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GENERAL ORDERS—

2025 WAIRC 00348

2025 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2025 WAIRC 00348
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T KUCERA
HEARD	:	WEDNESDAY, 21 MAY 2025, WEDNESDAY, 4 JUNE 2025, WRITTEN SUBMISSIONS FRIDAY, 6 JUNE 2025
DELIVERED	:	THURSDAY, 12 JUNE 2025
FILE NO.	:	CICS 1 OF 2025
BETWEEN	:	COMMISSION'S OWN MOTION Applicant AND (NOT APPLICABLE) Respondent

Catchwords	:	State Wage order – Commission's own motion – Minimum wage for employees under the *Minimum Conditions of Employment Act 1993* – Minimum award rates of wage – State Wage principles
Legislation	:	*Industrial Relations Act 1979* (WA) s 6(ac), s 50, s 50A, ss 50A(1)(a)(iii), (1A) & (1B), ss 50A(3)(a)(i) – (iv), s 50A(3)(b), s 50A(3)(c), s 50A(3)(d), s 50A(3)(f) *Industrial Relations Legislation Amendment Act 2024* (WA) *Minimum Conditions of Employment Act 1993* (WA) *Fair Work Act 2009* (Cth) s 285(2)(a)
Result	:	2025 State Wage order issued

Representation:

Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations

Mr C Harding and with him Mr S Collins on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)

Mr K Sneddon of counsel and with him Ms R Hendon and Mr G Hansen on behalf of UnionsWA

Ms S Hantz on behalf of the Western Australian Council of Social Service Inc

Ms J Love and with her Ms S Lyon on behalf of the Western Australian Local Government Association

Case(s) referred to in reasons:

2018 State Wage Case [2018] WAIRC 00363; (2018) 98 WAIG 263

2021 State Wage Case [2021] WAIRC 00173; (2021) 101 WAIG 459

2022 State Wage Case [2022] WAIRC 00273; (2022) 102 WAIG 431

2023 State Wage Case [2023] WAIRC 00330; (2023) 103 WAIG 733

2024 State Wage Case [2024] WAIRC 00293; (2024) 104 WAIG 731

Annual Wage Review 2022-23 [2023] FWCFB 3500

Annual Wage Review 2023-24 [2024] FWCFB 3500

Annual Wage Review 2024-25 [2025] FWCFB 3500

Reasons for Decision

THE COMMISSION IN COURT SESSION:

Introduction

1 Each year the Commission is required by s 50A of the *Industrial Relations Act 1979* (WA) to make a State Wage Order effective on 1 July. The SWO sets the State Minimum Wage and adjusts minimum award rates of pay. Section 50A of the *Act* provides as follows:

> **50A. Rates of pay etc. for MCE Act and awards, annual State Wage order as to**
>
> (1AA) In this section —
>
> ***instrument-governed employee with a disability*** means an employee —
>
> (a) whose contract of employment is governed by an industrial instrument that includes a SWIIP that incorporates the SWS; and
>
> (b) whose productive capacity has been assessed under the SWS as being reduced because of a disability; and
>
> (c) who is not employed by a supported employment service; and
>
> (d) who is being paid a weekly rate of pay determined by the SWS under the SWIIP;
>
> ***supported employment service*** means a service to support the paid employment of persons with disability, being persons —
>
> (a) for whom competitive employment at or above the wage payable under the relevant award is unlikely; and
>
> (b) who, because of their disability, need substantial ongoing support to obtain or retain paid employment.
>
> (1) The Commission must before 1 July in each year, of its own motion make a General Order (the ***State Wage order***) —
>
> (a) setting the following —
>
> (i) the minimum weekly rate of pay applicable under section 12 of the MCE Act to employees who have reached 21 years of age and who are not apprentices;
>
> (ii) the minimum weekly rate or rates of pay applicable under section 14 of the MCE Act to apprentices;
>
> (iii) the minimum amount payable under the MCE Act section 17(2);
>
> and
>
> (b) adjusting rates of wages paid under awards; and
>
> (c) having regard to the statement of principles issued under paragraph (d) —
>
> (i) varying each award affected by the exercise of jurisdiction under paragraph (b) to ensure that the award is consistent with the order; and
>
> (ii) if the Commission considers it appropriate to do so, making other consequential changes to specified awards;
>
> and
>
> (d) setting out a statement of principles to be applied and followed in relation to the exercise of jurisdiction under this Act to —
>
> (i) set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment; and
>
> (ii) ensure employees receive equal remuneration.

(1A) The amount set by the Commission under subsection (1)(a)(iii) must be the same as that set by the FW Commission in the national minimum wage order under the FW Act section 285(2)(c) for an eligible employee whose productive capacity is, under the SWS, assessed as reduced because of a disability.

(1B) For the purposes of subsection (1)(b), the Commission must, in relation to an instrument-governed employee with a disability, order the highest of the following —

(a) that the minimum amount payable is to be the same as in the previous State Wage order;

(b) that the minimum amount payable is to be the same as that set by the FW Commission in the national minimum wage order under the FW Act section 285(2)(c) for an eligible employee whose productive capacity is, under the SWS, assessed as reduced because of a disability.

(2) The Commission may, in relation to awards generally or specified awards, do any or all of the following for the purposes of subsection (1)(b) —

(a) adjust all rates of wages;

(b) adjust individual rates of wages;

(c) adjust a series of rates of wages;

(d) adjust specialised rates of wages.

(3) In making an order under this section, the Commission must take into consideration —

(a) the need to —

(i) ensure that Western Australians have a system of fair wages and conditions of employment; and

(ii) meet the needs of the low paid; and

(iii) provide fair wage standards in the context of living standards generally prevailing in the community; and

(iv) contribute to improved living standards for employees; and

(v) protect employees who may be unable to reach an industrial agreement; and

(vi) encourage ongoing skills development; and

(vii) provide equal remuneration;

and

(b) the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity in Western Australia; and

(c) to the extent that it is relevant, the state of the national economy; and

(d) 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

(e) for the purposes of subsection (1)(b) and (c), the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment; and

(f) relevant decisions of other industrial courts and tribunals; and

(g) any other matters the Commission considers relevant.

(4) Without limiting the generality of this section and section 26(1), in the exercise of its jurisdiction under subsection (1)(b) and (c) the Commission must ensure, to the extent possible, that there is consistency and equity in relation to the variation of awards.

(5) A State Wage order takes effect on 1 July in the year it is made and is applicable in respect of an employee or apprentice on and from the commencement of the first pay period of the employee or apprentice on or after that date.

(6) A State Wage order in effect under this section when a subsequent order is made under subsection (1) ceases to apply in respect of an employee or apprentice on the day on which the subsequent order commences to apply in respect of the employee or apprentice.

(7) A State Wage order must not be added to or varied.

(8) Nothing in subsection (7) affects the Commission's powers under section 27(1)(m).

2 As well as setting the SMW and adjusting minimum award rates of pay, the Commission is required to also set rates of pay for apprentices and trainees, and for employees with a disability, who are assessed as having a reduced capacity for work under the Supported Wage System.

3 Notice of the SWO proceedings was published on the Commission's website and in the 'West Australian' newspaper on 12 April 2025 and was also published in the Western Australian Industrial Gazette: (2025) 105 WAIG 687. Written initial submissions were received from the Minister, the Chamber of Commerce and Industry of Western Australia (Inc), UnionsWA, the Western Australian Council of Social Service Inc and the Western Australian Local Government Association. Written submissions in reply were also received from the Minister, the CCIWA and UnionsWA. As has been the practice in the past, the Commission has also been assisted by a presentation by Mr Christmas, the Director of the Economic and Revenue Forecasting Division of the Western Australian Department of Treasury. Mr Christmas' presentation focussed on developments in the national and Western Australian economies, relevant to the issues to be determined by the Commission, and also the global outlook. As always, Mr Christmas' presentation has been of considerable assistance to the Commission.

Broad overview of submissions

4 Whilst the issues raised by the submissions will be considered in detail when dealing with the statutory factors under s 50A of the *Act*, the following is a brief overview of the positions put.

The Minister

5 The Minister submitted that the SWO decision is critically important for those employees reliant on minimum award wages in the State industrial relations system. Whilst not nominating a figure by which the SMW and minimum award wages should be increased, the Minister contended that any increase should be such that the needs of the low paid are met to keep pace with the cost of living, and the Commission should take into consideration the importance of the small business sector in the State economy. In terms of any outcome, the Minister's position is that it is desirable for any increase to be not less than any increase awarded by the Fair Work Commission in its current 2025 Annual Wage Review.

6 The Minister described the overall state of the Western Australian economy as buoyant. A strong domestic economy, along with a robust labour market, has resulted in resilient household consumption. Gross State Product is forecast to grow by 2.25% over 2024–25, with State Final Demand to expand to 3.75% over the same period. The Minister noted a fall in inflation to 2.8% to the March quarter 2025. Excluding the electricity sub-component from the Consumer Price Index to remove volatility caused by electricity household subsidies, the Perth CPI increased by 3.4% over the year. Wages growth, as measured by the Wage Price Index over the same period, is expected to rise by 3.75%.

7 The Minister also referred to the Commission's decision in last year's SWO case, to realign the SMW from the C14 to the C13 classification rate, which has led to the SMW now being slightly higher than the National Minimum Wage, an outcome which was welcomed by the State Government.

The Chamber of Commerce and Industry

8 The CCIWA urged the Commission to have regard to the challenging circumstances facing small businesses, in terms of increases in cost pressures, as well as those being borne by households. Whilst the CCIWA noted that the State's economy has performed solidly overall, it was contended that business insolvency rates have shown a sharp increase, with a considerable number of small businesses in Western Australia being placed into administration in the first four months of this year. This reflects a trend of increased levels of business insolvencies over the last two years or so. CCIWA noted a significant increase in rates of insolvency for businesses in accommodation and food services, construction, health care and social assistance and retail, industry sectors most represented in the State industrial relations system.

9 Along with these factors, the CCIWA also noted Australia's poor productivity performance, additional labour costs to be borne by small businesses through increases in superannuation contributions from July 2025, and the uncertain global economic outlook. Having regard to all of these considerations, the CCIWA contended that an increase in the SMW and minimum award wages of 2.5% would be appropriate.

UnionsWA

10 According to UnionsWA, the State and national economies are strong. Given the continued high cost of living, a substantial increase in the SMW and award wages is needed. In particular, UnionsWA noted the resilience in household consumption, along with a very strong labour market. Whilst moderating somewhat, business investment remains solid, and in the main, businesses remain profitable. UnionsWA noted in particular, the effect of high inflation over recent years, as eroding the value of minimum wages.

11 Given the impact of the rising cost of living, and UnionsWA's view that award wage increases since 2021 have not kept pace with inflation, a substantial increase in the SMW of $41.34 per week and an increase in minimum award wages of 4.5% is needed.

Western Australian Council of Social Service Inc

12 The claim by the WACOSS was in line with the UnionsWA claim for a 4.5% increase in the SMW, but expressed as a percentage. It was contended that such an increase is needed to meet the needs of the low paid and to align their standard of living to community expectations.

13 The WACOSS contended that over recent years, given increases in the cost of living have outpaced wage increases, living standards for many in the community have declined. This has particularly impacted low income employees, who are most affected by increases in housing costs. The WACOSS submitted that the substantial increase in the ***2024 State Wage Case*** [2024] WAIRC 00293; (2024) 104 WAIG 731, whilst providing welcome relief, has not led to a sustained increase in the standard of living for low income employees.

14 In particular, the WACOSS emphasised the importance of increases in minimum wages as a means by which low income employees can meet their basic needs and to sustain a decent standard of living, relative to community standards generally. The WACOSS submitted that State and Commonwealth Government cost of living measures provide limited relief, but they do not replace the ongoing effect of regular, minimum wage increases, as recognised by the Commission most recently in the ***2024 State Wage Case*** at [63].

Western Australian Local Government Association

15 Whilst not nominating a figure by which the SMW and minimum award wages should be increased, the WALGA supported increases in wages that balance the need for fairness, along with the need for Local Governments to manage their budgets. The WALGA noted the State awards that apply to Local Governments and that in the main, employees are covered by industrial agreements, as a safety net. These are either negotiated and registered with the Commission, or operate as new State instruments under the transitional provisions contained in the *Act*.

16 Whilst acknowledging that the Western Australian economy is strong, it was submitted by WALGA that Local Governments, given increases in costs for the sector, must be prudent in the management of their budgets, as their main revenue sources are rates and State and Commonwealth Government grants.

Statutory factors to be considered

17 Consistent with s 50A(3) of the *Act*, the following factors are to be taken into account by the Commission in making a SWO. Some, whilst expressed individually in s 50A(3), have been considered together.

The economic environment (ss 50A(3)(b) and (c))

18 It was common ground that the State economy has continued to perform strongly. Including the external sector (goods exports), GSP is forecast to grow by 2.25% over 2024-25, with some further growth of 2.5% for both 2025-26 and 2026-27. This solid growth is supported by a robust domestic economy, with SFD projected to reach 3.75% over 2024-25. This domestic performance is underpinned by solid household consumption, along with increases in both housing and government sector investment, as noted by the Minister in her submissions.

19 Annexed to the Minister's submissions at Attachment A, is the *2025 State Wage Case – Economic Conditions Outlook*. Table 1 – Major Economic Aggregates, Annual Growth (%), which contains a summary of key economic indicators for the State as follows:

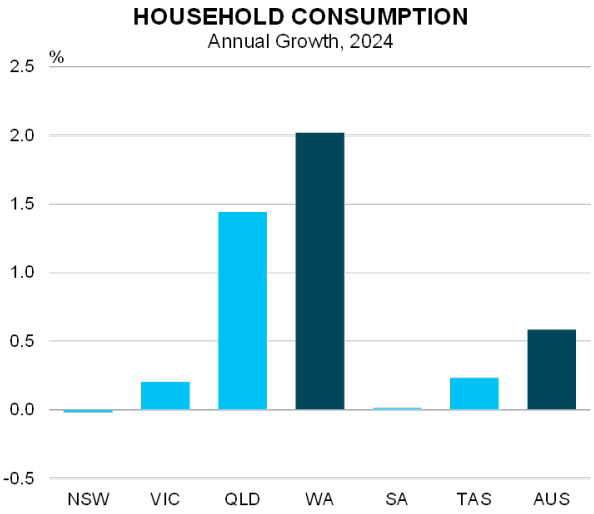
Table 1 – Major Economic Aggregates, Annual Growth (%)

	2023-24 Actual	2024-25 PFPS Forecast	2025-26 Outyear	2026-27 Outyear	2027-28 Outyear
State Final Demand	5.7	**3.75**	2.75	3.25	2.75
Gross State Product	0.5	**2.25**	2.5	2.5	2.0
Employment	3.8	**3.25**	1.75	1.5	1.5
Unemployment rate [a]	3.7	**3.5**	3.75	4.0	4.25
Consumer Price Index [b][c]	4.7	**2.75**	2.75	2.5	2.5
Wage Price Index [c]	4.2	**3.75**	3.5	3.0	3.0
Population [c]	2.8	**1.9**	1.8	1.8	1.7

(a) Data expressed as annual average during the financial year.
(b) CPI growth rates are based on the total index excluding the electricity sub-sector.
(c) Growth is expressed in year-ended terms.
Source: Western Australia 2024-25 Pre-election Financial Projections Statement and Australian Bureau of Statistics.

20 Both the Minister and UnionsWA noted that the Western Australian economy was ranked the nation's strongest in the most recent *CommSec State of the States* economic performance report. This report ranked Western Australia first in terms of retail spending, unemployment, population growth, housing finance and housing commencements.

21 Mr Christmas referred to household consumption, expected to grow by 2.5% over 2024-25, as did the s 50 parties, as remaining resilient, despite some easing from last year. A strong labour market, and wages growth, in conjunction with continued population expansion and surging house prices, has continued to underpin this resilience. Mr Christmas noted that whilst acknowledging some households have been challenged, the household consumption growth for Western Australia has far outpaced other States and the national performance, as reflected in the following bar chart at p 14 of Mr Christmas's presentation (Presentation):



Source: ABS

(a) Discretionary consumption includes 'transport services', 'cigarettes and tobacco', 'alcoholic beverages', 'clothing and footwear', 'communications', 'furnishings and household equipment', 'hotels, cafes and restaurants', 'purchases of vehicles' and 'recreation and culture'.

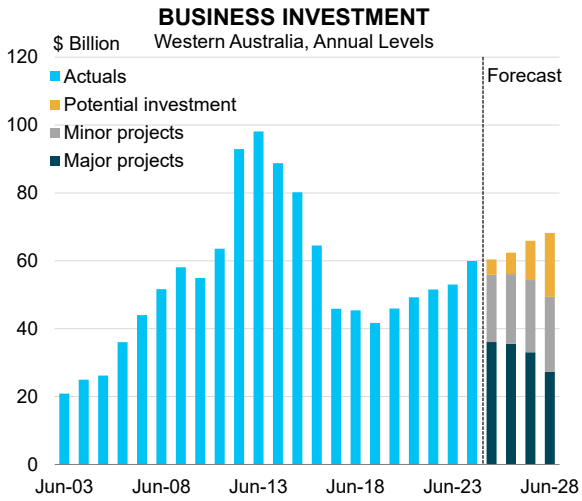
(b) Non-discretionary consumption includes 'food', 'rent and other dwelling services', 'electricity, gas and other fuel', 'health', 'operation of vehicles' and 'education'.

22 Retail spending is also elevated, with Mr Christmas noting a recovery for the March quarter this year, which represents about 30% of household consumption. Retail spending increased by 1.9% in the March quarter 2025, and by 2.9% in year-end terms, as reflected in the following chart at p 15 of the Presentation:

Source: ABS

23 In addition, recent falls in interest rates, Commonwealth Government income tax cuts and budget measures to ease the cost of living, will likely provide some further stimulus to household consumption and discretionary spending.

24 Both business investment and dwelling investment remain robust. Whilst the very strong growth of 12.7% over 2023-24 has eased, business investment has consolidated at a high level. This is supported by a pipeline of projects in the resources sector, along with non-mining infrastructure development. Increasing decarbonisation will also contribute to an increase in this investment. This investment profile is shown in the following bar chart at p 20 of the Presentation:



Source: ABS & Department of Treasury

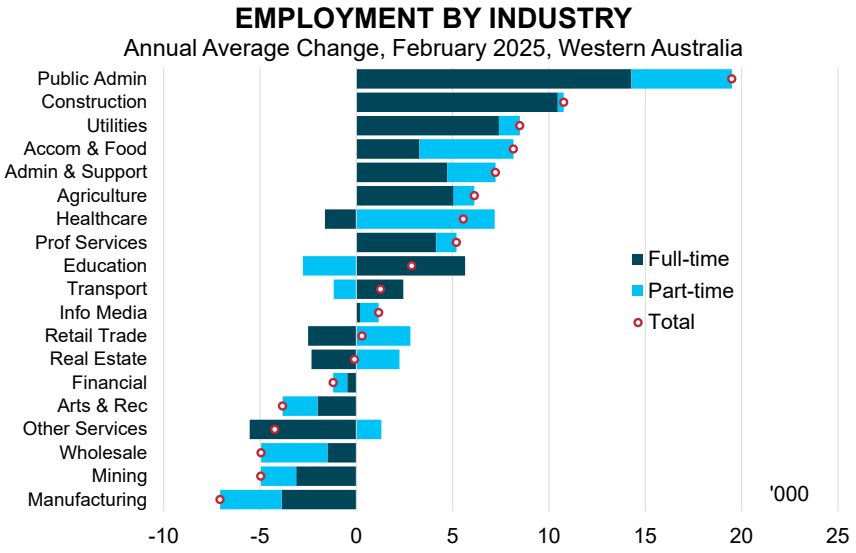
25 In the *ABS, Private New Capital Expenditure and Expected Expenditure, Australia March 2025*, released on 29 May 2025, Western Australia had the highest level of capital investment of any State and Territory for the year to the March quarter 2025, with growth of 5.8%. In all other States and Territories, except New South Wales (3.9% increase) and the Australian Capital Territory (0.4% increase), capital expenditure declined over the same period. Western Australia was one of only three States and Territories to show positive growth in business investment (an increase of 2.1%) over the March quarter 2025.

