities that, for the purposes of the FWA, he was an employee of the respondent, then the respondent is a *national system employer*, and the claimant is a *national system employee* as those terms are defined under the FWA.[1] A consequence of *if* the claimant was an employee of the respondent is that the respondent has obligations under the FWA, including under s 323 of the FWA. That is, *if* the claimant was an employee of the respondent, he is entitled to receive amounts payable in relation to 'the performance of work' in full.[2]

9 A contravention of s 323 of the FWA is a contravention of a civil remedy provision.

The Claimant's Claim in More Detail

10 On 3 January 2025, the claimant filed and served a witness statement in which he identified that the *Restaurant Industry Award 2020* (the Award) covered and applied to his employment where King Kong is in the restaurant industry referring to cl 4.1(a) and cl 4.2 of the Award, and he was employed as a kitchen attendant referring to cl 4.1(b) and Schedule A of the Award.

11 The claimant says he was paid $20 per hour for casual kitchenhand work done during the Employment Period. He says he was never provided with pay slips and he believes the respondent has breached the Award, the FWA and owes him wages.

12 The claimant's first language is Mandarin. I infer from the originating claim and the content of his witness statement, that the claimant is, in fact, claiming he was not paid in full because he was not paid the correct hourly rate applicable to a casual kitchenhand employed in the restaurant industry under the Award.

13 I am satisfied that when read together, the originating claim and the claimant's witness statement sufficiently identify the claim, and the respondent has had notice of the claim.

14 Accordingly, *if* the claimant proves he was an employee of the respondent, the second issue for determination, to be proved by the claimant on the balance of probabilities, is whether the Award covers and applies to his employment and the amount he says he ought to have been paid as a casual kitchenhand during the Employment Period.

Facts Not in Dispute

15 The respondent's director's, Ping Tan (Ms Tan), first language is also Mandarin, as is the other respondent's witness, Xiaogang Feng (Mr Feng), the manager at King Kong. Many of the documents relied upon by both parties were in Mandarin, but both parties had the documents translated to English by a certified translator and attached these documents to their witness statements.

16 Having regard to the content of the witness statements by the claimant, Ms Tan and Mr Feng, and to their oral evidence at trial, it is not disputed the claimant worked at King Kong commencing on 24 January 2024 and ceased on 25 March 2024. King Kong is a restaurant, and the claimant carried out kitchenhand work, predominantly washing dishes and other general duties.

17 On 23 January 2024, text messages between the claimant and Mr Feng indicate that the respondent wanted someone to work at King Kong doing 'general chores' and 'wash dishes'. The start time was 5.00 pm and the finishing time was midnight. The claimant made enquiries about the location and wanted to know the name of the 'store' (it was a restaurant). Mr Feng told the claimant to come to an address at 6.00 pm 'tomorrow' (being 24 January 2024) and to wear work shoes. The claimant was also told there were several 'Shandong people' there.[3]

18 On 24 January 2024 at 6.04 pm, the claimant sent Mr Feng a text message asking him the name of the 'store' and Mr Feng replied it was 'King Kong Bar'.[4]

19 On 5 February 2024, Mr Feng sent to the claimant a text message stating:[5]

> Tax Number information
>
> Superannuation information
>
> Bank information
>
> Contact information
>
> Personal information

20 On 8 February 2024, the claimant responded to Mr Feng's text message, stating:[6]

> Boss, I forgot my TFN (Tax File Number). When I called the [Australian Taxation Office] customer service, I couldn't remember some of the questions they asked me. Then they told me to reapply for a tax number. They said the ATO issue me one that is the same as before, but it will take at least about two weeks.

21 Mr Feng responded to the claimant as follows:[7]

> First, give me your ABN.

22 The claimant replied:[8]

> ABN: 79556450119

23 Mr Feng stated:[9]

> Your personal information.

24 The claimant then provided in a text message on the same day his bank account details, telephone number and email address.[10]

25 On 9 February 2024, the respondent transferred to a Commonwealth Bank Account (CBA) in the claimant's name the amount of $560.[11]

26 On 17 February 2024, the respondent transferred to a CBA in the claimant's name the amount of $2,120.[12]

27 On 4 March 2024, the respondent transferred to a CBA in the claimant's name the amount of $2,180.[13]

28 From 4 March 2024 to 25 March 2024, the respondent withheld $2,200 for the payment of work undertaken by the claimant purportedly because the claimant broke some kitchen equipment (a pot) owned by the respondent.

29 On an unknown date, Mr Feng sent a text message to the claimant stating:[14]

> Understand this clearly. You can't provide the information that I'm asking you for. It's too simple. Hahaha!

30 The claimant responded to Mr Feng as follows:[15]

> Cut the crap. How dare you still use my services or employ me when I don't have a tax file number?

31 Mr Feng replied:[16]

> Hahaha. Hurry up and go! Be quick.

32 On 5 March 2024, the claimant emailed Mr Feng informing him that his wages were incorrect and that he had been underpaid. He said he had worked 126 hours over the past two weeks. Mr Feng's response was to ask whether the claimant had clocked in every time and that the wages paid to the claimant were based on the hours recorded by the clock-in system.[17]

33 On the same day, Mr Feng asked the claimant how much money had been sent to him to which the claimant said it was $2,180 but it should have been $2,520. The claimant informed Mr Feng the clock in system was not accurate and there were times he had forgotten to clock in.[18]

34 Mr Feng responded that this was the claimant's problem, and the claimant 'never listen[s] to what I tell you'. After further remonstrating with the claimant, Mr Feng said '[Y]ou always have a bunch of excuses. I've already told you that you need to clock in when you start work. How can you not remember?'[19]

35 The claimant asked when he would be paid his money, and the respondent still owed him $340. Mr Feng replied that he did not owe money and that it's the claimant's problem. He reiterated that the wages he pays are based on the hours recorded by the clock-in system.[20]

36 Timesheets attached to Ms Tan's statement show the following:

- the timesheets are headed 'Employee Attendance Sheet';
- the claimant and two other persons are given 'employee' numbers; and
- the claimant and one other person appear to consistently clock on at times immediately before 5.00 pm. On less frequent occasions they appear to clock on at around 11.00 am between 5 February 2024 and 25 March 2024.[21]

37 The timesheets translated into English are attached at Schedule II.

Facts in Dispute

38 The facts in dispute concern the character of the claimant's employment status, although there is also a dispute over hours worked.

The Claimant

39 The claimant states that prior to working at King Kong he did some food delivery work for Uber Eats and the like, and he registered an Australian Business Number (ABN) in his name for this work. He states he never used an ABN for kitchenhand work.[22]

40 The claimant further states there was no written contract and that he and the respondent had a verbal agreement for him to undertake casual employment at King Kong in the kitchen and he was to be paid $20 per hour.[23]

41 The claimant said he did kitchenhand work, including mainly washing dishes and some minor food preparation.[24]

42 In February 2024, King Kong asked him for his tax file number via text message. He told King Kong that he was getting a new tax file number and that it would come in a couple of weeks. King Kong then asked for his ABN, which he provided. He understood this was so he could be paid.[25]

43 The claimant said he never discussed with King Kong that he would be a contractor. He was always King Kong's employee.[26]

44 The claimant says he was never provided with any payslips by the respondent.[27]

45 In his oral evidence the claimant clarified that Attachment 1 to his witness statement was a handwritten timesheet prepared by him on a weekly basis recording the hours he worked at King Kong.[28]

46 The claimant said that he started every day at 5.00 pm and finished at 12.00 am, except for two days, 19 and 20 March 2024, when he finished at 11.00 pm. He also worked occasionally on a day shift from 11.00 am to 3.00 pm to cover sick leave and annual leave taken by other staff. He was told what to do by the manager who he called 'Boss' (Mr Feng). The restaurant provided him with everything, like tea towels and dishwashing liquid, so that he could do his job.

47 The claimant said that he did not know how to reapply for a new Tax File Number (TFN), and it took time to sort this out, so he provided his ABN when he was asked to by Mr Feng. He denied that he had any conversation with Mr Feng about an ABN or that he was or would be a contractor rather than an employee. The claimant says that after the text message he sent on 8 February 2024, the respondent paid him $560 into his bank account on 9 February 2024 for the work he did from 24 January 2024 to 4 February 2024.

48 The claimant said the hours of work were fixed. He agreed he did not clock off, but he did clock in other than for the first two weeks of work where he was not told to clock on and on a couple of other occasions where he forgot to clock on. The claimant

referred to the payment made on 9 February 2024 in the amount of $560 and questioned why the respondent would pay him at all if he was not working in the preceding two weeks.

49 The claimant maintained that he worked for the whole time and did not have a day off. He reiterated that his hours were fixed and denied that he stayed behind so the manager could take him home.

50 The claimant referred to further text messages between him and Mr Feng dated 20 and 21 March 2024 which he had forgotten to put in his witness statement.[29] Both interpreters translated the text messages, which included:[30]

- Claimant on 20 March 2024 at 11.18 am: What time do I finish work now?
- Mr Feng on 21 March 2024 at 12.19 am: Didn't I tell you it was supposed to be 12.00 am. Why did you clock off early? Who let you go? Did you ask me?
- Claimant on 21 March 2024 at 12.20 am: okay.

51 I allowed the text message to be read into Court. It was partially included as an attachment to the claimant's witness statement, and, in my view, no prejudice was suffered by the respondent because the whole of the conversation was overlooked by the claimant. In addition, Mr Feng was available to give evidence if its contents were contested, which they were not.

52 The claimant said this was one of the two occasions that he left before 12.00 am and he recorded the times in his handwritten timesheet.[31]

53 The claimant did not sign a document authorising the respondent to deduct $2,200 from his pay because he broke the respondent's pot.

54 In cross-examination, the claimant said he completed his handwritten timesheet once per week. He denied he talked to 'the manager' separate to the text message dated 8 February 2024. The claimant said he never mentioned the ABN outside of the text message and denied there was a discussion in the interview about an ABN or that he would be a contractor.

55 In terms of evidence to support the contents of his witness statement, including Attachment 1, the claimant relied upon three things:

(1) the respondent's timesheets;

(2) the text messages between him and Mr Feng specifying the hours of work; and

(3) the payment for the first two weeks of work (when he was not required to clock on).

56 The claimant said that the notation on the bank statements (by the respondent) of 'inv' did not mean anything, he did not pay attention to that, and on its own it did not mean he was a contractor, which he denied he was.

57 The claimant denied there was any conversation with Mr Feng or Ms Tan that he would be engaged as a contractor.

Ms Tan

58 Ms Tan says the claimant's statement contains false records of time with the clock-in and clock-out records.[32]

59 She also states the claimant had no fixed working hours and he did not adhere to a set schedule and worked flexible hours. Further, she says the claimant was paid 'per task' rather than by 'hourly' or daily rates. In addition, she says the claimant is responsible for managing his own taxes. The claimant was hired for a short period to help during busy times.[33]

60 She annexes the claimant's clock-on, clock-out schedule used by the respondent.[34]

61 In her oral evidence, Ms Tan agreed King Kong was a restaurant and the claimant worked there.

62 Ms Tan said the manager arranged the claimant's work each day and the claimant's pay was based on what the manager determined. She understood the manager and the claimant discussed the claimant's tasks and what he would be paid.

63 Ms Tan occasionally worked at King Kong.

64 Ms Tan agreed that the respondent never got the claimant to sign a document to withhold $2,200 from the claimant's pay but referred to Attachment 3 to her response to the originating claim where the claimant agreed to pay for a new pot in a text message.

65 In respect of the text messages between the manager and the claimant on 5 March 2024, she understood that the claimant would be paid by an amount of money on the day he worked although all other 'employees' were paid on an hourly basis.

66 Ms Tan queried the claimant's handwritten records. She said before he commenced working there were discussions about the working arrangements and he was told that if he wanted to be an employee, he would need to provide his visa status and other information.

67 Ms Tan maintained the claimant was a contractor.

68 In cross-examination, Ms Tan said the calculation for the claimant's first payment of $560 was between the manager and the claimant. She agreed there was nothing in writing, only the bank statements.

69 Ms Tan agreed that she could not provide any written record of how the payments made to the claimant were calculated. Her understanding was that the manager and the claimant had a conversation every day about pay and tasks.

70 While it was difficult to obtain an answer, eventually Ms Tan said the claimant was paid for all work he did based on the respondent's attendance sheet. However, she could provide no record of how any amounts paid were calculated. She said he was paid a different amount every day but could provide no record of what the different amounts were.

71 While Ms Tan did not agree with the claimant's calculations, she had no records of her own upon which she could base any calculations of her own.

72 Ms Tan agreed the respondent provided the claimant with 'tools' to do the work at King Kong, but said he could have provided his own.

73 Ms Tan agreed the pot broken by the claimant was owned by the respondent.

74 Ms Tan states that in the beginning the claimant said he wanted to be an employee but then he decided to be a contractor based on his eligibility to work. Ms Tan agreed that there was nothing in the text messages sent between the claimant and Mr Feng from 5 to 8 February 2024 which indicated the claimant was now a contractor but said that straight away on 8 February 2024 the claimant decided this.

Mr Feng

75 Mr Feng states that it was the claimant's preference to be a contractor as he was unwilling to provide his personal information and visa details, and he assigned the claimant flexible and short-term tasks.[35]

76 Mr Feng said the respondent does not hire individuals whose visa do not meet eligibility criteria. He requested the claimant to provide invoices, but the claimant delayed doing so. Out of goodwill, Mr Feng transferred payments to the claimant in advance and used the message 'inv' as a short word for 'invoice'.[36]

77 Mr Feng said the claimant had the flexibility to come in anytime between 5.00 pm and 12.00 am to complete his work.[37]

78 In his oral evidence, Mr Feng clarified that the verbal discussions referred to in paragraph [3] of his witness statement occurred when the claimant first started working for the respondent and before the first payment was made. He could not recall the date but said it was when the claimant came in for an interview.

79 Mr Feng said the claimant washed dishes and some other casual tasks. He did not have the skills for other more difficult tasks.

80 Mr Feng said he paid the claimant the 'Award minimum wage' and when asked what that was, he said 'about $24 per hour'.[38] Mr Feng said the claimant was paid according to the days he worked and not in relation to how much he worked. The claimant did not provide his personal details which effected the pay. Mr Feng asked 'why didn't he follow my instructions? … washing dishes and doing casual jobs.'[39]

81 Mr Feng said he asked for the TFN and other information, but the claimant did not provide it, and he made payments to the ABN as a contractor. He said initially the claimant preferred to work as an employee, but he did not give his personal details, so the respondent had to make payments on the basis of tasks, not hours.

82 The payments were made fortnightly.

83 Mr Feng struggled to understand the point made by the claimant in cross-examination, when the claimant asked him to explain why Mr Feng asked for the claimant's TFN in the text message dated 5 February 2024. However, his answer appears to be that 'the payment was due' and that he runs the restaurant.[40]

84 Mr Feng said he paid the claimant in compliance with the 'clock machine' and he should have the calculation otherwise he would not pay the claimant.

85 Mr Feng was unable to provide any explanation on how he calculated the claimant's payment but appeared to suggest that it was different each day depending on how many hours per day was worked. He suggested the payment made was according to a private arrangement. He suggested it was calculated by the 'accounting department'.[41]

86 Mr Feng said the claimant had two options before he commenced work at King Kong; that is, he could be an employee or a contractor. Mr Feng said the claimant chose to be a contractor.

87 Mr Feng also said the claimant's payments were the total payment divided by the days he worked to calculate a daily payment.

88 In re-examination, Mr Feng said the claimant was responsible for washing dishes and gave an example where if the claimant had five trolleys of dishes and finished washing them, he could go.

Employee vs Independent Contractor

Contract Terms

89 It is not in dispute there was no formal written agreement or contract between the claimant and the respondent for work undertaken by the claimant. Notwithstanding this, the Court is to determine the nature and terms of the contract between the parties to ascertain their contractual rights and obligations.[42]

90 The terms are determined by application of orthodox principles. That is, where the terms are partly in writing and partly oral (or wholly oral), the terms may be inferred from all the circumstances, including the parties' conduct and words at the time of contract formation, their conduct over time, their course of dealing, or inferred where necessary for business efficacy.[43]

91 To this end, regard may be had to:[44]

> … circumstances surrounding the making of the contract and events and matters, known to the parties at the time of contracting, which assist in identifying the object or purpose of the contract. The nature of the work contracted for and the arrangements of the supply or provision of any tools or equipment to the employee may also be relevant.

92 In this case, the terms of the contract for the supply of labour (whether to an employer or to a client, yet to be determined) by the claimant were partly oral (as between the claimant and the respondent or the respondent's agent) and partly in writing (in text messages between the claimant and Mr Feng).

93 The claimant states he and the respondent agreed that he would be a casual employee working in King Kong's kitchen doing kitchenhand work for $20 per hour.

94 Ms Tan uses the term 'hired' in reference to engaging the claimant but says he was paid per task rather than by hourly or daily rate (although there was no real explanation of how or what he is paid per task – that is – is the claimant paid per dish washed,

per bench wiped, per square meter of floor swept and how much is he paid for these tasks – that is – is he paid $10 to wash 10 plates, $5 per bench wiped?). Ms Tan says this explains why the claimant 'clocked' on once per day using the respondent's system.

95 Mr Feng says during verbal discussions, the respondent and the claimant clarified and agreed his 'scope of work', finalised his role, and his responsibilities as a contractor. Mr Feng said the claimant had the flexibility to come in any time between 5.00 pm and 12.00 am to complete his work. Mr Feng also said the claimant was paid for the tasks he did but could not provide any explanation of what the pay was, how the pay was calculated or provide any records which in any way supported this explanation.

96 At its core, Mr Feng's evidence was that the claimant was paid to wash dishes and do some other unskilled work.

97 I find the contract terms for the supply of labour were those predominantly set out in the 23 January 2024 text message sent by Mr Feng, that is:

- the claimant would undertake dish washing and general jobs at King Kong;
- his work hours were 5.00 pm to midnight; and
- he would commence on 24 January 2024 at 6.00 pm.

98 I reject Ms Tan's evidence that the claimant was paid per task as preposterous and devoid of any rational basis, bearing in mind he was working as a kitchenhand washing dishes. Her evidence did not in any way detail how this was supposed to work, it was not supported by any evidence consistent with such a payment and was illogical. More importantly, it is entirely inconsistent with text messages sent by Mr Feng to the claimant specifically informing the claimant that he is paid based on the *hours* he clocked in and telling him what the hours of work were.

99 I also reject Mr Feng's evidence that the claimant came *any time* between 5.00 pm and 12.00 am. It is inconsistent with the text message engaging the claimant, inconsistent with the timesheets provided by the respondent, and illogical that a kitchenhand would attend a restaurant at say, 11.45 pm to undertake work that concludes at 12.00 am. It is also inconsistent with the text messages on 20 and 21 March 2024, when Mr Feng remonstrated with the claimant about leaving early.

100 I prefer the claimant's evidence, which is consistent with the timesheets provided by the respondent, consistent with the text message communication with the respondent, and consistent with his own records. I accept the claimant's evidence the oral agreement with the respondent is that he was paid $20 per hour to work at King Kong.

101 I accept the claimant may have from time to time not 'clocked on' or 'clocked off', but he provided a contemporaneous explanation to the respondent for failing to do so, and nothing otherwise put forward by the respondent causes me to doubt the credibility or truthfulness of the claimant's evidence.

102 Accordingly, I further find that an additional term of the contract for the supply of labour was the claimant was paid $20 per hour by the respondent. I also further find that, consistent with the payments made by the respondent, the payment for the claimant's work was made to the claimant's bank account on a fortnightly basis.

Other matters

103 The indicia indicating the claimant was an employee of the respondent include:

- he had a defined role within the respondent's business. That is, he washed dishes at King Kong;
- he used equipment, such as dishwashing liquid, scrubbers, tea towels, supplied by the respondent to do this work;
- he attended at times set by the respondent;
- he was instructed by Mr Feng about what to do and had little, if any autonomy about the work he was required to do; and
- he recorded (for the most part) attendances at King Kong by using the respondent's electronic recording system, which was in fortnightly blocks.

104 The indicia indicating the claimant was an independent contractor, included that he provided an ABN, and he was engaged for a short period of time to accommodate a busy time of year.

105 The bank account provided by the claimant was in his personal name not a business name. Shortly after the claimant was first engaged, Mr Feng requested the claimant to provide the claimant's '*tax number information*' and '*superannuation information*'.[45] Information of this type is ordinarily associated with an employee and not independent contractors.

106 The claimant explained to Mr Feng he had forgotten his tax file number, and he had to reapply for a tax file number which would take at least two weeks.

107 In response, Mr Feng said '*[f]irst, give me your ABN*,' which the claimant did.[46]

108 Notwithstanding this, Mr Feng put the word '*inv*' when depositing money into the claimant's bank account, the claimant did not render any invoices for work undertaken, nor was any claim made for Goods and Services Tax (GST). The respondent did not issue any pay slip or payment confirmation. Notably, personal income taxation was not deducted on a PAYE basis.

109 Like that in ***Jin v Premium Travel Solutions Pty Ltd*** [2023] FedCFamC2G 22, the parties were *remarkably casual* towards the responsibility for correctly paying any taxation liabilities, whether it be personal income taxation or GST.

110 Finally, I reject Mr Feng and Ms Tan's evidence of some verbal discussion where the claimant elected to be a contractor. Not only was their evidence on when this purported discussion occurred inconsistent with one another with Mr Feng suggesting it occurred at the 'interview' (which can only have been on 23 January 2024 before the claimant started work on 24 January

2024) and Ms Tan suggesting it occurred immediately when the claimant provided his ABN on 8 February 2024, but it is not reflected in any text messages between Mr Feng and the claimant.

Determination

111 Considering the terms of the contract for the supply of labour (such as they were) and all the surrounding circumstances, I am satisfied and I find the relationship between the claimant and the respondent was that of employer and employee, not that of an independent contractor providing services to the respondent's business.

112 The respondent determined the claimant's role, his place of work, the hours he worked, the amount he was paid per hour, and provided the equipment for him to do the work the respondent required of him, which is more consistent with an employer-employee relationship to that of an independent contractor.

113 In my view, this was clearly a case where the claimant was working in the respondent's business and not in his own business.[47]

114 The provision of an ABN by the claimant is not sufficient to rebut the finding that the claimant was an employee of the respondent where this needs to be seen in the context in which the ABN was given. That is, in the first instance Mr Feng requested taxation and superannuation information ordinarily associated with employees, and it was only when he was told this information was not able to be provided for two weeks that Mr Feng requested an ABN.

115 While things said or done after a contract is made are not aids to the contract's construction, the text messages between the claimant and Mr Feng on 5 March 2024 are consistent with the finding the claimant was an employee.

116 That is, on 5 March 2024, the claimant informs Mr Feng that his *wages* are incorrect. Mr Feng responds asking the claimant if he clocked on every time, and that the *wages* paid were based on the *hours* recorded by the clock-in system. Mr Feng further remonstrates with the claimant that he never listens to what Mr Feng tells him and if he does not clock in, how should Mr Feng know if he worked or not. Mr Feng says that he has told the claimant that he needs to clock in when he starts work, and that the *wages* he pays are based on the hours recorded by the clock-in system.

117 Nowhere in this chain of text messages does Mr Feng indicate the claimant is paid according to invoices rendered or tasks completed, even putting to one side the use of the word '*wage*'. In addition, the tenure of the messages is Mr Feng instructing the claimant what to do when he starts work and remonstrating with him because he does not follow Mr Feng's instructions. Again, this is consistent with an employee-employer relationship between the claimant and the respondent where the claimant is subordinate to the respondent's business.

118 Finally, addressing the respondent's submission that because the claimant worked on a short-term basis, he was an independent contractor. Short-term work, of itself, does not necessarily indicate whether the engagement was as an employee or as an independent contractor. In the claimant's case, there was a distinct lack of evidence of any firm advance commitment from the respondent to continuing and indefinite work.[48] The claimant said he was employed on a casual basis, and Ms Tan said the claimant was *hired* for two months during a busy period. Both of those statements are consistent with the claimant's engagement being as a casual employee.

119 Accordingly, I am satisfied, and I find that the claimant was employed by the respondent as a *casual* kitchenhand at King Kong.

120 Having found the claimant to be an *employee* and the respondent to be the claimant's *employer*, as stated previously, the claimant therefore is a *national system employee* where the respondent is a *national system employer* (for reasons already given).

121 Accordingly, the respondent, as a *national system employer*, has an obligation under s 323(1)(a) of the FWA to pay to the claimant amounts payable in relation to the performance of work in full.

Application of the Award

122 A modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the award *applies* to the person. Equally, a modern award does not give a person an entitlement unless the award *applies* to the person.[49]

123 A modern award *applies* to (relevantly) an employee and employer if: (a) the modern award *covers* the employee and employer; (b) the modern award is in operation; and (c) no other provision of the FWA provides that the modern award does not apply to the employee and employer.[50]

124 A modern award covers (relevantly) an employee and employer if the award is expressed to cover the employee and employer.[51]

125 For the following reasons I am satisfied, and I find that the Award applied to the claimant and the respondent during the Employment Period:

- clauses 4.1(a) and (b) specifically provide the Award *covers* employers in the *restaurant industry* throughout Australia and employees with a classification defined in Schedule A of employers mentioned in cl 4.1(a);
- *restaurant industry* is defined to mean, amongst other things, a restaurant;
- King Kong is a restaurant, and none of the exclusions in cl 4.2 and cl 4.4 of the Award apply;
- the claimant was employed as a casual kitchenhand to wash dishes and perform general chores, consistent with the classification in Schedule A, A.3.1(a) of the Award – *kitchen attendant grade 1*;[52] and
- the Award was in operation.