26 As in the ***2024 State Wage Case***, the CCIWA emphasised in its submissions, that the Western Australian economy is overly reliant on the resources sector, which accounts for nearly 50% of the Gross Value Added to the State economy (see chart at [87] below). In this respect, it was contended that this sector is cyclical in nature. In particular, the CCIWA referred to the current tariff and trade issues between the United States and China, and the risk to the outlook if China's economy suffers a slowdown, given that it accounts for approximately 53% of the State's exports. As to these trade tensions, in its reply submission, UnionsWA referred to modelling undertaken by the Commonwealth Treasury, concluding that the direct and indirect effects that any tariffs may have on the Australian economy would be modest. Similar views have been expressed by the RBA in its *Minutes of the Monetary Policy Board Meeting, 1 April 2025*. For these reasons, UnionsWA contended that domestic factors are more relevant to take into account.

27 Mr Christmas also said the risk of the current United States trade policy and tariffs, in terms of the direct impact, is seen as relatively minimal. There may be an indirect impact on China, if its exports are substantially curtailed, which may have an effect on embodied imports from Western Australia. Also, lower global growth may decrease demand for commodities. A notable effect of this is a falloff in confidence impacting on both household spending and business investment. Mr Christmas however, referred to mitigating measures that China may take, including policy stimulus, to boost its domestic economy.

28 The strength in the labour market, evident at the time of the ***2024 State Wage Case***, continues. As at March 2025, there were approximately 1.64 million people employed in the State, with the rate of growth in employment of 3.3% in annual average terms to April 2025. All parties acknowledged the strong labour market performance in their submissions. Unemployment has averaged 3.7% to April 2025, well below the State's long run average rate of 5.9%. Mr Christmas noted that as opposed to prior years, over the last year, employment growth has been principally full-time, reflecting growth of 4% to April 2025. On the other hand, part-time employment has grown by 1.8% over the same period. Employment is forecast to grow by 3.25% in 2024-25, moderating to 1.75% in 2025-26, consistent with easing in domestic economic growth over the same period. The participation rate has also remained elevated over 2024-25, with Mr Christmas noting a record level of female participation in the labour market.

29 The following chart, at p 29 of the Presentation, shows employment growth by industry sector. Notably, strong growth has been evident in public administration, construction, utilities, accommodation and food services, and administration and support:



Source: ABS

30 Despite the strength in the labour market overall, the rate of growth in wages in Western Australia has eased over 2024-25. In the year to March 2025, the WPI has increased by 3.7%. This is a fall from the peak of 4.7% in the December quarter 2024. A number of public sector industrial agreements coming into effect contributed to the March quarter WPI growth. The WPI is forecast to grow by 3.75% for 2024-25 and settle somewhat lower at 3.5% for 2025-26 and 3% for 2026-27. Mr Christmas noted however, that with easing inflation, there has been real wages growth over the year to 31 March 2025, and real growth is forecast for the period ahead.

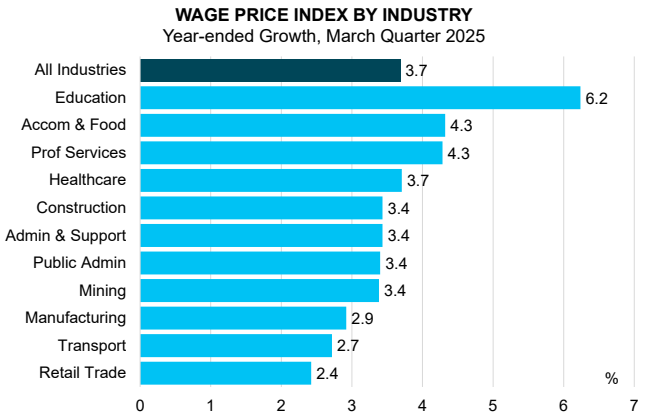
31 As further measures of earnings growth, Average Weekly Ordinary Time Earnings grew by 2.3% in the 12 months to November 2024, and Average Weekly Earnings grew by 3.2% over the same period. Comparing wages growth generally, with inflation as measured by the CPI (excluding the electricity sub-component), inflation outstripped wages growth by a large margin in the period of high inflation during the pandemic over the March quarter 2022 to the March quarter 2023, only achieving parity or gains in some quarters from September 2023, as reflected in the following table in the Minister's submission at p 12:

Table 2: Annual growth in CPI and WPI – Western Australia[19]

	Mar 2022	Jun 2022	Sep 2022	Dec 2022	Mar 2023	Jun 2023	Sep 2023	Dec 2023	Mar 2024	Jun 2024	Sep 2024	Dec 2024	Mar 2025
CPI	6.2	7.2	8.5	8.6	5.9	5.0	4.8	3.9	4.2	4.7	4.1	3.5	3.4
WPI	2.2	2.7	3.3	3.6	4.1	4.2	4.6	4.7	4.2	4.2	3.5	3.3	3.7

32 It was also contended by the CCIWA that wages growth figures, such as the WPI, do not capture other forms of remuneration, such as bonusses, sign-on and retention payments etc, used in a tight labour market to attract and retain employees. Whilst this is no doubt so in areas of peak demand, as was observed by the Commission in the ***2022 State Wage Case*** [2022] WAIRC 00273; (2022) 102 WAIG 431, and again in the ***2024 State Wage Case***, we have some doubts as to whether these incentive payments would be a common feature of pay for award reliant employees in the State industrial relations system. This was a point noted by the Minister in her reply submissions. In relation to superannuation contributions, and the increase of 0.5% which is to take effect from 1 July 2025, also raised by the CCIWA, as the Commission has said on prior occasions, such an increase will have a moderating influence on the outcome of SWO proceedings, as it will on this occasion.

33 Wages growth by industry sector was also the subject of evidence from Mr Christmas and the following chart shows wages growth exceeding 3.5% by industry. Those noted in particular include education, accommodation and food services, professional services, and health care and social assistance (see p 38 of the Presentation):



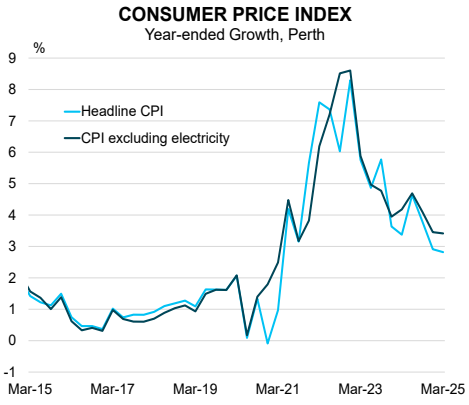
Source: ABS

34 Consistent with this trend, UnionsWA referred to wages and salaries growth as reflected in the Australian Bureau of Statistics aggregate salaries and wages from the Single Touch Payroll data. This demonstrates that Western Australia, as at December 2024, had the largest increase in wages and salaries of all States and Territories. Additionally, the Single Touch Payroll data provides some indication of changes in payroll jobs for the same period, which reflects that Western Australia had the second largest increase in the number of payroll jobs, with Queensland being the largest.

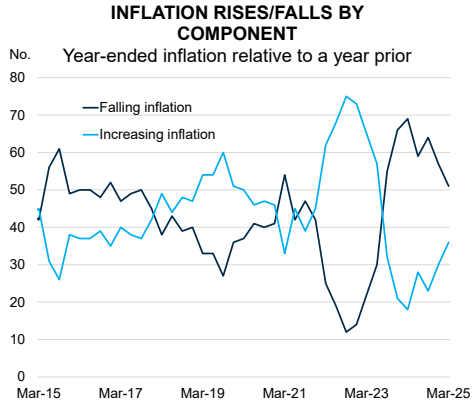
35 Business confidence, as reflected in the CCIWA *March 2025 Business Confidence Survey*, has improved by 2.5% from this time last year, and the CCIWA notes it has reached its highest level overall since December 2021. However, it has yet to return to pre-pandemic levels, being 4.7% lower. Volatility caused by the United States tariff and trade disputes, is weighing on the outlook and the CCIWA contended this is consistent with the recent *NAB Monthly Business Survey – April 2015*. This sees confidence slipping into the negative. Significant increases in business operating costs, along with labour shortages, are translating into outlooks, both short term and longer term, as being either about the same or weaker, across both metropolitan and regional areas.

36 For the purposes of a measure of inflation in the State economy, the Commission has accepted, and continues to do so, that the CPI, less the electricity sub-component, which removes volatility caused by recent State Government household electricity credits, is the preferred measure. On this basis, inflation has been moderating from its peak of 8.6% in the December quarter of 2022. Growth in inflation to March 2025, in year-end terms, is 3.4% (excluding the electricity sub-component). This is down from 4.7% (excluding the electricity sub-component) for 2023-24. The forecast is for the CPI (excluding the electricity sub-component) to reduce to 2.75% for 2024-25 and 2025-26, and to moderate further to 2.5% for the next two years, as population growth and housing costs ease.

37 Price pressures on employees and on small businesses were referred to by the Minister in her submissions, which has placed pressure on both households and on business margins. Both UnionsWA and the WACOSS emphasised the impact of the rising cost of living on the low paid. These impacts will be dealt with in more detail below when considering the factors of fairness, living standards and the needs of the low paid. The fall in both headline and underlying rates of inflation, and the spread of components in the 'CPI basket', were referred to by Mr Christmas in his evidence. He noted that of the 87 components, more than 50 of them have reduced rates of inflation. Of those which remain elevated, new housing in particular, remains high, but is easing. Both the CPI rates and the reduction in components of the CPI are set out in the following chart at p 42 of the Presentation:



Source: ABS



Source: ABS & Department of Treasury

38 Mr Christmas observed that the forecast fall in inflation for this State, is broadly consistent with the Commonwealth Budget and RBA trimmed mean projections for inflation for 2024-25 and the out years.

39 In response to the easing in inflation, the RBA has cut the cash rate by 0.25% at its February and May 2025 Board meetings, reflecting confidence that the rate of inflation will sustainably remain within the RBA's target range, although achieved somewhat earlier than expected. Whilst sounding a note of caution in relation to the impact of higher tariffs imposed by the United States, in its *Statement on Monetary Policy – May 2025*, the RBA said by way of overview:

> In Australia, inflationary pressures have continued to ease, and both headline and underlying inflation are within the 2-3 percent range. The unemployment rate has remained steady and employment growth has remained firm, but the pickup in household consumption seems to be a bit softer than previously expected. The global economic outlook has worsened following the introduction of higher tariffs by the United States and a significant increase in uncertainty related to trade policy. This is expected to weigh on Australia's domestic activity and inflation in the forecast period, slowing the pickup in GDP growth a little while inflation returns sustainably to around the midpoint of the target.
>
> The Monetary Policy Board judged that the risks to inflation had become more balanced but that the outlook is uncertain and depends heavily on unpredictable developments in global trade policy. Against this backdrop, the Board decided to lower the cash rate target by 25 basis points to 3.85 percent.

40 In terms of the national economic outlook, to the extent relevant, in the Commonwealth Budget 2025-26, growth as measured by Gross Domestic Product, grew by 2.3% over the calendar year 2023 and by 1.4% over 2023-24. Forecast growth for 2024-25 is 1.5% and 2.25% for 2025-26. As to the labour market and inflation, in the *Economic and Conditions Outlook* it is stated at p 8:

> The national labour market is expected 'to remain robust over the period ahead', and although employment growth is expected to moderate, the unemployment rate is forecast to peak at a historically low level of 4.25%. Although nominal wage growth has eased, and is forecast to increase by 3.0% in 2024-25, it is projected to pick up progressively to 3.75% over the forecast period and so 'to remain above pre-pandemic rates'. Consumer price inflation is projected to decline to 2.5% in 2024-25, and to remain within the Reserve Bank of Australia's (RBA) 2-3% target range over the forecast period.
>
> The Commonwealth Budget highlights that the strong labour market conditions and moderating inflation have led to five consecutive quarters of annual real wage growth. Annual real wages are forecast to grow by 0.5% in 2024-25, with positive real wage growth forecast in each year of the Budget period.

41 The CCIWA made particular reference to productivity in its submission. In reliance on both Productivity Commission research and RBA *Statements of Monetary Policy*, the CCIWA contended that consistently weak productivity performance in the Australian economy is a risk to the inflation outlook, as recognised by the RBA in its *Statement of Monetary Policy February 2025 – 3.3 The Domestic Outlook.* The CCIWA contended that unit labour costs, as a function of labour productivity, is a critical factor for firms' pricing decisions, and in turn, inflation.

42 CCIWA emphasised the importance of productivity growth in improving standards of living, and it being necessary to sustain real wages growth to avoid fuelling inflation. On the basis of Australian National Accounts data, CCIWA referred to increases in unit labour costs of 4.7% over the year to December 2024, as a result of increases in nominal wages growth and subdued productivity growth. It was contended by the CCIWA in its initial and reply submissions, that productivity growth remains weak, and for the year to December 2024, it has fallen by 1.1% returning to 2018-19 levels. According to the RBA *Statement of Monetary Policy May 2025 – 3.5 Detailed Forecast Information*, as noted by the CCIWA in its reply submissions, labour productivity will not reach its long run average of 1.2%, but is forecast to remain below it, at 1.0% by December 2026. The CCIWA emphasised that this is of sufficient concern to the RBA, that it is identified as one of three key risks to the Australian economic outlook.

43 It was also noted in the CCIWA submission that the Fair Work Commission, in the ***Annual Wage Review 2022-23*** [2023] FWCFB 3500 and the ***Annual Wage Review 2023-24*** [2024] FWCFB 3500, recognised the desirability of minimum award wages maintaining their real value, consistent with the trend rate of growth in productivity, and the moderating impact of low productivity growth on increases in minimum wages, significantly above the rate of CPI. This was said by the Fair Work Commission, but we should add that in the ***Annual Wage Review 2023-24*** decision at [154]-[155], it qualified this principle, as being subject to the particular circumstances of each annual review proceeding. In that decision of the Fair Work Commission, of particular importance was the cost of living pressures experienced by low paid modern award reliant employees, as was also a significant factor in the Commission's ***2024 State Wage Case*** decision.

44 UnionsWA took issue with the CCIWA's contentions in its submissions in relation to productivity. It submitted that long run productivity, leaving aside the 'COVID-19 productivity bubble' over 2020-22, sits just above the pre-pandemic trend average. Reference was made to the RBA *Statement on Monetary Policy – February 2025*, to the effect that labour productivity is expected to reach its long run average rate over the next two years, with a rebound in multi-factor productivity. We note the above however, at [42]. The RBA observed at p 55 of its *Statement*:

> **Labour productivity growth is assumed to pick up gradually over the next two years but to be weaker than previously anticipated; there is significant uncertainty around the longer term outlook.**
>
> The strength in non-market sector employment growth has had a small drag on measured aggregate productivity growth in recent years, given sectoral differences in measured productivity. This effect is likely to continue. However, the health care industry is also drawing labour predominantly from lower productivity jobs in the market sector, which is likely to be muting the overall drag on aggregate productivity (see Box C: Health Care Employment and its Impact on Broader Labour Market Conditions). Productivity growth is expected to pick up to reach its long-term (excluding the pandemic) average rate. The forecasts assume multifactor productivity (MFP) growth will rebound over the next couple of years, which would be consistent with increased rates of technology adoption, improved reallocation of labour between low- and high-productivity firms, improved labour quality and improved quality of job matching. However, there are risks to the outlook for productivity that could have implications for growth and inflation outcomes (see Key risk #3, below).

45 The RBA identified the issue of weak productivity growth as one of three risk factors over the forecast period. As to this, the RBA went on to say:

> **Key risk #3 – Weak productivity growth could be more persistent than expected.**
>
> Our forecasts for output and hours worked currently imply that labour productivity growth returns to longer run average annual rates of around 1 per cent by the end of the forecast period, driven by strong growth in MFP. This is higher than rates observed over the five years leading up to the pandemic, a time in which labour productivity and MFP grew by

around 0.5 per cent per year. If this does not eventuate, the supply capacity of the economy will grow more slowly over the forecast period than currently expected.

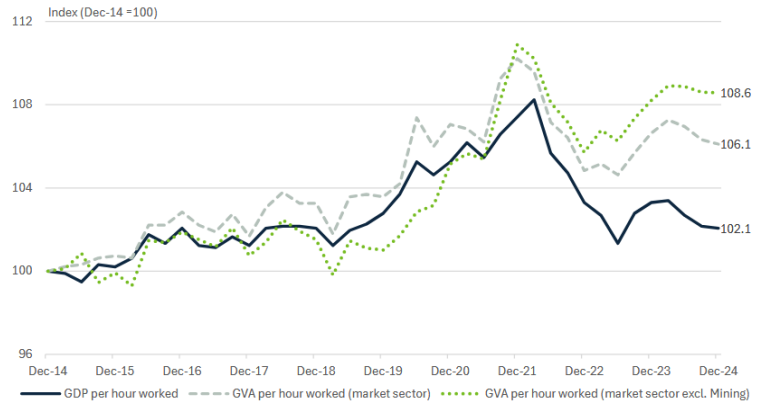
The implications for inflation are somewhat uncertain and depend crucially on how the economy adjusts to this lower rate of productivity growth. If the growth of aggregate demand and of wages adjust quickly to this slower growth in the supply side of the economy, there will be limited inflationary effects and the implications for monetary policy will therefore also be limited. However, if demand and wages adjust slowly, there may be additional inflationary pressure.

Noting the challenges around predicting trend productivity growth, we are examining international and domestic evidence to consider whether the weak productivity outcomes are more structural and/or persistent than assumed.

46 In relation to the above, UnionsWA submitted that consistent with the RBA analysis, the rising share of non-market employment, has led to challenges in productivity measurement and the possible underestimation of productivity growth in the non-market sector. Further, in referring to other research, difficulties arising in measuring outputs to meaningfully assess productivity performance in areas such as health care, may overstate the supposed drag on productivity performance by this sector. In relation to this, UnionsWA contended, citing research by the Productivity Commission, that parts of the health care sector have experienced robust productivity growth in recent years (see Productivity Commission *Advances in measuring Healthcare productivity* – Research Paper April 2024). In addition to these matters, UnionsWA also noted that it has been recognised that the mining industry in particular, has experienced negative productivity growth in recent years, placing a further drag on aggregate productivity performance (see Westpac IQ *Australian National Accounts* Report 30 October 2024).

47 In this regard, UnionsWA in its reply submissions, referred to a Fair Work Commission *Statistical Report – Annual Wage Review 2024-25* (Report, 24 April 2025), which tracked productivity indexes over a 10 year period from December 2014 to December 2024, as follows:

Chart 2.1: Measures of productivity, indexes—Dec-14 = 100



48 It was contended that the trajectory of productivity growth is very different when mining is removed from the market sector index. Given this sector is not directly impacted by the SWO, UnionsWA submitted that productivity performance should not be a moderating factor in the Commission's consideration of the SMW and minimum award wages. Allied to this, on the basis of an uptick in business investment in Western Australia, which grew by 12.7% in 2023-24, including non-mining capital investment growth of 15.9% in the December quarter 2024, UnionsWA contended that there is a basis to be optimistic in relation to the productivity outlook.

49 These issues were taken up in part by Mr Christmas in his presentation. He noted the measurement difficulties in using multi factor productivity, when trying to make short term estimates. This results from variations in capacity utilisation, re-allocation of capital and labour, economies of scale and measurement error. Given these limitations, Mr Christmas noted that multi factor productivity is best used for long term trends of at least five years. Experimental estimates of both multi factor productivity and labour productivity have been produced by the ABS at the State level, for the market sector, but not the total economy. Areas such as health, education and public administration are not included. Using this data set, for both 2023-24 and for the past five years, Mr Christmas presented the following table:

Market Sector Productivity Growth
State level experimental measures

	Multifactor Productivity		**Labour Productivity**	
	2023-24 %	Past 5-years %	2023-24 %	Past 5-years %
New South Wales	1.6	0.6	3.3	1.1
Victoria	0.1	0.2	1.1	0.9
Queensland	0.1	0.6	-1.0	0.1
South Australia	0.3	1.4	1.2	1.5
Western Australia	**-2.3**	**0.0**	**-0.5**	**-0.3**
Tasmania	2.8	0.5	6.3	0.5
Northern Territory	6.4	2.1	10.3	3.1
Australian Capital Territory	4.4	1.7	6.6	2.0
Australia	**0.1**	**0.5**	**1.1**	**0.7**

Source: ABS

50 Whilst at first blush these figures suggest that at the State level, which is the requirement specified in s 50A(3)(b) of the *Act*, productivity growth for Western Australia has been lower than that nationally, using both measures of multi factor productivity and labour productivity, Mr Christmas also referred to an important qualification to these productivity measures. The qualification is that for the mining industry nationally, as noted in the research referred to by UnionsWA, multi factor productivity has declined by 1.9% over the last five years. Given this sector represents about 50% of the Western Australian economy, removing it from the multi factor productivity measure of 0% for Western Australia for the last five years, a relevant consideration for the industry sectors in the State industrial relations system, would lead to a positive growth result. The quantum of that growth figure is however unknown.

51 The assessment of productivity contributions to the performance of the State economy is complex and difficult. This is particularly so as the majority of the data is reported on a national basis. Continued robust business investment in the non-mining sectors in the State economy is a positive factor. Given the material provided by Mr Christmas, that the market sector in the State economy, excluding mining, has had positive productivity growth over recent years, and the RBA assessment that trend productivity is expected to pick up over the next two years, there is some scope to be less pessimistic in relation to the State's productivity performance, than suggested by the CCIWA. However, as recognised by the RBA, there are risks to the outlook, and uncertainty remains.

52 The Commission invited further written submissions from the parties in relation to the terms of s 50A(3)(b) of the *Act*, in relation to the obligation on the Commission to have regard to the likely effect of its decision on productivity in Western Australia. Both the Minister and UnionsWA made further submissions. Section 50A(3)(b) does not expressly require the Commission to consider current trends in productivity. However, to the extent that current productivity trends play a part in the state of the economy of Western Australia, productivity trends will be relevant. Further, as the Minister submitted, it would be all but impossible to consider the effect of the decision on the economy, without also considering current productivity trends.

53 Referring to the International Labour Organization's 2025 Report *Economic factors for wage setting* and other publications, UnionsWA submitted that empirical studies support the conclusion that wage increases may lead to higher levels of productivity by boosting employee motivation, reducing turnover and encouraging skills development and organisational change. At the same time, UnionsWA submitted that the effect of this year's SWO on Western Australia's aggregate productivity would be neutral, with either unidentifiable or slightly positive effects at the enterprise level.

54 The Minister noted that measuring the impact of the SWO on productivity is inherently difficult. The Minister submitted that theoretically a 'significantly large' increase in wages could lift productivity, while a 'low' increase could reduce productivity by encouraging more employment with the same overall output. As with UnionsWA, the Minister submitted that a sustainable increase in wages is unlikely to have any significant impact on productivity levels in Western Australia, given the limited impact the SWO has on aggregate wages growth in the State.

Fairness, living standards and the needs of the low paid (ss 50A(3)(a)(i) – (iv))

55 In the ***2022 State Wage Case***, the Commission observed at [56]-[57] as follows:

> [56] In assessing what are fair wage standards in the context of living standards generally, and the requirement to consider contributing to improvements in living standards, for the purposes of both s 50A(3)(a)(iii) and (iv), this invites consideration of changes in the cost of living to date and how any increase in the SMW may improve living standards for the future: ***2021 State Wage Case*** at [61]. There has been a particular focus in this year's proceedings on the cost of living in the context of meeting the needs of the low paid under s 50A(3)(a)(ii).
>
> [57] It was accepted in last year's ***State Wage Case*** that the meaning of 'meeting the needs of the low paid' broadly corresponded to the similar criterion in s 284(1)(c) of the *Fair Work Act 2009* (Cth). This involves enabling low paid employees to purchase the essentials to have a decent standard of living, so they can participate in the community: at [70] to [71]. None of the submissions made this year took any issue with this approach.

56 We affirm those views for the purposes of these proceedings.

57 As in recent SWO proceedings in the ***2023 State Wage Case*** [2023] WAIRC 00330; (2023) 103 WAIG 733 and the ***2024 State Wage Case***, the cost of living and the impact of increases in living costs on those paid the SMW and award reliant employees, was placed in sharp focus on this occasion also.

58 We accept, as the Minister submitted, that award reliant employees are paid substantially less than those employees paid under other arrangements, such as collective agreements and individual arrangements, a point also made by UnionsWA in its submissions. We accept also, and no party asserted to the contrary, that low paid award reliant employees depend on increases arising from SWO cases to assist in meeting their living costs.

59 In its submissions, the WACOSS focussed on the impact of the rising cost of living on the low paid. At p 5 of its written submissions, the WACOSS said:

> *High inflation post-COVID has hit low-income households more harshly, rapidly deteriorated their financial security and exacerbated inequality. While inflation has eased in the last 12 months, the cost of many essential items remains high and continues to increase significantly.*
>
> It has been well established in previous State Wage Cases and broad economic analyses, that the cost of essential goods and services increased substantially between 2021 and 2024, outpacing wage growth. Australia's Consumer Price Index (CPI) has increased by 23.2 per cent since the beginning of the COVID-19 pandemic. Between 2021 and 2023, insurance prices rose 22.6 per cent. Between 2020 and 2024, rents in Greater Perth increased by almost 80 per cent. Over the last five years, grocery prices rose by 24 per cent, increasing at more than double the wage growth rate in early 2023. Between June 2021 and September 2023, real wages growth was negative. This means while the Wage Price Index (WPI) and CPI are now more closely aligned, wages have much catching up to do to restore their previous purchasing power. This is reflected in recent analysis conducted by Bankwest Curtin Economic Centre which projects that "*making up this*

lost purchasing power will require wages to grow at a rate at least 1 percentage point above prices consistently until at least September 2027".

60 Housing costs was a particular focus of the WACOSS submissions, also emphasised by UnionsWA. As the largest expense for a low income household, with the steep rise in rental costs in Perth, most rental properties are now out of the reach for this cohort of employees. For a single person on the SMW, only 0.3% of listed rental properties available in mid-March 2025 were affordable. For a couple with children, both on the SMW, only 4% of properties were affordable. With rents in Perth having increased by 6.3% over the last year based on the CoreLogic *Quarterly Rental Review*, and with a median weekly rental now at $710 per week, UnionsWA noted that Perth is now the second most expensive city in which to rent, apart from Sydney. Both UnionsWA and the WACOSS referred to last year's increase in the SMW and minimum award wages, as having now been eroded by the subsequent increase in living costs.

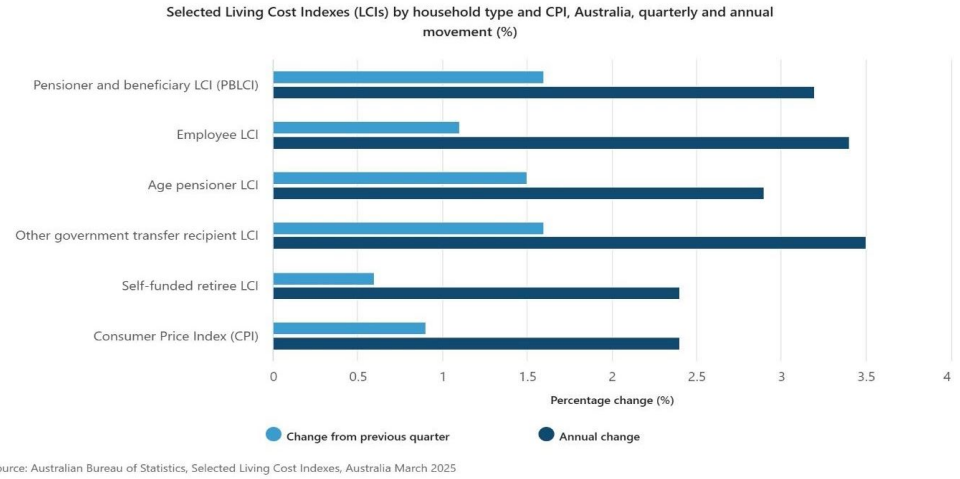
61 According to the *WACOSS 2024 Cost of Living Report*, which models the financial circumstances of a low income family of a couple and two children, whose income is typically derived from wages and government support payments such as Family Tax Benefit payments, for the first time in 2024, their expenses exceeded their income by $60.77 per week. The WACOSS submission also noted increasing access to emergency financial relief and food charities by employees on incomes of between $40,000 and $60,000 per annum, which includes employees on the SMW and those paid the C10 classification minimum award rate of pay.

62 In support of its position in relation to an increase in the SMW, the WACOSS placed considerable emphasis on the lived experience of employees on low wages. In conjunction with Murdoch University, the WACOSS research project *Living Realities: Understanding Life on Low Income in WA*, depicts the life experience of eight people on low incomes, in various living situations. Three of the eight were referred to in the WACOSS submissions, they being 'Heather', 'Anita' and 'Andy' (not their real names). The three are different ages and genders, two are parents, one is a homeowner and two are renters. All three individuals are on low incomes and receive income support. Two of the individuals are paid about the rate of the SMW, and the third is paid a combination of a casual employed rate, and student support payments.

63 We have considered carefully the content of these case studies. They have been impactful and are of assistance in gaining an insight into the challenges facing low income employees, and the consequences for individuals in different living circumstances. The WACOSS emphasised some of these consequences, especially for women and younger people, of employment in low paid occupations. This includes financial insecurity, negative health impacts of being deprived of basic needs essential for good health, and social exclusion. In relation to social exclusion, we refer to what was said by the Commission in Court Session in the ***2022 State Wage Case***, cited above at [55].

64 As in the ***2024 State Wage Case***, both the Minister and UnionsWA placed significant emphasis on escalating food prices and the impact, along with housing and other essentials, on the after tax incomes of low income households. The ABS *Selected Cost of Living Indexes*, measure the change in price for goods and services for various household types. They reflect purchasing power over time. The Employee Living Cost Index is the most relevant for present purposes. For this group, the LCI rose by 3.4% over the year to March 2025 and by 1.1% in the March quarter 2025. The LCIs set out at figure 13 in the Minister's submissions on p 23 are as follows:

Figure 13: Selected Living Cost Indexes by household type and CPI, Australia, March 2025



Source: Australian Bureau of Statistics, Selected Living Cost Indexes, Australia March 2025

65 The Minister noted that the 3.4% increase to the March quarter 2025 for employee households reflected in the Employee LCI was considerably less than the 6.5% increase over the period to the March quarter 2024, as noted at [59] of the decision of the Commission in the ***2024 State Wage Case***. Whilst the Minister also observed that the increase in the LCI is greater than the headline rate of CPI growth for Perth to the March quarter 2025 of 2.8%, it is to be noted however, that it is the same as the 3.4% increase in the CPI for this period, excluding the electricity sub-component.

66 It is to be accepted, as was submitted by UnionsWA in its submissions, that in terms of consumption as a share of income, the low paid spend disproportionately larger amounts of income on housing and food than higher income households. It logically follows, as submitted by UnionsWA, that substantial increases in rent occurring in Perth over recent years, will have the effect of constraining available income for other categories of expenses, as a result of meeting housing cost needs.

67 Whilst accepting that the LCIs are a useful measure of changes in costs of goods and services over time, in relation to different household types, as noted above, the Commission maintains the view, as urged by the CCIWA in its reply submissions, that the CPI remains its preferred measure of overall changes in the cost of living.

68 An issue of focus by UnionsWA in its submissions in this year's proceedings, was the relative decline in real wages over the period since 2021, and its impact on the low paid and their capacity to meet increases in living costs. It was contended that having regard to the decisions of the Commission in the ***2021 State Wage Case*** [2021] WAIRC 00173; (2021) 101 WAIG 459, through to the ***2024 State Wage Case***, and deflating the increases awarded in those decisions by the CPI for Perth, shows a decline of 3.2% from a peak in June 2020. Using the CPI excluding the sub-index, a decline of 4.92% is apparent. Adopting an alternative method of deflating a SWO increase from the date of its effect on 1 July each year, has led to a real wage decline of 4.65% and 4.95% respectively.

69 In relation to the SMW, UnionsWA contended that there has been modest growth over recent years but when the sub-index is excluded, there has been a fall of 2.14% from a peak in June 2020. Adopting the alternative method of deflating the SMW from 1 July each year, it was contended that over the period 2021-2024, the SMW has declined by 1.66% and 1.96%, when excluding the sub-index. The overarching submission of UnionsWA was that notwithstanding a real increase in award wages in 2023, and real increases in the SMW in 2023 and 2024, overall, SMW and award reliant minimum wage earners have experienced a real wage decline (see pp 20-22 UnionsWA submissions).

70 The CCIWA emphasised in its submissions, that compared to wage earners generally in the State, with wages growth measured against the WPI, those paid the SMW have received substantial wage increases, which means that the SMW has largely kept pace with inflation to 2024, as opposed to the WPI over the same period (see Figure 6 CCIWA submissions p 18). Using the WA Treasury forecast for 2024-25, the CCIWA contends that in this year's State Wage Case, wages growth would be positive for the SMW, with a small decline for wage earners generally. However, the CCIWA methodology, as noted by UnionsWA in its reply submissions, appears to have deflated the SMW by the year on year CPI growth figure over the ensuing year, presumably to reflect cost increases over the year that the increase in the SMW is in effect. Whereas the UnionsWA methodology, as noted in its reply submissions, in effect, reflects a 'catch up' of price increases, at the time the SWO takes effect.

71 UnionsWA acknowledged that the CCIWA approach is also valid. However, UnionsWA contended that if the base year of 2020-21 rather than 2021-22 is used, then given the very high inflation rate for the ensuing year, the CCIWA approach results in real growth of only 0.89% in the SMW over this total period. Another factor to note is that those employees paid the SMW, received the significant benefit of the re-alignment of the C14 to the C13 classification rate as the benchmark for the SMW, resulting from the ***2024 State Wage Case***. We would also add that whilst there has been some real increase in the SMW, relatively few employees are paid at that rate. Of more practical significance, are those who are paid minimum award rates of pay in award reliant industries.

72 Regardless of the methodology used, it is the case that with the significant increases in inflation over 2022-2024, minimum award wages have not risen in real terms over the period 2021-2024. This is acknowledged by the Minister in her reply submissions, and its impact on low income households is noted. This has impacted negatively on the ability of minimum wage increases to meet the needs of the low paid. The Minister also noted that with inflation now tracking lower, the opportunity exists for an improvement in wages for minimum wage earners, as long as this occurs sustainably, without risk to the State economy and the labour market.

73 The Commission has observed on prior occasions in SWO proceedings, that the needs of the low paid cannot be totally met by increases in the SMW and minimum award wages, a point noted by the CCIWA in its submissions. They are however, an important means to assist in meeting the needs of the low paid and contributing to improving their living standards. Targeted relief through the tax and transfer payment system is also essential in providing support for low paid employees. In this context, the CCIWA emphasised both State and Commonwealth Government budget measures, designed to assist in easing cost of living pressures, especially for low income households.

74 At the Commonwealth level, the CCIWA referred to the recent 2025-26 Budget delivered on 25 March 2025, which included cost of living measures such as the $150 energy bill supplement; changes to Medicare Low Income Thresholds to benefit lower income singles and families; reductions in the lowest income tax bracket from 1 July 2026 and 1 July 2027; and increases in other social security payments such as Rent Assistance, Job Seeker and Austudy payments. At the State Government level, the CCIWA also noted commitments to decrease public transport charges and increase payments to assist parents with children in public schools. It was also noted that the upcoming State Budget can be anticipated to provide further cost of living relief. UnionsWA contended that whilst there are also benefits to small businesses arising from the recent Commonwealth Budget, such as extending the instant asset write-off through to June 2026 and other measures, cost of living measures for households should not be taken into account by the Commission.

75 Undoubtedly, measures to ease the cost of living, especially for low income households, delivered by the Commonwealth and State Governments, will provide welcome relief. However, it would not be appropriate to moderate any increase in minimum wages, having regard to these considerations, a position also adopted by the Minister in reply. To do so would negate the intended effect of such measures. As the Commission said in both the ***2023 State Wage Case*** and the ***2024 State Wage Case***, one off cost of living measures implemented by Governments, whilst undoubtedly well received, are not a substitute for the continued beneficial effect of regular increases in minimum wages.

Protecting employees unable to reach an industrial agreement (s 50A(3)(a)(v))

76 As the Commission has observed over a number of years, industrial agreement making is almost non-existent in the industry sectors in the private sector State industrial relations system. There is a very high degree of award reliance in the industry sectors of accommodation and food services, and retail trade. Accordingly, as submitted by the Minister and UnionsWA, for

those in the State system who are primarily award reliant, fair and sustainable wage increases will serve to protect this group of employees, given the absence of agreement making.

Encouraging ongoing skills development (s 50A(3)(a)(vi))

77 The Minister, as in prior State Wage Cases, has provided data from the Department of Training and Workforce Development, in relation to apprenticeships and traineeships in Western Australia to 2024. Both the Minister and UnionsWA noted a fall in apprenticeship commencements from 2023 to 2024, although by a marginal number. The peak number of commencements occurred in 2021 and 2022, with the introduction of Commonwealth wage subsidies, boosting numbers of apprenticeship commencements to an all-time high of 12,547. Whilst the number of apprenticeship commencements has eased to 10,927 for 2024, commencements still remain at a considerably higher level than the average rate of commencements over the period 2014-2020 of 7,437.

78 As for traineeships, along with apprenticeships, while the number of commencements rose steeply in the 2021 to 2022 period, there has been a sharp fall in numbers of commencements to 10,814 in 2024, from 19,264 in 2022.

79 Whilst the total numbers of apprentices in training increased somewhat from 2023 to 2024, reflecting an ongoing trend of increases in apprenticeships in Western Australia, the total number of trainees in training fell over 2023 to 2024. As a global figure, the total number of persons in training (both apprenticeships and trainees) reduced from 40,952 to 38,952 between 2023 and 2024.