Amount owed under the Award (if any)

126 Pursuant to Table 3 in cl 18.1 of the Award, the minimum hourly rate for a non-casual kitchen attendant grade 1 is $24.10. However, cl 11.1 of the Award provides that an employer must pay a casual employee for each hour worked a loading of 25% in addition to the minimum hourly rate otherwise applicable under cl 18. Therefore, the minimum hourly rate for a casual kitchen attendant grade 1 is $30.13.[53]

127 The hourly rate for a casual kitchen attendant grade 1 working on a Saturday and Sunday is $36.15. The hourly rate for a casual kitchen attendant grade 1 working on a public holiday is $60.25.[54]

128 Ms Tan asserts the claimant's evidence is false as it relates to false records of time and wage rates.

129 However, there is no evidence before the Court that indicates the falsity of the claimant's evidence. Simply put, it is a bare assertion by Ms Tan.

130 The claimant prepared a handwritten document of the shifts he worked. This handwritten document is consistent with, although not identical to, the timesheets provided and relied upon by the respondent.

131 As already stated, I found the claimant to be a truthful and credible witness. The same cannot be said for Ms Tan or Mr Feng whose evidence I rejected in respect to the issue of whether the claimant was an employee of the respondent or an independent contractor.

132 The evidence of Ms Tan and Mr Feng is inconsistent with the contemporaneous and objective evidence of the timesheets (even incomplete) and the text messages. I have little confidence in the credibility or truthfulness of their evidence. Notably, Mr Feng said the claimant was paid in accordance with 'the Award' and this was about $24 per hour, again inconsistent with his other evidence which seemed to suggest the claimant was paid to do specified tasks, like a trolley of dishes. However, as already stated there were no records kept by the respondent that in any way supports this assertion and Ms Tan and Mr Feng could provide no evidence on how any money paid to the claimant was calculated. To say the payments were calculated on an ad hoc basis is an understatement.

133 Accordingly, I prefer the claimant's evidence regarding the days and hours he worked detailed in his handwritten documents (but also consistent, in part, with the respondent's timesheets).

134 On that basis, the below table is a distillation of the claimant's handwritten document and the hourly rate referrable to the time worked:

	Total number	7-hour days	11-hour days	Award hourly rate	**Total**
Weekdays worked	42	35	7	$30.13	**$9,701.86**
Saturdays worked	9	8	1	$36.15	**$2,422.05**
Sundays worked	9	8	1	$36.15	**$2,422.05**
Public Holiday worked	1	1		$60.25	**$421.75**
Hours	2			$30.13	**$60.26**
Total					**$15,027.97**

135 Having regard to the records maintained and produced by the claimant, if he was paid at the applicable Award rates, he should have been paid $15,027.97 for the work undertaken at King Kong during the Employment Period.

136 According to the bank records submitted by both parties, $4,860 was paid to the claimant.

137 As admitted by the respondent, $2,200 in wages were withheld by the respondent purportedly for breakages by the claimant. As will be discussed, there was no lawful basis for the respondent to withhold the claimant's wages.

Determination

138 An obligation under an award is a statutory obligation and cannot be contracted out.[55] However, a contract of employment can confer benefits upon an employee over and above those conferred by an award.[56]

139 Similar observations were made in ***Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd*** [2002] FCA 1406; (2002) 121 IR 250 at [35], ***Regional Express Holdings Ltd v Clarke*** [2007] FCA 957; (2007) 165 IR 251 at [56] and ***Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd*** [2014] FCCA 1115 at [84].

140 In paying the claimant $20 per hour under the disguise of a contractual arrangement, it is readily apparent the respondent has not conferred any benefit upon the claimant over and above that conferred by the Award. Simply put, the respondent cannot contract out of the minimum rates applicable under the Award. The claimant's mistaken accession to the payable rate being

$20 per hour does not change what, in fact, are the minimum rates applicable to the work he carried out as the respondent's employee.

141 Therefore, notwithstanding the claimant did not directly express the minimum hourly rate under the Award he says he should have been paid, it is sufficient that he identified the relevant provisions of the Award (as he did in his witness statement) and identified that he had been underpaid by the respondent. The fact that he mistakenly thought he was owed an amount based on $20 per hour, does not change what he was, in fact, owed.

142 Accordingly, I am satisfied that the claimant has proven on the balance of probabilities that he was underpaid for work carried out while an employee of the respondent, and that he was not, and still has not, been paid that amount in full for the performance of that work.

143 I find the amount of the underpayment is $10,167.97, and that this amount was not paid in full by the respondent and, in fact, remains outstanding.

144 I further find this amount is an amount required to be paid under s 323 of the FWA for the purposes of s 548(1A) of the FWA and the respondent contravened a civil remedy provision by failing to pay the amount.

Withholding of wages by the respondent

145 The respondent admitted to withholding $2,200 payable to the claimant for work undertaken because the claimant broke a pot. Leaving aside whether the respondent ever had a lawful basis to withhold monies for work undertaken by the claimant as either an employee or an independent contractor, the IMC having found the claimant was an employee of the respondent resolves the issue in favour of the claimant.

146 That is, the respondent was not lawfully entitled to withhold any wages payable to the claimant unless in compliance with s 324 or s 325 of the FWA, which in the claimant's case there was not.

147 Firstly, relevant to this case and the found facts, s 324(1) of the FWA permits deductions from an amount payable to an employee if the deduction is in writing, or authorised under the Award, or by court order. Notwithstanding the text message referred to by Ms Tan, I am not satisfied the claimant permitted the deduction of the money from his pay even if the text message reduced the deduction to writing (which I am not satisfied it did).

148 Second, s 325(1) of the FWA prohibits an employer from requiring an employee to spend an amount of the employee's wages if the requirement is unreasonable *and* the payment is directly or indirectly for the benefit of the employer. Leaving aside the issue of reasonableness, the withholding of the claimant's wages to pay for a broken kitchen item was clearly beneficial to the respondent rather than the claimant.

Outcome

149 Subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), and pursuant to s 545(3) and s 548(1A)(i) of the FWA, the respondent is required to pay to the claimant the amount of $10,167.97 in unpaid wages which was required to be paid in full for the performance of work under s 323 of the FWA.

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'); *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 323 – failing to pay an amount payable in full for the performance of work.

[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 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.

[6] A claimant may elect the small claim procedure under s 548 of the FWA provided the order sought relates to, relevantly, an amount under subsection (1A)(a)(i), namely that an amount that an employer was required to pay or an employee is under the FWA or a fair work instrument.

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] Similarly, in small claim proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities: s 548(3) of the FWA.

[12] At any stage of the small claim proceedings, the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment: s 548(4) of the FWA.

[13] 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: Employee Attendance Sheets

Employee Attendance Sheet

Attendance Date: 2024-01-15~2024-02-11
Preparation Time: 2024-02-17 13:48:15

Department	Company	Name	Pangzi						
Date	2024-01-15~2024-02-11	Employee No.	7						
Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours)		Late		Leave Early	
				Normal	Special	(Times)	(Points)	(Times)	(Points)
20	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning		Afternoon		Work Overtime	
	On Duty	Off Duty	On Duty	Off Duty	Sign-in	Sign-off
15 Monday						
16 Tuesday						
17 Wednesday						
18 Thursday						
19 Friday						
20 Saturday						
21 Sunday						
22 Monday						
23 Tuesday						
24 Wednesday						
25 Thursday						
26 Friday						
27 Saturday						
28 Sunday						
29 Monday						
30 Tuesday						
31 Wednesday						
01 Thursday						
02 Friday						
03 Saturday						
04 Sunday						
05 Monday					19:48	
06 Tuesday				16:56		
07 Wednesday		10:58				
08 Thursday		11:11				
09 Friday		10:50				
10 Saturday	10:29					
11 Sunday	10:47					

Department	Company	Name	april Xiaohan						
Date	2024-01-15~2024-02-11	Employee No.	8						
Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours)		Late		Leave Early	
				Normal	Special	(Times)	(Points)	(Times)	(Points)
20	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning		Afternoon		Work Overtime	
	On Duty	Off Duty	On Duty	Off Duty	Sign-in	Sign-off
15 Monday						
16 Tuesday						
17 Wednesday						
18 Thursday						
19 Friday						
20 Saturday						
21 Sunday						
22 Monday						
23 Tuesday						
24 Wednesday						
25 Thursday						
26 Friday						
27 Saturday						
28 Sunday						
29 Monday						
30 Tuesday						
31 Wednesday						
01 Thursday						
02 Friday						
03 Saturday						
04 Sunday						
05 Monday						
06 Tuesday						
07 Wednesday						
08 Thursday						
09 Friday						
10 Saturday						
11 Sunday						

Department	Company	Name	Xiaoyu						
Date	2024-01-15~2024-02-11	Employee No.	9						
Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours)		Late		Leave Early	
				Normal	Special	(Times)	(Points)	(Times)	(Points)
20	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning		Afternoon		Work Overtime	
	On Duty	Off Duty	On Duty	Off Duty	Sign-in	Sign-off
15 Monday						
16 Tuesday						
17 Wednesday						
18 Thursday						
19 Friday						
20 Saturday						
21 Sunday						
22 Monday						
23 Tuesday						
24 Wednesday						
25 Thursday						
26 Friday						
27 Saturday						
28 Sunday						
29 Monday						
30 Tuesday						
31 Wednesday						
01 Thursday						
02 Friday						
03 Saturday						
04 Sunday						
05 Monday					19:50	00:10+
06 Tuesday				16:58		
07 Wednesday				16:51		
08 Thursday				16:54		
09 Friday				16:57		
10 Saturday	10:57	16:56				
11 Sunday	10:53	16:58				

Employee Attendance Sheet

Attendance Date: 2024-02-12~2024-02-25
Preparation Time: 2024-03-02 12:25:34

Department	Company	Name	Pangzi
Date	2024-02-12~2024-02-25	Employee No.	7

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
12 Monday						
13 Tuesday						
14 Wednesday						
15 Thursday				16:52		
16 Friday		10:51				
17 Saturday	10:58					
18 Sunday	10:57					
19 Monday				17:03		
20 Tuesday				16:55		
21 Wednesday		10:48				
22 Thursday		11:00				
23 Friday		11:01				
24 Saturday	10:51					
25 Sunday	10:49					

Department	Company	Name	april Xiaohan
Date	2024-02-12~2024-02-25	Employee No.	8

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
12 Monday						
13 Tuesday						
14 Wednesday						
15 Thursday						
16 Friday						
17 Saturday						
18 Sunday						
19 Monday						
20 Tuesday						
21 Wednesday						
22 Thursday						
23 Friday						
24 Saturday						
25 Sunday						

Department	Company	Name	Xiaoyu
Date	2024-02-12~2024-02-25	Employee No.	9

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	1	63

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
12 Monday			13:12	16:57		
13 Tuesday				16:37		
14 Wednesday		11:01		16:56		
15 Thursday		10:58		16:57		
16 Friday				16:57		
17 Saturday	16:51					
18 Sunday	16:59					
19 Monday		11:07		16:57		
20 Tuesday		11:20		16:55		
21 Wednesday				16:58		
22 Thursday				16:58		
23 Friday		11:01				
24 Saturday	16:58					
25 Sunday						

Employee Attendance Sheet

Attendance Date: 2024-02-26~2024-03-10
Preparation Time: 2024-03-15 13:07:56

Department	Company	Name	Pangzi
Date	2024-02-26~2024-03-10	Employee No.	7

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
26 Monday				16:48		
27 Tuesday				16:56		
28 Wednesday		11:00				
29 Thursday		11:00				
01 Friday				17:07		
02 Saturday	20:23					
03 Sunday	17:57					
04 Monday				16:59		
05 Tuesday						
06 Wednesday				16:53		
07 Thursday		10:56				
08 Friday		11:00				
09 Saturday	10:56					
10 Sunday	10:53					

Department	Company	Name	april Xiaohan
Date	2024-02-26~2024-03-10	Employee No.	8

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
26 Monday						
27 Tuesday						
28 Wednesday						
29 Thursday						
01 Friday						
02 Saturday						
03 Sunday						
04 Monday						
05 Tuesday						
06 Wednesday						
07 Thursday						
08 Friday						
09 Saturday						
10 Sunday						

Department	Company	Name	Xiaoyu
Date	2024-02-26~2024-03-10	Employee No.	9

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
26 Monday				16:48		
27 Tuesday				16:57		
28 Wednesday				16:59		
29 Thursday				16:59		
01 Friday				16:58		
02 Saturday	16:57					
03 Sunday	17:02			16:59		
04 Monday				16:59		
05 Tuesday				16:59		
06 Wednesday				16:58		
07 Thursday				17:00		
08 Friday						
09 Saturday	17:02					
10 Sunday	16:58					

Employee Attendance Sheet

Attendance Date: 2024-03-11~2024-03-24
Preparation Time: 2024-04-01 13:11:51

Department	Company	Name	Pangzi
Date	2024-03-11~2024-03-24	Employee No.	7

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
11 Monday				16:58		
12 Tuesday				16:56		
13 Wednesday				17:02		
14 Thursday		10:50				
15 Friday		10:57				
16 Saturday	10:56					
17 Sunday	16:56					
18 Monday				16:55		
19 Tuesday				16:58		
20 Wednesday				17:13		
21 Thursday		10:55				
22 Friday		11:00				
23 Saturday	10:53					
24 Sunday	10:45					

Department	Company	Name	april Xiaohan
Date	2024-03-11~2024-03-24	Employee No.	8

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
11 Monday						
12 Tuesday						
13 Wednesday						
14 Thursday						
15 Friday						
16 Saturday						
17 Sunday						
18 Monday						
19 Tuesday						
20 Wednesday						
21 Thursday						
22 Friday						
23 Saturday						
24 Sunday						

Department	Company	Name	Xiaoyu
Date	2024-03-11~2024-03-24	Employee No.	9

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
10	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
11 Monday				16:59		
12 Tuesday				16:58		
13 Wednesday				16:59		
14 Thursday				16:57		
15 Friday				16:58		
16 Saturday						
17 Sunday	16:55					
18 Monday				16:58		
19 Tuesday				17:02		23:03
20 Wednesday				16:57		23:06
21 Thursday				16:59		
22 Friday				17:11		
23 Saturday	16:56					
24 Sunday	16:51					

Employee Attendance Sheet

Attendance Date: 2024-03-25~2024-04-14
Preparation Time: 2024-04-16 12:21:20

Department	Company	Name	Pangzi
Date	2024-03-25~2024-04-14	Employee No.	7

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
15	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
25 Monday			16:49			
26 Tuesday						
27 Wednesday			17:03			
28 Thursday		10:54				
29 Friday		11:00				
30 Saturday	10:50					
31 Sunday	10:55					
01 Monday			16:55			
02 Tuesday			16:57			
03 Wednesday			16:56			
04 Thursday		11:00				
05 Friday		10:56				
06 Saturday	10:58					
07 Sunday	10:52					
08 Monday			17:00			
09 Tuesday			17:03			
10 Wednesday			16:58			
11 Thursday		10:55				
12 Friday		10:57				
13 Saturday	10:59					
14 Sunday	10:54					

Department	Company	Name	april Xiaohan
Date	2024-03-25~2024-04-14	Employee No.	8

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
15	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
25 Monday						
26 Tuesday						
27 Wednesday						
28 Thursday						
29 Friday						
30 Saturday						
31 Sunday						
01 Monday						
02 Tuesday						
03 Wednesday						
04 Thursday						
05 Friday						
06 Saturday						
07 Sunday						
08 Monday						
09 Tuesday						
10 Wednesday						
11 Thursday						
12 Friday						
13 Saturday						
14 Sunday						

Department	Company	Name	Xiaoyu
Date	2024-03-25~2024-04-14	Employee No.	9

Absenteeism (days)	Leave (days)	Business Trip (Days)	Working (Days)	Overtime (Hours) Normal	Overtime (Hours) Special	Late (Times)	Late (Points)	Leave Early (Times)	Leave Early (Points)
15	0	0	0	0.0	0.0	0	0	0	0

Attendance Sheet

Date Day of the Week	Morning On Duty	Morning Off Duty	Afternoon On Duty	Afternoon Off Duty	Work Overtime Sign-in	Work Overtime Sign-off
25 Monday				16:55		
26 Tuesday						
27 Wednesday						
28 Thursday						
29 Friday						
30 Saturday						
31 Sunday						
01 Monday						
02 Tuesday						
03 Wednesday						
04 Thursday						
05 Friday						
06 Saturday						
07 Sunday						
08 Monday						
09 Tuesday						
10 Wednesday						
11 Thursday						
12 Friday						
13 Saturday						
14 Sunday						

[1] An *employee* is defined as a *national system employee*. A *national system employee* is defined to be 'an individual so far as he or she is employed, or usually employed, [by a] *national system employer*' (for instance 'a constitutional corporation, so far as it employed, or usually employs, an individual'): ss 13, 14 and s 322 of the FWA.

[2] Section 323(1)(a) of the *Fair Work Act 2009* (Cth) (FWA).

[3] Exhibit 1 – Witness Statement of the claimant at Attachment 2.

[4] Exhibit 1 at Attachment 2.

[5] Exhibit 1 at Attachment 2.

[6] Exhibit 1 at Attachment 2.

[7] Exhibit 1 at Attachment 2.

[8] Exhibit 1 at Attachment 2.

[9] Exhibit 1 at Attachment 2.

[10] Exhibit 1 at Attachment 2.

[11] Exhibit 1 at Attachment 3 and Exhibit 3 – Witness Statement of Xiaogang Feng at Attachment C.

[12] Exhibit 1 at Attachment 3 and Exhibit 3 at Attachment C.

[13] Exhibit 1 at Attachment 3 and Exhibit 3 at Attachment C.

[14] Exhibit 3 at Attachment B.

[15] Exhibit 3 at Attachment B.

[16] Exhibit 3 at Attachment B.

[17] Exhibit 1 at Attachment 2.

[18] Exhibit 1 at Attachment 2.

[19] Exhibit 1 at Attachment 2.

[20] Exhibit 1 at Attachment 2.

[21] Exhibit 2 – Witness Statement of Ping Tan at Attachment A.

[22] Exhibit 1 at [5].

[23] Exhibit 1 at [7].

[24] Exhibit 1 at [8] and oral evidence.

[25] Exhibit 1 at [9].

[26] Exhibit 1 at [10].

[27] Exhibit 1 at [13].

[28] Exhibit 1 at Attachment 1 and oral evidence.

[29] In fact, in exhibit 1 at Attachment 1 part of the text message is included but the content of the reply on 21 March 2024 is missing.

[30] ts 13, 16.

[31] Exhibit 1 at Attachment 1.

[32] Exhibit 2 at [2].

[33] Exhibit 2 at [4], [5] and [7].

[34] Exhibit 2 at Attachment A.

[35] Exhibit 3 at [3].

[36] Exhibit 3 at [4].

[37] Exhibit 3 at [5].

[38] ts 37.

[39] ts 36.

[40] ts 41.

[41] ts 42.

[42] ***Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*** [2022] HCA 1; (2022) 275 CLR 165 at [83] and [177] (***Personnel Contracting***); ***EFEX Group Pty Ltd v Bennett*** [2024] FCAFC 35; (2024) 330 IR 171 at [7] and [52]-[56] (***EFFEX***).

[43] ***EFFEX*** at [9].

[44] ***EFFEX*** at [11].

[45] Exhibit 1 at Attachment 2.

[46] Exhibit 1 at Attachment 2.

[47] ***Personnel Contracting*** at [36]-[39].

[48] Section 15A(a) of the FWA.

[49] Sections 46(1) and (2) of the FWA.

[50] Section 47(1) of the FWA.

[51] Section 48(1) of the FWA.

[52] General cleaning duties within a kitchen or food preparation area and scullery, including cleaning cooking and general utensils used in a kitchen or restaurant.

[53] This amount is also contained in the Award in Schedule B in Table B.1.3 Casual adult employees – ordinary and penalty rates.

[54] See footnote 5.

[55] ***Metropolitan Health Service Board v Australian Nursing Federation*** [2000] FCA 784; (2000) 176 ALR 46 (***Metropolitan Health Service Board***) at [18]; ***Kronen v Commercial Motor Industries Pty Ltd (CMI Toyota)*** [2008] FCAFC 171; (2008) 171 FCR 521 at [16].

[56] ***Metropolitan Health Service Board*** at [18].

2025 WAIRC 00223

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	:	2025 WAIRC 00223
CORAM	:	INDUSTRIAL MAGISTRATE C. TSANG
HEARD	:	TUESDAY, 4 FEBRUARY 2025
DELIVERED	:	TUESDAY, 8 APRIL 2025
FILE NO.	:	M 143 OF 2023
BETWEEN	:	JULIE MAIOLO

CLAIMANT

AND

DRU MARTIN DANIELS

RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Application to join a second respondent to proceedings against the employer for a contravention of s 49DA(1) of the *Industrial Relations Act 1979* (WA) – Whether claimant has an arguable case that employer's bookkeeper 'involved in' the contravention – Whether joining a second respondent in circumstances where the proceedings against the employer is programmed for a penalty hearing is consistent with reg 5 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA)
Legislation	:	*Industrial Relations Act 1979* (WA), ss 49DA(1), 49F, 83E(1)(b), 83E(1A), 83E(1B)(a), 83E(1B)(c), 83EA(1), 83EA(2), 83EA(6)
		Industrial Relations Legislation Amendment Act 2021 (WA), s 21
		Industrial Relations Legislation Amendment Act 2024 (WA)
		Industrial Magistrate's Court (General Jurisdiction) Regulations 2005 (WA), reg 5
Result	:	Application dismissed
Representation:		
Claimant	:	Mr J Raftos (of counsel)
Respondent	:	Ms M Girgis (of counsel)

REASONS FOR DECISION

1 On 25 November 2024, the claimant (**Ms Maiolo**) filed an application seeking leave to join the respondent's (**Dr Daniels'**) bookkeeper, Patricia Atkinson (**Ms Atkinson**) as the second respondent (**Application**).

2 Dr Daniels opposed the Application, and it was heard on 4 February 2025.

3 For the reasons that will follow, an order will be issued to dismiss the Application.

Background

4 On 1 December 2023, Ms Maiolo filed an Originating Claim against her former employer, Dr Daniels, claiming pecuniary penalties and costs due to a contravention of s 49DA(1) of the *Industrial Relations Act 1979* (WA) (**Act**).

5 Section 49DA(1) of the Act states:

> **49DA. Employer obligations in relation to pay slips**
>
> (1) An employer must, in accordance with this section, give a pay slip (in hard copy or electronic form) to each employee within 1 working day after paying an amount to the employee in relation to the performance of work.

6 The Originating Claim [3]–[4] and the Response filed on 12 February 2024 [2]–[3] state:

Originating Claim	Response to Originating Claim
3. The First Respondent has an obligation to give pay slips to the claimant within one working day after paying the claimant in relation to the performance of work.	2. The First Respondent accepts paragraph 3.
4. The First Respondent contravened a civil remedy provision of the IR Act by failing in its obligation to give a pay slip to the claimant within one working day after paying the claimant in relation to the performance of work.	3. The First Respondent does not accept or deny paragraph 4.

7 The Originating Claim was amended on 6 May 2024. The Amended Originating Claim [4]–[5] and the Response to Amended Originating Claim filed on 27 May 2024 [3]–[7] state:

Amended Originating Claim	Response to Amended Originating Claim
4. The Claimant was employed by the Respondent	3. The Respondent accepts that the Claimant was

from April 2022 – October 2023 (40 pay slips in all) and was paid on the following dates in relation to the performance of work for the Respondent: a. 29/4/22; b. 13/5/22; c. 27/5/22; d. 10/6/22; e. 24/6/22; f. 8/7/22; g. 22/7/22; h. 5/8/22; i. 19/8/22; j. 2/9/22; k. 16/9/22; l. 30/9/22; m. 14/10/22; n. 28/10/22; o. 11/11/22; p. 25/11/22 q. 9/12/22; r. 22/12/22 s. 23/12/22; t. 6/1/23; u. 20/1/23; v. 3/2/23; w. 17/2/23; x. 3/3/23; y. 17/3/23; z. 31/3/23; aa. 14/4/23; bb. 28/4/23; cc. 12/5/23; dd. 26/5/23; ee. 9/6/23; ff. 23/6/23; gg. 7/7/23; hh. 21/7/23; ii. 4/8/23; jj. 18/8/23; kk. 1/9/23; ll. 15/9/23; mm. 29/9/23; nn. 12/10/23; and oo. 12/10/23 (two payments at this date).	employed by the Respondent between 27 April 2022 – October 2023. 4. The Claimant does not accept all payment made was for the performance of work. 5. Between the dates 10 July 2023 and 3 August 2023, the Claimant received payment for annual leave notwithstanding the Claimant did not have accrued leave. The Respondent allowed the Claimant to take leave in advance. 6. During their employment the Claimant took leave between: a. 1st, 3rd, 4th August 2022 – one week leave. b. 22nd, 28th, 29th December 2022 – one week leave. c. 4th, 11th, 16th January 2023 – one week leave. d. 27th February, 1st, 2nd March – one week leave. e. 10th July - 3rd August – 4 weeks leave. f. Worked additional days: 14th April and 8th September 2023.
5. At no time did the Respondent provide the Claimant with a payslip within 1 working day after paying the Claimant as referred to above or at all.	7. The Respondent does not deny paragraph 5, however s 49DA(1) was introduced on 30 June 2022. The [Respondent] did not breach that provision in relation to the pay periods identified prior to that date.

8 At the directions hearing on 5 July 2024, counsel for Dr Daniels stated that Dr Daniels did not dispute contravening s 49DA(1) of the Act after it came into effect. As a result, the matter could proceed to be listed for the court to determine penalties.

9 Consequently, the matter was listed for a Pre-Trial Conference before a Clerk of the Court. The conference took place on 16 August 2024. On 29 August 2024, the Clerk issued orders in the following terms:

1. THAT the respondent provide to the claimant the list of documents or communications provided to the respondent by UHY Norton Haines (accountants) for payslips or related information concerning the period 1 July 2022 to 30 November 2023.