80 UnionsWA contended that the fall in the total number of those in training, and in particular the falling overall entry rate into apprenticeships and traineeships, in total, most likely reflects cost of living pressures as a barrier to entry, acknowledged by the Minister in her reply submissions. It was submitted that increases to minimum wages, flowing on to apprentices and trainees, is therefore essential to encourage ongoing skills development.

81 Apprenticeship numbers remain at a considerably higher level than in the years prior to the pandemic. There is nothing to suggest that regular increases in minimum wages for apprentices have acted as a disincentive to apprenticeship commencements. Whilst the fall in traineeship commencements is notable, if, as UnionsWA contended, the falloff reflects increases in the cost of living over recent years, regular increases in minimum wages in a high cost of living environment, could only assist trainees in meeting their living expenses, and hence, their retention in the training system.

Providing equal remuneration (s 50A(3)(a)(vii))

82 The Commission is required, in making a SWO, to take into consideration the provision of equal remuneration. As noted by the Minister and the WACOSS, the gender pay gap in Western Australia has reduced from 21.7% to 20.2% in the year to November 2024. Average weekly ordinary time earnings for females grew at a faster rate than for males over this period. Whilst women in Western Australia earn the second highest average weekly earnings of all the States and Territories, as referred to by the Minister in her submissions, the reason for the large gender pay gap in Western Australia, is the relatively high AWOTE in this State, compared to others.

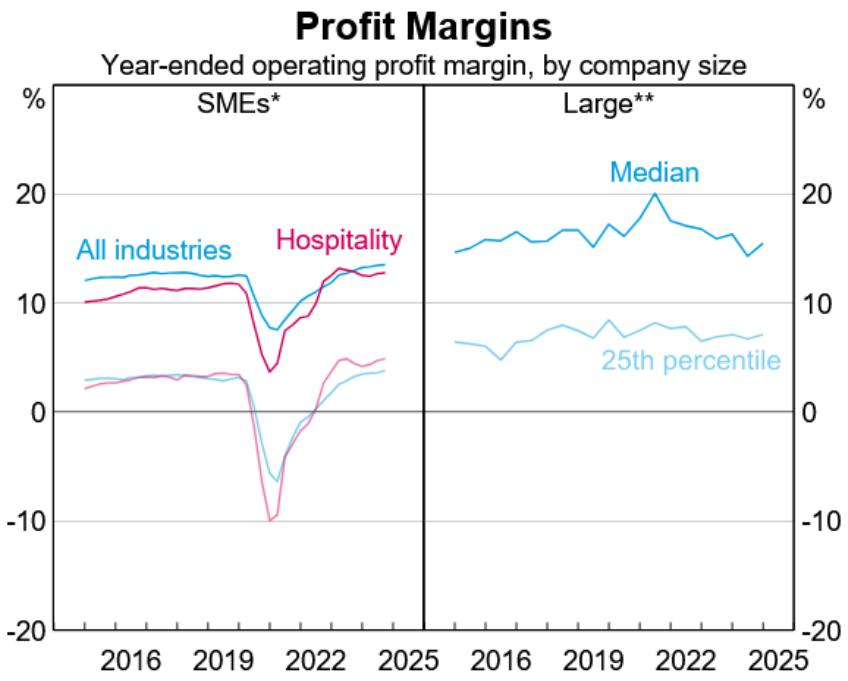
83 This latter point, as the Commission has observed previously, is partly a result of the compositional effect of greater numbers of male employees in higher paying industries such as mining and construction, in particular. Conversely, greater numbers of women are employed in lower paid, award reliant industry sectors, such as social assistance, retail, health care and accommodation and food services. This was also identified by UnionsWA and the WACOSS in their submissions. The CCIWA acknowledged the gender pay gap as a matter of ongoing concern for the community in its reply submissions.

84 Whilst the SWO proceedings of themselves are not able to address the underlying and complex reasons for the gender pay gap, the Commission continues to hold the view that sustainable increases in the SMW can contribute to reducing the gender pay gap. This appears to be confirmed by overseas research referred to by UnionsWA in its submissions.

85 As a result of the *Industrial Relations Legislation Amendment Act 2024*, a new object has been inserted into the *Act* in s 6(ac), which is 'to promote gender equality in the workplace through equal remuneration and eliminating gender-based under valuation of work'. Additionally, the Commission's *Statement of Principles – July 2024* contains *Principle 8 – Equal Remuneration for Men and Women for Work of Equal or Comparable Value*. This principle enables an application to be made to the Commission to 'implement equal remuneration for work of equal or comparable value', and operates in conjunction with the capacity for a range of persons to bring an application under Part II Division 3B of the *Act*, for an equal remuneration order. It is only in proceedings of that kind, that the complex issues of gender undervaluation of work can be properly considered, as in the recent decision of the Fair Work Commission in ***Gender-based undervaluation – priority awards review*** [2025] FWCFB 74.

Capacity of employers as a whole to bear cost increases in wages, salaries, allowances and other remuneration (s 50A(3)(d))

86 This factor is focussed on an assessment of the capacity of employers as a whole, to bear the costs of an increase in wages and conditions of employment. The circumstances of individual businesses cannot be considered. In the RBA *Financial Stability Review - April 2025 Report* at pp 26-27, the overall conclusion reached was that most businesses, including small businesses, remain profitable. There has been growth in overall small and medium size business profitability levels since the pandemic. This is despite ongoing cost pressures. The RBA noted however, that borrowing costs have reduced, as a result of the February and May 2025 reductions in the cash rate. Profitability has been achieved, although often by a decrease in operating costs. UnionsWA, in both its initial and reply submissions (at p 6 and p 9 respectively), referred to the following chart in relation to profit margins nationally, in the RBA *April 2025 Report* as follows:



87 As a proxy of business profitability for Western Australian industry sectors, the Commission regularly has regard to the ABS Gross Operating Surplus (GOS) and Gross Mixed Income (GMI) as contained in the Minister's submission. It is accepted, consistent with the CCIWA submissions, that this also reflects the dominance of the mining sector in the Western Australian economy. Table 5 in the Minister's submissions sets out the GOS plus GMI as follows at p 16:

Table 5: Gross Operating Surplus (GOS) and Gross Mixed Income (GMI) by industry, WA, current prices, 2023 and 2024[28]

Industry	GOS + GMI June 2023 ($m)	GOS + GMI June 2024 ($m)	Annual Increase ($m)	Annual Increase (%)
Agriculture, forestry and fishing	8,101	5,632	-2,469	-30.5%
Mining	181,379	172,044	-9,335	-5.1%
Manufacturing	8,559	8,701	142	1.7%
Electricity, gas, water and waste services	2,791	3,152	361	12.9%
Construction	6,805	8,463	1,658	24.4%
Wholesale trade	5,276	5,151	-125	-2.4%
Retail trade	4,773	4,976	203	4.3%
Accommodation and food services	2,344	2,165	-179	-7.6%
Transport, postal and warehousing	6,305	6,326	21	0.3%
Information media and telecommunications	1,884	2,011	127	6.7%
Financial and insurance services	9,349	9,494	145	1.6%
Rental, hiring and real estate services	3,583	3,696	113	3.2%
Professional, scientific and technical services	4,325	4,348	23	0.5%
Administrative and support services	857	687	-170	-19.8%
Public administration and safety	2,269	2,605	336	14.8%
Education and training	1,586	1,858	272	17.2%
Health care and social assistance	2,820	3,165	345	12.2%
Arts and recreation services	634	671	37	5.8%
Other services	1,973	2,105	132	6.7%
Total all industries	**275,108**	**269,898**	**-5,210**	**-1.9%**

88 This data shows that for 2023-24, whilst overall GOS plus GMI decreased by 1.9%, 14 out of 19 industries were profitable. The retail trade sector increased by 4.3%, while accommodation and food services fell by 7.6%. Health care and social assistance were up by a strong 12.2%, as were the services sectors generally, except for administrative and support services. Whilst accommodation and food services shows some easing in GOS plus GMI, this comes off a very high base for the corresponding result for 2022 and 2023, which revealed annual growth of 24.9% (see ***2024 State Wage Case*** at [73]).

89 As noted earlier at [29], employment growth has been very strong in the accommodation and food services sector, through to February 2025. Additionally, wages growth in accommodation and food services to the March quarter 2025, was the second highest of any industry of 4.3%, as set out at [33] above. These figures suggest a strong demand for labour in the accommodation and food services sector through to the end of the first quarter 2025. It also suggests that the lag data for GOS plus GMI for this sector, up to June 2024, in light of such strong performance in employment and wages growth, may not reflect the current position. Furthermore, recent reductions in the cash rate, with further expected in coming months, will likely assist in boosting discretionary spending in the economy, with industries such as accommodation and food services and retail likely to obtain some benefit.

90 As previously noted, the CCIWA referred to business confidence having improved as at March 2025, although rising cost pressures are noted as an area of concern. Rising costs, as reflected in the Producer Price Index, to March 2025 increased by 3.7%, an amount in excess of the rate of inflation. Interest rates and labour cost increases cited by the CCIWA as pressing issues, are contributing to a high level of small business insolvencies, as referred to earlier in these reasons. As noted earlier too, the WALGA also referred to significant increases in costs facing the sector over recent years, as reflected in the Local Government Cost Index, which measures changes in prices for a basket of items most commonly used in Local Governments.

91 The LGCI rose sharply with increases in the CPI over 2021-24. Costs have recently eased with growth of 3.2% over the year to December 2024. With rates increases being the main source of revenue raising, the WALGA submitted Local Governments need to balance any rates increases, as opposed to a reduction in services provided. Smaller councils face different pressures, through declining populations, leading to operating deficits.

92 UnionsWA suggested that the capacity of Local Governments to increase rates put them in a strong position to manage any cost increases as a part of budget management. However, rates increases, like price increases by small businesses, impose additional costs on households, especially in periods of elevated cost of living generally, a point noted by the CCIWA in its reply submissions.

93 As a cost to businesses, the CCIWA referred to recent variations to State awards and to the increase in the casual loading to 25%, consistent with the *Minimum Conditions of Employment Act 1993* (WA) and other changes to allowances in some awards as part of the award review process. It was contended that these should also be taken into account in the Commission's consideration. To a similar effect, the WALGA contended that recent variations to Local Government awards to increase wages, along with the increased casual loading, are relevant considerations.

94 This was not the view of UnionsWA, which submitted in its reply submissions that in the General Order proceedings leading to the change in the casual loading, the Commission noted the administrative savings to employers of not having to navigate the payment of casual loadings to employees at different rates for award covered employees, and the higher 25% loading payable under the *MCE Act*. This will be of some benefit to employers. According to UnionsWA, nor should recent changes to Local Government awards to increase wages be taken into account, as they were by consent. It was also noted by UnionsWA, and acknowledged by the WALGA in its submissions, that most Local Governments are covered by an industrial agreement, whether by way of a New state instrument under the *Act*, or separately negotiated. This means that any increase in minimum wages will have a minimal impact overall.

95 The Minister also noted in reply that variations to allowances in awards, and the increase to the casual loading, given the reasons for these changes, should not moderate any increase in minimum wages.

96 The casual loading increase to 25%, reflects the long standing casual loading in national system modern awards, and the change aligns the State casual loading to that applying in the national system. State system employers have had the benefit of paying a lower rate than national system employers since 2010. Allowances have been updated in some State awards, in circumstances where they have not been adjusted for many years, to reflect the current value of the relevant allowance. We do not think these changes should be taken into account as moderating factors in relation to any increase in minimum wages.

97 As to costs, the recent reduction in the cash rate in February and May 2025, will assist small businesses in the State industrial relations system. Also, whilst the CCIWA pointed to insolvencies as an issue, UnionsWA noted in its initial and reply submissions, that the RBA *Financial Stability Review – April 2025 Report* at p 26, observed that while insolvencies have risen sharply, as a percentage of total businesses, it is in relative terms, still a small number overall. Additionally, the RBA noted that the level of business insolvencies remains below the pre-pandemic trend.

98 Relevant also, is the RBA comment in the *April 2025 Report*, that the increase in levels of insolvencies reflects not just challenging trading conditions for some businesses, but also the unwinding of 'significant support measures introduced during the pandemic, including the Australian Taxation Office (ATO) resuming enforcement actions on unpaid taxes' (p 26). Also noted by the RBA, is the 'catchup effect', from the very low insolvency rate during the pandemic, a matter taken up by UnionsWA in its submissions.

99 Whilst neither business types nor industry sectors are identified, UnionsWA also referred to data published by the ABS in its *Counts of Australian Businesses, including Entries and Exits – 27 August 2024*. This reveals that for 2023-24, net growth in the number of businesses in Western Australia, rose to 8,698, compared to 6,384 for the year prior. This reflects growth of 3.5%, placing Western Australia first amongst the States and Territories, along with the Australian Capital Territory.

100 In light of the above, the Western Australian specific insolvency data referred to by the CCIWA, is a relevant consideration.

Decision of other industrial courts and tribunals (s 50A(3)(f))

101 Decisions of other industrial courts and tribunals are to be taken into account by the Commission in making a SWO. On 3 June 2025, the Fair Work Commission handed down its decision in the ***Annual Wage Review 2024-25*** [2025] FWCFB 3500. In its decision, the Fair Work Commission increased the NMW and all modern award rates of pay by 3.5% from 1 July 2025. Consistent with the Commission's approach in past years, the hearing resumed on 4 June 2025, to provide the parties with an opportunity to make submissions in relation to the Fair Work Commission's decision.

102 Whilst both the Minister and UnionsWA, as noted in their initial submissions, reaffirmed their positions that the Commission should award no less than the 3.5% increase determined by the Fair Work Commission, the Commission has previously said that it is obliged to have regard to specific factors relevant to Western Australia in s 50A of the *Act*, in setting the SMW and any increase in minimum award wages. The Fair Work Commission is required under the *FW Act* to have regard to the circumstances prevailing in the national economy, which involves consideration of disparate State and Territory economies, industry sectors and labour markets: ***2018 State Wage Case*** [2018] WAIRC 00363; (2018) 98 WAIG 263 at [230]-[232].

103 We reiterate what the Commission in Court Session said in the ***2024 State Wage Case*** at [124]:

Whilst the Minister urged the Commission to adopt the outcome of the Fair Work Commission's determination in its ***2023 - 24 Annual Wage Review***, there is no presumption that this will be the case, given that the Commission is required to balance all of the criteria in s 50A(3) of the *Act*, in coming to a decision, which are State focussed. The Fair Work Commission decision is a relevant consideration under s 50A(3)(f), amongst a number of others. If the Parliament intended s 50A of the *Act* to require the Commission to adopt the national decision, unless there is good reason not to do so for example, it would have made this express in the legislation. There will be occasions, as in the past, where the circumstances prevailing in Western Australia warrant a larger increase than that awarded nationally, and vice versa.

104 The Minister submitted that the Fair Work Commission paid particular attention to the needs of the low paid, and that the real value of modern award wages, as reflected in the C10 classification level, had reduced by 4.5% in real terms since July 2021. The Minister contended that a similar situation has occurred in Western Australia, with a decline in real wages over the period 2021 to 2025. Given the decline in inflation, the Minister referred to the Fair Work Commission's observations that the ***Annual Wage Review 2024-25*** presented an opportunity to grant a real wage increase for the low paid, which may otherwise be lost, with the reduction in the value of minimum award wages becoming entrenched in the award system.

105 The Minister also referred to the Fair Work Commission's acknowledgment of low productivity growth as being a moderating factor in its decision. On the basis of the decision of the Fair Work Commission to increase minimum rates by 3.5%, it was submitted that with the CPI for Perth at 3.4% (excluding the electricity sub-component), and with projected CPI of 2.75% for this financial year, an increase in the SMW and minimum award rates of 3.5% would be appropriate.

106 The CCIWA contended that the real impact of the Fair Work Commission decision was a 4% increase in the NMW and minimum award wages, when the 0.5% increase in superannuation contributions is included. The CCIWA also contended that contrary to the Fair Work Commission's conclusions, inflation remains a risk. As to business viability, the CCIWA noted the Fair Work Commission's observations in its decision that the accommodation and food services and retail sectors have experienced ongoing weakness at the national level.

107 The CCIWA also reiterated its concerns in relation to business insolvency levels in Western Australia. It was also contended by the CCIWA that the Fair Work Commission's conclusions as to the decline in real minimum award wages, does not reflect the position in Western Australia. Also of relevance, according to the CCIWA submissions, are the Fair Work Commission's conclusions in relation to declining productivity. In this respect, the CCIWA referred again to the RBA *Statement of Monetary Policy May 2025*, to the effect that labour productivity in the market sector has fallen to 2015 levels. It was contended that the Commission should take this into account in its decision, and a 2.5% increase to the SMW and minimum award rates remains appropriate.

108 A reduction in the real value of minimum award wages, resulting from the 'spike' in inflation, as found by the Fair Work Commission, equally applies to Western Australia, according to UnionsWA. Also, the decline in the relative living standards of the low paid, when compared to wage movements generally, as reflected in the WPI, is an important factor. This point, referred to in the Fair Work Commission's decision, is also relevant to Western Australia, with the WPI projected to be 3.75% for this financial year.

109 Given the 3.4% increase in the CPI for Perth (excluding the electricity sub-component) to the March quarter 2025, UnionsWA contended, as was the conclusion of the Fair Work Commission, that the Commission in Court Session should award a real increase in minimum rates of pay to restore their loss in value, which would have a minimal effect on the rate of inflation and the competitiveness of small businesses. In the circumstances prevailing in Western Australia, UnionsWA contended that the Fair Work Commission's increase of 3.5%, should be seen as a floor, and its claim of a 4.5% increase in the SMW and minimum award wages, would provide relief for low paid employees, so they are not left behind.

110 The WALGA contended that while it supports a balanced increase in the SMW and minimum award wages, in light of the Fair Work Commission decision, it reiterated its submission to the Commission that consideration be given to costs imposed on the Local Government sector, with its constrained ability to raise revenue.

Employees with a disability

111 Sections 50A(1)(a)(iii), (1A) and (1B) of the *Act*, require a rate to be set the same as that in s 285(2)(a) of the *FW Act*, for employees with a disability who have been assessed as having a reduced productive capacity under the SWS. Accordingly, the minute of proposed order arising from these proceedings will specify this rate, as will awards that prescribe a rate for an employee that contains a rate of pay specified for the purposes of the SWS.

Consideration

112 As in each SWO case, the terms of s 50A(3) of the *Act* require the Commission to balance a range of economic, social and equity factors. These factors, as the Commission has observed previously, are in some senses competing. In addition, the Commission has to exercise its jurisdiction in accordance with equity and good conscience, and have regard to the interests of those directly affected by its decision, and the interests of the community as a whole.

113 In this year's case, as for 2023 and 2024, the cost of living has been a significant factor. Whilst inflation is now moderating, SMW and minimum award wage earners have had reductions in their purchasing power as a result of the inflation 'spike' over the 2021-2024 period. Rises in prices for essentials of food and housing in particular, have placed low income households under financial pressure.

114 The State economy remains strong, as one of the best performing in the nation. The labour market is particularly robust, with very solid, although easing, wages growth in the community generally. As a result, household consumption and discretionary spending have also been elevated, as reflected in retail spending remaining very solid. Business investment also remains robust, along with housing investment. Despite these factors, low levels of productivity, especially in the market sector, remain of concern. So too, are risks to the outlook, resulting from trade tensions between the United States and other

countries, especially China, being a major trading partner with Western Australia. This is reflected in some measures of business confidence.