2. THAT the parties have liberty to apply at short notice.

10 At the directions hearing on 25 November 2024, counsel for the parties confirmed compliance with the Clerk's orders. Furthermore, in addition to programming the Application for hearing, the proceedings against Dr Daniels were programmed for a 2-day penalty hearing.

Consideration

11 As outlined at [5] above, the obligation under s 49DA(1) of the Act lies with the employer. As outlined at [7]–[8] above, Dr Daniels admits to contravening s 49DA(1), and the proceedings are programmed for a penalty hearing to determine any penalties that should be imposed on him.

12 Section 49F of the Act states that a contravention of s 49DA(1) is not an offence but is a civil penalty provision for the purposes of s 83E of the Act.

13 Ms Maiolo is seeking the payment to her of pecuniary penalties to be imposed on Dr Daniels pursuant to ss 83E(1) and 83EA(2)[1].

14 Counsel for Ms Maiolo clarified at the hearing on 4 February 2025 that if Ms Atkinson were to be joined to the proceedings, Ms Maiolo would be seeking penalties to be imposed on Ms Atkinson pursuant to ss 83E(1A), 83E(1B)(a) and (c), and 83EA(6) of the Act.

15 The Act has recently been amended by the *Industrial Relations Legislation Amendment Act 2024* (WA) (**amending legislation**). It is the version of the Act immediately prior to the amendments arising from the amending legislation that applies to these proceedings.

16 Sections 83E(1)(b), (1A), (1B)(a) and (c) and 83EA(1), (2) and (6) of the Act state:

83E. Civil penalty provision, proceedings for contravening

(1) If a person contravenes a civil penalty provision, the industrial magistrate's court may, on an application to the court, make an order imposing a pecuniary penalty on the person, not exceeding –

…

(b) in the case of an individual –

(i) if the contravention is a serious contravention – $130 000; or

(ii) if the contravention is not a serious contravention – $13 000.

(1A) A person who is involved in a contravention of a civil penalty provision is taken to contravene that provision.

(1B) A person is ***involved in*** a contravention of a civil penalty provision if, and only if, the person –

(a) aids, abets, counsels or procures the contravention; or

…

(c) is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention;

…

83EA. Serious contravention of entitlement provision or civil penalty provision

(1) In this section –

contravention means a contravention of or failure to comply with –

(a) a civil penalty provision; or

(b) an entitlement provision.

(2) A contravention by a person is a ***serious contravention*** if –

(a) the person knowingly commits the contravention; and

(b) the person's conduct constituting the contravention is part of a systematic pattern of conduct relating to 1 or more other persons.

…

(6) A person (the ***involved person***) who is involved in a contravention by another person (the ***principal***) commits a serious contravention only if –

(a) the principal's contravention is a serious contravention; and

(b) the involved person knows that the principal's contravention is a serious contravention.

17 While the Response to Amended Originating Claim states that s 49DA(1) of the Act was introduced on 30 June 2022, it actually came into operation on 20 June 2022 upon proclamation of the *Industrial Relations Legislation Amendment Act 2021* (WA), s 21.

18 In the Amended Originating Claim [4] (at [7] above), Ms Maiolo outlines the dates that she claims she received payment from Dr Daniels. Dr Daniels disputes that all payments were made for the performance of work[2]. Under cross-examination, Ms Maiolo agreed she received a Christmas bonus of $5,000. This appears to align with the payment Ms Maiolo claims she received on 22 December 2022[3]. In 2022, 22 December fell on a Thursday. Analysing the stated dates of payment, excluding those at Amended Originating Claim [4(r), (nn) and (oo)], indicates that Ms Maiolo was paid on a fortnightly basis, each Friday.

19 As the first amount paid to Ms Maiolo in relation to the performance of work following the introduction of s 49DA(1) on 20 June 2022 was paid on Friday, 24 June 2022[4], the obligation imposed by s 49DA(1) first applied to Ms Maiolo's employment on Monday, 27 June 2022, being '1 working day after paying an amount in relation to the performance of work'.

20 There is no dispute that Ms Atkinson was at all material times Dr Daniels' bookkeeper. In opposing the Application, Dr Daniels filed an affidavit of Ms Atkinson on 14 January 2025. In relation to her role and the generation of payslips, Ms Atkinson deposes[5]:

1. I commenced working with Dr Douglas Candy, an Ophthalmologist in 1975. In approximately 2007, Dr Candy retired and Dr Dru Daniels took over his Ophthalmology practice including his patients. Dr Daniels offered the current staff employment with [*sic*]. I accepted this offer and continued to work in the same practice with Dr Daniels. I have continued to work in the practice to date.
2. I am 79 years old, and I have been working in the Ophthalmology practice now for 50 years including with Dr Dru Daniels for 18 years.
3. I am employed with Dr Daniels as a bookkeeper not an accountant.
4. My responsibilities at work include: paying accounts, pay runs, superannuation, handling any queries in relation to payments or invoices, end of month group tax including PAYG and quarterly BAS.
5. I record all pay related information. For permanent staff, I ensure bank payment transfers are paid into the staff nominated accounts at the end of each month. I keep a record of what has been paid (gross tax and net) and give that to the accountants. This includes a record of:
   a. Gross payments, tax and net pay,
   b. leave days taken,
   c. sick leave,
   d. public holidays.
   e. breakdown of the hours worked by each staff member during the month, and
   f. I provide this information to UHY Norton.
6. I keep a handwritten record of all staff sick leave and annual leave and other leave entitlements taken during their employment.

…

16. I never generated payslips for permanent staff as their pay was the same every week. If anyone asked for proof of employment for banking reasons I would provide them with a letter.
17. I was not aware of the amendment to the law that made it a legal requirement to provide payslips as I have never been required to do so in my 50 years with the Ophthalmology practice. Since this has been brought to my attention, I ensure I provide payslips. We have also commenced consulting for new accounting programmes such as Xero, MYOB and other programmes to keep electronic records of staff pay.

21 As such, it is reasonable to say that, as Dr Daniels' bookkeeper, Ms Atkinson is involved in (as those words are used in their ordinary sense) the generation of payslips for Dr Daniels' staff. It is trite to say that whether Ms Atkinson was 'involved in' a contravention of s 49DA(1) pursuant to ss 83E(1A) and (1B) of the Act is a different matter.

22 For joinder, Ms Maiolo must present an arguable case that Ms Atkinson was 'involved in' the contravention of s 49DA(1), meaning she aided, abetted, counselled or procured the contravention (s 83E(1B)(a)) or was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention (s 83E(1B)(c)).

23 If Ms Maiolo is unable to present an arguable case that Ms Atkinson was 'involved in' the contravention of s 49DA(1), it becomes unnecessary to consider whether Ms Maiolo has presented an arguable case that Ms Atkinson has committed a serious contravention of s 49DA(1) pursuant to s 83EA(6).

24 In Ms Maiolo's written submissions filed on 13 January 2025 [3]–[4], Ms Maiolo relies on [4]–[6] and [16] of Ms Atkinson's affidavit (at [20] above) to argue that Ms Atkinson was 'involved in' the contravention of s 49DA(1) of the Act: (original emphasis)

3. Indeed, Ms Atkinson in her purported affidavit admits to her *substantial* involvement in the Respondent's payroll activities and the wrongdoing in question at paragraphs 4 – 6 and 16.
4. Accordingly, there is a prima facie case that Ms Atkinson was *'involved'* in the contravention in terms of [the Act]. At the very least it can be found, based on her own evidence, that she 'aided' the contraventions.

25 At the hearing, counsel for Ms Maiolo argued that Ms Atkinson was 'involved in' the contravention of s 49DA(1) because:

(a) Ms Atkinson was responsible for administering the pay, and she interacted with the accountants; and

(b) Ms Atkinson apologised during the hearing, which should be deemed an admission of the contravention.

Requests for payslips

26 In particularising the claim that Dr Daniels' contravention of s 49DA(1) of the Act constituted a serious contravention, the Amended Originating Claim [7(a)(III)]–[7(c)(II)] and the Response to Amended Originating Claim [11(v)–(ix)] state:

Amended Originating Claim	Response to Amended Originating Claim
III. At all material times the Respondent employed 5 staff (part time and casual employees) including a qualified certified practicing accountant as his bookkeeper, Ms Patricia Atkinson; and IV. At all material times the Respondent retained the services of a firm of accountants UHY Haines Norton to assist with his payroll. The Respondent was advised by his accountants of his obligation in relation to pay slips and failed or refused to act on that advice. (b) the breaches occurred for at least 18 months being the period April 2022 – October 2023 when the Claimant's employment had come to an end; and (c) the Respondent was asked for payslips by the Claimant and another employee. **Particulars** I. In or around June 2022 the Claimant made two oral requests for payslips from Ms Patricia Atkinson and was refused. II. In or around June 2022 Gemma Grover made at least one oral request for payslips from Ms Patricia Atkinson and was refused.	v. The Respondent denies paragraph 7(a)(iii). Ms Patricia Atkinson is employed as a bookkeeper and not an accountant. She holds a Diploma in accounting. vi. During the Claimant's employment, the Respondent employed 5 individual employees totalling 2.8 FTE. vii. The Respondent disputes paragraph 7(a)(iv). viii. The Respondent disputes paragraph 7(b), no breaches occurred between the period of April 2022 to 30 June 2022. ix. The Respondent wholly disputes paragraph 7(c).

27 In support of the Application, Ms Maiolo filed an affidavit of her partner, Peter John Speechley (**Mr Speechley**). Regarding Ms Maiolo's request for a payslip, Mr Speechley deposes [12], [15]:

> 12. The Claimant and I are in a de facto relationship. At the time that she was employed by the Respondent, we were looking to refinance some bank loans. As part of that process we engaged the services of a Mortgage Broker – Ms Sarah Wells. Ms Wells asked the Claimant to contact the Respondent to obtain payslips, as part of the process of applying to refinance our loans. The Claimant has informed me, and I verily believe it to be true, that she contacted Patricia Atkinson from the Respondent's business and asked her to provide 3 payslips for herself so that she could use this as part of her refinancing application.
>
> …
>
> 15. The Claimant has told me, which I verily believe to be true, that Patricia Atkinson gave to her a letter, which letter was dated 23 June 2022 and signed by Patricia Atkinson as the Accountant for Dr Dru Daniels and that letter stated, inter alia, the last Gross Fortnightly Wage that the Claimant had received, along with the PAYG tax that had been deducted. I have seen the letter and the letter was not a payslip.

28 Mr Speechley's affidavit attaches the letter referenced at [15] of his affidavit:

> **23rd June 2022**
>
> TO WHOM IT MAY CONCERN
>
> Julie Ann Maiolo is employed by Dr Dru Daniels on a permanent part time basis.
>
> Her Gross Wage is $2538.47 per fortnight. $512.00 tax has been taken out of this amount leaving a net figure of $2026.47 per fortnight.
>
> Yours faithfully
>
> T Atkinson
>
> Accountant

29 In support of the Application, Ms Maiolo filed three affidavits that she deposed to on 10 April 2024, 18 November 2024 and 10 January 2025. In relation to her request for a payslip, she deposes[6]: (original emphasis)

> 7. In or around June 2022 I asked Ms Atkinson for payslips for my wages.
>
> 8. In reply to my request Ms Atkinson said *'we do not provide payslips. I will provide you with a letter indicating your salary.'*

30 At the hearing, Ms Maiolo stated that she had asked Ms Atkinson for payslips on two occasions. The first time was on 8 June 2022, and following from her second request, Ms Atkinson provided her with the letter of employment, around 22 June 2022. I take this to refer to the letter attached to Mr Speechley's affidavit, which is dated 23 June 2022.

31 In relation to the requests for payslips, Ms Atkinson deposes[7]:

13. During my employment with Dr Daniels, I do not recall anyone ever asking me for a payslip. If someone asked me for a payslip I would give it to them. Staff usually ask me for a letter for the bank or finance company. They usually ask for pay particulars on a letter. I usually provide a letter that identifies the gross, tax and net pay as well as length of service. If someone asked me for a payslip I would provide it.
14. To the best of my knowledge and recollection the Claimant never asked me for a payslip, if she had I would have provided her a payslip.
15. I created a payslip for Ms Shelley Krasenstein. I automatically provided payslips to Ms Krasenstein as her pay was different every week. She was employed on a casual basis and for this reason I always generated payslips for her. Ms Krasenstein passed away recently.

32 Ms Atkinson's evidence at [31] above was challenged but not disturbed under cross-examination. Under cross-examination, Ms Atkinson stated that Ms Maiolo asked her for a letter of employment in support of a loan application. She emphatically denied that Ms Maiolo asked her twice for payslips. She says that she knows it is incorrect that Ms Maiolo asked her for payslips because, if Ms Maiolo had asked her for payslips, she would have provided them. This is because, if Dr Daniels knew that she had been asked to provide payslips but had refused, then she 'wouldn't even be there a week later, I would have been dismissed if I wouldn't do it'[8].

33 In the Amended Originating Claim [7(c)] (at [26] above), Ms Maiolo claims that in or around June 2022, both she and Gemma Grover (**Ms Grover**) asked Dr Daniels for payslips through requests made of Ms Atkinson.

34 In opposing the Application, and in addition to the affidavit of Ms Atkinson, Dr Daniels filed an affidavit of Ms Grover on 9 January 2025. Ms Grover deposes:

1. I commenced employment with Dr Dru Daniels on or about April 2022. During my employment I did not receive a payslip until approximately December 2023. At no time did I ask for a payslip.
2. Sometime on November 2022 I asked Patricia Atkinson for a letter of employment for the purpose of applying for car finance. I needed this letter to prove I work full time.
3. Patricia Atkinson provided me this letter in approximately 5 minutes. The finance company accepted my letter of employment without requesting any further documentation and my finance application was approved. Any time I have requested employment related documents, these have been provided by Patricia Atkinson.

35 Ms Grover's evidence was challenged but not disturbed under cross-examination. Under cross-examination, Ms Grover emphatically stated that she never asked for a payslip. Ms Grover clarified that she has only requested employment related documents on the one occasion, when she needed a letter of employment for applying for car finance.

36 For the reasons at [34]–[35] above, I accept Ms Grover's evidence that she never asked for a payslip.

37 Mr Speechley deposes to Ms Maiolo telling him that she asked Ms Atkinson for three payslips to support his and Ms Maiolo's refinancing application. Ms Maiolo deposes that she asked Ms Atkinson for payslips. Ms Atkinson's evidence concerning Ms Maiolo's request is outlined at [31]–[32] above.

38 Consequently, there is a divergence of evidence regarding whether Ms Maiolo asked Ms Atkinson for payslips. However, I do not consider that I need to resolve this divergence for the purposes of determining the Application, as I do not consider whether Ms Maiolo asked Ms Atkinson for payslips on two occasions, each prior to 23 June 2022, to be relevant. This is because, based on Ms Maiolo's own evidence, any requests for payslips were made before 27 June 2022.

39 As outlined at [19] above, Dr Daniels first became obliged to provide Ms Maiolo with a payslip in accordance with s 49DA(1) on 27 June 2022. As there was no obligation on Dr Daniels to provide Ms Maiolo with a payslip prior to 27 June 2022, any request for a payslip before this time is not relevant to the Application. This is because, if there cannot be a contravention of s 49DA(1) of the Act prior to 27 June 2022, then it cannot be argued that Ms Atkinson was 'involved in' the contravention of s 49DA(1) arising from her alleged refusal of Ms Maiolo's payslip request prior to 27 June 2022.

40 There is no evidence that Ms Atkinson refused a payslip request after 27 June 2022.

41 There is no evidence that Ms Atkinson was aware of the obligation created by s 49DA(1) for Dr Daniels to provide Ms Maiolo with payslips from 27 June 2022, before September 2023.

42 Ms Grover's evidence, which I accept, is that on Ms Maiolo's last day in the office, which was in the week beginning Monday, 18 September 2023, Ms Maiolo used the word 'illegal' in reference to Dr Daniels not issuing payslips. Consequently, on Wednesday, 20 September 2023, Ms Grover said to Dr Daniels 'Just so you know that if you're not giving out payslips, I think it's illegal'[9].

43 Ms Atkinson's evidence, which I accept, is that she was first made aware of the obligation to provide payslips when she 'went in' to the office on 21 September 2023 and was informed that Ms Maiolo had raised the issue on 18 September 2023. After this, she has been generating and issuing payslips 'through the office'[10].

Accountants

44 As outlined at [25(a)] above, counsel for Ms Maiolo submitted that Ms Atkinson was 'involved in' the contravention of s 49DA(1) because Ms Atkinson interacted with the accountants.

45 At the hearing, Ms Atkinson stated that her interactions with the accountants consisted of:

(a) Providing them with information for the wages for the Single Touch Payroll.

(b) Meeting with them once a year to provide them with the information for them to prepare the annual tax return.

(c) Receiving emails from them.

46 Under cross-examination, Ms Atkinson emphatically stated that at no time did she have a discussion with the accountants regarding the obligation to provide payslips. Ms Atkinson stated that the accountants are not involved in the issuance of payslips.

47 As outlined at [9]–[10] above, by the directions hearing on 25 November 2024 when the Application was programmed for hearing, Dr Daniels had complied with the Clerk of the Court's order and provided to Ms Maiolo a list of documents or communications from the accountants 'for payslips or related information concerning the period 1 July 2022 to 30 November 2023.' As such, it can be inferred that given Ms Maiolo did not rely on any document or communication from the accountants in support of the Application, the disclosure required by the Clerk's order did not produce any material relevant to the Application.

48 In all the circumstances, I accept Ms Atkinson's evidence that her interactions with the accountants did not involve Dr Daniels' payslip obligations.

49 There is no evidence that the accountants advised Ms Atkinson of Dr Daniels' obligations under s 49DA(1) or that she disregarded such advice.

50 In the absence of any evidence, the submission that Ms Atkinson was 'involved in' the contravention of s 49DA(1) of the Act pursuant to ss 83E(1A) and (1B) because she interacted with the accountants, must be rejected.

Apologies

51 As outlined at [25(b)] above, counsel for Ms Maiolo submitted that Ms Atkinson's apologies during cross-examination should be deemed her admission that she was 'involved in' the contravention of s 49DA(1) of the Act.

52 Ms Atkinson apologised twice during the hearing. The first time in response to questions regarding being kept informed of changes to legislation[11]:

> [N]ow, you've been in this role a long time, you'd agree with me that pay rates change?---Yes.
>
> Super changes?---Yes.
>
> Legislation changes?---Yes.
>
> You've been in that role a long time, and you know that?---Yes.
>
> So over the years, how have you kept informed and up to date with changes?---Um, well, obviously, in this case, to do with the pay, I didn't, and I apologise for that. It was an error on my part. I assumed that if everyone was, um, getting the same pay each week, um, I did not need to give them a payslip. This is not an excuse, but this was my reasoning for people who - there was a person who did not get a regular pay every week, and I did give them a payslip. So yes, I'm - I apologise for the fact - - -

53 The second time Ms Atkinson apologised was in response to questions regarding her stating 'Accountant' under her name in the letter at [28] above[12]:

> You've actually - you - the letter that you wrote for Ms Maiolo, you've actually put yourself - your title as an accountant?---Mm hmm.
>
> That's correct, isn't it?---That's correct.
>
> And that's not true, is it?---Well, I am an accountant.
>
> So you're a qualified accountant?---Yes.
>
> But yet you describe yourself as a bookkeeper?---Um, when, um, Julie, um, contacted us, she called me a book - bookkeeper.
>
> Okay. As a qualified - - -?---So I'm quite happy to be - I only do bookkeeping work.
>
> But as a qualified accountant, you know the importance of keeping up with changes in the law?---Yes, and I've apologised for that because, um, it was an oversight on my part and, um, the fact that people had the same pay each week, that was my reasoning, but it's certainly not an excuse, but I've, um, you know, I've remedied that as quickly as I can.
>
> Now, Ms - so Ms Atkinson, you take blame - some degree of blame for what's occurred?---I take complete blame for that.
>
> Thank you?---I made a mistake, but I've remedied it as quickly as I can.

54 At the hearing, Ms Grover stated:

(a) She is employed as a Secretary and was interviewed for the role by Dr Daniels. At this interview, she was informed that leave is not calculated; she could take as much or as little leave as she likes because 'what goes around comes around'.

(b) When she commenced employment, Ms Atkinson provided her with a contract that stated her yearly salary. Ms Atkinson also gave her an exact figure that would be paid into her bank account every fortnight. 'There was no talk about payslips or no communication'.

(c) She has received pay increases during her employment. Dr Daniels informs her of the pay increases. Afterwards, Ms Atkinson informs her of the exact figure that is going to be paid into her bank account fortnightly.

(d) On the day that she mentioned the requirement to provide payslips to Dr Daniels, she was present and overheard Dr Daniels telephoning a fellow doctor to ask whether it is illegal not to give your staff payslips. Within that week, Dr Daniels told her that he had also spoken to the AMA about issuing payslips.

55 Relevantly, Ms Grover agreed with counsel for Ms Maiolo's questions under cross-examination that Ms Atkinson is the 'go to' person when it comes to pay, and that Ms Atkinson's involvement with pay is under the direction of Dr Daniels.

56 Relevantly, Ms Grover gave evidence that when Dr Daniels became aware he should have provided payslips, he informed

Ms Atkinson that 'she needs to start doing payslips and straightaway she'd started working out what people's annual leave had taken, hours, and started generating payslips, but her first instinct was to do [Ms Maiolo's] payslips before everyone else's'[13].

57 As outlined in Ms Atkinson's affidavit at [20] above, and Ms Grover's evidence at [54]–[56] above, Ms Atkinson was (and remains) employed as Dr Daniels' bookkeeper, and in that role her responsibilities include managing Dr Daniels' payroll, under his direction.

58 I agree with the submissions made by counsel for Dr Daniels that 'there is a big difference between an admission and an apology'[14].

59 It is also trite to say that there is a difference between vicarious liability and accessorial liability. As outlined at [2] above, the Application is opposed. It is trite to observe that the Application is unlikely to have been opposed if Ms Atkinson did in fact admit to accessorial liability.

60 In all the circumstances, I find Ms Atkinson's apologies to be in reference to the former form of liability (vicarious) and not the latter (accessorial). I find that Ms Atkinson's apologies during cross-examination express her regret for not issuing payslips, consistent with her bookkeeping duties under Dr Daniels' direction. They do not indicate she was 'involved in' the contravention of s 49DA(1) pursuant to ss 83E(1A) and (1B) of the Act.

Regulation 5

61 Regulation 5 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (**reg 5**) states:

> **5. Court's duties in dealing with cases**
>
> (1) The court must ensure that cases are dealt with justly.
>
> (2) Ensuring that cases are dealt with justly includes ensuring –
>
> (a) that cases are dealt with efficiently, economically and expeditiously;
>
> (b) so far as is practicable, that the parties are on an equal footing; and
>
> (c) that the court's judicial and administrative resources are used as efficiently as possible.
>
> *[Regulation 5 amended: SL 2022/100 r. 7.]*

62 As the Application is Ms Maiolo's application, she bears the onus of establishing that the court should grant her leave to join Ms Atkinson as the second respondent to the proceedings.

63 Ms Maiolo seeks to have her claim against Ms Atkinson heard and remedies ordered without initiating separate proceedings against Ms Atkinson, which she argues would be inefficient and cause additional unnecessary costs[15].

64 However, and as outlined at [39]–[43], [50] and [60] above, I am not convinced that Ms Maiolo has provided any evidence of an arguable case that Ms Atkinson has any accessorial liability for Dr Daniels' contravention of s 49DA(1) of the Act.

65 As outlined at [7]–[8] and [11] above, Dr Daniels has admitted to contravening s 49DA(1) of the Act and the proceedings against him are programmed for a penalty hearing.

66 Counsel for Ms Maiolo accepts that joining Ms Atkinson as the second respondent would 'add some more delay'[16].

67 Where, as I have found, that Ms Atkinson does not admit to accessorial liability, the penalty hearing against Dr Daniels would need to be adjourned pending the outcome of a hearing to determine Ms Atkinson's alleged accessorial liability.

68 In the absence of an arguable case against Ms Atkinson, I do not consider the joinder of Ms Atkinson to the proceedings, necessitating the adjournment of the penalty hearing against Dr Daniels, would be consistent with reg 5.

69 For all the preceding reasons, the Application will be dismissed.

C. TSANG

INDUSTRIAL MAGISTRATE

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[1] Amended Originating Claim [1], [7], [9].

[2] Response to Amended Originating Claim [4].

[3] Amended Originating Claim [4(r)].

[4] Amended Originating Claim [4(e)].

[5] Exhibit 6 [1]–[6], [16]–[17].

[6] Exhibit 1 [7]–[8].

[7] Exhibit 6 [13]–[15].

[8] Transcript, *Maiolo v Daniels*, Industrial Magistrates Court of Western Australia, 4 February 2025, 32.

[9] Ibid, 16.

[10] Ibid, 25, 29, 30.

[11] Ibid, 28.

[12] Ibid, 35.

[13] Ibid, 22.

[14] Ibid, 49.

[15] Ms Maiolo's written submissions filed on 13 January 2025 [5], [15].

[16] Transcript, *Maiolo v Daniels*, Industrial Magistrates Court of Western Australia, 4 February 2025, 39.

2025 WAIRC 00185

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00185
CORAM	**:**	INDUSTRIAL MAGISTRATE R. COSENTINO
HEARD	**:**	WEDNESDAY, 19 MARCH 2025
DELIVERED	**:**	WEDNESDAY, 19 MARCH 2025
FILE NO.	**:**	M 139 OF 2024
BETWEEN	**:**	ROBERT ARNOLD **CLAIMANT** AND BENALE PTY LTD ATF THE FLETCHER UNIT TRUST T/A FLETCHER INTERNATIONAL WA **RESPONDENT**
CatchWords	**:**	INDUSTRIAL LAW – claimed contravention of *Fair Work Act 2009* (Cth) – small claims procedure – construction of Award – *Meat Industry Award 2020* – weekend penalties – whether weekend penalties payable to shiftworker – no contravention – claim dismissed
Legislation	**:**	*Fair Work Act 2009* (Cth) *Fair Work Regulations 2009* (Cth)
Instrument	**:**	*Meat Industry Award 2020* *Meat Industry Award 2010*
Case(s) referred to in reasons:	**:**	***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131; (2018) 264 FCR 536 ***James Cook University v Ridd*** [2020] FCAFC 123; (2020) 278 FCR 566 ***Tasmanian Water and Sewerage Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*** [2025] FCA 39
Result	**:**	Claim dismissed
Representation:		
Claimant	:	Self-represented
Respondent	:	Mr D. Bates (agent)

REASONS FOR DECISION

1 The claimant, Mr Robert Arnold, has been employed by the respondent, Benale Pty Ltd which trades as Fletcher International WA for nearly 20 years.

2 Mr Arnold commenced this claim seeking payment of $89,064 as compensation for what he says is Fletcher International's contraventions of the *Meat Industry **Award** 2020* in the last six years of his employment. He has elected for the proceedings to be dealt with under the small claims procedure set out in s 548 of the *Fair Work Act 2009 (Cth)* (**FWA**).

3 There are two components to Mr Arnold's claim. First, he claims payment of weekend penalty rates under clause 24.1 of the Award. He says he ought to have been paid an additional $86,192 over six years for weekend penalty rates that were not paid to him (**Weekend Penalty Claim**).

4 Second, Mr Arnold claims that he has been underpaid by $5.70 per hour because Fletcher International decreased, rather than increased, his base rate of pay in 2023. In the 58 weeks since then, he says he has been underpaid a total of $2,872.80 (**Wage Underpayment Claim**).

5 While Fletcher International accepts the Award applies to Mr Arnold, it denies it has contravened it. It says that Mr Arnold, as a shiftworker, is not entitled to the weekend penalty rates under clause 24.1. He is paid the relevant rate of pay for a shiftworker, which includes a shift loading, for all hours he works. In relation to the Wage Underpayment Claim, it says it has correctly calculated and paid annual increases to Mr Arnold's rate of pay which includes a shift loading.

6 The key to determining the Weekend Penalty Claim is the correct construction of the Award. In particular, are weekend penalty rates payable to shiftworkers engaged in meat processing facilities, or are the shiftwork provisions and the weekend penalty rate provisions mutually exclusive?

7 The Wage Underpayment Claim turns on a question of fact, namely, what changed in relation to Mr Arnold's pay following 1 July 2023?

8 At the conclusion of the hearing of Mr Arnold's claims, I dismissed them. Mr Arnold failed to persuade me that the weekend penalty provisions of the Award applied to him, and he failed to establish as a matter of fact that his rate of pay was unlawfully

reduced or that it was less than what he was legally entitled to receive. I indicated that I would publish my reasons for this decision. These are my reasons.

The Industrial Magistrates Court's Jurisdiction

9 Under s 539 and s 540 of the FWA, an employee may apply to an eligible State or Territory court for orders in relation to a contravention of s 45 of the FWA, that is, the prohibition against contravening a term of a modern award, if the employee is affected by the contravention. Such application must be made within six years after the day the contravention occurred.[1]

10 The Industrial Magistrates Court of Western Australia (**IMC**) is 'an eligible State or Territory court'.[2]

11 The IMC may order that an employer pay an amount to an employee if the IMC is satisfied the employer was required to pay the amount under the FWA or a fair work instrument, and the employer has contravened a civil remedy provision by failing to pay the amount.[3]

12 Mr Arnold is an employee affected by the alleged contraventions of s 45 and the Award. The Award is a modern award under the FWA and is a 'fair work instrument'. Section 45 is a civil penalty provision.

13 Mr Arnold, as the claimant in these proceedings, carries the burden of proving his claim on the balance of probabilities.

Background & Uncontentious Evidence

14 Most of the relevant background facts were outlined by Fletcher International's Human Resources Manager, Matthew Nelson, in his evidence-in-chief. Mr Arnold told me that he agreed with Mr Nelson's evidence about the following matters.

15 Fletcher International operates a meat processing plant in Narrikup, Western Australia. Its normal production operations occur over a single shift which commences early in the morning and finishes early in the afternoon. Outside of normal production there may be a second shift, or a second and third shift. Cleaners come in to clean at the conclusion of each shift.

16 Employees who work in production processes at the Narrikup plant are covered by an enterprise agreement made under s 185 of the FWA.

17 Outside the production operations, the plant's gatehouse is staffed 24 hours a day, seven days a week. It is staffed over three shifts each day: a day shift which ends in the early afternoon, an afternoon shift which ends at 10.00 pm on week days and 9.00 pm on weekends, and a night shift which ends at 6.30 am.

18 Mr Arnold commenced employment with Fletcher International at the Narrikup plant on about 11 October 2006. According to Mr Arnold, he has worked in a variety of positions over the years, with different work patterns, including some day work.

19 Mr Arnold has worked on a permanent part-time basis for the duration of his employment.

20 Since late 2011 until 9 March 2024, Mr Arnold worked two shifts per week on the gatehouse:

a. From 9.00 pm Saturday to 6.30 am Sunday; and

b. From 9.00 pm Sunday to 5.00 am Monday.

21 From about 9 March 2024 Mr Arnold has worked only the Sunday night to Monday morning shift, with his usual Saturday shift being taken as personal leave.

22 Fletcher International has treated Mr Arnold as a Level 3 fixed night shift worker under the Award, and has applied the fixed night shift penalty rate of 130% to his rate of pay.

23 Fletcher International has not paid Mr Arnold additional weekend penalty rates.

24 The rates of pay which were paid to Mr Arnold are set out in the following table:

Time Period	Actual Hourly Rate Paid to Mr Arnold
1 July 2018 – 30 June 2019	$27.20
1 July 2019 – 31 October 2020	(a) From 1 July 2019 – 19 November 2019: $27.20 (b) From 20 November 2019 – 31 October 2020: $28.00
1 November 2020 – 30 June 2022	(a) From 1 November 2020 – 9 November 2020: $28.00 (b) From 10 November 2020 – 30 June 2021: $28.35
1 July 2021 – 30 June 2022	(a) From 1 July 2021 – 14 December 2021: $28.35 (b) From 15 December 2021 – 30 June 2022: $29.35
1 July 2022 – 30 June 2023	$29.35
1 July 2023 – 30 June 2024	$30.74
1 July 2024 – Present	$31.90

25 Mr Arnold's pay was increased with effect from 1 July 2023 from a total of $29.35 per hour to a total of $30.74 per hour.

26 At about the same time, Fletcher International changed the format of the payslips it issued to Mr Arnold to separate the total hourly rate into two components, one of which was described as 'Normal' and the other as 'Fixed Night Shift'. The 'Fixed Night Shift' component was equivalent to 30% of the 'Normal' component.

27 On 25 August 2023 Fletchers International issued a letter to Mr Arnold which said:

> As you would have seen from your recent payslips your hourly rate now shows as a base rate plus 30% permanent afternoon shift separately.

In the past your rate (most recently $29.35) had the shift penalty included.

Your total remuneration from July 2023 is $30.74 per hour. This comprises of $23.65 base rate plus $7.09 shift loading per hour.[4]

Did Mr Arnold work fixed night shifts?

28 It is implicit in Mr Arnold's claim that he considers himself to be a shiftworker. His claim refers to him requesting to be paid 'fixed night shift loading'. During a directions hearing held in these proceedings on 12 March 2025 he told me that he agreed that he was a fixed night shift worker. And during the hearing, he tendered into evidence an email dated 4 December 2023 from a Fair Work Inspector which said:

The FWO also agrees Mr Arnold is employed as a Fixed Night Shift worker as reflected in clause 23.2 of the [Award].[5]

29 Mr Arnold said during the hearing that he agreed with that conclusion.

30 Clause 23.2 of the Award defines what is 'shiftwork':

Shiftwork definitions

For the purpose of clause 23:

afternoon shift means any shift commencing at or after 2.00 pm and finishing at or before midnight.

day shift in a three-shift system means any shift finishing at or after 2.00 pm and at or before 4.00 pm.

fixed night shift means a night shift on which an employee is not allowed to rotate so as to give the employee at least one week in each 3 consecutive weeks on another shift or shifts.

night shift means any shift finishing subsequent to midnight and at or before 9.00 am.

non-successive shift means afternoon or night shifts which do not continue for at least 5 successive afternoon or night shifts.

31 Mr Arnold worked one or two shifts each week, both of which finished after midnight and before 9.00 am. He worked these shifts every week, without rotation. I am therefore satisfied his work pattern fits the description of fixed night shift in clause 23.2 of the Award.

32 Although I did not hear a fulsome argument as to the applicability of the non-successive shift definition to Fletcher International, my understanding is that the definition would not apply because the gatehouse runs on continuous shifts with seven consecutive afternoon and night shifts each week.

Wage Underpayment Claim

Mr Arnold's 2023 Request to Human Resources

33 In his claim, Mr Arnold alleges that 'in 2023 [he] asked Human Resources for an increase with the Fixed night shift loading.' His evidence about this request was vague. He was unable to say whether the request was made to Mr Nelson in person, or in writing. He tended to think he might have just left a note to Mr Nelson on his door, because their hours of work did not cross over and he rarely saw Mr Nelson at work. His evidence was unclear as to whether what he was asking of Mr Nelson was a pay increase of any type, or whether it was to be paid night shift loading specifically.

34 As to what happened after the request, Mr Arnold's evidence was even more vague. Initially he said that Mr Nelson said 'yes, we'll pay' but he could not recall whether or not this eager agreement was verbal, or what exactly Mr Nelson was agreeing to pay. In cross-examination he suggested that Mr Nelson simply agreed to pay him an additional 30% on top of his current pay.

35 Mr Nelson's evidence was that he can clearly recall Mr Arnold speaking to him directly about his pay in July 2023. According to Mr Nelson, Mr Arnold demanded he be given a pay rise because 'everyone else in Australia just got one.'[6]

36 Fletcher International was reviewing employee wage rates as a result of the Fair Work Commission's Annual Wage Review in any event. Fletcher International did increase Mr Nelson's pay from 1 July 2023, as set out in paragraph [25] above.

Consideration of Wage Underpayment Claim

37 It is not necessary for me to make any findings as to what, if anything, was requested or agreed in July 2023. Mr Arnold's claim does not arise out of an alleged agreement. It arises as a result of his pay slips changing their format and content, from July 2023, as described in the 25 August 2023 letter. That this occurred, as a matter of fact, is uncontentious.

38 Mr Arnold says that he did not know that his rate of pay included a shift loading prior to July 2023, and that because his payslips did not identify a shift loading, that means he was not paid a shift loading. In effect, he says the form his payslips took are evidence that his 'base rate of pay' was the total rate shown on his pay slip, and that he was not paid any shift loading.

39 Regulation 3.46 of the *Fair Work Regulations 2009* (Cth) requires that a pay slip provided to an employee under s 536(2)(b) of the FWA 'must specify….any amount paid to the employee that is a bonus, loading, allowance, penalty rate, incentive-based payment or other separately identifiable entitlement'.

40 As a shiftworker, the Award provides for 'shiftwork rates'. The Award describes shiftwork rates in clause 23 as a percentage of the minimum hourly rate. In the tables in Part B.5 of Schedule B, the rates are called 'penalty rates' and are described as an hourly dollar amount for each level.

41 The Award does not grant an entitlement to an allowance or additional amount of 30% on top of a 'base rate'. Rather it provides for a different minimum rate of pay for shiftworkers, with that minimum loaded and calculated by reference to the Award minimum rates.

42 The penalty rate, for the purpose of regulation 3.46, is therefore a total hourly rate. While the hourly rate is loaded, the loading is not a separately identifiable component.

43 Accordingly, it was not necessary for Mr Arnold's payslips to show a separate shift loading. What they had to show was the applicable penalty rate for shiftwork. They did show an hourly rate of pay although not expressly identified as a fixed nightshift penalty rate.

44 I do not accept Mr Arnold's assertion that he did not know that the hourly rate referred to in his payslips prior to July 2023 was the shift penalty rate. That is because he referred in his evidence to a Notification of Change of Wages dated 10 January 2013 which showed a 'new rate of pay' (then $24.70 per hour) and also showed a lower flat rate of $20.67 for day work.[7]

45 Further, on 24 October 2022, in response to a request for employment records from Mr Arnold's then solicitors, Fletcher International wrote to Mr Arnold stating:

> …
>
> (c) in accordance with then clause 33 (now clause 23) of the Award, you are a fixed night shift employee;
>
> (d) in accordance with then subclause 33.9(c) (now subclause 23.3(c)) of the Award, you are entitled to payment of the base rate of pay for your classification level plus a 30% fixed night shift penalty;
>
> …
>
> You have at all times been paid an hourly rate which is *higher* than the corresponding hourly rate in the Award.[8] (original emphasis)

46 Mr Arnold's pay was not reduced in July 2023. It was increased. And at all relevant times the rate that he was paid was the same as or slightly exceeded the Award minimum rate of pay for fixed night shifts.

47 Immediately before 1 July 2023 the minimum rate of pay for Level 3 fixed night shift under the Award was $29.08 per hour. Mr Arnold was paid $29.35 per hour. From 1 July 2023 Mr Arnold's total pay was increased to $30.74 per hour in line with the Award minimum rate for fixed night shifts.

48 Mr Arnold has failed to establish he is entitled to any further payment in relation to his Wage Underpayment Claim.

Weekend Penalty Claim

Applicable Principles

49 This part of Mr Arnold's claim involves the proper construction of the Award, and in particular the interaction between clause 14 – Ordinary Hours of Work and Rostering, clause 23 – Shiftwork and clause 24 – Penalty Rates.

50 The principles that apply when construing an industrial instrument are not in dispute. They are encapsulated at [197] of ***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131; (2018) 264 FCR 536:

> The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: ***City of Wanneroo v Holmes***; (1989) 30 IR 362 at 378 (French J). The interpretation "... turns on the language of the particular agreement, understood in the light of its industrial context and purpose ...": ***Amcor Limited v Construction, Forestry, Mining and Energy Union***; (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (***Holmes*** at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (***Holmes*** at 378–9, citing ***Geo A Bond & Co Ltd (in liq) v McKenzie*** [1929] AR(NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see ***Kucks v CSR Limited***; (1996) 66 IR 182 at 184 (Madgwick J); ***Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd*** [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); *Amcor* at [96] (Kirby J).

51 In the Federal Court of Australia Full Court decision in ***James Cook University v Ridd*** [2020] FCAFC 123; (2020) 278 FCR 566 at [65], Griffiths and Derrington JJ expressed the relevant principles as follows (citations omitted):

(i) The starting point is the ordinary meaning of the words, read as a whole and in context.

(ii) A purposive approach is preferred to a narrow or pedantic approach — the framers of such documents were likely to be of a "practical bent of mind". The interpretation "turns upon the language of the particular agreement, understood in the light of its industrial context and purpose."

(iii) Context is not confined to the words of the instrument surrounding the expression to be construed. It may extend to "... the entire document of which it is a part, or to other documents with which there is an association".

(iv) Context may include "... ideas that gave rise to an expression in a document from which it has been taken".

(v) Recourse may be had to the history of a particular clause "Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form...".

(vi) A generous construction is preferred over a strictly literal approach, but "Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties".

(vii) Words are not to be interpreted in a vacuum divorced from industrial realities but in the light of the customs and working conditions of the particular industry.

52 This statement of the principles was referred to with approval by Lee J in ***Tasmanian Water and Sewerage Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*** [2025] FCA 39 at [28].

Relevant clauses in the Award

53 It is the provisions of the Award relating to meat processing establishments that apply in this case.

54 What is set out below is the current provisions of the Award. Mr Arnold's claim spans six years. Prior to 2020, the Award was known as the *Meat Industry Award 2010*. The provisions set out below were differently arranged and numbered, and there were slight differences in wording. However, those minor differences are not material to the outcome in these proceedings. To keep things simple, I will refer only to the Award in its current form, and current clause numbering.

55 The relevant provisions of the Award are inserted as a schedule and attached to these reasons.

Does clause 24.1 apply to shiftwork?

56 Mr Arnold accepts that a precondition for an entitlement to weekend penalties in meat processing establishments is that there be an agreement in accordance with clause 14.3(b).

57 Mr Arnold relied on a handwritten document dated 10 March 2010[9] as being evidence of an agreement meeting the description in clause 14.3(b), that is, an agreement between Fletcher International and Mr Arnold individually, that ordinary hours be worked on Saturday and Sunday.

58 Mr Arnold's evidence was that this document was signed by himself and Mr Greg Cross who was then Fletcher International's General Manager. Mr Arnold's evidence was that the document was written by him and signed by Mr Cross in the presence of someone from the Fair Work Ombudsman's office.

59 The main body of the document is in Mr Arnold's handwriting. It is in dot-point form. The document contains the following:

> (31.2) Hours of work Max 10 hours. Outside spread.
>
> Mon-Fri. 6 am – 8 pm. (iii) Midnight Fri-Mid Sat 1 ½ Mid Sat – Mid Sun. 2.[10]

60 The reference to '31.2' is apparently a reference to what was, at the time, the Ordinary Hours of Work clause of the Award (current clause 14.3). Clause 31.2(f) of that clause (current clause 14.3(b)) provided for ordinary hours for meat processing establishments, and paragraph (iii) refers to the penalty rates of time and half and double time for work between midnight Friday and midnight Saturday and midnight Sunday and midnight Sunday where an agreement is reached in accordance with then-clause 31.2(f)(ii).

61 I am mindful, though, that this was an agreement that was struck in 2010. The evidence before me is that Mr Arnold commenced working two weekend night shifts in about late 2011. There is scant evidence before me as to what hours and duties Mr Arnold was performing as at 10 March 2010. He did tell me in his closing submissions that he has worked days as well as afternoon and night shifts before 2011.

62 It is therefore difficult to form a conclusive view as to what the 10 March 2010 document means, and whether it continued to apply at the relevant times. If, at the time the document was drafted, Mr Arnold was not a shiftworker, then the document could be an agreement that Mr Arnold's ordinary hours could be worked on Saturdays and Sundays in accordance with clause 14.3(b).

63 However, even if Mr Arnold and Fletcher International did make an agreement for the days in which ordinary hours are worked to include Saturday and Sunday, such an agreement could not be made in relation to shiftwork. Any such agreement could only be made in relation to ordinary hours for the purpose of clause 14.3's ordinary hours, and could only apply to non-shiftwork.

64 The Award contemplates that ordinary hours for shiftworkers be determined in accordance with clause 23 to the exclusion of clause 14.

65 This is revealed by the words in clause 23 itself. Clause 23.1(b) expressly deals with the ordinary hours of work for shiftworkers. It covers the same ground as clause 14.1, except it does so by reference to shiftworkers. Under clause 23, ordinary hours for shiftwork can be worked on any day of the week, Monday to Sunday and any hour of the day. Unlike clause 14, there is nothing which limits ordinary hours for shiftwork to Monday to Friday, nor is there a limit on the spread of hours.

66 In other words, the reference point to determine ordinary hours for shiftworkers is clause 23 only.

67 This is reinforced by the shiftwork definitions in clause 23.2. The definitions of afternoon shift and night shift involve shifts where the hours of work fall outside ordinary hours under clause 14. A person whose ordinary hours are those set out in clause 14 cannot by definition be a shiftworker.

68 This is also consistent with the fact that clause 14.3 only permits agreement for ordinary hours to be worked on Saturday and Sunday, but does not permit agreement for ordinary hours to be worked beyond one hour at either side of the spread of hours in clause 14.3(a) of 6.00 am to 8.00 pm. There can be no agreement to alter the spread of hours to start earlier than 5.00 am or finish later than 9.00 pm.[11] Neither afternoon shifts nor night shifts can, by definition, involve only ordinary hours under clause 14.

69 Other indications in the text of the Award of this mutual exclusivity between clause 23 and clause 14 include:

a. Schedule B – Summary of Hourly Rates of Pay contains separate tables for non-shiftworkers: Table B.1.1 and Shiftworkers: Table B.5.1. Notably, the table for non-shiftwork includes columns showing weekend penalty rates with express reference to an agreement under clause 14.3(b), whereas the table for shiftworkers does not.

b. Both clause 14.1(b) and clause 23.1(b) refer in the same terms to ordinary hours for part-time and casual employees. If clause 14 applied to shiftworkers, there would be no need to repeat these provisions. The fact that they are repeated indicates the clauses are to be read and applied independently of one another.

c. Under clause 14 ordinary hours cannot exceed ten hours on any day or shift.[12] For shiftwork, 12-hour shifts are permitted by agreement and subject to conditions.[13] These provisions are inconsistent and cannot both operate simultaneously. They are mutually exclusive.

d. Clause 15 – Breaks contains a separate provision for shiftworkers.[14]

e. Clause 23.1(e) requires agreement between the employer and an employee to transfer from day work to shiftwork, or from shiftwork to day work. There can be no unilateral transfer between day work and shiftwork. This is consistent with the significance of the differences between the terms and conditions for shiftwork and the terms and conditions for day work.

f. Clause 23.3(f) expressly provides that where a cleaning employee is entitled to a penalty rate under clause 24.4 and a shiftwork rate under clause 23.3 in relation to the same shift, only the higher penalty rate applies, not both. There is no equivalent provision for any other category of shiftworker. The need for express provision about how the different penalty rates apply for cleaners arises because under clause 14.2 cleaners' ordinary hours can be worked between 6.30 am and midnight. There is no weekend penalty rate for cleaners under clause 24.4, but penalty rates do apply for particular hours. This means that cleaners might work ordinary hours under clause 14, but be a shiftworker rather than a day worker under clause 23.

   The fact that the Award does not expressly describe how clauses 23 and 24 interact for other categories of shiftworker indicates that it was not intended that both provisions could simultaneously apply, unlike the position for cleaners. The need to describe the interaction only arises for cleaners.

70 Viewing the relevant clauses in the context of the Award as a whole, it is apparent that clauses 23 and 24 are mutually exclusive. An agreement cannot be made under clause 14.3(b) in respect of shiftwork. Accordingly, clause 23, which is conditioned on the existence of such an agreement, cannot apply to shiftwork.

71 Therefore, on a proper construction of the Award, applied to the present facts, Mr Arnold was not entitled to receive weekend penalty rates when working fixed night shifts.

Orders and Disposition

72 For the above reasons, I dismissed Mr Arnold's claim.

73 Fletcher International sought an opportunity to make an application for the costs of all or part of these proceedings. I am surprised by this, given:

a. the limitations on the Court's power to award costs contained in s 570 of the FWA;

b. the fact that these proceedings were conducted under the small claims procedure under s 548 of the FWA, with legal representation only permitted by leave of the IMC under s 548(5);

c. Mr Arnold complied with all directions made in the course of these proceedings and the manner in which he prosecuted his claim and conduct in the proceedings generally was clearly reasonable;

d. the hearing of this matter involved contestable issues of fact and law.

74 Nevertheless, I made orders giving Fletcher International the opportunity to file any application for costs it may decide to make within 21 days. If an application is made, I will determine it in due course on the papers.

R. COSENTINO

INDUSTRIAL MAGISTRATE

Schedule: Relevant Clauses

10. Part Time Employees

10.1 A part-time employee

(a) is engaged to work less than 38 ordinary hours per week; and

(b) has reasonably predictable hours of work of not less than 4 consecutive hours on any day; and

(c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

10.2 At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work specifying at least:

(a) the hours worked each day;

(b) which days of the week the employee will work;

(c) the actual starting and finishing times of each day; and

(d) that the minimum daily engagement is 4 hours.

10.3 Clause 10.2 does not apply to a meat processing establishment, except for employees of the establishment engaged in retail and/or wholesale sales of fresh meat and/or meat products and any ancillary products.

10.4 The terms of any agreement concerning part-time employment or any agreed variation to the hours of work will be in writing, with a copy retained by the employer and a copy provided to the employee.

10.5 All time worked in excess of the hours as mutually agreed will be overtime.

10.6 A part-time employee employed under the provisions of clause 10 will be paid for ordinary hours worked at the minimum hourly rate prescribed in clause 16—Minimum rates.

…

14. Ordinary hours of work and rostering

14.1 Ordinary hours and roster cycles

(a) The ordinary hours of work for a full-time employee must not exceed 38 hours per week or an average of 38 hours per week not exceeding 152 hours in 28 days.

(b) The ordinary hours of work for a part-time or casual employee will be in accordance with clause 10—Part-time employees and clause 12—Casual employees.

(c) The ordinary hours of work for a casual employee must not exceed 38 hours in any week.

(d) The ordinary hours of work must be worked continuously at the discretion of the employer, except for meal breaks or other breaks prescribed in the award.

(e) The maximum number of ordinary hours which may be worked on any day or shift must not exceed 10 hours.

(f) Any hours worked outside the spread of hours listed must be paid at overtime rates.

14.2 Cleaners

Regardless of the spread of hours in clauses 14.3(a), 14.4(a) or 14.5(a), cleaners may be employed to work ordinary hours between 6.30 am and midnight in any establishment under this award. A cleaner may be entitled to a payment under clause 24.4.

14.3 Meat processing establishments (except for employees of the establishment engaged in retail and/or wholesale sales of fresh meat and/or meat products and any ancillary products)

(a) Subject to clause 14.3(b), ordinary hours for these establishments are worked between:

Days	**Spread of hours**
Monday to Friday	6.00 am–8.00 pm

(b) Where the employer and a majority of affected employees agree, ordinary hours may be worked on Saturday and Sunday. Agreement in this respect may also be reached between the employer and an individual employee.

(c) Payment for ordinary hours on weekends in accordance with clause 14.3(b) is provided in accordance with clause 24.1.