115 In terms of major economic aggregates, the State economy is stronger than the national economy. Wages growth, as measured by the WPI, is forecast to be higher for 2024-25, as is the projected CPI, although not greatly. The unemployment and employment rate projections for 2024-25 are also more favourable for Western Australia. The overall strength of the economy is an important factor, as the Commission has previously said that sustainable increases in minimum wages in a strong economy, are unlikely to have any adverse impacts on employment and inflation.

116 An important measure of living standards generally prevailing in the community, is the level of general wage movements.

117 The CCIWA's proposal for a 2.5% increase in the SMW and minimum award wages, would be a reduction in real wages for the low paid. In view of the impact of the high levels in inflation over the 2022-2024 period, such an outcome would not be consistent with meeting the needs of the low paid, and nor would it contribute to improving their living standards.

118 On the other hand, the proposal by UnionsWA for a $41.34 per week increase in the SMW and a 4.5% increase in minimum award wages, and the WACOSS proposal for a 4.5% increase, would result in an increase significantly above projected inflation and wage movements in the community generally. This would impose a substantial cost on small businesses, when they too, are facing elevated cost pressures. This must be taken into account. Additionally, the increase in superannuation contributions of 0.5% from 1 July 2025, is a moderating consideration.

119 Having regard to all of the factors that the Commission must take into account under s 50A(3) of the *Act*, the Commission has determined that an increase in the SMW and minimum award rates of pay of 3.75% is appropriate. This will lift the SMW to $953 per week. This will provide low wage earners in the State industrial relations system with a real wage increase, and is aligned with wage movements in the community generally.

Statement of principles

120 The parties did not raise any matters in relation to the Commission's *Statement of Principles – July 2024*.

Order to issue

121 A matter was raised by the Commission with the s 50 parties in relation to cl 8(b) of the current SWO. This deals with the adjustment of trainee rates of pay, following an increase in the SMW and minimum award rates of pay. Clause 8(b) presently provides that the highest rates of pay for each skill level are adjusted by an amount which is 80% of the arbitrated safety net adjustment. The Commission informed the parties that this only occurs in the case of a flat dollar increase and in the case of a percentage increase, the full amount of the increase is applied.

122 The parties have conferred and agree that cl 8(b) should reflect the actual method applied by the Commission to the adjustment of these rates of pay. This change will be made to cl 8(b) in the SWO and the Commission is grateful for the parties' co-operation.

123 Minutes of proposed orders now issue. If any party wishes to raise a matter with the minutes, they are requested to do so in writing by 12 noon, Monday 16 June 2025, setting out the issues they wish to raise.

2025 WAIRC 00365

2025 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T KUCERA
DATE	TUESDAY, 17 JUNE 2025
FILE NO.	CICS 1 OF 2025
CITATION NO.	2025 WAIRC 00365

Result 2025 State Wage order issued

Representation

Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations

Mr C Harding and with him Mr S Collins on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)

Mr K Sneddon of counsel and with him Ms R Hendon and Mr G Hansen on behalf of UnionsWA

Ms S Hantz on behalf of the Western Australian Council of Social Service Inc

Ms J Love and with her Ms S Lyon on behalf of the Western Australian Local Government Association

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General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2025 State Wage order and thereby orders as follows:

1. THAT the 2025 State Wage order takes effect on 1 July 2025.
2. THAT the General Order which issued in matter No. CICS 1 of 2024 ([2024] WAIRC 00345; (2024) 104 WAIG 752) is to be of no force and effect on and from the beginning of the first pay period commencing on or after 1 July 2025.
3. THAT the minimum weekly rate of pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be $953.00 per week from the beginning of the first pay period commencing on or after 1 July 2025.
4. THAT the minimum amount payable for each week worked applicable under section 17(2) of the *Minimum Conditions of Employment Act 1993* to an employee shall not be less than $109 per week.

Apprentices

5. THAT the minimum weekly rate of pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking an apprenticeship ("apprentice") shall be:
   (a) In relation to that class of apprentice to whom an award or a relevant order applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant order where an employer-employee agreement is in force.
   (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant order to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award* which operate from the beginning of the first pay period commencing on or after 1 July 2025:

	Total Rate Per Week
	1 July 2025
Four Year Term	
First year	$443.10
Second year	$580.30
Third year	$791.30
Fourth year	$928.50
Three and a Half Year Term	
First six months	$443.10
Next year	$580.30
Next year	$791.30
Final year	$928.50
Three Year Term	
First year	$580.30
Second year	$791.30
Third year	$928.50
Two Year Term	
First year	$580.30
Second year	$791.30

6. THAT the minimum weekly rate of pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be $791.30 per week from the beginning of the first pay period commencing on or after 1 July 2025.

Trainees

7. THAT the minimum weekly rate of pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking a traineeship ("trainee") shall be:
   (a) In relation to that class of trainee to whom an award applies or a relevant order applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of trainee under the award where an award applies or the relevant order where an employer-employee agreement is in force.
   (b) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant order to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay at the relevant Industry/Skill Level as determined by reference to Attachment A hereunder, shall be the rate of pay based on the *Metal Trades (General) Award* contained in Table 1 as follows:

Table 1
The following rates of pay apply from the beginning of the first pay period commencing on or after 1 July 2025:

Industry/Skill Level A			
School Leaver	**Year 10** **$**	**Year 11** **$**	**Year 12** **$**
	323.00	384.00	471.00
Plus 1 year out of school	384.00	471.00	545.00
Plus 2 years	471.00	545.00	640.00
Plus 3 years	545.00	640.00	730.00
Plus 4 years	640.00	730.00	
Plus 5 years or more	730.00		
Industry/Skill Level B			
School Leaver	**Year 10** **$**	**Year 11** **$**	**Year 12** **$**
	323.00	384.00	462.00
Plus 1 year out of school	384.00	462.00	527.00
Plus 2 years	462.00	527.00	620.00
Plus 3 years	527.00	620.00	708.00
Plus 4 years	620.00	708.00	
Plus 5 years or more	708.00		
Industry/Skill Level C			
School Leaver	**Year 10** **$**	**Year 11** **$**	**Year 12** **$**
	323.00	384.00	460.00
Plus 1 year out of school	384.00	460.00	517.00
Plus 2 years	460.00	517.00	581.00
Plus 3 years	517.00	581.00	652.00
Plus 4 years	581.00	652.00	
Plus 5 years or more	652.00		

(c) For any class of trainees under this subclause undertaking a traineeship that is not provided for in Attachment A, the minimum weekly rate of pay shall be the rate of pay in Industry/Skill Level C.

Australian Qualifications Framework (AQF)

(d) For a trainee in this class undertaking an AQF Level 4 traineeship the minimum weekly rate of pay shall be the weekly wage rate for an AQF Level 3 trainee at Industry/Skill Levels A, B or C as applicable with the addition of 3.8% of that wage rate.

Part-time and School-based Trainees

(e) This provision shall apply to trainees who undertake a traineeship on a part-time basis, or as a school-based trainee, by working less than full-time hours and by undertaking the approved training at the same or lesser training time than a full-time trainee.

(i) School-based trainees will receive the following minimum hourly rates of pay, as for school leavers:

	Current year of schooling	
Industry/Skill level	Year 11 or lower	Year 12
A	$10.11	$12.39
B	$10.11	$12.16
C	$10.11	$12.11

(ii) The minimum hourly rate of pay for part-time trainees shall be calculated by taking the full-time rates expressed in clause 7(b) Table 1 and dividing that rate by 38 in accordance with section 10 of the *Minimum Conditions of Employment Act 1993*.

(iii) As per the requirement under 60E(1)(a)(iv) of the *Vocational Education and Training Act 1996*, any time spent by a trainee in performing his or her obligations under the training contract and in being trained and assessed under the contract, whether at the employer's workplace or not, is to be taken for all purposes (including the payment of remuneration) to be time spent working for the employer.

(f) In relation to that class of trainee to whom an award applies or a relevant order applies where an employer-employee agreement is in force and who has reached 21 years of age, the minimum weekly rate of pay is the rate of pay that applies to that class of trainee determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant order where an employer-employee agreement is in force.

(g) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant order to apply if an employer-employee agreement is in force or is entered into and who has reached

21 years of age, the minimum weekly rate of pay shall be that determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship set out below:
from the beginning of the first pay period commencing on or after 1 July 2025:

Industry/Skill Level A	$730.00 per week
Industry/Skill Level B	$708.00 per week
Industry/Skill Level C	$652.00 per week

8. THAT

(a) The rates of pay applicable to trainees under the following awards be adjusted in accordance with the formula outlined in sub-clause (b):

(i) AWU National Training Wage (Agriculture) Award 1994;
(ii) Farm Employees' Award;
(iii) Food Industry (Food Manufacturing or Processing) Award;
(iv) Furniture Trades Industry Award;
(v) Licensed Establishments (Retail and Wholesale) Award 1979;
(vi) Metal Trades (General) Award;
(vii) Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980;
(vii) Printing Award;
(viii) Sheet Metal Workers' Award No. 10 of 1973;
(ix) Soft Furnishings Award; and
(x) Vehicle Builders' Award 1971.

(b) Trainee rates be adjusted as follows:

(i) (aa) If the arbitrated safety net adjustment ordered is a flat dollar increase, Industry/Skill Level A, B and C top rates are increased by 80% of the arbitrated safety net adjustment. Each result is then rounded to the nearest dollar.

(bb) If the arbitrated safety net adjustment ordered is a percentage increase, Industry/Skill Level A, B and C top rates are increased by that percentage arbitrated safety net adjustment. Each result is then rounded to the nearest dollar.

(ii) All other Industry/Skill Level A, B and C rates are increased by a percentage of the unrounded result of the first step. Each result is then rounded to the nearest dollar.

(iii) However, if an existing rate in Industry/Skill Level B or C is the same as an existing rate in Industry/Skill Level A or B, the rates are adjusted in line with whichever is the highest rate applicable, Industry/Skill Level A, B or C, in order to maintain consistency.

Award Rates of Pay

9. THAT weekly rates of pay for adults in the awards of the Commission, other than those set out in Schedule 1, be increased by 3.75% from the beginning of the first pay period commencing on or after 1 July 2025 and that this increase shall be subject to absorption in the same terms as previous State Wage orders.
Where wages are expressed as an hourly, fortnightly, annualised or other amount, that rate shall be increased by a relevant amount having regard to the 3.75% increase in pay for full-time employees pursuant to the relevant award.

10. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula, those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of 3.75% to the adult award wage from the beginning of the first pay period commencing on or after 1 July 2025.

11. THAT increases under previous State Wage orders prior to 1 July 2025, except those resulting from enterprise agreements, are not to be used to offset the State Wage order increases herein.

12. THAT from the beginning of the first pay period commencing on or after 1 July 2025 all awards which contain a minimum adult award wage clause or provision be varied by deleting the text of that provision and replacing it with the following:

MINIMUM ADULT AWARD WAGE
No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.
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 $953.00 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 $953.00 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 2025.
The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case decisions.
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.
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*.

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*.

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.

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

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 2025 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.

Adult Apprentices

Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for a 38-hour week is $791.30 per week.

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 $791.30 by 38 and multiply by the number of ordinary hours prescribed for a full-time apprentice under the award.

The minimum adult apprentice wage is payable from the beginning of the first pay period commencing on or after 1 July 2025.

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.

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.

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.

13. THAT, where an award of the Commission incorporates the Supported Wage System (as defined in section 7(1) of the *Industrial Relations Act 1979*), the minimum amount payable for each week worked applicable under section 17(2) of the *Minimum Conditions of Employment Act 1993* to an instrument-governed employee with a disability (as defined in section 50A(1AA) of the *Industrial Relations Act 1979* and section 15 of the *Minimum Conditions of Employment Act 1993*) shall not be less than $109 per week.

Statement of Principles

14. THAT the Statement of Principles – July 2024 under the General Order in matter No. CICS 1 of 2024 ([2024] WAIRC 00345; (2024) 104 WAIG 752) be replaced by the Statement of Principles – July 2025 in Schedule 2.

Publication

15. THAT the Registrar publish in the Western Australian Industrial Gazette and on the Commission's website the clauses of the awards varied by Clauses 9 – 13 of this State Wage order incorporating the amendments made.

By the Commission in Court Session

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

ATTACHMENT A

INDUSTRY / SKILL LIST (2025)

SKILL LEVEL A		
CODE*	**TRAINING PACKAGE TITLE**	**AQF CERTIFICATE LEVEL**
MEA	Aeroskills	II, IV, Diploma
AVI	Aviation	II, III
BSB	Business Services	II, III, IV, Diploma
PMA	Chemical, Hydrocarbons and Refining	II, III, IV, Diploma

SKILL LEVEL A		
CODE*	**TRAINING PACKAGE TITLE**	**AQF CERTIFICATE LEVEL**
CHC	Community Services	II, III, IV, Diploma
CPC	Construction, Plumbing and Services	II, III, IV
CSC	Correctional Services	III, IV
UEP	Electricity Supply Industry - Generation Sector	II, III, IV, Diploma
UEE	Electrotechnology	II, III, IV, Diploma, Advanced Diploma
FNS	Financial Services	II, III, IV, Diploma
SFL	Floristry	III, IV
FBP	Food, Beverage and Pharmaceutical	III, IV
UEG	Gas Industry	III, IV, Diploma
SHB	Hairdressing and Beauty Services	III, IV, Diploma
ICT	Information and Communications Technology	II, III, IV, Diploma, Advanced Diploma
MSL	Laboratory Operations	II, III, IV, Diploma, Advanced Diploma
LGA	Local Government (other than Operational Works Certificate II)	II, III
MSA07	Manufacturing	Diploma, Advanced Diploma
MSM	Manufacturing	II, III
MAR	Maritime	II, III
MEM	Manufacturing and Engineering (Technical)	II, III, IV, Diploma, Advanced Diploma
NWP	National Water	III, IV
PMB	Plastics, Rubber and Cablemaking	III, IV
PSP	Public Sector	II, III, IV, Diploma
RII	Resources and Infrastructure Industry	II, III, IV, Diploma, Advanced Diploma
SIR	Retail Services	III, IV
MSS	Sustainability	III, IV, Diploma
MST	Textiles, Clothing and Footwear	III, IV
SIT	Tourism, Travel and Hospitality	II, III, IV, Diploma
UET	Transmission, Distribution and Rail Sector	II, III, Diploma, Advanced Diploma
TLI	Transport and Logistics	III, IV, Diploma
CPP	Property Services	II, III, IV, Diploma
RII	Resources and Infrastructure Industry	I
SIR	Retail Services	II
SIS	Sport, Fitness and Recreation	II, III, IV
MST	Textiles, Clothing and Footwear	II
TLI	Transport and Logistics	II

SKILL LEVEL B		
CODE*	**TRAINING PACKAGE**	**AQF CERTIFICATE LEVEL**
ACM	Animal Care and Management	II, III, IV
AMP	Australian Meat Processing	II, III, IV, Diploma
AUR	Automotive Retail, Service and Repair	II, III, IV, Diploma
AUM	Automotive Manufacturing	III
CUA	Creative Arts and Culture	II, III, IV
SFL	Floristry	II
FBP	Food, Beverage and Pharmaceutical	II
FWP	Forest and Wood Products	II, III, IV

SKILL LEVEL B		
CODE*	**TRAINING PACKAGE**	**AQF CERTIFICATE LEVEL**
MSF	Furnishing	II, III, IV
SHB	Hairdressing and Beauty Services	II
HLT	Health	II, III, IV, Diploma
MEM	Manufacturing and Engineering (Production)	II, III, Diploma, Advanced Diploma
NWP	National Water	II
PMB	Plastics, Rubber and Cablemaking	II

SKILL LEVEL C		
CODE*	**TRAINING PACKAGE**	**AQF CERTIFICATE LEVEL**
AHC	Agriculture, Horticulture and Conservation and Land Management	II, III, IV
SIF	Funeral Services	III, IV
RGR	Racing and Breeding	II, III, IV
SFI	Seafood Industry	II, III, IV

*The training package code is the first three letters of the traineeship qualification (the National Qualification Code) as recorded in the Apprenticeship/Traineeship Training Contract, for example **SHB**30121 Certificate III in Beauty Services. This list has been updated to align with the Classification of Prescribed Vocational Education and Training Qualifications (dated 1 April 2025).

Schedule 1

LIST OF AWARDS NOT FULLY SUBJECT TO THIS GENERAL ORDER

Awards that do not contain wages and are therefore excluded:

Alcoa Long Service Leave Conditions Award, 1980
Catering Employees' (North West Shelf Project) Long Service Leave Conditions Award 1991
Catering Workers' (North Rankin A) Long Service Leave Conditions Award No. A 40 of 1987
The Contract Cleaning (F.M.W.U.) Superannuation Award 1988
Health Care Industry (Private) Superannuation Award 1987
Miscellaneous Government Conditions and Allowances Award No A 4 of 1992
Miscellaneous Workers' (Security Industry) Superannuation Award, 1987
Ngala Superannuation Award, 1989
Public Service Allowances (Fisheries and Wildlife Officers) Award 1990
Supported Employees Industry Award
The Swan Brewery Company Limited (Superannuation) Award 1987
West Australian Petroleum Pty Ltd Long Service Leave conditions Award 1991
Woodside Offshore Petroleum Pty. Ltd. Long Service Leave Conditions Award, 1984
Worsley Alumina Pty. Ltd. Long Service Leave Conditions Award, 1984

Awards that have certain parts quarantined:

Clerks (Racing Industry - Betting) Award 1978 **– Schedule C**
The Iron Ore Production & Processing (Locomotive Drivers) Award 2006 – **Clause 2.1**
Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 **– Clause 6**
Shearing Contractors' Award of Western Australia 2003 **– Clause 4.2**

Awards containing transitional provisions to which the General Order does not apply:

Clothing Trades Award 1973 **– Clause 18**
Department of Communities (CSA Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 **– Schedule F**
Department of Education (School Support Officers) Award **– Schedule I**
Egg Processing Award 1978 **– Appendix 4**
Electorate Officers Award 1986 **– Schedule G**
Family Day Care Co-Ordinators' and Assistants' Award, 1985 **– Schedule C**
Government Officers (Insurance Commission of Western Australia) Award, 1987 **– Schedule D**
Government Officers (Social Trainers) Award 1988 **– Schedule K**
Government Officers Salaries, Allowances and Conditions Award 1989 **– Schedule P**
Juvenile Custodial Officers' Award **– Schedule G**
Public Service Award 1992 **– Schedule M**

Schedule 2

STATEMENT OF PRINCIPLES – July 2025

1. Application of the Statement of Principles

1.1 This Statement of Principles is to be applied and followed when the Commission is making or varying an award or making an order in relation to the exercise of the jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.

1.2 In these Principles, wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of employment will be referred to as "wages".

1.3 In making a decision in respect of any application brought under these Principles, the primary consideration in all cases will be the merits of the application in accordance with equity, good conscience and the substantial merits of the case pursuant to section 26(1)(a) of the Act.

1.4 These Principles do not have application to Enterprise Orders made under section 42I of the Act or to applications made under section 40A of the Act to incorporate industrial agreement provisions into an award by consent.

1.5 This Statement of Principles will operate until reviewed under section 50A(1)(d) of the Act.

2. (deleted)

3. When an Award may be varied or another Award made without the claim being regarded as above or below Minimum Award Conditions

3.1 In the following circumstances wages in an award, may on application, be varied or another award made without the application being regarded as a claim for wages above or below the minimum award conditions:

3.1.1 To include previous State Wage Case increases in accordance with Principle 4.1.

3.1.2 To adjust wages for total minimum rates pursuant to Principle 4.2.

3.1.3 **(deleted)**

3.1.4 To adjust allowances and service increments in accordance with Principle 6.

3.1.5 To adjust wages pursuant to work value changes in accordance with Principle 7.

3.1.6 To make or vary an award or to make an order to provide for equal remuneration for men and women for work of equal or comparable value in accordance with Principle 8.

3.1.7 To vary an award to include the minimum wage in accordance with Principle 9.

4. Previous State Wage Case Increases

4.1 Wage increases available under previous State Wage Case decisions such as structural efficiency adjustments, and previous arbitrated safety net adjustments will, on application, still be accessible.

4.2 Minimum rates adjustments may also be progressed under this Principle.

5. (deleted)

5.1 **(deleted)**

6. Adjustment of Allowances and Service Increments

6.1 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of those expenses.

6.2 **(deleted)**

6.3 Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the State Wage order, or, if an award contains another method for adjusting such allowances, in accordance with that other method.

6.4 In the absence of any other prescribed method, where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed or service increments for a monetary safety net increase, the method of adjustment shall be as follows: divide the monetary safety net increase by the rate of pay for the key classification in the award which applied immediately prior to the safety net increase, and multiply the resulting figure by 100.

6.5 Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7.

6.6 New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to those expenses.

6.7 Where changes in the work have occurred or new work and conditions have arisen, the introduction of a new allowance, if any, is to be determined in accordance with the most appropriate Principles.

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

(Principle 7 Work Value Changes is deleted and replaced with the following)

7. Work Value Changes

7.1 Applications may be made for a wage increase under this Principle based on changes in work value.

7.2 Changes in work value may arise from significant changes in the nature of the work, skill and responsibility required or the conditions under which work is done. Changes in work by themselves may not lead to a change in wage rates.

7.3 The Commission may make a determination varying wage rates under this Principle if it is satisfied that the variation is necessary and justified by significant changes in work value related to any of the following:

7.3.1 the nature of the work;

7.3.2 the level of skill or responsibility involved in doing the work;

7.3.3 the conditions under which the work is done.

7.4 If the Commission varies the wage rates in an award on work value grounds, it must ensure that any new or changed rates of pay are confined to those employees whose work value has changed. Work value increases should not be flowed on to other awards to maintain relativities between awards or particular classifications in awards.

7.5 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, the new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by an employee and not by increasing the rate for all employees working at that classification.

7.6 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.

7.7 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.

7.8 A past work value assessment which was not free of gender-based undervaluation would not constitute a proper assessment of work value.

7.9 Where the conditions specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. The assessment should normally be based on the previous work and the nature and extent of the change in work.

7.10 The expression "the conditions under which the work is done" relates to the environment in which the work is done.

7.11 The Commission should guard against contrived classifications and over classification of jobs.

7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is done, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

8. <u>Equal Remuneration for Men and Women for Work of Equal or Comparable Value</u>

8.1 Applications may be made under this Principle to implement equal remuneration for work of equal or comparable value.

8.2 The Commission must apply this principle when it:

8.2.1 hears applications to implement equal remuneration for work of equal or comparable value, including applications for an equal remuneration order made under Part II Division 3B of the *Industrial Relations Act 1979*;

8.2.2 arbitrates industrial disputes about equal remuneration; or

8.2.3 values or assesses the work of employees in 'female dominated' industries, occupations or callings.

8.3 In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed (which has the same meaning as it does for Principle 7 Work Value Changes) as well as other relevant work features.

8.4 The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.

8.5 The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated.

8.6 Prior work value assessments and/or the prior setting of pay rates for the work cannot be assumed to have been free of assumptions based on gender.

8.7 In assessing the value of the work, the Commission is to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers. Relevant matters to consider may include:

8.7.1 whether there has been some characterisation or labelling of the work as "female";

8.7.2 whether there has been some underrating or undervaluation of the skills of female employees;

8.7.3 whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;

8.7.4 whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or

8.7.5 whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.

8.8 Gender discrimination is not required to be shown to establish undervaluation of work, therefore there is no requirement for a male comparator.

8.9 Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.

8.10 Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.

8.11 Where the Commission determines that there is not equal remuneration for work of equal or comparable value, the Commission is to make an assessment as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.

8.12 There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle.

8.13 The Commission will guard against contrived classifications and over classification of jobs.

8.14 The Commission may determine in each case whether any increases in wages will be absorbed into over award payments.

8.15 Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment.

8.16 The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular circumstances of each case and any related material will be rigorously tested.

8.17 Claims brought under this principle will be considered on a case by case basis.

9. Minimum Adult Award Wage

9.1 A minimum adult award wage clause will be required to be inserted in all new awards, including interim awards.

9.2 The minimum adult award wage clause will be as follows –

MINIMUM ADULT AWARD WAGE

No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

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 $953.00 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 $953.00 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 2025.

The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case decisions.

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.

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*.

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*.

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.

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

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 2025 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.

Adult Apprentices

Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for a 38-hour week is $791.30 per week.

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 $791.30 by 38 and multiply by the number of ordinary hours prescribed for a full-time apprentice under the award.

The minimum adult apprentice wage is payable from the beginning of the first pay period commencing on or after 1 July 2025.

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.

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.

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.

10. **Making or Varying an Award or issuing an Order which has the effect of varying wages or conditions above or below the award minimum conditions**

10.1 An application or reference for a variation in wages which is not made by an applicant under any other Principle and which is a matter or concerns a matter to vary wages above or below the award minimum conditions may be made under this Principle.

10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.

10.3 **(deleted)**

11. **(deleted)**

12. **Economic Incapacity**

12.1 Any respondent or group of respondents to an award may apply to reduce and/or postpone the variation which results in an increase in labour costs under this Statement of Principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any related material shall be rigorously tested. The impact on employment at the enterprise level of the increase in labour costs is a significant factor to be taken into account in assessing the merit of an application.

13. **(deleted)**

2025 WAIRC 00363

RESCIND LOCATION ALLOWANCE GENERAL ORDER 2 OF 2024 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER R COSENTINO
	COMMISSIONER T B WALKINGTON
	COMMISSIONER C TSANG
DATE	MONDAY, 16 JUNE 2025
FILE NO.	CICS 2 OF 2025
CITATION NO.	2025 WAIRC 00363

Result General Order issued

Representation

Mr R Dobson and with him Mr R James on behalf of the Hon. Minister for Industrial Relations

Mr C Harding on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)

Mr G Hansen on behalf of UnionsWA

2025 Location Allowance General Order

HAVING heard from Mr Dobson on behalf of the Honourable Minister for Industrial Relations and Mr Harding on behalf of the Chamber of Commerce and Industry of Western Australia (Inc), and Mr Hansen on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT each award cited in Schedule A of this General Order be varied by substituting the table within the first subclause of the location allowance provisions contained in each such award with the table at Schedule B of this General Order.

2. THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2025.

3. THAT this General Order replace the General Order in Matter No. CICS 2 of 2024 ([2024] WAIRC 00282) which hereby shall be rescinded.

(Sgd.) R COSENTINO,
Senior Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

SCHEDULE A

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

Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Local Government Officers' (Western Australia) Award 2021	17.2
Meat Industry (State) Award, 2003	21(1)
Metal Trades (General) Award	5.6
Motel, Hostel, Service Flats and Boarding House Workers' Award	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Municipal Employees (Western Australia) Award 2021	19.6
Nurses' (Day Care Centres) Award	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Pest Control Industry Award	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award	41
Retail Pharmacists' Award, 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	20(3)
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award	31.6
Social and Community Services (Western Australia) Interim Award 2011	18.10
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R47 of 1978	24
The Western Australian Surveying (Private Practice) Industry Award, 2003	8.4

SCHEDULE B

Replacement Table of Weekly Location Allowances

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

TOWN	PER WEEK
Agnew	$25.90
Argyle	$70.00
Balladonia	$27.20
Barrow Island	$45.60
Boulder	$11.10
Broome	$41.90
Bullfinch	$12.10
Carnarvon	$21.50
Cockatoo Island	$45.80
Coolgardie	$11.10

Cue	$26.70
Dampier	$36.50
Denham	$21.50
Derby	$43.50
Esperance	$7.40
Eucla	$29.10
Exmouth	$38.50
Fitzroy Crossing	$52.90
Halls Creek	$61.40
Kalbarri	$9.40
Kalgoorlie	$11.10
Kambalda	$11.10
Karratha	$44.10
Koolan Island	$45.80
Koolyanobbing	$12.10
Kununurra	$70.00
Laverton	$26.60
Learmonth	$38.50
Leinster	$25.90
Leonora	$26.60
Madura	$28.20
Marble Bar	$68.20
Meekatharra	$23.10
Mount Magnet	$29.00
Mundrabilla	$28.70
Newman	$24.90
Norseman	$23.30
Nullagine	$68.10
Onslow	$45.60
Pannawonica	$33.90
Paraburdoo	$33.80
Port Hedland	$36.40
Ravensthorpe	$13.60
Roebourne	$50.80
Sandstone	$25.90
Shark Bay	$21.50
Southern Cross	$12.10
Telfer	$62.50
Teutonic Bore	$25.90
Tom Price	$33.80
Whim Creek	$43.60
Wickham	$42.00
Wiluna	$26.10
Wyndham	$65.40

COMMISSION IN COURT SESSION—Unions—Application for Alteration of Rules—

2025 WAIRC 00403

APPLICATION PURSUANT TO S 62(2) - ALTERATION OF REGISTERED RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2025 WAIRC 00403
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG
HEARD	:	THURSDAY, 3 JULY 2025
DELIVERED	:	THURSDAY, 3 JULY 2025
FILE NO.	:	CICS 8 OF 2025
BETWEEN	:	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES Applicant AND (NOT APPLICABLE) Respondent

Catchwords	:	Industrial Law (WA) - Application pursuant to s 62(2) - Alteration of registered rules - Application granted
Legislation	:	*Industrial Relations Act 1979* (WA) s 52A, s 55, s 56, s 58(3), s 62(2), s62(4), s 71 *Industrial Relations Commission Regulations 2005* (WA) reg 77A *Fair Work Act 2009 (Cth)*
Result	:	Order issued
Representation:		
Applicant	:	Mr M Elliott

Reasons for Decision

THE COMMISSION IN COURT SESSION:

1 The applicant, the Independent Education Union of Western Australia, Union of Employees, is a registered organisation under the *Industrial Relations Act 1979* (WA). The present proceedings are brought under s 62(2) of the *Act* seeking an order authorising the Registrar to register alterations to the Rules of the applicant. The first alteration is to r 3 – Constitution, to substitute the present rule for a rule in the same terms as the eligibility for membership rule of the Independent Education Union of Australia WA Branch, the federal counterpart of the applicant, registered under the *Fair Work Act 2009* (Cth). The second is an alteration to r 10 – Elections to enable persons elected to office in the federal Branch, to also occupy the corresponding office in the applicant. Both proposed rule alterations are in aid of a related application CICS 9 of 2025, by which the applicant seeks declarations from the Commission in Court Session under ss 52A and 71 of the *Act*.

2 In support of the application were two statutory declarations made by Ms Collopy, the Secretary of the applicant, made on 24 April 2025. The first statutory declaration refers to steps taken by the applicant to give effect to a number of alterations to the applicant's Rules, including r 3 – Constitution. The second statutory declaration refers specifically to steps taken by the applicant to effect the alteration to r 10 – Elections, which was dealt with separately. Both statutory declarations refer to the requirements of r 17 – Alteration of Rules of the applicant's Rules, read with relevant provisions of r 8 – Executive, and the steps taken to comply with those rules. What the relevant rules require include that:

(a) Any proposal to amend any or all of the Rules must be forwarded to each member of the applicant's Executive at least 14 days prior to a meeting of the Executive at which the resolution is to be considered;

(b) The proposal must be moved and seconded by any two members of the Executive;

(c) At least two thirds of voting members of the Executive must support the proposal;

(d) All members of the applicant must be informed of the proposed alteration to the Rules and the reasons for the alteration by notice to each member; and

(e) All members must be informed that they have the right to object to the proposed alterations to the Rules by forwarding a written objection to the Registrar within 28 days of the notice.

3 Under the terms of the *Act*, by s 62(4), ss 55, 56 and 58(3) of the *Act* apply to the present application, with such modifications as may be necessary. In light of the material contained in the application, the evidence by way of the statutory declarations that have been filed in support of it, and the written submissions, we are satisfied that these relevant provisions of the *Act* have been met, along with the requirements of reg 77A of the *Industrial Relations Commission Regulations 2005*, dealing with the alteration of rules of registered organisations. On the basis of the foregoing, we are satisfied that:

(a) The application made by the applicant was duly authorised in accordance with the applicant's Rules;

(b) That reasonable steps have been taken by the applicant to inform its members of the proposed alterations to the Rules and the application to be made to the Commission, and that members may object to the making of the application or the alterations to the rules by written objection to the Registrar; and

(c) That having regard to the structure of the applicant no objections have been made to the making of the application or the proposed alterations to the Rules.

4 Having regard to s 58(3) of the *Act*, we note that r 3 – Constitution of the proposed alterations to the Rules, is in terms that exclude certain persons or classes of persons from the description of persons who would be eligible for enrolment as members of the applicant, and the Commission in Court Session hereby authorises those alterations.

5 On the basis of the foregoing, the Commission in Court Session authorises the proposed alterations to the Rules of the applicant in the terms of the order which now issues.

2025 WAIRC 00404

APPLICATION PURSUANT TO S 62(2) - ALTERATION OF REGISTERED RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG
DATE	FRIDAY, 4 JULY 2025
FILE NO/S	CICS 8 OF 2025
CITATION NO.	2025 WAIRC 00404

Result	Order issued
Representation	
Applicant	Mr M Elliott

Order

THIS MATTER having come on for hearing before the Commission in Court Session on 3 July 2025, and having heard Mr M Elliott on behalf of the applicant, the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the Registrar is hereby authorised to register the alterations to rules 3 and 10 of the Rules of the applicant as published in the Western Australian Industrial Gazette on 5 May 2025: [2025] WAIRC 00269; (2025) 105 WAIG 960 and as published on the Commission's website by Notice dated 5 May 2025.

By the Commission in Court Session

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2025 WAIRC 00409

DEPARTMENT OF COMMUNITIES (CSA FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS AND PARENT HELPERS) AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF COMMUNITIES
	APPLICANT
	-v-
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 8 JULY 2025
FILE NO/S	APPL 28 OF 2025
CITATION NO.	2025 WAIRC 00409

Result	Award Cancelled
Representation	**On the Papers**
Applicant	Ms R Desmond
Respondent	Ms S Zuvelek

Order

WHEREAS on 1 May 2025, a Form 1 – General Application, was filed in the Western Australian Industrial Relations Commission, seeking to cancel the Department of Communities (CSA Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990, as employees will be covered by the Public Service Award 1992;

AND WHEREAS on 30 May 2025, the Commission sought whether the Civil Service Association of Western Australia Incorporated, had any objections to cancelling the Department of Communities (CSA Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990;

AND WHEREAS on 30 May 2025, the Civil Service Association of Western Australia Incorporated, advised that they did not have any objections.

NOW THEREFORE, the Commission, pursuant to the powers conferred under s 40(3)(c) of the *Industrial Relations Act 1979* (WA), hereby orders that the following award be cancelled:

Department of Communities (CSA Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2025 WAIRC 00379

APPLICATION PURSUANT TO SECTION 80BH TO NAME WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES AS A PARTY TO THE LOCAL GOVERNMENT INDUSTRY AWARD 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2025 WAIRC 00379
CORAM	**:**	SENIOR COMMISSIONER R COSENTINO
HEARD	**:**	TUESDAY, 13 MAY 2025
DELIVERED	**:**	MONDAY, 23 JUNE 2025
FILE NO.	**:**	APPL 164 OF 2024
BETWEEN	**:**	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
		Applicant
		CITY OF MELVILLE AND OTHERS AS REFERRED TO IN THE ATTACHED SCHEDULE
		Respondents
		AND
		MINISTER FOR INDUSTRIAL RELATIONS
		Intervenor

CatchWords	:	Industrial law (WA) - *Industrial Relations Act 1979* (WA) - New State instruments - Construction of s 80BB - Effect of s 80BB in relation to the Local Government Industry Award 2020 - Whether the new State instrument exists as a single multi-employer collective instrument for all declared employers or whether multiple individual new State instruments exists for each declared employer - Preliminary issue determined
Legislation	:	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA) *Industrial Relations (General) Regulations 1997* (WA) *Interpretation Act 1984* (WA)
Result	:	Preliminary Issue Determined

Representation:

Mr C Fogliani (of counsel) on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees

Ms J Flinn (of counsel) on behalf of the Shire of Dundas

Ms D Lamb (of counsel) on behalf of the Shire of East Pilbara

Ms R Panetta (of counsel) on behalf of the Minster for Industrial Relations

Case(s) referred to in reasons:

City of Cockburn v Western Australia Municipal, Administrative, Clerical and Services Union of Employees & Ors [2023] WAIRC 00787; (2023) 103 WAIG 1723

East End Dwellings Co Ltd v Finsbury Borough Council [1952] AC 109

East West Airlines Ltd v Turner [2010] NSWCA 53; (2010) 78 NSWLR 1

Project Blue Sky Inc & Ors v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

Re Ludeke; Ex parte Customs Officers Association of Australia, Fourth Division [1985] HCA 31; (1985) 155 CLR 513

SZTZAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362

The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch v Western Australian Government Railways Commission (2000) 80 WAIG 1740

Valuer-General of New South Wales v In Adam Pty Ltd [2012] NSWCA 20; (2012) 211 LGERA 75

Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Bunbury & Ors [2024] WAIRC 00443

Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Gosnells & Ors [2024] WAIRC 00422

Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Shire of Northampton [2024] WAIRC 00459

Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Swan & Ors [2024] WAIRC 00463

Wyloo Metals Pty Ltd v Quarry Park Pty Ltd [2024] WASCA 38

Reasons for Decision

1 The Western Australian Municipal, Administrative, Clerical and Services Union of Employees (**WASU**) has applied under s 80BH of the *Industrial Relations Act 1979* (WA) (**IR Act**) for an order naming WASU as a party to a new State instrument. The new State instrument referred to in WASU's application is 'the Local Government Industry Award 2020 Industrial Agreement'. WASU listed some sixty local governments as respondents to its application.

2 The question which has arisen and which I am presently deciding as a preliminary issue is whether, in respect of the *Local Government Industry Award 2020* (**LGIA**), what was created by the operation of s 80BB(2) and (3) of the IR Act, is a single new State instrument applying collectively to all relevant local governments or whether there is a separate new State instrument in respect of each relevant individual local government.

3 If there is a separate new State instrument in respect of each relevant individual local government then WASU's application is misconceived and cannot proceed in its current form as an application in respect of one new State instrument.

4 The preliminary issue turns on the correct construction of s 80BB of the IR Act concerning new State instruments.

Local government change from Federal to State system

5 WASU's application follows the local government transition from the federal to the State industrial relations system. I will borrow from the Full Bench's decision in ***City of Cockburn v Western Australia Municipal, Administrative, Clerical and Services Union of Employees & Ors*** [2023] WAIRC 00787; (2023) 103 WAIG 1723 [1] - [3] (***City of Cockburn)*** for a description of the transition:

On 1 January 2023, the local government industry transitioned from the national industrial relations system to the State industrial relations system, as a consequence of the *Industrial Relations Legislation Amendment Act 2021* (WA), the *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* (Cth) and the *Fair Work (State Declarations – Employers not to be national system employers) Endorsement 2022 No.1)* (Cth). Additionally, complementary State Regulations, in Part 4 of the *Industrial Relations Regulations (Consequential Amendment) Regulations 2022* (WA), amended the *Industrial Relations (General) Regulations 1997* (WA) to declare, for the purposes of s 80A(2) of the *Industrial Relations Act 1979* (WA), that local government employers are not to be national system employers under the *Fair Work Act 2009* (Cth).