(d) The spread of hours may be altered by up to one hour at either side of the spread by agreement between:

(i) the employer and the majority of employees concerned; or

(ii) in appropriate circumstances, between the employer and an individual employee.

(e) Any work performed by an employee prior to the commencement of the spread of hours and which is continuous with the normal ordinary hours for the purpose, for example, of getting the plant in a state of readiness for processing work, may be regarded as part of the employee's ordinary hours of work.

(f) Where an employee of the establishment is engaged in retail and/or wholesale of fresh meat and/or meat products and any ancillary products, clause 14.3 will not apply and clause 14.5 will apply to the employee.

14.4 Meat manufacturing establishments (except for employees of the establishment engaged in retail and/or wholesale sales of fresh meat and/or meat products and any ancillary products)

(a) Ordinary hours for these establishments are worked between:

Days	**Spread of hours**
Monday to Saturday	6.00 am–6.00 pm

(b) In addition, up to 4 ordinary hours may be worked by an employee on Saturday between the hours of 6.00 am and 6.00 pm.

(c) Payment for ordinary hours worked on Saturday is provided in accordance with clause 24.2(a).

(d) Where an employee of the establishment is engaged in retail and/or wholesale of fresh meat and/or meat products and any ancillary products, clause 14.4 will not apply and clause 14.5 will apply to the employee.

14.5 Meat retail establishments (including employees of meat processing establishments and meat manufacturing establishments engaged in retail and/or wholesale sales of fresh meat and/or meat products and any ancillary products)

(a) Ordinary hours for these establishments are worked between:

Days	**Spread of hours**
Monday to Friday	4.00 am–9.00 pm
Saturday	4.00 am–6.00 pm
Sunday	8.00 am–6.00 pm

(b) Payment for ordinary hours on weekends will be in accordance with clause 24.3/

(c) **Load out areas**

Notwithstanding clause 14.5(a), in load out areas involving the receipt, storage, inspection, load out and delivery of meat or meat products, the ordinary hours may be worked between 10.00 pm and 4.00 pm (the following day), Sunday to Saturday. Payment will be in accordance with clause 24.3(d).

(d) **Weekends off**

Once every 4 weeks, an employee who works ordinary hours on each Sunday over a 152 hour work cycle must be given 3 consecutive days off which will include Saturday and Sunday. Any alternative arrangements between the employer and the employee must be by mutual agreement and in writing and signed by each of the parties.

(e) **Spread of hours for particular employees performing meat retail establishment duties**

Where an employee of an establishment covered by this award is called upon to perform meat retail establishment duties, the hours of work provisions for the employee will be all the provisions associated with a meat retail establishment as contained in clause 14.5.

14.6 **Methods of arranging ordinary working hours**

(a) Clause 14.6 applies to all establishments.

(b) Matters upon which agreement may be reached include:

(i) how the hours are to be averaged within a work cycle established;

(ii) the duration of the work cycle for day workers provided that such duration does not exceed 3 months;

(iii) rosters which specify the starting and finishing times of working hours;

(iv) a period of notice of a rostered day off which is less than 4 weeks;

(v) substitution of rostered day off;

(vi) accumulation of rostered days off;

(vii) arrangements which allow for flexibility in relation to the taking of rostered days off; and

(viii) arrangements of ordinary hours overall.

14.7 **Rostering**

(a) The employer must post a roster in the premises, showing the starting and finishing times for ordinary hours for employees.

(b) Starting and finishing times appearing on the roster will be for a period which is not less than one week in length.

(c) This roster may be amended by the employer provided 36 hours' notice is given. Any change to regular rosters or ordinary hours of work is subject to the consultative provisions in clause 32—Consultation about major workplace change.

14.8 **Make-up time**

An employee may elect, with the consent of their employer, to work make-up time, under which the employee takes time off ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in the award.

…

23. **Shiftwork**

23.1 **Hours of work—shiftwork**

(a) Shifts may be worked on any work covered by this award.

(b) The ordinary hours of work for full-time shiftworkers are to be an average of 38 per week and must not exceed 152 hours in 28 consecutive days, subject to clauses 23.1(b)(i) and 23.1(b)(ii). The ordinary hours of work for a part-time employee with be in accordance clause 10—Part-time employees and for a casual employee will be in accordance with clause 12—Casual employees.

(i) Where the employer and the majority of affected employees agree, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months.

(ii) In the absence of agreement between the employer and employee, by the employer giving not less than 7 days' notice to each employee of such proposed change of times.

(c) The ordinary hours of work are to be worked continuously, except for meal and any rest breaks, at the discretion of the employer.

(d) Except at changeover of shift an employee will not be required to work more than one shift in each 24 hours.

(e) Transfer of an employee from day work to shiftwork, or from shiftwork to day work, will be by agreement between the employer and the employee.

(f) Shifts may be worked on a one-shift, 2 shift or 3 shift system.

23.2 Shiftwork definitions

For the purpose of clause 23:

afternoon shift means any shift commencing at or after 2.00 pm and finishing at or before midnight.

day shift in a three-shift system means any shift finishing at or after 2.00 pm and at or before 4.00 pm.

fixed night shift means a night shift on which an employee is not allowed to rotate so as to give the employee at least one week in each 3 consecutive weeks on another shift or shifts.

night shift means any shift finishing subsequent to midnight and at or before 9.00 am.

non-successive shift means afternoon or night shifts which do not continue for at least 5 successive afternoon or night shifts.

23.3 Shiftwork rates

(a) Afternoon shift

A shiftworker will be paid **115%** of the minimum hourly rate for all ordinary hours worked on afternoon shift.

(b) Night shift

A shiftworker will be paid **125%** of the minimum hourly rate for all ordinary hours worked on night shift.

(c) Fixed night shift

A shiftworker will be paid **130%** of the minimum hourly rate for all ordinary hours worked on fixed night shift.

(d) Non successive shifts

A shiftworker will be paid:

(i) **150%** of the minimum hourly rate for the first 3 hours; and

(ii) **200%** of the minimum hourly rate thereafter,

for all ordinary hours worked on non successive afternoon or night shifts.

(e) Casual shiftwork

A casual shiftworker will be paid the appropriate shift rate and the 25% casual loading (as prescribed by clause 12.4) based on the minimum hourly rate in clause 16.1 for the classification in which the casual employee is employed. For example, a casual employee working on afternoon shift would be paid 140% of the minimum hourly rate.

(f) Cleaners— shiftwork rates and cleaning penalty rates not cumulative

Where a cleaning employee is entitled to a penalty rate under clause 24.4 and a shiftwork rate under clause 23.3 in relation to the same shift, the employee will only be entitled to payment of the higher penalty rate and not both.

NOTE: See Schedule B—Summary of Hourly Rates of Pay for a summary of hourly rates of pay including overtime and penalty rates.

23.4 Meal break—shiftworkers

Meal breaks for shiftworkers are provided in accordance with clause 15.4.

23.5 Altering starting times

Unless otherwise agreed, an individual employee who is required to alter their starting time to enable the management to make provision for a replacement will be given at least 24 hours' notice of the change. Any change to regular rosters or ordinary hours of work is subject to the consultative provisions in clause 33—Consultation about changes to rosters or hours of work.

23.6 Three-shift systems

Employees engaged on a three-shift system will rotate between shifts unless otherwise agreed between the employer and employees directly concerned.

23.7 Twelve-hour days or shifts

By agreement between an employer and the majority of employees in the enterprise or part of the enterprise concerned, 12 hour days or shifts may be introduced subject to:

(a) proper health monitoring procedures being introduced;

(b) suitable roster arrangements being made;

(c) proper supervision being provided;

(d) adequate breaks being provided; and

(e) an adequate trial or review process being undertaken.

24. Penalty rates

…

24.1 Meat processing establishments (except for employees of the establishment engaged in retail and/or wholesale sales of fresh meat and/or meat products and any ancillary products)

Where agreement is reached in accordance with clause 14.3(b) ordinary hours may be worked on weekends at the following rates:

(a) Saturday

An employee will be paid **150%** of the minimum hourly rate for ordinary hours worked between midnight Friday and midnight Saturday.

(b) Sunday

An employee will be paid **200%** of the minimum hourly rate for ordinary hours worked between midnight Saturday and midnight Sunday.

---

[1] *Fair Work Act 2009* (Cth) (**FWA**) s 544.

[2] FWA s 12 (see definitions of 'eligible State or Territory court' and 'magistrates court'); *Industrial Relations Act 1979* (WA) s 81, s 81B.

[3] FWA s 545(3).

[4] Exhibit R1 Annexure Y.

[5] Exhibit C12.

[6] Exhibit R1 [60].

[7] Exhibit C9.

[8] Exhibit R1 Annexure O.

[9] Exhibit C1.

[10] Exhibit C1.

[11] Clause 14.3(d) of the Award.

[12] Clause 14.1(b).

[13] Clause 23.7.

[14] Clause 15.4.

2025 WAIRC 00208

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	:	2025 WAIRC 00208
CORAM	:	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	:	FRIDAY, 28 MARCH 2025
DELIVERED	:	FRIDAY, 4 APRIL 2025
FILE NO.	:	M 120 OF 2024
BETWEEN	:	SIMON WARREN

CLAIMANT

AND

SAFE CO PTY LTD

FIRST RESPONDENT

AND

SAFE INTEGRATED SYSTEMS PTY LTD

SECOND RESPONDENT

AND

CYBER DINE HOLDINGS PTY LTD

THIRD RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Small claims procedure under the *Fair Work Act 2009* (Cth) – Failure to pay untaken annual leave pursuant to s 90(2) of the *Fair Work Act 2009* (Cth) – Failure to pay personal leave pursuant to s 99 of the *Fair Work Act 2009* (Cth) – Whether the deduction recorded on a final payslip was unauthorised – Whether amounts owed were paid in full
Legislation	:	*Fair Work Act 2009* (Cth)
		Fair Work Regulations 2009 (Cth)
Case(s) referred		
to in reasons:	:	***Mildren v Gabbusch*** [2014] SAIRC 15
		Miller v Minister of Pensions [1947] 2 All ER 372, 374
		Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Result	:	The claim is proven
Representation:		
Claimant	:	Self-represented
Respondents	:	Mr Ben Pavlic (Director)

REASONS FOR DECISION

Introduction

1 The claimant, Mr Simon Warren (Mr Warren), was employed as a technical sales manager for Safe Co Pty Ltd, when his employment was transferred to the first respondent (Safe). Mr Warren commenced employment with Safe Integrated Pty Ltd on 1 December 2017 as a service manager and then as an operations manager and assumed his last role with Safe after his employment was transferred.

2 It was not disputed that Safe employed Mr Warren after some form of restructuring of its business when Safe Integrated Pty Ltd (the second respondent) and Cyber Dine Holdings Pty Ltd (the third respondent) went into administration. Safe Integrated Pty Ltd's and Cyber Dine Holdings Pty Ltd's status was the subject of some dispute at the hearing, but it is unnecessary to resolve this issue where Safe accepts it employed Mr Warren.

3 Mr Warren resigned from his employment on 4 July 2024. Mr Warren alleges Safe failed to pay him $18,795.37, being an amount that he alleges would have been payable to him had he taken his unpaid accrued annual leave of 311 hours.

4 Mr Warren further alleges he was not paid 80 hours of sick, or carers leave (now called personal leave) in accordance with medical certificates provided by him for the period 20 June to 4 July 2024. The number of hours of unpaid personal leave was amended to 40 hours.

5 In a response to an application for default judgment, Safe agreed to pay 311 hours of unpaid annual leave but disputed Mr Warren's claim for the payment of 80 hours of personal leave. However, later Safe agreed it owed 40 hours of personal leave.

6 On 31 January 2025, Safe prepared a final payslip for Mr Warren where it recorded it owed 311.4611 hours of unpaid accrued annual leave and 40 hours of unpaid personal leave, in the total amount of $16,897.17 (the Final Payslip)[1].

7 On 2 February 2025, Safe made a payment of $5,089.17 for unpaid accrued annual leave and personal leave to Mr Warren (less the applicable taxation)[2].

Issue for Determination

8 At the commencement of the hearing, the Industrial Magistrates Court of Western Australia (IMC or Court) confirmed with Mr Benjamin Pavlic (Mr Pavlic), Director for Safe, whether the alleged hours of unpaid accrued annual leave detailed in the Final Payslip were in dispute. It was not.

9 Further, the Court confirmed with Mr Warren whether the alleged hours of unpaid personal leave in the Final Payslip was in dispute. It was not.

10 As will be seen, the only issue in dispute was an amount of $7,024 deducted by Safe and recorded on the Final Payslip, and whether Safe was authorised to make this deduction.

11 Schedule 1 of these reasons for decision outline the jurisdiction, practice and procedure of the IMC.

12 Mr Warren relied upon his witness statement lodged on 11 March 2025 with annexures[3].

13 Safe relied upon the witness statement of Mr Pavlic lodged on 20 March 2025 with annexures[4].

The Claim

14 Mr Warren elected the small claims procedure to apply pursuant to s 548 of the *Fair Work Act 2009* (Cth) (FWA). The Originating Claim lodged in the Court on 2 September 2024 states that the grounds of his claim is that Safe '[f]ailed to comply with an award, agreement, instrument or order', namely the *Commercial Sales Award 2010*. However, Mr Warren has not made any claim for payment pursuant to an award or industrial agreement. Rather, it appears that his claim relates to not being paid in full:

(a) his annual leave entitlements pursuant to s 90(2) and s 323(1) of FWA; and

(b) his personal leave entitlement pursuant to s 99 and s 323(1) of FWA.

15 Section 545(3) of the FWA enables an eligible state court (and the IMC is an eligible state court) to:

[O]rder an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:

(a) the employer was required to pay the amount under this Act or a fair work instrument; and

(b) the employer has contravened a civil remedy provision by failing to pay the amount (emphasis added)

16 There are three pre-conditions for the IMC to make an order under s 545(3) of the FWA:

(a) An amount is payable by the employer to the employee;

(b) A requirement to pay the amount arises by reference to an obligation under the FWA or a fair work instrument; and

(c) The failure to pay constitutes a civil remedy provision under s 539(1) and s 539(2) of the FWA.

17 As Mr Warren elected the small claims procedure to apply pursuant to s 548 of the FWA, the amount referred to in s 548(1)(a) and s 548(1A)(a) of the FWA refers to:

[A]n amount that an employer was required to pay to … an employee:

(i) under [FWA] or a fair work instrument; or

(ii) because of a safety net contractual entitlement; or

(iii) because of an entitlement of the employee arising under subsection 542(1) [of the FWA].

18 Section 12 of the FWA defines '*safety net contractual entitlement*' to mean:

An entitlement under a contract between an employee and an employer that relates to any of the subject matters described in:

(a) Subsection 61(2) (which deals with the National Employment Standards); or

(b) Subsection 139(1) (which deals with modern awards).

19 I have understood Mr Warren's claim to be made pursuant to the provisions of s 548 of FWA by reference to the National Employment Standards (NES) and the FWA. I have therefore limited my consideration and determination of Mr Warren's claim for payment under the FWA, pursuant to s 61(2), s 90(2), s 99, s 323(1), s 326, s 542 and s 548 of the FWA.

Is Safe a National System Employer and is Mr Warren a National System Employee?

20 According to Mr Pavlic, Safe is an Australian proprietary company limited by shares operating a small manufacturing business[5].

21 Therefore, Safe is a *constitutional corporation* to which paragraph 51(xx) of the Constitution applies. Further, where Safe admits it employed Mr Warren, pursuant to s 14(1)(a) of the FWA, as a *constitutional corporation*, Safe is a *national system employer*.

22 Mr Warren, being employed by Safe, a *national system employer*, is a *national system employee*: s 13 of the FWA.

23 Where Safe and Mr Warren are a *national system employer* and *national system employee*, the NES applies as the minimum standards to Mr Warren's employment and cannot be displaced: s 61(2) of the FWA. This includes minimum standards relating to annual leave (Part 2-2, Division 6) and personal leave (Part 2-2, Division 7).

Was Mr Warren Entitled Upon Termination of Employment to the Payment of Unpaid Accrued Annual Leave?

24 Safe did not dispute that at the date of cessation of his employment, Mr Warren's unpaid accrued annual leave amounted to 311.4611 hours, consistent with the Final Payslip[6].

25 As identified on the Final Payslip, this amounted to $14,974.09.

26 At the time his employment ceased, Mr Warren had a period of untaken paid annual leave owing (311.4611 hours) and, pursuant to s 90(2) of the FWA, Safe was required to pay him the amount that would have been payable had he taken the period of leave. Therefore, at the time Mr Warren's employment ended, Safe was required to pay him $14,974.09.

Was Mr Warren Entitled to the Payment of Personal Leave?

27 Safe did not dispute that at the date of cessation of his employment, Mr Warren was entitled to personal leave of 40 hours, consistent with the Final Payslip[7].

28 As identified on the Final Payslip this amounted to $1,923.08.

29 Pursuant to s 99 of the FWA, Mr Warren was entitled to be paid for a period of paid personal leave where he complied with s 97 of the FWA. Therefore, at the time Mr Warren's employment ended, Safe was required to pay him $1,923.08 for taken personal leave.

Was Safe Entitled to Deduct Monies from Mr Warren's Final Payment?

30 Part 2-9 of the FWA relates to other terms and conditions of employment. Section 322 of the FWA defines employee in this Part to mean a national system employee and an employer to mean a national system employer. The effect of these definitions is that, unless provided otherwise, the requirements of Part 2-9 apply to Mr Warren's employment with Safe.

31 Section 323(1)(a) of the FWA provides that an employer may pay an employee amounts payable to the employee in relation to the performance of work in full (except as provided by s 324). This includes leave payments.

32 Pursuant to s 324(1) of the FWA an employer may deduct an amount from an amount payable to an employee in accordance with s 323(1) if, relevant to this case, the deduction is authorised in writing by the employee and is principally for the employee's benefit.

33 It is common ground between the parties that Mr Warren did not authorise in writing the deduction of $7,024 referred to in the Final Payslip. Mr Warren was not aware of the deduction until he saw the Final Payslip and he did not know the reason for the deduction until Mr Pavlic gave evidence at the trial. He disagreed that he and Mr Pavlic spoke about repaying $5,000 in cash provided to him by Mr Pavlic in June 2023 at the Wanneroo Tavern.

34 Mr Pavlic admitted that Safe did not obtain in writing any authorisation from Mr Warren to deduct the monies referred to in the Final Payslip. Mr Pavlic also admitted that Safe never informed Mr Warren that it intended to deduct the monies referred to in the Final Payslip. Mr Pavlic referred to the deduction as more of a 'balance adjustment' or 'cash advance'.

35 Section 326(1) of the FWA provides that, relevantly, a term of a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:

(a) directly or indirectly for the benefit of the employer or a party related to employer; and

(b) is unreasonable in the circumstances.

36 Section 326(2) of the FWA provides that the *Fair Work Regulations 2009* (Cth) (FWR) may prescribe circumstances in which a deduction referred to in s 326(1) is or is not reasonable.

37 Regulation 2.12(1) of the FWR provides that for s 326(2) of the FWA, a circumstance in which a deduction in s 326(1) is reasonable is that:

(a) [T]he deduction is made in respect of the provision of goods or services:

 (i) by an employer, or a party related to the employer; and

 (ii) to an employee; and

(b) the goods or services are provided in the ordinary course of the business of the employer or related party; and

(c) the goods or services are provided to members of the general public on:

 (i) the same terms and conditions as those on which the goods or services were provided to the employee; or

 (ii) on terms and conditions that are not more favourable to the members of the general public.

38 Examples provided in the associated notes include deductions of health insurance fees made by an employer that is a health fund or deductions for a loan repayment by an employer that is a financial institution.

39 Regulation 2.12(2) of the FWR provides that for s 326(2) of the FWA, a circumstance in which a deduction in s 326(1) is reasonable is that the deduction is 'for the purpose of recovering costs directly incurred by the employer as a result of the voluntary private use of particular property of the employer by an employee (whether authorised or not).'

40 Examples provided in the associated notes include deductions for the costs of items purchased on a corporate credit card for personal use by the employee or deductions for the cost of personal calls on a company mobile telephone or deductions for the cost of petrol purchased for the private use of a company vehicle by the employee.

41 The reason Mr Pavlic gave for the deduction in the Final Payslip is because Safe was looking to 'clawback' a cash amount of $5,000 paid to Mr Warren in June 2023, and because Mr Pavlic thought Mr Warren took advantage of Safe. Mr Pavlic referred to Safe's 'Clawback' Policy attached to his witness statement and sought to rely upon the payment of $5,000 to Mr Warren as an 'inappropriate benefit' (along with an increase in salary).

42 Mr Pavlic said the 'Clawback' Policy enabled Safe, at cl 3, to deduct or balance adjust the employee's final payslip[8].

43 However, there are a number of difficulties for Safe in relying upon the 'Clawback' Policy in the circumstances:

(a) Mr Pavlic forgot about the 'Clawback' Policy until it was bought to his attention by an insolvency agent in December 2024 when reconciling the first respondent's finances;

(b) Mr Warren was never informed that Safe was seeking to invoke the 'Clawback' Policy before they made the deduction; and

(c) Mr Warren was not aware, and I accept he was not aware, of the 'Clawback' Policy and its application. The footnote at end of the document provides that it is dated in 2021, whereas the induction form signed by Mr Warren on 20 November 2017, also attached to Mr Pavlic's witness statement, makes no reference to a 'Clawback' Policy[9]. Thus, there is considerable doubt as to whether the 'Clawback' Policy was, in fact, ever a term of any contract of employment between Mr Warren and Safe.

44 To the extent that Safe relies upon other employment documents attached to Mr Pavlic's witness statement, I note these documents include a Code of Conduct signed by Mr Warren on 16 May 2019[10] and a Statutory Declaration and job description document signed by Mr Warren on 6 April 2021[11]. Neither of these documents refer to the 'Clawback' Policy, even if they could be considered as comprising employment contracts.

45 Thus, not only was the deduction not made in accordance with s 324(1) of the FWA, but for the purposes of s 326(1)(a) it was also a deduction that was for the benefit, either directly or indirectly, of Safe and not Mr Warren.

46 Further, for the purposes of s 326(1)(b) the deduction was unreasonable in the circumstances where it was never conveyed to Mr Warren that it would be made, he had no opportunity to respond to it being made, and he was not aware it could be made under the 'Clawback' Policy.

47 Of course this assumes that, in fact, the inclusion of the 'Clawback' Policy was a term of any contract of employment between Mr Warren and Safe. But even if it was (which I expressed doubt that it was), for reasons given it would have no effect in enabling Safe to 'clawback' or deduct or balance adjust $7,024 from the Final Payslip.

48 For the avoidance of any doubt, as indicated to Mr Pavlic during the hearing, this assumes his evidence at its highest about Mr Warren's behaviour[12]. However, this does not change the outcome or Safe's obligations under the FWA.

49 I am satisfied and I find on the balance of probabilities that there was no basis under the FWA for the respondent to make the deduction of $7,024 in the Final Payslip.

50 I further find on the balance of probabilities that in doing so, Safe failed to pay in full the entitlements owed to Mr Warren for unpaid accrued annual leave and personal leave in contravention of s 323(1) of the FWA, when read with s 90(2) and s 99 of the FWA.

51 I am satisfied and I find the claim proven as against Safe, the first respondent. Mr Warren named Safe Integrated Pty Ltd and Cyber Dine Holdings Pty Ltd as parties to the proceedings where he seemed unsure of the relationship between the companies. However, I am satisfied Safe was Mr Warren's employer.

Outcome

52 Pursuant to s 545(3) and s 548(1A) of the FWA, the first respondent is to pay to the claimant the amount $7,024, subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth).

53 The claim as it relates to the named second and third respondents is dismissed.

D. SCADDAN

INDUSTRIAL MAGISTRATE

Schedule 1 – The Jurisdiction, Practice And Procedure Of The Western Australian Industrial Magistrates Court

Jurisdiction and burden of proof

[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.

[2] The IMC, being a court constituted by an industrial magistrate, is an '*eligible State or Territory court*': FWA s 12 (see definitions of '*eligible State or Territory court*' and '*magistrates court*'); *Industrial Relations Act 1979* (WA) s 81, s 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include contravening a term of the NES and failing to pay in full an amount owed under the FWA: FWA s 44(1), s 323 respectively.

[5] An obligation upon an '*employer*' is an obligation upon a '*national system employer*' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA s 12, s 14, s 42, s 47. A NES entitlement of an employee is an entitlement of 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*': FWA s 13, s 42, s 47.

Contravention

[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 (emphasis added): FWA s 545(3)(a).

[7] The civil penalty provisions identified in s 539 of the FWA includes:

- The Core provisions set out in pt 2 - 1 of the FWA: FWA s 61(2), s 539; and
- Other terms and conditions of employment set out in Part 2-9 of the FWA: FWA s 323(1), s 539.

[8] 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 FWA: FWA s 545(3).

[9] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[10] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. 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.

[11] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 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].

[1] Exhibit 1 – Witness Statement of Simon Warren as an attachment (last page).

[2] Exhibit 1 – as above.

[3] Exhibit 1

[4] Exhibit 2 – Witness Statement of Ben Pavlic.

[5] Exhibit 2 at [56].

[6] Exhibit 1 as an attachment.

[7] Exhibit 1 as an attachment.

[8] Exhibit 2 at attachment 6.

[9] Exhibit 2 at attachment 9.

[10] Exhibit 2 at attachment 12.

[11] Exhibit 2 at attachments 13 and 14.

[12] Exhibit 2 and by way of example at [3], [4], [20], [33], [37], [38] and [50].