The effect of the new Part 2AA of the *Act*, in particular s 80BB, is to create an industrial instrument, known as a 'new State instrument', where immediately prior to the commencement day, an instrument made under the *FW Act*, applied to 'a declared employer and a declared employee'. The latter are employers and employees in local government, subject to the above transitional instruments.

Upon commencement of the legislation, an award or enterprise agreement made under the *FW Act* became, under s 80BB(2), an 'industrial agreement', described as a new State instrument and 'applied' to a declared employer and employees. Section 80BB is in the following terms:

80BB. New State instruments

(1) This section applies —

(a) to the extent section 80BA does not provide for a declared employee of a declared employer; and

(b) if, immediately before the relevant day, a federal industrial instrument (the ***old federal instrument***) applies to, or purports to apply to, the declared employee.

(2) On the relevant day, an industrial agreement (the ***new State instrument***) applies to the declared employer and declared employees.

(3) The new State instrument is taken —

(a) to have been registered under this Act on the relevant day; and

(b) except as provided in this section or section 80BC, to have the same terms as the old federal instrument including those terms as added to or modified by any of the following —

(i) terms of a federal award incorporated by the old federal instrument;

(ii) orders of a federal industrial authority;

(iii) another instrument under the national fair work legislation or the repealed Workplace Act;

and

(c) to have a nominal expiry date that is the earlier of the following —

(i) a day that is 2 years after the relevant day;

(ii) the day that, immediately before the relevant day, was the nominal expiry day of the old federal instrument.

(4) This Act applies in relation to the new State instrument subject to any modifications or exclusions prescribed by regulations for this subsection.

(5) The new State instrument applies except as provided in the MCE Act.

6 The LGIA is a modern award made under the *Fair Work Act 2009* (Cth) (**FWA**). In accordance with s 48 and s 143 of the FWA and clause 4 of the LGIA, it covers employers throughout Australia in the local government industry and their employees in the classifications set out in the LGIA.

7 Under the FWA, a person may be covered by a modern award, but the modern award does not impose obligations or confer entitlements unless the modern award also applies to the person: s 46. A modern award applies to an employer when it meets the conditions in s 47 of the FWA. The effect of that section is that where an enterprise agreement is in operation in respect of an employer and employee, the modern award ceases to apply.

8 It is uncontentious that as part of the local government transition to the State system, the LGIA as a modern award under the FWA, ceased to apply to any Western Australian local governments and their employees. It is also uncontentious that the terms of the LGIA as at 1 January 2023 continued to apply to those employers and employees to whom it had applied immediately before 1 January 2023, pursuant to s 80BB of the IR Act.

New State instruments under Part 2AA of the IR Act

9 Section 80BB, which is reproduced at paragraph 5 above, is located within Part 2AA of the IR Act. Part 2AA is headed 'Employers declared not to be national system employers'. As extensive reference is made to the provisions of Part 2AA in these reasons, the entire part is reproduced as **Schedule 1** to these reasons for ease of reference.

Parties' positions on the preliminary issue

10 WASU's position is that, as it concerns the LGIA as a federal instrument, s 80BB creates one new State instrument temporarily applying collectively to Western Australian local governments to whom the LGIA applied, or purported to apply, immediately before 1 January 2023. WASU calls this instrument 'the Local Government Industry Award 2020 Industrial Agreement'.

11 The Shire of Dundas' position is that s 80BB results in each individual declared employer who has declared employees to whom the LGIA applied immediately prior to 1 January 2023 having their own industrial agreement by way of a new State instrument with the same terms as the LGIA. That is, there exists multiple single employer new State instruments each of which has the same terms as the LGIA.

12 The majority of the other local government respondents adopted the same position as the Shire of Dundas in this regard. To streamline the determination of the preliminary issue, only the Shire of Dundas and the Shire of East Pilbara (together referred to as **Shires**) made submissions and took part in the hearing of the preliminary issue.

13 A handful of the respondents have not responded to or taken part in the proceedings or adopted a position in relation to the preliminary issue.

Application by the Minister to intervene

14 The Honourable Minister for Industrial Relations gave notice of her intention, by the leave of the Commission, to intervene on behalf of the State in relation to the preliminary issue pursuant to s 30 of the IR Act.

15 The Minister's application was unopposed.

16 At the hearing of the preliminary issue, I granted the Minister leave to intervene insofar as it relates to the determination of the preliminary issue. These are my reasons for doing so.

17 The Minister's application for leave to intervene was made on the ground that the State has an interest in the proper construction of s 80BB(2) of the IR Act in the context of the matter before the Commission. Counsel for the Minister noted that in ***City of Cockburn*** at [13], the Full Bench of the Commission accepted that the Minister's interest in the proper construction and application of a section of the IR Act is an adequate interest for the purposes of an intervention application.

18 The Minister filed written submissions on the preliminary issue prior to the hearing and pointed out that these proposed submissions were not merely repetitive of submissions made by the other parties. Therefore, granting the Minister leave to intervene would have some utility.

19 Section 30 of the IR Act says:

> (1) The Minister may, by giving the Registrar notice in writing of the Minister's intention to do so, and by leave of the Commission, intervene on behalf of the State in any proceedings before the Commission in which the state has *an interest*.
>
> (emphasis added)

20 Section 30 has been contrasted with the Commission's power under s 27(1)(k) enabling the Commission to permit intervention by a person who has, in the opinion of the Commission, *sufficient interest* in a matter.

21 Section 30 appears to create a lower threshold for leave when it concerns the State. It may be that the test of a sufficient interest as articulated in ***Re Ludeke; Ex parte Customs Officers Association of Australia, Fourth Division*** [1985] HCA 31; (1985) 155 CLR 513 is not intended to apply for the purpose of s 30 of the IR Act.

22 Consistent with the observations of the Full Bench in ***City of Cockburn***, it is clear that the State has an interest in the construction and application of the IR Act and accordingly leave should be granted for the Minister to exercise her right under s 30 of the IR Act to intervene on behalf of the State.

WASU's submissions

23 Counsel for WASU pointed out that the present issue is novel. It is unique to the circumstances of the change from the federal to State system and unique to the particular type of federal industrial instrument concerned. For the vast majority of federal industrial instruments that have transitioned to the State system under Part 2AA of the IR Act, being enterprise agreements, the issue does not arise. That is because an enterprise agreement self-evidently applies only to a single enterprise.

24 It is clear enough that the nature of the instrument created as a new State instrument under Part 2AA is to be treated as if it were an industrial agreement under the IR Act rather than an award. However, the reality is that the LGIA is neither the product of a bargain between an employer and a union or collective of employees, nor is it an instrument that applies at an enterprise level. It is therefore ill-suited to be treated as an industrial agreement under the IR Act.

25 WASU noted that s 80BB(4) makes it clear that the whole of the IR Act was intended to operate without modification in relation to new State instruments. There are no regulations prescribed for the purposes of s 80BB(4) creating exclusions in this regard.

26 WASU submits that what flows from this supports its construction of s 80BB. Part of the scheme of the IR Act is that an industrial agreement cannot exist without there being two or more parties to it. WASU refers in this regard to the Full Bench's decision in ***The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch v Western Australian Government Railways Commission*** (2000) 80 WAIG 1740 (***RTBU***) at [12]:

> In the Western Australian Industrial Gazette dated 22 December 1999 (79 WAIG 3708), the Registrar published the appropriate Notice of Retirement by the abovenamed organisation dated 12 November 1999.
>
> As a result, by the operation of s 41(6) and (7) of the Act, the applicant organisation retired from the Agreement, ceasing to be a party to the Agreement. The Agreement could, therefore, continue in force in respect of only one party thereto. Such a proposition is, however, absurd.
>
> It is trite to say that an agreement cannot exist or continue, unless two or more parties have and remain bound by an agreement. In this case, the applicant, since there were only two parties to the Agreement, by exercising a statutory right

to retire, exercised coincidentally a right to terminate the Agreement by the retirement, as and from the date specified in the Notice of Retirement.

27 According to WASU, this means that the LGIA must become a new State instrument with multiple local government parties in order for it to exist. There is no union or employee association party to the LGIA. A new State instrument with only a single local government employer as party to it cannot exist as an industrial agreement under the IR Act.

28 WASU's counsel acknowledged that the concept of having an industrial agreement without a union party is also an anomaly which is inconsistent with the scheme of the IR Act. However, this anomaly was contemplated by the legislature and dealt with by enacting s 80BH which enables an organisation of employees or an association of employees to apply for an order naming the organisation or association as a party to a new State instrument.

29 In short, WASU submits that its construction of s 80BB sits more harmoniously with the IR Act's scheme, because it means that the LGIA became a new State instrument with two or more parties consistent with the nature of industrial agreements under the IR Act.

30 The second main theme of WASU's submissions draws support for its conclusion based on s 80BB(3)(b) read with the coverage clause 4.1 of the LGIA. By s 80BB(3)(b), a new State instrument is taken to have the same terms as the old federal instrument. The LGIA, being the relevant old federal instrument, says at cl 4.1:

> This industry award covers employers throughout Australia in the local government industry and their employees in the classifications listed in Schedule A — Classification Definitions to the exclusion of any other modern award.

31 WASU says that the fact the new State instrument's terms are taken to include clause 4.1, means its terms are such that all employers in the local government industry are 'covered' by it, and therefore are parties to it. WASU says the Shires' alternative construction of s 80BB, cannot be reconciled with cl 4.1 because cl 4.1 does not expressly refer to a single individual employer. There cannot be both a new State instrument that applies only to the Shire of Dundas, and that new State instrument have a term that says it covers all employers in the local government industry.

32 WASU submits that the Shires' construction would require a rewrite of cl 4.1, which would conflict with s 80BB(3)(b)'s requirement to take the new State instrument as having the same terms as the LGIA.

33 Third, WASU makes the point that if the effect of s 80BB was to transform the single LGIA into numerous new State instruments, this is conceptually inconsistent with the purpose of s 80BB which is to uphold the continuity of the pre-existing industrial and employment arrangements, by splitting one instrument into multiple instruments. This purpose is expressed in the **Explanatory Memorandum** to the Industrial Relations Legislation Amendment Bill 2021 at [335]:

> [T]o provide declared employers and declared employees with continuity in their employment arrangements for an appropriate transitional period, to enable them to comply with the IR Act and other applicable state industrial laws.

34 Finally, WASU relies on the fact that only a single new State instrument containing the terms of the LGIA is maintained on the website www.wairc.wa.gov.au, rather than 60 or so versions for each individual local government.

The Shires' and Intervenor's submissions

35 The Shire of Dundas submitted that the words used in Part 2AA support a construction that a separate new State instrument is created for each individual local government that applied the LGIA immediately prior to the local government transition. It refers to the consistent use of the term 'declared employer' in the singular throughout the sections in Part 2AA. The Shire points out that in contrast, Part 2AA refers to the defined term 'declared employee' in both the singular and the plural.

36 The Shire of Dundas submits that it is individual local governments or employers that are referred to in the *Industrial Relations (General)* ***Regulations*** *1997* (WA) referenced in s 80A(2)(a). It is clearly contemplated by s 80A(2)(a) that individual employers are the subject of the declaration made by the *Regulations* rather than a category or cohort of employers or an industry generally.

37 The Shire of Dundas submitted that its construction is consistent with the objects of the IR Act and in particular the objects in s 6 which focus on the promotion of collective bargaining at the enterprise level to reach agreements that are appropriate to the needs of enterprises within each industry. A construction of s 80BB that makes the LGIA a new State instrument operating at a single enterprise level rather than a collective or industry level has greater alignment with these objects.

38 The Shire of Dundas also relies on the broader legislative context in support of its contended for construction. It points out that s 80A(1) expressly makes reference to s 14(2) of the FWA. Section 14(2) of the FWA says:

> *Particular employers declared not to be national system employers*
>
> (2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:
>
> (a) that employer:
>
> (i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
>
> (ii) is a body established for a local government purpose by or under a law of a State or Territory; or
>
> (iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and
>
> (b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

39 Section 14(2) also refers to 'employer' in the singular contemplating individual named employers as being the subject of an endorsement from the federal Minister.

40 The Shire of Dundas says its construction is consistent with the purpose of s 80BB as stated in the Explanatory Memorandum, namely to provide declared employers and declared employees with continuity in their employment arrangements for a transitional period, to enable them to comply with the IR Act and other applicable state industrial laws.

41 Finally, the Shire of Dundas argues that WASU's contended for construction leads to impracticable and unintended results in practice such as:

a) Difficulty in determining which employers are party to a single, multi-employer new State instrument.

b) Uncertainty in relation to the impact of a party's retirement from a multi-employer new State instrument for the ongoing operation of the new State instrument particularly if it is the union party that retires from it: s 41(7) of the IR Act.

c) Difficulties in dealing with applications to vary a multi-employer new State instrument, and in particular variations designed to meet the needs of an employer or employees at an enterprise level: s 43 of the IR Act.

d) Difficulty in the application of the provisions of s 41(8) the IR Act concerning the replacement and cancellation of industrial agreements by the making of a subsequent agreement.

e) Prevention of the possibility of a union retiring from the new State instrument in respect of a particular enterprise where union members at that enterprise want the union to retire from the agreement but in circumstances where union members in other enterprises do not want the union to retire from it.

f) If there is a single multi-employer new State instrument, then any union that has coverage of at least one employee across multiple local government employers may apply to be named as a party to it under s 80BH even if no employees at other local governments are eligible to be members of that union. The union would then have standing to enforce the new State instrument in respect of a declared local government employer even if that local government employer has no employees who are eligible for membership of that union.

42 The Shire of East Pilbara's submissions supplemented the Shire of Dundas' submissions. Its submissions emphasised the difference in the nature of a modern award such as the LGIA under the FWA and an industrial agreement under the IR Act. It noted that if parliament intended for the LGIA to operate in a similar way to a federal award under the FWA it could have:

a) drafted the transitional provisions at Part 2AA to differentiate between new State instruments which were enterprise agreements and those which were modern awards under the FWA or;

b) made the LGIA an interim State award.

Parliament chose not to make any distinction, but to instead have all old federal instruments operate in the same way as new State instruments.

43 The Minister submits that Part 2AA must be construed in the broader legislative context. In Part 2AA of the IR Act, s 80A provides the mechanism under Western Australian law for declaring an employer not to be a national system employer. But s 80A refers to, and relies on the operation of, s 14(2) of the FWA. The FWA is therefore relevant legislative context.

44 Section 14(2) of the FWA provides for three categories of employers that may be the subject of a declaration:

a) Bodies established for a public purpose by or under a law of a State;

b) Local governments; and

c) Wholly-owned subsidiaries of local governments.

45 As indicated above, s 14(2) of the FWA enables 'a particular employer' to be declared not to be a national system employer for the purposes of the FWA, if that employer is specifically declared by or under a law of the State not to be a national system employer for the purposes of the FWA.

46 Section 14(3) of the FWA provides that a declaration under s 14(2)(b) 'does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer'.

47 Section 14(4)(a) of the FWA says the federal Minister may endorse, 'in relation to an employer' a declaration referred to in s 14(2)(b).

48 Read together, these provisions mean, in effect, that each particular employer who is to be declared not a national system employer must be specifically named.

49 The Minister points out that under this scheme there may be different regulations made at different times declaring an employer or employers not to be a national system employer for the purposes of the FWA and so there may be different relevant days for each of those declarations.

50 Regulation 7 of the *Regulations* was made under s 80A(2) of the IR Act declaring employers not be national system employers for the purpose of the FWA. The Minister says that while currently reg 7 only declares a number of individual local government employers not to be national system employers, in theory a regulation could also provide for other types of employers specified in s 14(2)(a) of the FWA not to be national system employers for the purposes of the FWA.

51 Within this broader legislative context it is natural and unsurprising that Part 2AA refers to 'declared employer' in the singular. The legislative scheme reveals an intention that a single named employer be a declared employer. The scheme deliberately does not permit for categories or classes of employers to be declared employers.

52 The Minister submits that this apparent intention defeats the application of the rule in s 10(c) of the ***Interpretation Act*** *1984* (WA) whereby words in the singular number include the plural.

53 Like the Shires, the Minister points to other provisions in the IR Act concerning industrial agreements which she says are consistent with the concept that a new State instrument, which is taken to be an industrial agreement, has a single named employer as party to it. Sections 41, 80BC and 80BG of the IR Act are each referred to.

54 Finally, the Minister notes that s 80BB is a deeming provision. It deems the existence of an industrial agreement and thereby creates a statutory fiction because a federally registered enterprise agreement or a federal award is not in fact an industrial agreement under the IR Act, except for the deeming provision.

55 Because s 80BB is a deeming provision, some modification of the terms of the LGIA is acceptable and not, as WASU argues, indicative of an intention that the new State instrument be a multi-employer instrument. The Minister refers to ***East West Airlines Ltd v Turner*** [2010] NSWCA 53; (2010) 78 NSWLR 1 (***Turner***) at [52] in which Justice Hoeben referring to a statement of Lord Asquith in ***East End Dwellings Co Ltd v Finsbury Borough Council*** [1952] AC 109 at 132 said:

> [I]f you were bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.

In other words, when confronted with a fiction imposed by a statute, the court or tribunal has to determine its incidents. See also: ***Valuer-General of New South Wales v In Adam Pty Ltd*** [2012] NSWCA 20; (2012) 211 LGERA 75 at [25].

56 Similarly, the fact that a new State instrument might not in fact have at least two parties does not advance WASU's construction either. The principle in ***Turner*** means that the new State instrument is to be treated as having at least two parties, even if it in fact does not. It is to be treated as a valid industrial agreement.

Principles of statutory construction

57 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute: ***Project Blue Sky Inc & Ors v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 at [69]. The principles were recently summarised by the Court of Appeal in ***Wyloo Metals Pty Ltd v Quarry Park Pty Ltd*** [2024] WASCA 38 at [202]-[208] (citations omitted):

> The context includes the legislative history and extrinsic materials.
>
> At common law, apart from any reliance upon s 19 of the *Interpretation Act 1984* (WA), a court may have regard to reports of law reform bodies to ascertain the mischief which a statutory provision is intended to remedy.
>
> However, legislative history and extrinsic materials cannot displace the meaning of statutory text. Further, the examination of legislative history and extrinsic materials is not an end in itself.
>
> The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose.
>
> Recently, in ***ENT19 v Minister for Home Affairs***, Gordon, Edelman, Steward and Gleeson JJ made these observations:
>
> > The context of the words, consideration of the consequences of adopting a provision's literal meaning, the purpose of the statute and principles of construction may lead a court to adopt a construction that departs from the literal meaning of the words of a provision. One such principle is that legislation must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. As expressed by Gageler J in ***SAS Trustee Corporation v Miles*****,** 'statutory text must be considered from the outset in context and attribution of meaning to the text in context must be guided so far as possible by statutory purpose on the understanding that a legislature ordinarily intends to pursue its purposes by coherent means'. Where conflict appears to arise in construing an Act, 'the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions', and this 'will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"'. Ultimately, the task in applying the accepted principles of statutory construction is to discern what Parliament is to be taken to have intended.
>
> Section 18 of the *Interpretation Act* provides that, in the interpretation of a provision of a written law (defined in s 5 as 'all Acts for the time being in force'), a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object. The requirement in s 18 that one construction be preferred to another can apply only where two constructions are otherwise open. If the ordinary meaning conveyed by the text of a provision is to be modified by reference to the purposes or objects underlying the written law, the modification must be able to be identified precisely as that which is necessary to give effect to those purposes or objects and it must be consistent with the text otherwise adopted by the draftsperson. Section 18 requires a court to construe a written law, and not rewrite it by reference to its purposes or objects.
>
> The function of a definition in a statute is not, except in rare cases, to enact substantive law. Rather, its function is to provide aid in construing the substantive enactment that contains the defined term. The meaning of the definition depends on the context, and the purpose or object, of the substantive enactment.