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2025 WAIRC 00210

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2025 WAIRC 00210
CORAM	:	SENIOR COMMISSIONER R COSENTINO
HEARD	:	TUESDAY, 18 MARCH 2025
DELIVERED	:	THURSDAY, 3 APRIL 2025
FILE NO.	:	U 116 OF 2024
BETWEEN	:	GLENDA TEEDE Applicant AND SHIRE OF MENZIES Respondent

CatchWords	:	Application for stay or adjournment of proceedings pending finalisation of matter before the Supreme Court – Matters before the Commission and the Supreme Court are significantly interrelated –Whether maintenance of both proceedings is an abuse of process – Whether applicant approbates and reprobates in relation to Commission's jurisdiction – Whether grant of stay is in public interest – Inappropriate for the Commission to proceed while matter before the Supreme Court – Stay granted
Legislation	:	*Industrial Relations Act 1979* (WA) *Local Government Act 1995* (WA)
Result	:	Stay application granted
Representation:		
Counsel:		
Applicant	:	Mr D Coulter
Respondent	:	Mr C Beetham
Solicitors:		
Applicant	:	Civic Legal
Respondent	:	Kennedys

Case(s) referred to in reasons:

Association of Professional Engineers Scientists & Managers Aust v Skilled Engineering Pty Ltd (1994) 54 IR 236

Commonwealth v Verwayen [1990] HCA 39; (1990) 95 ALR 321

Cooper v Darwin Rugby League Inc (1994) 1 IRCR 130

Dadey v Edith Cowan University (1996) 70 IR 295

De Pledge v Moulding Industries Pty Ltd [2004] WAIRC 11157; (2004) 84 WAIG 1195

Gilmore v Cecil Bros & Ors (1996) 76 WAIG 1184

Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd [2020] WASCA 77; (2020) 386 ALR 632

JMD v GJH [2012] WADC 124; (2012) 79 SR 259

Insurance Commission of Western Australia v Woodings as Liquidator of the Bell Group Ltd (In Liq) [No 2] [2017] WASC 372

Kermani v Westpac Banking Corporation [2012] VSCA 42; (2012) 36 VR 130

L & W Developments Pty Ltd v Della [2003] NSWCA 140; (2003) 135 IR 118

Matthews v Cool or Cosy Pty Ltd & Anor [2004] WASCA 114; (2004) 136 IR 156

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

Mineralogy Pty Ltd v Sino Iron Pty Ltd [2015] WASC 454

Mohazab v Dick Smith Electronics (No. 2) Pty Ltd (1995) 62 IR 200

Moore v Inglis (1976) 9 ALR 509

Moylan v City of South Perth [2006] WASC 262; (2006) 157 IR 441

Patrick Jebb atf The Trafalgar West Investments Trust v Superior Lawns Australia Pty Ltd [2019] WASC 121

Portolesi v Fini Group Management Pty Ltd (1997) 77 WAIG 506

Scicluna v Brooks t/as Bayview Motel Esperance, WA [2016] WAIRC 00862; (2016) 96 WAIG 1475

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Sterling Pharmaceuticals Pty Ltd v The Boots Company (Australia) Pty Ltd [1992] FCA 71; (1992) 34 FCR 287

The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch (1985) 65 WAIG 385

Thirteenth Corporation Pty Ltd v State [2006] FCA 979; (2006) 232 ALR 491

United Australia Ltd v Barclays Bank Ltd [1941] AC 1 30; [1940] 4 All ER 20

Reasons for Decision

1 The applicant, Glenda Teede commenced a referral of an **unfair dismissal application** in the Western Australian Industrial Relations **Commission** in which she seeks reinstatement to her position as Chief Executive Officer of the **Shire** of Menzies. She now asks the Commission to adjourn, postpone or stay her unfair dismissal application until other proceedings are determined (**stay application**).

2 In the form initiating Ms Teede's unfair dismissal application says she was told she was dismissed on 17 October 2024 with her last day of employment also being 17 October 2024. In the form, Ms Teede flagged that she intended to apply to the Supreme Court of Western Australia for judicial review of the Shire's decision to terminate her employment.

3 Since filing her unfair dismissal application, as foreshadowed, Ms Teede has now commenced proceedings in the Supreme Court of Western Australia in CIV 1202 of 2025 seeking judicial review of the Shire's 17 October 2024 decision (**judicial review proceedings**).

4 In the judicial review proceedings Ms Teede seeks a writ of certiorari in relation to the Shire's decision terminating Ms Teede's appointment as Shire CEO.

5 There is no dispute that the Shire did make a decision, by resolution dated 17 October 2024, to terminate Ms Teede's employment as CEO: Form 2A – **Response** to Unfair Dismissal Application, Attachment 2.

6 In the judicial review proceedings, Ms Teede alleges this decision was *legally* invalid on grounds of:

(a) Breach of natural justice due to a failure to afford her a fair hearing, bias, or both.

(b) The absence of evidence to justify the decision.

(c) The absence of power to make the decision in that:

i. The decision was not authorised by and was contrary to the *Local Government Act 1995* (WA) and its subsidiary legislation; or

ii. The jurisdictional facts necessary to enliven the power did not exist.

(d) Failure to follow procedures required by law.

(e) Failure to take account of mandatory relevant considerations.

(f) Unreasonableness.

7 She seeks orders quashing the decision and declaring the decision to be invalid and of no force or effect.

8 The Shire opposes Ms Teede's stay application. It says that Ms Teede should not be able to 'park' her unfair dismissal application, while maintaining other proceedings in which she asserts, in effect, that the Commission does not have jurisdiction

because there has been no valid dismissal. The Shire says to grant the stay application would amount to condoning Ms Teede's abuse of process.

9 This contest is novel. Normally a respondent to proceedings might want to stay them in circumstances where there are multiple actions on foot or where it is alleged that proceedings are an abuse of process. Here it is the applicant who seeks a stay to allow the judicial review proceedings to take their course, while the respondent resists a stay of the unfair dismissal application and at the same time rebukes the applicant's conduct in commencing the unfair dismissal application.

10 The resolution of the stay application first requires consideration of whether I have power to 'stay' the proceedings. If I do, then I must decide whether to exercise the discretion to grant the stay application. There are several factors that are relevant to the exercise of the discretion. Those which are the focus in this matter are:

(a) Whether Ms Teede's conduct in maintaining the judicial review proceedings and this unfair dismissal application amounts to an abuse of process, such that the stay application should be dismissed so as not to sanction the abuse.

(b) The effect of the judicial review proceedings on these proceedings.

(c) Avoiding multiple proceedings on similar issues.

(d) The advantages and disadvantages to Ms Teede and the Shire of a stay being granted.

11 Putting aside the question of whether there is power to make an order, as I understand it, if Ms Teede's conduct did not involve an implicit denial of the Commission's jurisdiction, the merit of staying or adjourning these proceedings so that interrelated or common issues could be determined in the judicial review proceedings first would be relatively uncontentious. There would be little doubt that several factors relevant to such applications as set out in ***Sterling Pharmaceuticals Pty Ltd v The Boots Company (Australia) Pty Ltd*** [1992] FCA 71; (1992) 34 FCR 287 (***Sterling Pharmaceuticals***) would favour the grant of stay.

12 What provokes the Shire's opposition is the alleged inconsistency between Ms Teede's invocation of the Commission's jurisdiction in the unfair dismissal application whilst simultaneously denying it in the judicial review proceedings.

13 In my view the Shire is mistaken to characterise Ms Teede's position as involving inconsistency. Much of the foundation for its opposition to the application therefore falls away.

14 It is appropriate to stay these proceedings for the following reasons.

Does the Commission have power to temporarily stay proceedings before it?

15 The Shire puts the Commission's power to make a temporary stay order in issue. There are two ways the question as to whether the Commission has power arises.

16 The first is that the *Industrial Relations **Act** 1979* (WA) contains no express power to 'stay' proceedings or to adjourn proceedings for an indefinite duration.

17 Section 27(1)(f) permits the Commission to adjourn 'to any time and place' and s 27(1)(v) says the Commission may:

> [G]enerally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.

18 The Shire acknowledges that the Commission has in the past stayed proceedings, for example where related criminal proceedings are pending: see ***Portolesi v Fini Group Management Pty Ltd*** (1997) 77 WAIG 506 at 507. The Commission has also stayed unfair dismissal and denied contractual benefits proceedings where interrelated Supreme Court proceedings were also on foot: ***De Pledge v Moulding Industries Pty Ltd*** [2004] WAIRC 11157; (2004) 84 WAIG 1195. In those matters, it is likely that the existence of the power was assumed, without there being a binding finding of law that the power exists.

19 The Shire also concedes that an adjournment of the proceedings might, for practical purposes, be in effect a stay. It says that the power to adjourn the proceedings is limited to the power to adjourn to 'any time and place' and therefore, the power to adjourn indefinitely or without specifying a particular or definite point in time is precluded.

20 The answer is simple. The adjournment Ms Teede is seeking is not of an indefinite duration. She seeks an adjournment until the happening of a definite event, that is, the determination of the judicial review proceedings. The moment when the judicial review proceedings are determined is a 'time' for the purpose of the power in s 27(1)(f) of the Act.

21 In the event that the Shire is suggesting that s 27(1)(f) does not permit an adjournment to a time determined by the happening of an event, but only to a time expressed as a certain duration or a fixed date and time, I reject that suggestion.

22 The word 'any' appearing before 'time' denies the ability to read the power as limited in respect of the time to which a matter is adjourned. 'Any time' means whatever and whichever time. By its ordinary meaning, 'any time' can be a point or moment that is described as a date, as well as a point or moment described by reference to the occurrence of an event. A narrower construction does no more than limit the form that an order adjourning a matter can take. I cannot see any purpose is served by a narrow construction.

23 The second way in which the question of the Commission's power arises is if the Commission lacks jurisdiction in relation to Ms Teede's unfair dismissal application. For the Commission to have jurisdiction under s 29(1)(c) of the Act the employee, Ms Teede, must have been dismissed by the Shire. Whether Ms Teede was dismissed by the Shire is a jurisdictional fact which is necessary for the Commission to exercise any of its powers under the Act.

24 The Shire says that Ms Teede 'says there's been no dismissal, but also, maybe there has been a dismissal' (ts 7). It says that if Ms Teede's case is that the Shire's decision to terminate her employment was invalid, then the Commission's jurisdiction has not been engaged in substance, even if she invokes it as a matter of form, and therefore the Commission's powers are not engaged.

25 The Act does not define what is a 'dismissal'. But the concept is a broad one. In ***Metropolitan (Perth) Passenger Transport Trust v Gersdorf*** (1981) 61 WAIG 611 Smith J said (at 616):

> The meaning attributed by the Shorter Oxford Dictionary to the verb "dismiss" is "to send away or remove from office, employment, or position." Speaking of the meaning of the word "dismissal" in ***Auckland Transport Board v Nunes*** (1952) NZLR. 412 Fair J said at p 410:
>
> > The word "dismissal" may be used in a sense of a peremptory or arbitrary dismissal or a dismissal after due notice or payment under the terms of the contract of employment.
>
> Being qualified as the verb "dismissed" is in the context in which it appears in s 29(2)(a) by the adverb "unfairly" it seems to me that the subsection is designed to apply to all dismissals, whether wrongful or lawful at common law. To paraphrase the words of Bray C J in his reasons for judgment in ***The Queen v. The Industrial Court of South Australia; ex parte General Motors Holdens Pty Ltd*** 10 SASR 582 at p 586, a lawful dismissal on notice can, I think, in appropriate circumstances be categorised as unfair, e.g. if dismissed by reason of his religious persuasion—conversely, some wrongful dismissals, as when by excusable mistake a notice is given slightly short of the period specified in the contract of employment or at common law, might not deserve that adjective.

26 It is well established that 'dismissal' and 'termination' as those words appear in the unfair dismissal provisions of the Act and federal legislation in its various iterations from time to time have the same meaning. That meaning is an act done by an employer terminating or purporting to terminate the employment: ***Dadey v Edith Cowan University*** (1996) 70 IR 295; ***Association of Professional Engineers, Scientists & Managers Australia v Skilled Engineering Pty Ltd*** (1994) 54 IR 236 per Gray J; ***Cooper v Darwin Rugby League Inc*** (1994) 1 IRCR 130 per Northrop J; ***Mohazab v Dick Smith Electronics (No. 2) Pty Ltd*** (1995) 62 IR 200 and ***Matthews v Cool or Cosy Pty Ltd & Anor*** [2004] WASCA 114; (2004) 136 IR 156 per EM Heenan J at [68].

27 Whether or not there has been an act done by the employer terminating or purporting to terminate the employment is a matter for evidence in each case.

28 Ms Teede's challenge to the lawfulness and validity of the Shire's decision to dismiss her in the judicial review proceedings does not amount to a denial of the existence of a dismissal as a jurisdictional fact. It is not inconsistent to maintain that there was a 'dismissal' as a matter of fact for the purpose of s 29(1)(c), whilst also denying the dismissal was valid as a matter of law. Both propositions can be true.

29 In light of the Shire's concession that it made a decision by resolution to terminate Ms Teede's employment, there was a dismissal by the Shire enlivening the Commission's jurisdiction. Ms Teede's judicial review application does not amount to a denial that there was a dismissal in fact, or a denial of the Commission's jurisdiction.

30 The Commission has jurisdiction in relation to Ms Teede's unfair dismissal application. I therefore have power to make the orders Ms Teede seeks.

Is Ms Teede's conduct an abuse of process?

31 The Shire submits that an abuse of process arises in two ways. One is the approbation and reprobation of the Commission's jurisdiction, or what it says is a collateral misuse of the Commission's jurisdiction. As outlined above, it says Ms Teede's conduct is simultaneously accepting and denying that she was dismissed. For the preceding reasons at [25]-[30], I reject this characterisation of Ms Teede's position.

32 The other way the Shire submits that there is an abuse of process is by maintaining two civil actions where one will lie, where the issues overlap or significantly overlap or there is a similarity of subject matters of the proceedings. The Shire points out that the issues in the unfair dismissal application and the issues in the judicial review proceedings clearly do overlap substantially.

33 It is not an abuse of process to seek relief in the alternative: ***Insurance Commission of Western Australia v Woodings as Liquidator of the Bell Group Ltd (In Liq) [No 2]*** [2017] WASC 372 (***ICWA v Woodings***) at [83]. The Shire accepts that it is permissible to maintain inconsistent or alternative claims, without that being an abuse of process in and of itself.

34 Vaughan J set out the relevant principles in ***Patrick Jebb atf The Trafalgar West Investments Trust v Superior Lawns Australia Pty Ltd*** [2019] WASC 121 at [102]-[112] (***Jebb***). Relevant extracts are reproduced below with citations omitted:

> [102] What amounts to an abuse of the court's process is insusceptible of a formulation comprising closed categories. It extends to all categories of case in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Abuse of process occurs in any circumstance in which the use of the court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. However, the onus of satisfying the court that there is an abuse of process is a heavy one.
>
> ...
>
> [103] In ***Rogers v The Queen*** McHugh J observed:
>
> > Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute.
>
> [104] Subsequently, in ***Ridgeway v The Queen***, Gaudron J referred to 'abuse of process' in terms that included within the concept the notion of proceedings that are frivolous, vexatious or oppressive.
>
> …

[106] The doctrine of abuse of process is informed in part by considerations of finality and fairness. The underlying public interest is twofold: there should be finality in litigation and a party should not be twice vexed in the same matter. Thus abuse of process may exist where a person seeks to re-litigate an issue already decided. There is a general public interest in the same issue not being litigated over again. It has been said that it would be a 'scandal to the administration of justice' if, a question having been disposed of by one case, the litigant were permitted to set up the case again by changing the form of proceedings.

[107] For a step in a proceeding to amount to an abuse of process by reason of impermissible re-litigation of a dispute it is not necessary that one of res judicata, issue estoppel or Anshun estoppel be applicable.

….

[111] Abuse of process may arise beyond the circumstance where a person seeks to relitigate an issue already decided. There may be an abuse of the process of the court in seeking to litigate matters which could and should have been litigated in earlier proceedings. That possibility was recognised by Lord Bingham in the House of Lords in ***Johnson v Gore Wood & Co***:

> The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied ... that the claim or defence *should have been raised* in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings would be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. *It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case*, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

[112] That aspect of the doctrine of abuse of process has been accepted by various intermediate appellate courts in Australia including the Court of Appeal in Western Australia. It has also been expressly confirmed by four members of the High Court in ***Tomlinson v Ramsey Food Processing Pty Ltd***:

> [I]t has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, *or which ought reasonably to have been made or raised for determination in that earlier proceeding*, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.

(original emphasis)

35 The principles described at [111]-[112] above are encapsulated by the statement in ***ICWA v Woodings*** at [35] that it is prima facie vexatious to bring two extant civil actions where one will lie, whether or not the proceedings are in separate courts.

36 In considering whether the rule should apply, consideration should be given to whether there was reasonable justification for the second proceeding based on legitimate considerations of convenience, cost or the like: ***Mineralogy Pty Ltd v Sino Iron Pty Ltd*** [2015] WASC 454 per Chaney J at [17] citing ***Kermani v Westpac Banking Corporation*** [2012] VSCA 42; (2012) 36 VR 130, ***Moore v Inglis*** (1976) 9 ALR 509 and ***Thirteenth Corporation Pty Ltd v State*** [2006] FCA 979; (2006) 232 ALR 491.

37 For cause of action estoppel or issue estoppel to apply, there must first be an exercise of judicial power to determine the parties' rights or resolve a contested issue. That has not occurred. But as ***Jebb*** at [107] indicates, it is not necessary to find that issue estoppel, cause of action estoppel or Anshun estoppel applies, in order to find there is an abuse of process.

38 Nevertheless, the Shire relied on the principle, reflected in the statement of Lord Atkin in ***United Australia Ltd v Barclays Bank Ltd*** [1941] AC 1; [1940] 4 All ER 20 (***United Australia v Barclays Bank***) at 30, that if a person is entitled to one of two inconsistent rights, and if the person has with knowledge done an unequivocal act showing they have chosen one, they cannot afterwards pursue the other. The Shire argued that upon delivery of a judgment in the Supreme Court, that election between inconsistent rights will in effect have been made.

39 I initially understood the Shire's submission to be to that whichever action proceeds to determination first, regardless of the outcome of the determination, Ms Teede will have been taken to have elected between the two inconsistent rights. Had that been the submission, it would be a misapplication of the principle. The election is between the rights the alternative causes of action seek to enforce: As Brennan J said in ***Commonwealth v Verwayen*** [1990] HCA 39; (1990) 95 ALR 321 at 340 (citations omitted):

> Election consists in a choice between rights which the person making the election knows he possesses and which are alternative and inconsistent rights. A doctrine closely related to election, and sometimes treated as a species of election, is the doctrine of approbation and reprobation. This doctrine precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he exercised as, for example, where a person "having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit". An election is binding on the party who makes it once it is made overtly — or, at all events, not later than on the communication of the election to the party or parties affected thereby. It is binding whether or not others who are affected by the election have acted in reliance on it. In this respect, election is to be distinguished from estoppel.

40 A judgment which does not determine in favour of, and therefore give the benefit of a right, does not preclude the pursuit of another alternative right.

41 In any event, it is not clear that the Shire was seeking to apply the principle in this way. It later submitted that what Ms Teede ought to have done, is to await the outcome of the judicial review proceedings, and then, if the decision is against her, at that point make an application to bring an out of time unfair dismissal application to the Commission, at which point the Commission would need to determine whether an issue estoppel and/or res judicata prevents her from doing so. In making that submission, the Shire effectively conceded that Lord Atkin's principle did not preclude the maintenance of a second alternative clause of action after judgment in one cause of action, per se.

42 This reveals the difficulty with the Shire's objection. Ms Teede's alternative claims do not meet the threshold condition. They cannot be determined by a single proceeding. The Commission could not review the Shire's decision, quash it or make a declaration that the decision is invalid. If the Commission determines that a dismissal is harsh, oppressive or unfair it may make the orders set out in s 23A of the Act: for reinstatement, reemployment and for compensation for remuneration lost, or for loss or injury caused by the dismissal.

43 On the other hand, Ms Teede could not pursue a claim for compensation for loss or injury caused by an unfair dismissal by way of judicial review.

44 It cannot be said that Ms Teede's alternative causes of action could have been pressed by a single proceeding, let alone that she should have commenced only one proceeding. This is not a case where one civil action lies. There is therefore no prima facie abuse of process. Ms Teede has legitimately taken the course of pursing alternative claims within the limits of the jurisdiction of the Supreme Court and the Commission respectively.

45 Ms Teede's strategy does not undermine the administration of justice, nor does it involve any improper purpose. Her strategy does not infringe the public interest in the finality of litigation. As there is no abuse of process involved in the maintenance of her two alternative causes of action at this point, the fact she does so is not a factor weighing against the grant of her stay application.

46 The Shire has failed to establish that the two proceedings involve effectively identical claims or inconsistent rights. While it is fair to characterise both claims as commonly founded on a denial of procedural fairness, and therefore having essentially the same factual substrata, the criteria for relief, and the relief itself, is not identical.

Other factors in exercising the discretion to adjourn the proceedings

47 The relevant factors in determining whether to stay proceedings are set out in ***Sterling Pharmaceuticals*** and ***L & W Developments Pty Ltd v Della*** [2003] NSWCA 140; (2003) 135 IR 118 with ***Sterling Pharmaceuticals*** being applied in ***Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd*** [2020] WASCA 77; (2020) 386 ALR 632 at [389]. The factors in ***Sterling Pharmaceuticals*** (at 290-291) are set out in the following extract:

> The court has a general power to control its own proceedings, and that power extends to enable it to order a temporary stay of proceedings in various circumstances including the case where proceedings are pending in another court and it is desirable that those proceedings should proceed to their conclusion first.
>
> …
>
> In my opinion relevant considerations to be taken into account in the present case include the following:
>
> - Which proceeding was commenced first.
> - Whether the termination of one proceeding is likely to have a material effect on the other.
> - The public interest.
> - The undesirability of two courts competing to see which of them determines common facts first.
> - Consideration of circumstances relating to witnesses.
> - Whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted.
> - The undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues.
> - How far advanced the proceedings are in each court.
> - The law should strive against permitting multiplicity of proceedings in relation to similar issues.
> - Generally balancing the advantages and disadvantages to each party.

The impact of the judicial review proceedings and the unfair dismissal application on each other

48 To support its case that the two proceedings should be treated as identical claims, the Shire argued that whatever the outcome of the judicial review proceedings might be, the maintenance of the unfair dismissal application will be an abuse because:

(a) If the judicial review proceedings succeed, Ms Teede must then be taken to have elected between her alternative causes of action, and is estopped from pursuing the unfair dismissal application. The Commission is without jurisdiction as there has been no dismissal.

(b) If the judicial review proceedings fail, the dismissal decision is valid but the essential issues of fact and law will have been determined giving rise to issue estoppel.

49 For the Shire, the consequence of this position should be a finding that the maintenance of both proceedings is an abuse of process, but a stay should be refused.

50 As set out above, I do not agree there is an abuse of process. But the impact of determinations made in one proceeding for the other proceeding is relevant to whether a stay should be granted.

51 Ms Teede has not expressly conceded that an order quashing or declaring invalid the dismissal in the judicial review proceedings will give rise to cause of action estoppel, although she does say that it will mean that it will be 'a moot point deciding whether the decision was unfair as a matter of industrial law' (stay application, pg 5) and that such a result would avoid the need to continue with the unfair dismissal application.

52 On this point, I agree with the Shire. An outcome in the judicial review proceedings which declares the dismissal to be invalid would prevent Ms Teede from continuing with the unfair dismissal application. Even if the Commission had jurisdiction, none of its s 23A powers of reinstatement, re-employment, or compensation would be available. Ms Teede's success in the judicial review proceedings would constitute an election as between her alternative causes of action: ***JMD v GJH*** [2012] WADC 124; (2012) 79 SR 259 at [108]; ***United Australia v Barclays Bank*** at 30.

53 What if the judicial review proceedings do not determine that the dismissal was invalid? Ms Teede does not concede that the judicial review proceedings will necessarily give rise to issue estoppel. It is unclear whether Ms Teede accepts that the judicial review proceedings may result in findings that give rise to an issue estoppel. Her counsel submitted that it is premature to determine whether and how an estoppel might arise, but the possibility of estoppel arising is a good reason to stay these proceedings.

54 The Shire argued that if the judicial review proceedings fail, and the Supreme Court were to find that the termination of Ms Teede's employment was valid then it must follow that there was no denial of procedural fairness. Such a finding would bind the Commission, and be fatal to the unfair dismissal claim.

55 The issues in the two proceedings significantly overlap. Ms Teede relies on grounds that relate to denial of procedural fairness both for the purpose of her judicial review proceedings, and to demonstrate that the dismissal was unfair.

56 The judicial review proceedings will not necessarily have the exhaustive effect the Shire described though. A lawful dismissal can be harsh, oppressive or unfair: ***Scicluna v Brooks t/as Bayview Motel Esperance, WA*** [2016] WAIRC 00862; (2016) 96 WAIG 1475 at [50]. The question of whether the Shire had a statutory obligation to afford Ms Teede procedural fairness for the purpose of the validity of its decision is different to the question of whether a denial of procedural fairness generally renders a dismissal unfair for the purpose of s 29(1)(c). For the latter purpose, a denial of procedural fairness is but one factor in determining whether a dismissal is harsh, oppressive or unfair, but in some cases, may be a most important circumstance: ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891. Further, the manner of the dismissal may render it unfair even without constituting a denial of procedural fairness: ***Gilmore v Cecil Bros & Ors*** (1996) 76 WAIG 1184.

57 Further, the judicial review proceedings might fail on grounds that the decision is not amenable to judicial review, without there being any findings about procedural fairness. Or the relief sought by Ms Teede might be refused as a matter of the Court's discretion.

58 The point at which an estoppel could arise has not been reached. Nevertheless, there is a prospect that the determination of the judicial review proceedings will resolve some issues if not the entire unfair dismissal application.

59 Whether and how any findings made in these proceedings will have an effect on the judicial review proceedings is less clear. Arguably, issue estoppel could arise such that the Commission's findings on an issue could prevent a party from re-litigating the same issue in judicial review proceedings, either by virtue of s 34(4) of the Act or common law principles: see the dicta in ***Moylan v City of South Perth*** [2006] WASC 262; (2006) 157 IR 441 at [83].

60 Even so, neither the dismissal of the unfair dismissal proceedings, nor the upholding of them, will resolve all of the issues in the judicial review proceedings. A finding that there was a dismissal for the purpose of s 29(1)(c) does not, of itself, resolve the question of whether the dismissal was valid at law: see [28] above. Nor will a finding that there was procedural unfairness. A finding in the unfair dismissal application that there was no denial of procedural fairness will not resolve the question in the judicial review proceedings as to whether there was an absence of power to make the decision.

61 There is a wide scope for the Commission to determine the unfair dismissal application without making findings about whether there was a denial of procedural fairness. A denial of procedural fairness is but one factor in determining whether a dismissal is harsh, oppressive or unfair for the purpose of s 29(1)(c). The test in the unfair dismissal application is ultimately whether the Shire has abused its right to dismiss as outlined by the Industrial Appeal Court in ***The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch*** (1985) 65 WAIG 385 at 386.

62 The possibility of the unfair dismissal application finally resolving all issues in the judicial review proceedings is more remote than the prospect of the judicial review proceedings resolving all issues in the unfair dismissal proceedings.

63 This factor weighs heavily in favour of staying the unfair dismissal application. If upheld, orders in the judicial review proceedings could have a fundamental effect on the unfair dismissal application, precluding the maintenance of the claim entirely. Otherwise, aspects of the unfair dismissal application may be affected by issues determined by the judicial review proceedings.

Generally balancing the advantages and disadvantages to each party

64 The Shire argued that it would be disadvantaged by a stay of these proceedings, because:

(a) It remains party to, and exposed to, two sets of proceedings with the prospect of having to litigate the same issues twice; and

(b) The course Ms Teede has taken has effectively deprived it of the ability to oppose an extension of time to bring an unfair dismissal claim.

65 The first argument does not advance the Shire's opposition to the stay application. Ms Teede has commenced two sets of proceedings. The grant or denial of a stay will not alter the Shire's position to its disadvantage in this regard. Rather, a stay will alleviate the disadvantage.

66 The second argument is that if Ms Teede only intends to press the unfair dismissal claim if her judicial review application fails, then it should be made at that time and not sooner. By not waiting to commence the unfair dismissal application, Ms Teede has effectively reversed the onus of proof which she would have had, to establish that she ought to be given an extension of time to bring unfair dismissal proceedings. Further, she has denied the Shire the opportunity to argue that an extension of time should not be granted, including for reasons that she is estopped by the determination of the judicial review proceedings from doing so.

67 As to this second argument, a stay will not deprive the Shire of the opportunity to argue, after the judicial review proceedings are determined, that an estoppel arises, should Ms Teede continue to maintain these proceedings. And, even if technically the Shire misses an opportunity to oppose an extension of time, it is difficult to envisage how Ms Teede would not discharge the onus on her of making a case for an extension in circumstances where unfair dismissal proceedings had been foreshadowed as an alternative cause of action to judicial review proceedings at a time when the unfair dismissal claim was within time. All that the course the Shire proposes would achieve is an additional step in the hypothetical later proceedings, namely, an out of time application.

68 And again, a stay does not create this disadvantage. It is the current reality.

69 Finally, I am uncomfortable with the idea that a party should be penalised or criticised for complying with the time limits set out in the Act. The 28-day time limit for commencing a referral of an unfair dismissal claim is designed, in part, to limit prejudice to respondents. The effect of bringing the claim within time is, obviously, that Ms Teede avoids the need to establish a case for an extension of time by commencing the claim only if and after dismissal of judicial review proceedings. But that is an incidental consequence, rather than a 'forensic benefit' as the Shire contends (ts 9).

70 Compliance with the Act should not be discouraged just because it incidentally advantages a party or disadvantages another. Compliance with the Act means that the respondent is on notice of the claim. It limits prejudice to the respondent and promotes the efficient use of the Commission's and the parties' resources compared with what the Shire says ought to occur, namely, nothing until judicial review proceedings are determined, and then an application for an extension of time.

71 I am not persuaded that disadvantage to the Shire is a reason not to grant a stay.

72 On the other hand, to refuse a stay will mean that the parties will both need to commit resources to these proceedings, whilst also prosecuting and defending the judicial review proceedings. A stay is, in this respect, advantageous to everyone.

Which proceeding was commenced first

73 The unfair dismissal application was commenced first. That might ordinarily indicate that the unfair dismissal application should be progressed and if any proceeding is to be stayed it would be the subsequently commenced judicial review proceedings. However, tempering this is the fact that there is a relatively short time limit for commencing proceedings for unfair dismissal of 28 days, and Ms Teede expressly foreshadowed in the unfair dismissal application that she intended to commence judicial review proceedings, and seek to stay the unfair dismissal application.

Avoiding multiplicity of proceedings in relation to similar issues

74 This factor has overlapping considerations to those discussed above. This factor favours the grant of a stay.

Whether work done might be wasted

75 I note that to date, three conciliation conferences have been convened in the unfair dismissal application, but the application has not otherwise been significantly advanced. It is in its early stages. While the Shire has filed a response and participated in conferences, the proceedings have not reached a stage where it can be said this factor weighs against the grant of a stay.

The effects of duplicate proceedings becoming common practice

76 The circumstances of Ms Teede's termination are relatively unique in that she was the CEO of a local government. The *Local Government Act 1995* (WA) contains provisions relevant to the engagement and termination of local government CEOs: s 5.39 and 5.39A. In these circumstances I do not consider that there is a significant risk of it becoming a common practice to bring both unfair dismissal applications in the Commission concurrently with judicial review proceedings.

The public interest

77 The abuse of process issues the Shire raised are relevant to the public interest. As discussed above, I am satisfied that a stay of these proceedings would not be against the public interest for the reasons the Shire argued.

78 Another aspect of the public interest is in ensuring the efficient use of the Commission's resources.

79 Because the judicial review proceedings might resolve the unfair dismissal application in its entirety, or determine significant issues that arise, a stay is likely to ensure more efficient use of the Commission's resources.

The undesirability of two courts competing to see which of them determines common facts first

80 This factor self-evidently favours one of the two proceedings being stayed.

Consideration of circumstances relating to witnesses

81 Neither party has suggested that any consideration of the circumstances of witnesses is relevant to the determination of this application.

How far advanced the proceedings are in each venue

82 I was told that the judicial review proceedings have not progressed beyond the filing of the application on 25 February 2025. These proceedings are slightly more advanced. However, this factor does not tip the balance either way.

Orders and Disposition

83 Having weighed the relevant factors, I am satisfied that it is appropriate to stay these proceedings until the determination of the judicial review proceedings. I will order accordingly, with liberty to the parties to apply.

2025 WAIRC 00211

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GLENDA TEEDE

APPLICANT

-v-

SHIRE OF MENZIES

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE THURSDAY, 3 APRIL 2025

FILE NO/S U 116 OF 2024

CITATION NO. 2025 WAIRC 00211

Result Application granted

Representation

Applicant Mr D Coulter (of counsel)

Respondent Mr C Beetham (of counsel)

Order

HAVING heard from Mr Coulter on behalf of the applicant and Mr Beetham on behalf of the respondent, the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders –

1. THAT these proceedings be stayed until the determination of Supreme Court of Western Australia proceedings CIV 1202 of 2025.

2. THAT there be liberty to apply.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2025 WAIRC 00200

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GLENN ROBERT MACDONALD

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER T KUCERA

DATE MONDAY, 31 MARCH 2025

FILE NO/S U 119 OF 2024

CITATION NO. 2025 WAIRC 00200

Result Application dismissed

Representation

Applicant Mr G Macdonald

Respondent Ms S Power (of counsel)

Order

WHEREAS the applicant on 15 November 2024, filed a *Form 2 –Unfair Dismissal Application* pursuant to s 29 (1)(c) of the *Industrial Relations Act 1979* (WA) (**unfair dismissal application**);

AND WHEREAS the unfair dismissal application was referred to, but was unable to be resolved at a conciliation conference that was convened on 6 February 2025;

AND WHEREAS the Commission on 19 February 2025 issued orders by consent, programming the unfair dismissal application for arbitration (**programming orders**);

AND WHEREAS the programming orders variously included dates by which the parties were required to file, any outlines of witness evidence to be prepared in accordance with *Practice Note 9*, together with any documents to be relied upon as evidence (**witness outlines and supporting documents**);

AND WHEREAS the applicant was, pursuant Order 3 of the programming orders, required to file any witness outlines and supporting documents by Monday, 17 March 2025;

AND WHEREAS the applicant did not comply with Order 3 of the programming orders by the date specified;

AND WHEREAS the applicant on 19 March 2025 made a *Form 1A Application* in which he sought an extension of time for him to file any witness outlines and supporting documents by 2 April 2024 (**interlocutory application**);

AND WHEREAS the Commission convened a directions hearing on 24 March 2025 (**directions hearing**), to hear the interlocutory application, which was opposed by the respondent;

AND WHEREAS the Commission, during the directions hearing, determined that orders should issue on 24 March 2025 in the following terms;

1. THAT the date by which the applicant is to file any outlines of witness evidence, in accordance with Order 3 of the Orders the Commission issued by consent, on 19 February 2025 (programming orders), be extended to Tuesday 25 March 2025.
2. THAT if the applicant fails to comply with, Order 3 of the programming orders, by Tuesday 25 March 2025, application U 119 of 2024 will be dismissed.

AND WHEREAS the applicant did not comply with the Order 1 of the orders the Commission issued on 24 March 2025, by the date specified;

NOW THEREFORE the Commission, pursuant to the powers conferred under s27 of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application U 119 of 2024 be dismissed.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2025 WAIRC 00182

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GLENN ROBERT MACDONALD

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER T KUCERA

DATE MONDAY, 24 MARCH 2025

FILE NO/S U 119 OF 2024

CITATION NO. 2025 WAIRC 00182

Result Order issued

Representation

Applicant Mr G Macdonald

Respondent Ms S Power (of counsel)

Order

HAVING heard from Mr G Macdonald on his own behalf and Ms S Power of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under s 27(1) of the *Industrial Relations Act 1979* (WA) herby orders –

1. THAT the date by which the applicant is to file any outlines of witness evidence, in accordance with Order 3 of the Orders the Commission issued by consent, on 19 February 2025 (programming orders), be extended to Tuesday 25 March 2025.
2. THAT if the applicant fails to comply with, Order 3 of the programming orders, by Tuesday 25 March 2025, application U 119 of 2024 will be dismissed.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2025 WAIRC 00161

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MARTY WALL

APPLICANT

-v-

BAE SYSTEMS MARITINE HENDERSEN

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE THURSDAY, 13 MARCH 2025

FILE NO/S U 11 OF 2025

CITATION NO. 2025 WAIRC 00161

Result Matter discontinued

Representation

Applicant On his own behalf

Respondent Ms L Krollig (as agent)

Order

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

AND WHEREAS on 7 March 2025 the applicant emailed the Commission indicating he would like to discontinue application U 11 of 2025;

AND WHEREAS the respondent confirmed on 13 March 2025 that it consents to the application being discontinued;

NOW THEREFORE the Commission, having heard from the parties and pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT application U 11 of 2025 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2025 WAIRC 00201

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PAUL MANSELL

APPLICANT

-v-

CITY OF BAYSWATER

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE TUESDAY, 1 APRIL 2025

FILE NO/S U 10 OF 2025

CITATION NO. 2025 WAIRC 00201

Result	Application dismissed
Representation	
Applicant	Mr P Mansell (in person)
Respondent	Ms A Gillespie and Ms N Moyle

Order

HAVING heard from Mr Mansell on his own behalf and Ms Gillespie and Ms Moyle on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (Act), and for reasons given ex tempore on 28 March 2024, hereby orders –

1. THAT the application be and is hereby dismissed; and
2. THAT the Act's s 35(1) requirement to publish reasons for decision be dispensed with.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2025 WAIRC 00213

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SCOTT CHEETHAM
	APPLICANT
	-v-
	BURGER BONES
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 4 APRIL 2025
FILE NO/S	U 127 OF 2024
CITATION NO.	2025 WAIRC 00213

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application for unfair dismissal under s 29(1)(c) of the *Industrial Relations Act 1979* (WA) that was listed for a show cause hearing on 4 April 2025;

AND WHEREAS on 18 March 2025 the Commission told Mr Cheetham that the Commission was concerned that he was not prosecuting his claim and that if he did not comply with the Commission's direction, application U 127 of 2024 may be listed for a hearing for Mr Cheetham to show cause why it should not be dismissed for want of prosecution;

AND WHEREAS on 21 March 2025 the Commission wrote to Mr Cheetham and told him that the Commission was concerned that Mr Cheetham was not prosecuting application U 127 of 2024, because he had not updated the Commission about his application since 21 February 2025, he had failed to comply with the Commission's directions in the matter and he had not filed materials in support of his application as directed. The Commission told Mr Cheetham that the matter was listed for a show cause hearing on 4 April 2025, and that if Mr Cheetham did not attend the show cause hearing and show cause why his application should not be dismissed, his application would be dismissed;

AND WHEREAS on 21 March 2025 Mr Cheetham emailed the Commission and said that the next few weeks would take his full attention as he deals with a range of personal matters, and 'I apologise for not following the timeline agreed to and for not notifying you sooner. If you have to drop this case as a result of this I understand.';

AND WHEREAS on 2 April 2025 the Commission emailed Mr Cheetham and said:

> *I refer to application U 127/2024 and to your attached email dated 21 March 2025.*
>
> *You have not said that you intend to file the required documents by a particular date, nor have you requested an extension of time. Rather, in your email you said: "If you have to drop this case as a result of this I understand."*

> *From your email, it appears that you do not intend to attend the show cause hearing listed this Friday, 4 April 2025, and further, that you do not intend to pursue application U 127/2024.*
>
> *In the circumstances, the matter remains listed for the show cause hearing.*

AND WHEREAS at the hearing on 4 April 2025 there was no appearance for or by Mr Cheetham;

AND WHEREAS the Commission has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS service on Mr Cheetham was effected by sending notice of the hearing by pre-paid post to the postal address that Mr Cheetham provided to the Commission, and by emailing notice of the hearing to the email address that Mr Cheetham provided to the Commission: r 24(2)(d) *Industrial Relations Commission Regulations 2005* (WA);

AND WHEREAS the Commission was satisfied that Mr Cheetham had been duly served with notice of the show cause hearing and proceeded in Mr Cheetham's absence;

AND WHEREAS the Commission considers that there has been a relatively long delay in the context of this application, there has been not been an adequate explanation for that delay (because Mr Cheetham's explanation by email only deals with part of the period of delay), there is no evidence of hardship to Mr Cheetham if his application is dismissed and there is nothing before the Commission to suggest that the respondent's conduct in the matter has in any way contributed to Mr Cheetham's lack of prosecution of his application;

AND WHEREAS Mr Cheetham has shown a general pattern of behaviour of not progressing his application for some weeks, has not complied with directions from the Commission, has not asked for an extension of time, has not indicated that he intends to file the required documents and did not attend the show cause hearing on 4 April 2025. The Commission considers that Mr Cheetham has had a reasonable opportunity to prosecute his application but has not done so. In the circumstances, the Commission considers that Mr Cheetham is not prosecuting his application and application U 127 of 2024 should be dismissed under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) for want of prosecution;

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

THAT this application be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

STOP BULLYING/SEXUAL HARASSMENT—

2025 WAIRC 00167

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THOMAS CHARLES SMYTH

APPLICANT

-v-

DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL DEVELOPMENT

BRETSON CHAVEZ ESPINOZA

RESPONDENTS

CORAM COMMISSIONER T EMMANUEL

DATE FRIDAY, 14 MARCH 2025

FILE NO/S S 1 OF 2025

CITATION NO. 2025 WAIRC 00167

Result Matter discontinued

Representation

Applicant On his own behalf

Respondent Mr M McIlwaine (of counsel) & Mr B Chavez Espinoza (on his own behalf)

Order

WHEREAS this is an application under s 51BM of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 13 March 2025 the applicant emailed the Commission confirming that he would like to discontinue application S 1 of 2025;

AND WHEREAS both respondents confirmed on 13 March 2025 that they consent to the application being discontinued;

NOW THEREFORE the Commission, having heard from the parties and pursuant to the powers

conferred by the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT application S 1 of 2025 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,

[L.S.] Commissioner.

CORRECTIONS—

2025 WAIRC 00177

GOVERNMENT SERVICES (MISCELLANEOUS) GENERAL AGREEMENT 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ARTS AND CULTURE TRUST (WA) AND OTHERS

APPLICANTS

-v-

UNITED WORKERS UNION (WA)

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE THURSDAY, 20 MARCH 2025

FILE NO. AG 2 OF 2025

CITATION NO. 2025 WAIRC 00177

Result Correction Order issued

Representation **On the Papers**

Applicant Mr Alex Lyon

Respondent Ms Lisa Judge

Correction Order

WHEREAS the *Government Services (Miscellaneous) General Agreement 2025* (Industrial Agreement) was registered by the Commission's order [2025] WAIRC 00025 on Wednesday, 22 January 2025;

AND WHEREAS on Monday, 10 March 2025, the parties identified an unintentional drafting error in the Industrial Agreement and asked the Commission to issue an order correcting the Industrial Agreement;

AND WHEREAS on Monday, 10 March 2025 the parties provided to the Commission a replacement page correcting the unidentified drafting error in subclause 44.9(a), page 46;

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

THAT the *Government Services (Miscellaneous) General Agreement 2025* be corrected by inserting the replacement page 64 provided by the parties on Monday, 10 March 2025.

(Sgd.) T B WALKINGTON,

[L.S.] Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2025 WAIRC 00168

INSURANCE COMMISSION OF WESTERN AUSTRALIA (GOVERNMENT OFFICERS) CSA AGREEMENT 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES INSURANCE COMMISSION OF WESTERN AUSTRALIA

APPLICANT

-v-

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT

CORAM COMMISSIONER C TSANG

DATE FRIDAY, 14 MARCH 2025

FILE NO. AG 13 OF 2025

CITATION NO. 2025 WAIRC 00168

Result Order issued

Representation

Applicant Ms V Dimanopoulos

Respondent Ms G Murray

Order

HAVING heard from Ms V Dimanopoulos on behalf of the applicant and Ms G Murray on behalf of the respondent, the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

> THAT the name of the respondent to the application 'Civil Service Association of Western Australia Incorporated' be deleted and substituted with 'The Civil Service Association of Western Australia Incorporated'.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00207

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ROBERT KNEEBONE

APPLICANT

-v-

MUNTULGURA GURAMA PTY LTD

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE WEDNESDAY, 2 APRIL 2025

FILE NO. B 63 OF 2024

CITATION NO. 2025 WAIRC 00207

Result Direction issued

Representation

Applicant Mr R Kneebone

Respondent Mr D Miller

Direction

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

1. THAT the respondent file and serve a response to the application by no later than 16 April 2025;

2. THAT the matter be listed for a Directions hearing on 24 April 2025; and
3. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2025 WAIRC 00225

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 10 OF 2024

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPELLANT
	-v-
	MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	BUSS J
DATE	MONDAY, 7 APRIL 2025
FILE NO/S	IAC 1 OF 2025
CITATION NO.	2025 WAIRC 00225
Result	Programming Order Issued

Order

1. The appellant be granted leave to file an amended List of Legal Authorities by 7 April 2025.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2024 WAIRC 01038

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREGORY BUSSON
	APPLICANT
	-v-
	THE COAL MINERS' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	FRIDAY, 13 DECEMBER 2024
FILE NO/S	PRES 1 OF 2022
CITATION NO.	2024 WAIRC 01038
Result	Order issued
Appearances	
Applicant	Ms A McNamara of counsel
Respondent	Ms A McNamara of counsel

Order

WHEREAS on 4 May 2022, the Commission made an order ([2022] WAIRC 00178) establishing an Interim Delegate Board of the respondent to enable the respondent to continue to operate while amendments to its Rules are being progressed, with such orders to operate until 30 June 2024 unless otherwise varied or revoked;

AND WHEREAS on 28 June 2024, orders ([2024] WAIRC 00382) were made extending the period of operation of the Interim Delegate Board of the respondent until 31 December 2024;

AND WHEREAS on 6 December 2024, the applicant made further application for extension of the period of operation of the Interim Delegate Board of the respondent;

AND WHEREAS having considered the circumstances, I am satisfied that such an extension should be granted;

NOW THEREFORE, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

(1) THAT an Interim Delegate Board of the respondent is established and constituted as follows –

(a) Mr Robert Sanford in the office of District President;

(b) Mr Kim Praetz in the office of District Vice-President;

(c) Mr Gregory Busson in the office of District Secretary; and

(d) Mr Darren Crowe in the office of lodge delegate to the Delegate Board.

(2) THAT each Interim Delegate Board member's position on the Interim Delegate Board will continue unless or until –

(a) The member resigns or leaves their position on the Interim Delegate Board; or

(b) The member ceases to be a member of the respondent; or

(c) The member is elected to an office in the respondent.

(3) THAT the Interim Delegate Board have the authority to exercise all the powers, duties, and functions of the Delegate Board of the respondent and each of the members of the Interim Delegate Board shall have authority to exercise all the powers, duties and functions of the office held by each of them.

(4) THAT rules 12(c) and 14(b) of the respondent's rules have no effect, and the duties, functions and powers of District Treasurer may be exercised by Mr Gregory Busson in his capacity as District Secretary.

(5) THAT elections are to be held for the offices of District President, District Vice-President, and District Secretary before 30 March 2025.

(6) THAT this order remains in effect until 30 March 2025, unless otherwise varied.

(7) THAT there be liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Chief Commissioner.

2025 WAIRC 00194

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREGORY BUSSON
	APPLICANT
	-v-
	THE COAL MINERS' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	THURSDAY, 27 MARCH 2025
FILE NO/S	PRES 1 OF 2022
CITATION NO.	2025 WAIRC 00194

Result	Order issued
Representation	
Applicant	Ms A McNamara of counsel
Respondent	Ms A McNamara of counsel

Order

WHEREAS on 4 May 2022, the Commission made an order ([2022] WAIRC 00178) establishing an Interim Delegate Board of the respondent to enable the respondent to continue to operate while amendments to its Rules are being progressed, with such orders to operate until 30 June 2024 unless otherwise varied or revoked;

AND WHEREAS on 28 June 2024, orders ([2024] WAIRC 00382) were made extending the period of operation of the Interim Delegate Board of the respondent until 31 December 2024;

AND WHEREAS on 13 December 2024, orders ([2024] WAIRC 01038) were made extending the period of operation of the Interim Delegate Board of the respondent until 30 March 2025;

AND WHEREAS on 25 March 2025, the applicant made a further application for an extension of the period of operation of the Interim Delegate Board of the respondent;

AND WHEREAS having considered the circumstances, I am satisfied that such an extension should be granted;

NOW THEREFORE, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

(1) THAT an Interim Delegate Board of the respondent is established and constituted as follows –

  (a) Mr Robert Sanford in the office of District President;

  (b) Mr Kim Praetz in the office of District Vice-President;

  (c) Mr Gregory Busson in the office of District Secretary; and

  (d) Mr Darren Crowe in the office of lodge delegate to the Delegate Board.

(2) THAT each Interim Delegate Board member's position on the Interim Delegate Board will continue unless or until –

  (a) The member resigns or leaves their position on the Interim Delegate Board; or

  (b) The member ceases to be a member of the respondent; or

  (c) The member is elected to an office in the respondent.

(3) THAT the Interim Delegate Board have the authority to exercise all the powers, duties, and functions of the Delegate Board of the respondent and each of the members of the Interim Delegate Board shall have authority to exercise all the powers, duties and functions of the office held by each of them.

(4) THAT rules 12(c) and 14(b) of the respondent's rules have no effect, and the duties, functions and powers of District Treasurer may be exercised by Mr Gregory Busson in his capacity as District Secretary.

(5) THAT elections are to be held for the offices of District President, District Vice-President, and District Secretary before 30 June 2025.

(6) THAT this order remains in effect until 30 June 2025, unless otherwise varied.

(7) THAT there be liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2025 WAIRC 00183

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ADAM WOODAGE

APPLICANT

-v-

ELECTRICAL TRADES UNION OF WORKERS OF AUSTRALIA (WESTERN AUSTRALIAN GOLDFIELDS' SUB-BRANCH), KALGOORLIE

RESPONDENT

FILE NO PRES 1 OF 2025

PARTIES THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-v-

ELECTRICAL TRADES UNION OF WORKERS OF AUSTRALIA (WESTERN AUSTRALIAN GOLDFIELDS' SUB-BRANCH), KALGOORLIE

RESPONDENT

FILE NO PRES 2 OF 2025

CORAM CHIEF COMMISSIONER S J KENNER

DATE MONDAY, 24 MARCH 2025

CITATION NO. 2025 WAIRC 00183

Result Directions revoked

Representation

Applicant	Mr C Fogliani of counsel
Respondent	No appearance
Applicant	Mr J Carroll of counsel
Respondent	No appearance

Direction

HAVING heard from Mr C Fogliani of counsel on behalf of the applicant in application PRES 1 of 2025 and there being no appearance on behalf of the respondent and Mr J Carroll of counsel on behalf of the applicant in application PRES 2 of 2025 and there being no appearance on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred on him under the *Industrial Relations Act 1979* (WA), hereby directs –

THAT pars 2 to 7 of the directions in the herein matters dated 27 February 2025 ([2025] WAIRC 00123 and [2025] WAIRC 00124) be and are hereby revoked.

(Sgd.) S J KENNER,
[L.S.] Chief Commissioner.

2025 WAIRC 00196

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADAM WOODAGE
	APPLICANT
	-v-
	ELECTRICAL TRADES UNION OF WORKERS OF AUSTRALIA (WESTERN AUSTRALIAN GOLDFIELDS' SUB-BRANCH), KALGOORLIE
	RESPONDENT
FILE NO	PRES 1 OF 2025
PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	APPLICANT
	-v-
	ELECTRICAL TRADES UNION OF WORKERS OF AUSTRALIA (WESTERN AUSTRALIAN GOLDFIELDS' SUB-BRANCH), KALGOORLIE
	RESPONDENT
FILE NO	PRES 2 OF 2025
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	FRIDAY, 28 MARCH 2025
CITATION NO.	2025 WAIRC 00196

Result	Order issued
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	No appearance
Applicant	Mr J Carroll of counsel
Respondent	No appearance

Direction

HAVING heard from Mr C Fogliani of counsel on behalf of the applicant in application PRES 1 of 2025 and there being no appearance on behalf of the respondent and Mr J Carroll of counsel on behalf of the applicant in application PRES 2 of 2025 and there being no appearance on behalf of the respondent, and by consent, the Chief Commissioner, pursuant to the powers conferred on him under the *Industrial Relations Act 1979* (WA), hereby directs –

(1) THAT these applications are to be listed for hearing to determine the following issues (the Issues):

(a) whether an interim executive should be appointed to manage the affairs of the respondent in application PRES 2 of 2025;

(b) whether Mr Woodage should be appointed to any interim executive; and

(c) whether the powers of any interim executive should be limited to:

(i) making any necessary amendments to the Rules of the respondent in order to facilitate holding of elections for all offices; and

(ii) arranging for the holding of such elections, or whether there should be no such limitation on the powers of the interim executive.

(2) THAT on or before 15 April 2025, Mr Woodage is to file any affidavits and submissions upon which he intends to rely upon in respect of the Issues.

(3) THAT on or before 6 May 2025, the Registrar is to file any submissions upon which she intends to rely upon in respect of the Issues.

(4) THAT the applications be listed on a date to be fixed by the Commission.

(5) THAT there be liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Chief Commissioner.

2025 WAIRC 00171

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS,

THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

APPLICANTS

-v-

BUILDING TRADES ASSOCIATION OF UNIONS OF WESTERN AUSTRALIA (ASSOCIATION OF WORKERS)

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER

DATE MONDAY, 17 MARCH 2025

FILE NO. PRES 3 OF 2025

CITATION NO. 2025 WAIRC 00171

Result Direction issued

Representation

Applicants Ms L Fraser Hardy of counsel

Respondent No appearance

Direction

HAVING heard Ms L Fraser Hardy of counsel on behalf of the applicants, the Chief Commissioner, pursuant to the powers conferred on him under the *Industrial Relations Act 1979*, hereby directs –

(1) THAT the applicants file an outline of submissions and any documents and evidence upon which they intend to rely by 11 April 2025.

(2) THAT the matter be listed for hearing on a date to be fixed not before 14 April 2025.

(Sgd.) S J KENNER,
[L.S.] Chief Commissioner.

2025 WAIRC 00195

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAVE THE CHILDREN
	APPLICANT
	-v-
	COMMUNITY EMPLOYERS WA INCORPORATED
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	FRIDAY, 28 MARCH 2025
FILE NO/S	PRES 14 OF 2024
CITATION NO.	2025 WAIRC 00195

Result	Order issued
Representation	
Applicant	Mr T Grey-Smith
Respondent	Mr T Grey-Smith

Order

WHEREAS on 7 October 2024, orders ([2024] WAIRC 00879) were made establishing an Interim Board of the respondent to enable the respondent to continue to operate pending an application to the Registrar under the *Act*, that the Association be deregistered, with such orders to operate until 30 March 2025 unless otherwise varied or revoked;

AND WHEREAS on 26 March 2025, the parties sought a variation to the orders to extend their period of operation to 10 May 2025;

AND WHEREAS having considered the circumstances, I am satisfied that an extension should be granted;

NOW THEREFORE, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

> THAT the operation of the orders made on 7 October 2024 ([2024] WAIRC 00879) be and are hereby extended to 31 May 2025.

(Sgd.) S J KENNER,
[L.S.] Chief Commissioner.

2025 WAIRC 00191

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 27 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEAN-PIERRE CLEMENT
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER C TSANG – CHAIR
	MR G LEE – BOARD MEMBER
	MR M NORTON – BOARD MEMBER
DATE	WEDNESDAY, 26 MARCH 2025
FILE NO.	PSAB 3 OF 2025
CITATION NO.	2025 WAIRC 00191

Result	Direction issued
Representation	
Appellant	Mr L Nicholls (of counsel)

Respondent Mr S Pack (of counsel)

Direction

HAVING heard from Mr L Nicholls (of counsel) on behalf of the appellant and Mr S Pack (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 directs –

1. THAT the application to appeal out of time be heard at the same time as the appeal, which is to be listed for hearing not before Wednesday, 27 August 2025 (**Hearing**).

2. THAT discovery be informal.
3. THAT the parties file **by Wednesday, 21 May 2025**:
   (a) An agreed statement that identifies:
      (i) The agreed facts.
      (ii) The agreed issues that are to be determined at the Hearing.
      (iii) The agreed legal principles applicable to the issues at 3(a)(ii) above.
   (b) A bundle of agreed documents.
4. THAT the appellant file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Wednesday, 11 June 2025**.
5. THAT the respondent file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Wednesday, 2 July 2025**.
6. THAT the parties notify the Chambers of the Chair **by Wednesday, 9 July 2025**:
   (a) Their agreed estimate of the number of days required for the Hearing.
   (b) Their availability in the 3-month period from Wednesday, 27 August 2025.
7. THAT the appellant file an outline of legal submissions **by Wednesday, 23 July 2025**.
8. THAT the respondent file an outline of legal submissions **by Wednesday, 13 August 2025**.
9. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00190

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 27 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JEAN-PIERRE CLEMENT

APPELLANT

-v-

DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR G LEE – BOARD MEMBER
MR M NORTON – BOARD MEMBER

DATE WEDNESDAY, 26 MARCH 2025

FILE NO. PSAB 3 OF 2025

CITATION NO. 2025 WAIRC 00190

Result Order issued

Representation

Appellant Mr L Nicholls (of counsel)

Respondent Mr S Pack (of counsel)

Order

HAVING heard from Mr L Nicholls (of counsel) on behalf of the appellant and Mr S Pack (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 –

THAT the name of the respondent 'Department of Water and Environmental Regulation' be deleted and substituted with 'Director General, Department of Water and Environmental Regulation'.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00216

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 31 OCTOBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MALCOLM HARBOR
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL DEVELOPMENT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T B WALKINGTON – CHAIRPERSON
	MR G LEE – BOARD MEMBER
	MS Z JOHNSTON – BOARD MEMBER
DATE	FRIDAY, 4 APRIL 2025
FILE NO.	PSAB 26 OF 2024
CITATION NO.	2025 WAIRC 00216

Result	Direction issued
Representation	
Applicant	Ms Georgia Murray (of counsel)
Respondent	Mr John Carroll (of counsel)

Direction

HAVING heard from Ms Murray on behalf of the appellant and Mr Carroll 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 discovery be informal between the parties;
2. THAT the parties file and serve an agreed statement of facts and agreed bundle of documents by 1 May 2025;
3. THAT the appellant file and serve any outlines of evidence and any documents, not being agreed documents, upon which they intend to rely by 15 May 2025;
4. THAT the respondent file and serve any outlines of evidence and any documents, not being agreed documents, upon which they intend to rely by 29 May 2025;
5. THAT the appellant file and serve an outline of written submissions by 12 June 2025;
6. THAT the respondent file and serve an outline of written submissions by 26 June 2025;
7. THAT the matter be listed for hearing of up to 1 day on a date to be fixed not before 3 July 2025; and
8. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00228

APPEAL AGAINST THE DECISION TO DISMISS GIVEN ON 21 NOVEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GORDON MILLER
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON — CHAIRPERSON MS B CONWAY — BOARD MEMBER MS S SHAH — BOARD MEMBER
DATE	TUESDAY, 8 APRIL 2025
FILE NO.	PSAB 31 OF 2024
CITATION NO.	2025 WAIRC 00228

Result	Direction issued
Representation	
Applicant	Mr Jason Tebbutt
Respondent	Mr John Carroll (of counsel)

Direction

HAVING heard from Mr Tebbutt on behalf of the appellant and Mr Carroll 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 discovery be informal between the parties;
2. THAT the parties file and serve an agreed statement of facts and agreed bundle of documents by 28 April 2025;
3. THAT the appellant file and serve any outlines of evidence and any documents, not being agreed documents, upon which they intend to rely by 19 May 2025;
4. THAT the respondent file and serve any outlines of evidence and any documents, not being agreed documents, upon which they intend to rely by 9 June 2025;
5. THAT the appellant file and serve an outline of written submissions by 23 June 2025;
6. THAT the respondent file and serve an outline of written submissions by 7 July 2025;
7. THAT the matter be listed for hearing of up to three days on a date to be fixed not before 14 July 2025; and
8. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00189

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 29 NOVEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HARSHA RANASINGHE ARACHCHILLAGE
	APPELLANT
	-v-
	HEALTH SUPPORT SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIRPERSON MR B HAWKINS - BOARD MEMBER MS K O'HARA - BOARD MEMBER
DATE	WEDNESDAY, 26 MARCH 2025
FILE NO	PSAB 32 OF 2024
CITATION NO.	2025 WAIRC 00189

Result	Programming orders issued
Representation	
Appellant	Mr M Dassanayake (as agent)
Respondent	Mr J Carroll (of counsel)

Programming orders

HAVING heard from Mr M Dassanayake (as agent) on behalf of the appellant 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), orders –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 4pm on Wednesday, 16 April 2025;
2. THAT the appellant file outlines of evidence and documents (that are not agreed documents) on which he intends to rely by 4.00pm on Monday, 5 May 2025;
3. THAT the respondent file outlines of evidence and documents (that are not agreed documents) on which it intends to rely by 4.00pm on Monday, 19 May 2025;
4. THAT the appellant file written submissions by 4.00pm on Tuesday, 3 June 2025;
5. THAT the respondent file written submissions by 4.00pm on Tuesday, 17 June 2025;
6. THAT discovery be informal; and
7. THAT the matter be listed for hearing on dates to be fixed.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00220

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 13 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN BRUCE BURNS
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER C TSANG – CHAIR
	MR M FINNEGAN – BOARD MEMBER
	MS E HAMILTON – BOARD MEMBER
DATE	MONDAY, 7 APRIL 2025
FILE NO.	PSAB 34 OF 2024
CITATION NO.	2025 WAIRC 00220

Result	Direction issued
Representation	
Appellant	Mr J Tebbutt
Respondent	Mr J Carroll (of counsel)

Direction

HAVING heard from Mr J Tebbutt on behalf of the appellant 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), and by consent, hereby directs –

1. THAT discovery be informal.
2. THAT the parties file **by Friday, 9 May 2025**:

(a) An agreed statement that identifies:

(i) The agreed facts.

(ii) The agreed issues that are to be determined at the hearing.

(iii) The agreed legal principles applicable to the issues at 2(a)(ii) above.

(b) A bundle of agreed documents.

3. THAT the appellant file outlines of witness evidence and any documents (other than those in the bundle of agreed documents) by **Friday, 23 May 2025**.

4. THAT the respondent file outlines of witness evidence and any documents (other than those in the bundle of agreed documents) by **Friday, 6 June 2025**.

5. THAT the appellant file an outline of legal submissions by **Friday 20 June 2025**.

6. THAT the respondent file an outline of legal submissions by **Friday 4 July 2025**.

7. THAT the matter be listed for 2-day hearing not before **Friday, 11 July 2025**.

8. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00217

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 17 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LACHLAN JEFFREY CONEY

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T KUCERA - CHAIRPERSON
MR G LEE - BOARD MEMBER
MR T DALY - BOARD MEMBER

DATE FRIDAY, 4 APRIL 2025

FILE NO PSAB 35 OF 2024

CITATION NO. 2025 WAIRC 00217

Result Order issued

Representation

Appellant Mr L Coney

Respondent Mr M McIlwaine (of counsel)

Order

HAVING heard from Mr L Coney on his own behalf and Mr M McIlwaine 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 discovery is to be informal.
2. THAT the parties are to file any statement of agreed facts and bundle of agreed documents by Wednesday, 23 April 2025.
3. THAT by Wednesday, 7 May 2025 the appellant is to file:
   a. any witness outlines in the manner required by practice note 9 of 2021; and
   b. any documents which are not agreed documents upon which he intends to rely on.
4. THAT by Wednesday, 21 May 2025 the respondent is to file:
   a. any witness outlines in the manner required by practice note 9 of 2021; and
   b. any documents which are not agreed documents upon which they intend to rely on.

5. THAT the appellant is to file an outline of written submissions upon which he intends to rely on by Wednesday, 4 June 2025.
6. THAT the respondent is to file an outline of written submissions upon which they intend to rely on by Wednesday, 18 June 2025.
7. THAT the appeal is to be listed for hearing of up to 2 days not before Friday, 20 June 2025.
8. THAT there be liberty to apply.

(Sgd.) T KUCERA,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00164

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATALIE WARNOCK **APPLICANT** **-v-** DIRECTOR GENERAL, DEPARTMENT OF EDUCATION **RESPONDENT**
CORAM	COMMISSIONER C TSANG
DATE	THURSDAY, 13 MARCH 2025
FILE NO.	U 3 OF 2025
CITATION NO.	2025 WAIRC 00164

Result	Directions issued
Representation	
Applicant	Mr C Fogliani (of counsel)
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Mr C Fogliani (of counsel) on behalf of the applicant and Mr M McIlwaine (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT discovery be informal and be completed **by Friday, 4 April 2025**.
2. THAT the parties file **by Friday, 4 April 2025**:
   (a) An agreed statement that identifies:
      (i) The agreed facts.
      (ii) The agreed issues that are to be determined at the hearing.
      (iii) The agreed legal principles applicable to the issues at 2(a)(ii) above.
   (b) A bundle of agreed documents.
3. THAT the applicant file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Monday, 28 April 2025**.
4. THAT the respondent file outlines of witness evidence and documents (other than those in the bundle of agreed documents) (**Respondent's evidence**) **by Monday, 19 May 2025**.
5. THAT the applicant file **by Tuesday, 3 June 2025**:
   (a) Any outlines of witness evidence and documents (other than those in the bundle of agreed documents) in reply to the Respondent's evidence.
   (b) An outline of legal submissions.
6. THAT the respondent file an outline of legal submissions **by Tuesday, 17 June 2025**.
7. THAT the matter be listed for a 2-day hearing not before Tuesday, 24 June 2025.
8. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2025 WAIRC 00222

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	OLASOJI RAYMOND BAYONLE FALOHUN
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	MONDAY, 7 APRIL 2025
FILE NO/S	U 8 OF 2025
CITATION NO.	2025 WAIRC 00222

Result	Direction issued
Representation	
Applicant	Mr O Falohun
Respondent	Mr M McIlwaine

Direction

HAVING heard from the applicant on his own behalf, and Mr McIlwaine 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 applicant file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 24 April 2025;
2. THAT the respondent file and serve any outlines of witness evidence and documents, upon which it intends to rely, by no later than 15 May 2025;
3. THAT if the applicant intends to summons any witnesses before the Commission, he is to file and serve those summonses no later than 29 May 2025;
4. THAT the applicant file and serve an outline of submissions and any list of authorities, upon which he intends to rely, by no later than 12 June 2025;
5. THAT the respondent file and serve an outline of submissions and any list of authorities, upon which it intends to rely, by no later than 26 June 2025;
6. THAT this matter be listed for hearing not before 3 July 2025; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2025 WAIRC 00231

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RITA GAIL CARNES
	APPLICANT
	-v-
	WILINGGIN ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 9 APRIL 2025
FILE NO.	U 17 OF 2025
CITATION NO.	2025 WAIRC 00231

Result	Direction issued
Representation	
Applicant	Ms E Edmands (of counsel)
Respondent	Mr A Mumford (of counsel)

Direction

HAVING heard from Ms E Edmands (of counsel) on behalf of the applicant and Mr A Mumford (of counsel) on behalf of the respondent at the Directions Hearing on 8 April 2025, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

Jurisdictional issue

1. THAT the question of whether the respondent is a *national system employer* pursuant to s 14(1)(a) of the *Fair Work Act 2009* (Cth) (**jurisdictional issue**) be determined as a preliminary issue.

2. THAT the respondent file **by Tuesday, 29 April 2025**:

   (a) Any affidavit(s) addressing the jurisdictional issue, which may include the respondent's constitution, its activities and financial records.

   (b) Legal submissions addressing the jurisdictional issue.

3. THAT the applicant file **by Tuesday, 13 May 2025**:

   (a) Any affidavit(s) addressing the jurisdictional issue.

   (b) Legal submissions addressing the jurisdictional issue.

4. THAT subject to further order, the jurisdictional issue be determined on the papers.

5. THAT the parties have liberty to apply.

Substantive matter

Subject to the Commission determining the jurisdictional issue and issuing an Order giving effect to the Commission's jurisdiction (**The Order**):

6. THAT the matter be listed for a 3-day hearing, to be scheduled not before:

   (a) The Commission issuing The Order; and

   (b) **2-weeks** following the date of Direction 11 below.

7. THAT **by no later than 4-weeks** following the date of The Order, the parties file:

   (a) An agreed statement that identifies:

      (i) The agreed facts.

      (ii) The agreed issues that are to be determined at the hearing.

      (iii) The agreed legal principles applicable to the issued at 7(a)(ii) above.

   (b) A bundle of agreed documents.

8. THAT **by no later than 2-weeks** following the date of Direction 7 above, the applicant file outlines of witness evidence and any documents (other than those in the bundle of agreed documents).

9. THAT **by no later than 2-weeks** following the date of Direction 8 above, the respondent file outlines of witness evidence and any documents (other than those in the bundle of agreed documents).

10. THAT **by no later than 2-weeks** following the date of Direction 9 above, the applicant file an outline of legal submissions.

11. THAT **by no later than 2-weeks** following the date of Direction 10 above, the respondent file an outline of legal submissions.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00202

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LISA KING

APPLICANT

-v-

THE TRUSTEE FOR SARAHS FAMILY TRUST

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE TUESDAY, 1 APRIL 2025

FILE NO/S U 23 OF 2024

CITATION NO. 2025 WAIRC 00202

Result Order issued

Representation

Applicant Ms Lisa King

Respondent Ms Sarah O'Sullivan

Order

HAVING heard from the applicant on her own behalf, and Ms O'Sullivan on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders —

1. THAT the respondent's application made pursuant to s. 27(1)(a) of the Industrial Relations Act 1979 (WA) to dismiss U 23/2024 without hearing is hereby dismissed;
2. THAT respondent's application in the alternative application to exclude witnesses from giving evidence in the proceedings is dismissed;
3. That parties have liberty to object to evidence at the hearing;
4. The applicant be granted to leave to file and serve an amended the outline of witness evidence for Anna Fleming by 17 April 2025;
5. THAT the applicant file and serve evidence to support her claims of loss or injury and mitigation of the loss, upon which she intends to rely, by no later than 17 April 2025;
6. THAT the respondent file and serve an outline/s of evidence in response to the further evidence of the applicant, upon which it intends to rely, by no later than 8 May 2025;
7. That orders 2025 WAIRC 00057, Direction numbers 3 and 4 are hereby set aside;
8. THAT the applicant file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 22 May 2025;
9. THAT the respondent file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 5 June 2025;
10. THAT this matter be listed for hearing for 3 days on a date to be fixed not before 12 June 2025; and
11. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2025 WAIRC 00199

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LISA KING

APPLICANT

-v-

THE TRUSTEE FOR SARAHS FAMILY TRUST

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE MONDAY, 31 MARCH 2025

FILE NO/S U 23 OF 2024

CITATION NO. 2025 WAIRC 00199

Result	Order issued
Representation	
Applicant	Ms Lisa King
Respondent	Ms Sarah O'Sullivan

Order

HAVING heard from the applicant on her own behalf, and Ms O'Sullivan 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 respondent's application for hearings at the Commission to be conducted in camera be refused.

THAT the names of any clients associated with the parties be referred to in proceedings under a pseudonym approved by the Commission.

THAT all court documents filed in the proceedings by the parties shall redact the name of clients associated with the parties.

THAT any reasons for decision issued shall use the pseudonyms approved by the Commission consistent with these Directions.

THAT the respondent's application for individual/s to be excluded from observing the proceedings is refused except to the extent necessary to ensure a witness is prevented from hearing the testimony of other witnesses before giving their evidence.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2025 WAIRC 00163

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANNA BOVE

APPLICANT

-v-

SESSIONS AT CRAIGIE

RESPONDENT

CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 13 MARCH 2025
FILE NO.	U 108 OF 2024
CITATION NO.	2025 WAIRC 00163

Result	Direction issued
Representation	
Applicant	Ms Anna Bove
Respondent	Mr Garreth Dirk

Direction

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

1. THAT the question of whether the Commission ought to accept this application out of time be determined as a preliminary matter;

2. THAT the applicant file and serve any outlines of witness evidence and documents, outline of submissions and any list of authorities upon which they intend to rely addressing the preliminary matter, by no later than 31 March 2025;

2. THAT the respondent file and serve any outlines of witness evidence and documents, outline of submissions and any list of authorities upon which they intend to rely addressing the preliminary matter, by no later than 22 April 2025;

3. THAT this matter be listed for hearing for 1 day on a date to be fixed; and

4. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Insurance Commission of Western Australia (Government Officers) CSA Agreement 2024 AG 13/2025	17/03/2025	Insurance Commission of Western Australia	Civil Service Association of Western Australia	Commissioner C Tsang	Agreement registered
Shire of Broome Outside Workforce Industrial Agreement 2024 AG 19/2025	13/03/2025	Shire of Broome	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU), The Local Government Racing Cemetries Employees Union (LGRCEU).	Senior Commissioner R Cosentino	Agreement registered
State School Teachers' Union of W.A. (Administrative Services Staff) and Western Australian Municipal, Administrative, Clerical and Services Union of Employees Collective Agreement 2024 - The AG 17/2025	27/03/2025	The State School Teachers' Union of W.A.	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Commissioner C Tsang	Agreement registered
WA Health System - HSUWA - PACTS Industrial Agreement 2024 AG 23/2025	19/03/2025	Child and Adolescent Health Service, East Metropolitan Health Services, Health Support Services, North Metropolitan Health Service, PathWest Laboratory Medicine WA, Quadriplegic Centre, South Metropol	Health Services Union of Western Australia (Union of Workers)	Commissioner T Emmanuel	Agreement registered

NOTICES—Appointments—

2025 WAIRC 00204

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 2025. This designation ceases to have effect on 31 March 2026.

Dated the 4h day of March 2025.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2025 WAIRC 00169

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 3 OCTOBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ERIC JAROSLAV SHEWCHUK

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF ENERGY, MINES, INDUSTRY REGULATION AND SAFETY

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR G BROWN – BOARD MEMBER
MS H MOIR – BOARD MEMBER

DATE MONDAY, 17 MARCH 2025

FILE NO. PSAB 24 OF 2024

CITATION NO. 2025 WAIRC 00169

Result Order issued

Representation

Appellant Mr E J Shewchuk (on his own behalf)

Respondent Mr M McIlwaine (of counsel)

Order

WHEREAS on 22 October 2024 the appellant filed a *Form 8B – Notice of Appeal – Government Officers, Public Service Officers*;

AND WHEREAS by Notices of Hearing issued on 4 February 2025, the appeal was set down for a 4-day hearing on 10–13 June 2025;

AND WHEREAS on 14 March 2025 the appellant sought leave to discontinue the appeal and the respondent advised that they have no objection to the discontinuance of the appeal;

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

THAT PSAB 24 of 2024 be, and by this order is, discontinued by leave.

(Sgd.) C TSANG,
[L.S.] Commissioner.

WORK HEALTH AND SAFETY ACT—Matters dealt with

2025 WAIRC 00157

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

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES SEAN KELLY

APPLICANT

-v-

BHP NICKEL WEST PTY LTD

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE WEDNESDAY, 12 MARCH 2025

FILE NO/S WHST 14 OF 2024

CITATION NO. 2025 WAIRC 00157

Result Application discontinued

Representation

Applicant On his own behalf

Respondent Mr K Vague (of counsel) and Ms Z Weir (of counsel)

Order

WHEREAS on 6 March 2025 the applicant sent to the Registry a Form 1A – Multipurpose Form asking to discontinue application WHST 14 of 2024;

AND WHEREAS the respondent confirmed on 12 March 2025 that it consents to the application being discontinued;

NOW THEREFORE the Tribunal, pursuant to the powers conferred under the *Work Health and Safety Act 2020* (WA) and the *Industrial Relations Act 1979* (WA), orders –

THAT application WHST 14 of 2024 is discontinued.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2025 WAIRC 00162

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES SEAN KELLY

APPLICANT

-v-

WORKSAFE COMMISSIONER

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE THURSDAY, 13 MARCH 2025

FILE NO/S WHST 15 OF 2024

CITATION NO. 2025 WAIRC 00162

Result Matter discontinued

Representation

Applicant On his own behalf

Respondent Ms J Courtney (of counsel)

Order

WHEREAS on 6 March 2025 the applicant sent to the Registry a Form 1A – Multipurpose Form asking to discontinue application WHST 15 of 2024;

AND WHEREAS the respondent confirmed on 13 March 2025 that she consents to the application being discontinued;

NOW THEREFORE the Tribunal, pursuant to the powers conferred under the *Work Health and Safety Act 2020* (WA) and the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT application WHST 15 of 2024 is discontinued.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]