58 These principles mean that context should be considered at the first stage and in its widest sense: ***SZTZAL v Minister for Immigration and Border Protection*** [2017] HCA 34; (2017) 262 CLR 362 at [14]. Context may encompass the structure of the Act and surrounding provisions.

Consideration

59 Section 80BB clearly expresses that a new State instrument that applies to the declared employer and declared employees is 'an industrial agreement'. The section's purpose is to give an old federal instrument status as an industrial instrument under the Act. Therefore, the key to resolving the current construction issue involves finding the way that the new State instrument may most harmoniously operate as an industrial instrument within the scheme of the IR Act.

60 WASU has identified one way that a single employer new State instrument could be seen as disharmonious with the IR Act's scheme for industrial agreements, namely, by having an insufficient number of parties, contrary to the statement of the Full Bench in ***RTBU***.

61 Industrial agreements under the IR Act are made pursuant s 41. It says:

> (1) An agreement with respect to any industrial matter or for the prevention or resolution under this Act of any related disputes, disagreements, or questions may be made between an organisation or association of employees and any employer or organisation or association of employers.
>
> (1a) An agreement may apply to a single enterprise or more than a single enterprise.
>
> (1b) For the purposes of subsection (1a) an agreement applies to more than a single enterprise if it applies to —
>
> (a) more than one business, project or undertaking; or
>
> (b) the activities carried on by more than one public authority.
>
> (2) Subject to subsection (3) and sections 41A and 49N, where the parties to an agreement referred to in subsection (1) apply to the Commission for registration of the agreement as an industrial agreement the Commission must register the agreement as an industrial agreement.
>
> (3) Before registering an industrial agreement the Commission may require the parties to effect such variation as the Commission considers necessary or desirable for the purpose of giving clear expression to the true intention of the parties.
>
> (4) An industrial agreement extends to and binds —
>
> (a) all employees who are employed —
>
> (i) in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies; and
>
> (ii) by an employer who is —
>
> (I) a party to the industrial agreement; or
>
> (II) a member of an organisation of employers that is a party to the industrial agreement or that is a member of an association of employers that is a party to the industrial agreement;
>
> and
>
> (b) all employers referred to in paragraph (a)(ii), and no other employee or employer, and its scope must be expressly so limited in the industrial agreement.
>
> (5) An industrial agreement operates —
>
> (a) in the area specified in the agreement; and
>
> (b) for the term specified in the agreement.
>
> (6) Notwithstanding the expiry of the term of an industrial agreement, it continues in force in respect of all parties to the agreement, except those who retire from the agreement, until a new agreement or an award in substitution for the first-mentioned agreement has been made.
>
> (7) At any time after, or not more than 30 days before, the expiry of an industrial agreement any party to the agreement may file in the office of the Registrar a notice in the approved form signifying the party's intention to retire from the agreement at the expiration of 30 days from the date of the filing, and, on the expiration of that period, the party ceases to be a party to the agreement.
>
> (8) When a new industrial agreement is made and registered, or an award or enterprise order is made, in substitution for an industrial agreement (the first agreement), the first agreement is taken to be cancelled, except to the extent that the new industrial agreement, award or order saves the provisions of the first agreement.
>
> (9) To the extent that an industrial agreement is contrary to or inconsistent with an award, the industrial agreement prevails unless the agreement expressly provides otherwise.

62 The reality that an old federal instrument may not have parties as required by s 41 is not unique to federal modern awards. Federal enterprise agreements can also be made without naming an employee organisation as party. WASU has not suggested that an enterprise agreement that does not have two or more parties cannot exist as a new State instrument. Rather, WASU

appears to have accepted that such instruments can exist as new State instruments, as it applied under s 80BH to be named as a party to several of them. See for example: ***Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Gosnells & Ors*** [2024] WAIRC 00422; ***Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Shire of Northampton*** [2024] WAIRC 00459; ***Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Swan & Ors*** [2024] WAIRC 00463; ***Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Bunbury & Ors*** [2024] WAIRC 00443.

63 This reality is reflected in the words used in Part 2AA and s 80BB in particular. Section 80BB is expressed in terms of a new State instrument 'applying' to a declared employer and declared employees. It does not refer to the declared employer being a 'party' to a new State instrument. Section 80BC provides for 'a declared employer, a declared employee or an organisation' to apply to amend a new State instrument. It does not refer to a 'party' being able to apply to amend a new State instrument. Indeed, nowhere in Part 2AA is there any description of an employer by reference to being a 'party' to a new State instrument.

64 One of the reasons that parliament may have chosen to express new State instruments as *applying* to declared employers, rather than specifying that declared employers are a *party* to new State instruments, may be to disqualify a declared employer from exercising the right of a party to retire from a new State instrument under s 41(7) of the IR Act, on the basis that to do so would be contrary to Part 2AA's purpose of providing continuity in terms and conditions of employment.

65 Section 80BH permits an organisation of employees or an association of employees to apply for an order 'naming' it as 'a party' to a new State instrument. There is no provision in Part 2AA for a declared employer to apply to be named as a party to a new State instrument. Because s 80BB(2) says that the new State instrument *applies* to the declared employer, and s 80BC permits 'a declared employer, a declared employee or an organisation' to apply to amend a new State instrument, there is practically no need for an employer to be named as a party to a new State instrument. An industrial agreement can be enforced under, by and against 'an employer bound by it': s 83(1)d) of the IR Act. It is not necessary that the employer be a named party to the new State instrument for it to operate.

66 Section 80BH does not mandate that an organisation of employees or association of employees must apply for an order to be named a party to a new State instrument. Any such application is optional and voluntary. If no application is made, the new State instrument remains operative.

67 In this light, s 80BH cannot be characterised as being intended to cure the anomaly that a new State instrument does not have a union party, as required by s 41 of the IR Act. Rather, it would appear that s 80BH's purpose is to enable a union to acquire the status of a party for the purpose of enforcement, if the new State instrument applies to employees who are eligible for membership of the union and the union wants to acquire that status.

68 Accordingly, the disharmony, or anomaly, of a new State instrument existing without two or more parties is not, in my view, a compelling indication of either s 80BH's purpose or the preferable construction of s 80BB. If anything, it is a core feature of old federal instruments which s 80BB's deeming effect operates on.

69 In any event, this disharmony is outweighed by the greater disharmony created by WASU's contended for construction. For instance, section 41(8) says:

> When a new industrial agreement is made and registered, or an award or enterprise order is made, in substitution for an industrial agreement (the ***first agreement***), the first agreement is taken to be cancelled, except to the extent that the new industrial agreement, award or order saves the provisions of the first agreement.

70 If the LGIA became a collective, multi-employer new State instrument, and a new industrial agreement is made in respect of one local government pursuant to s 41 of the IR Act, the registration of the new industrial agreement would be taken to cancel the new State instrument, even though the new industrial agreement relates only to one local government and its employees.

71 The concept of a collective, multi-employer new State instrument is disharmonious with the ability in s 80BC for 'a declared employer, a declared employee or an organisation' to apply to amend a new State instrument, and for such amendments to be made if the Commission is satisfied 'it is fair and reasonable to do so in the circumstances'. It is difficult to envisage how the Commission could ever be satisfied as to the fairness and reasonableness of a proposed amendment, without hearing from or considering the position of every employer and employee to whom the new State instrument applied. The difficulty of meeting the test means such applications would be rare, and success rarer. This is in a context where new State instruments are a form of transitional instrument applying temporarily. It is unlikely the parliament intended to include a mechanism for amendment of new State instruments, with temporary application, for the mechanism to be practically prohibitive.

72 A practical consequence of adopting WASU's contended for construction is that it would be very difficult to identify precisely which employers (and therefore which employees) the new State instrument applies to. There are 137 local governments (and 8 regional local governments) that are declared employers listed in Schedule 4 of the *Regulations*. WASU have named some 60 local governments as respondents to these proceedings, implicitly accepting that the LGIA did not apply to all 137 local governments immediately prior to 1 January 2023. But there is nothing in the IR Act or the *Regulations* which gives any clue as to which of the 137 local governments the LGIA applied to prior to 1 January 2023.

73 If s 80BB creates a single, multi-employer new State instrument, but ascertaining who it applies to is difficult, it follows that it will also be difficult to implement many of the IR Act's provisions that apply to industrial agreements.

74 Other examples of disharmony created by the concept of a collective, multi-employer new State instrument were identified by the Shire of Dundas and the Minister, as set out above.

75 The broader legislative context supports the view that s 80BB of the IR Act creates separate new State instruments for each individual declared employer. Section 80A expressly refers to s 14(2) of the FW Act. Also, the heading to Part 2AA is in language that replicates precisely the language used in s 14 about employers being declared not to be national system employers. Part 2AA can only operate in conjunction with s 14 of the FWA.

76 Section 14(2) of the FWA refers to 'a particular employer' as not being a national system employer when that employer meets the criteria in s 14(2). It is clear for the reasons articulated by the Shire of Dundas and the Minister, that the subject of s 14(2) is an individual, named employer. A 'declared employer' is, necessarily, also an individual named employer.

77 As the Minister's counsel identified, s 14(3) of the FWA precludes a declaration having effect in respect to an employer only because the employer is included in a specified class or kind of employer. Also, it is theoretically possible under s 80A of the IR Act that different employers will be declared by regulations not to be national system employers at different times and additionally or alternatively with different days fixed as being the 'relevant day' for the purpose of the declaration. Section 80BB of the IR Act provides for a new State instrument to be created 'on the relevant day'. This theoretical possibility demonstrates why there must be separate new State instruments.

78 The legislative framework that supports the operation of Part 2AA treats declared employers singularly and separately. New State instruments being singular and separate in respect of individual declared employers provides consistency with this framework and harmony with the sense in which the term 'declared employer' is used in the statutory provisions.

79 This construction is also consistent with the IR Act's objects in sections 6(ad) and 6(ag):

> [T]to promote collective bargaining and to establish the primacy of collective agreements over individual agreements; and
>
> …
>
> [T]o encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises.

80 On WASU's construction, the created new State instrument is unconnected to individual enterprises and therefore has no function in advancing enterprise level collective bargaining. On the Shires' construction, a new State instrument exists for individual enterprises and so plays a role in advancing these objects because:

a) It gives effect to the ability to initiate bargaining at an enterprise level as contemplated by s 42 of the IR Act;

b) It gives effect to the ability to vary, renew or cancel the new State instrument to meet the needs of an enterprise by agreement under s 43(1) of the IR Act;

c) It gives effect to the ability to vary the new State instrument to meet the needs of an enterprise under s 43(2) of the IR Act.

81 I am unpersuaded by WASU's reliance on the coverage clause of the LGIA as support for its construction. First, the LGIA is not material of a kind that is listed in s 19(2) of the *Interpretation Act*. In any event, the LGIA is only one of many federal industrial instruments which are impacted by s 80BB of the IR Act. The LGIA cannot, in isolation, provide useful context to assist in understanding the purpose of s 80BB. If resort is had to the LGIA as extrinsic material, resort would also need to be had to every other federal instrument which existed at the time s 80BB was enacted, to which s 80BB might apply.

82 Second, the words in cl 4.1, which WASU relies on, do not mean that the LGIA covers the multiple local governments who are respondents to WASU's application. Clause 4.1 of the LGIA cannot be read in isolation. Clause 2 of the LGIA defines 'employer' to mean a national system employer within the meaning of the FWA. The respondents are no longer national system employers.

83 Third, the coverage clause must be read and understood in the context of s 46 of the FWA. Coverage is only one prerequisite for a modern award applying to an employer and its employees. It is not determinative of which employers are bound by the LGIA.

84 The coverage clause of the LGIA cannot sensibly be given meaning or effect as part of a new State instrument, whether the new State instrument is a separate new State instrument for a single employer, or a single collective multi-employer new State instrument. It could be said that this sits uneasily with s 80BB's demand that the new State instrument be taken to have the same terms as the old federal instrument. However, it does not, as WASU submits, impermissibly require the old federal instrument be rewritten. Section 80BB of the IR Act itself is the source of a new State instrument's application and binding effect.

85 Nor do I place any weight on the manner in which the website displays the LGIA as an industrial agreement. The **Department** of the Registrar of the Western Australian Industrial Relations Commission maintains a webpage of 'current industrial agreements'. It displays the Local Government Industry Award 2020 as a new State instrument in force from 1 January 2023, on a single page, with a single hyperlink, accompanied by the usual disclaimer that the document should be used as a guide only.

86 WASU's counsel did not articulate why the principles of statutory construction permit resort to the Department's website, and in particular pages created after the statute's enactment, as an aid to the construction of s 80BB of the IR Act. I decline to have regard to this material.

Conclusion and orders

87 For these reasons, I consider that on a correct construction a 'new State instrument' referred to in s 80BB of the IR Act is an instrument which applies to an individual declared employer and not to a collective of multiple declared employers.

88 Accordingly, applying the correct construction of s 80BB, a separate new State instrument is created for each individual local government to whom the LGIA applied, or purported to apply, immediately prior to the local government transition.

89 The consequence of this conclusion is that WASU's application under s 80BH for an order naming it as party to a single multi-employer new State instrument called the Local Government Industrial Award 2020 Industrial Agreement is misconceived. No such new State instrument exists and no such order can be made.

90 To exercise the ability to apply for an order naming it as a party to a new State instrument under s 80BH of the IR Act, WASU will need to apply in respect of each separate new State instrument created under s 80BB which has the terms of the LGIA.

91 I will hear from the parties as to what orders should follow from this determination.

Schedule 1 – Extract of Part 2AA of the Industrial Relations Act 1979 (WA)

Part 2AA — Employers declared not to be national system employers

[Heading inserted: No. 30 of 2021 s. 38.]

Division 1 — Declarations

[Heading inserted: No. 30 of 2021 s. 38.]

80A. Employers declared not to be national system employers

(1) This section applies to an employer who, under the FW Act section 14(2), may be declared by or under a law of the State not to be a national system employer.

(2) The regulations may —

(a) declare the employer not to be a national system employer for the purposes of the FW Act; and

(b) fix a day (the ***relevant day***) for the purposes of that declaration.

[Section 80A inserted: No. 30 of 2021 s. 38.]

Division 2 — Change from federal to State system

[Heading inserted: No. 30 of 2021 s. 38.]

80B. Terms used

In this Division —

declared employee means a person employed by a declared employer;

declared employer means an employer declared not to be a national system employer in regulations under

section 80A(2)(a);

federal award means —

(a) a modern award under the FW Act; or

(b) an award under the repealed Workplace Act continued in existence under the FW (Transitional) Act;

federal industrial authority means —

(a) the Australian Industrial Relations Commission under the repealed Workplace Act; or

(b) the FW Commission;

federal industrial instrument means a fair work instrument under the FW Act;

national fair work legislation means —

(a) the FW Act; or

(b) the FW (Transitional) Act;

new State instrument has the meaning given in section 80BB(2);

old federal instrument has the meaning given in section 80BB(1)(b);

relevant day has the meaning given in section 80A(2)(b);

repealed Workplace Act means the *Workplace Relations Act 1996* (Commonwealth);

terms includes conditions, restrictions and other provisions.

[Section 80B inserted: No. 30 of 2021 s. 38.]

80BA. Operation of awards, industrial agreements or orders

(1) The regulations may provide that, on and from the relevant day, an award, industrial agreement or order specified in the regulations applies to the employees of a declared employer specified in the regulations.

(2) If regulations are made under subsection (1), on and from the relevant day the award, industrial agreement or order applies to each of the following —

(a) the declared employer;

(b) the declared employees of the declared employer;

(c) an organisation that is a party to the award or industrial agreement or that is bound by the order.

80BB. New State instruments

(1) This section applies —

(a) to the extent section 80BA does not provide for a declared employee of a declared employer; and

(b) if, immediately before the relevant day, a federal industrial instrument (the ***old federal instrument***) applies to, or purports to apply to, the declared employee.

(2) On the relevant day, an industrial agreement (the ***new State instrument***) applies to the declared employer and declared employees.

The new State instrument is taken —

(a) to have been registered under this Act on the relevant day; and

(b) except as provided in this section or section 80BC, to have the same terms as the old federal instrument including those terms as added to or modified by any of the following —

(i) terms of a federal award incorporated by the old federal instrument;

(ii) orders of a federal industrial authority;

(iii) another instrument under the national fair work legislation or the repealed Workplace Act;

and

(c) to have a nominal expiry date that is the earlier of the following —

(i) a day that is 2 years after the relevant day;

(ii) the day that, immediately before the relevant day, was the nominal expiry day of the old federal instrument.

(1) This Act applies in relation to the new State instrument subject to any modifications or exclusions prescribed by regulations for this subsection.

(2) The new State instrument applies except as provided in the MCE Act.

[Section 80BB inserted: No. 30 of 2021 s. 38.]

80BC. Amendment of new State instruments

(1) A declared employer, a declared employee or an organisation may apply to the Commission to amend a new State instrument.

(2) On the application, the Commission may make the amendment if it is satisfied it is fair and reasonable to do so in the circumstances.

(3) The amendment may be provided to take effect —

(a) immediately; or

(b) progressively, in stages specified in the amendment.

[Section 80BC inserted: No. 30 of 2021 s. 38.]

80BD. Ability to carry over matters

The Commission may, in connection with the operation of this Part, or any matter arising directly or indirectly out of the operation of this Part —

(a) accept, recognise, adopt or rely on any step taken under, or for, the national fair work legislation; and

(b) accept or rely on anything (including in the nature of evidence presented for the purpose of any proceedings) that has been presented, filed or provided under, or for, the national fair work legislation; and

(c) give effect in any other way to any other thing done under, or for, the national fair work legislation.

[Section 80BD inserted: No. 30 of 2021 s. 38.]

80BE. References in new State instruments to federal industrial authority and General Manager

(1) In this section —

General Manager means the General Manager under the FW Act.

(2) On and from the relevant day, a term of a new State instrument expressed to confer a power or function on a federal industrial authority has effect as if it conferred the power or function on the Commission.

(3) On and from the relevant day, a term of a new State instrument expressed to confer a power or function on the General Manager has effect as if it conferred the power or function on the Registrar.

[Section 80BE inserted: No. 30 of 2021 s. 38.]

80BF. References in new State instruments to provisions of Commonwealth laws

(1) In this section —

corresponding provision of this Act, to a provision of the FW Act, means —

(a) if paragraph (b) does not apply — a provision of this Act that is of similar effect to the provision of the FW Act; or

(b) a provision of this Act declared by regulations to be a corresponding provision.

(2) On and from the relevant day, a term of a new State instrument expressed to refer to a provision of the FW Act is taken to refer to the corresponding provision of this Act.

[Section 80BF inserted: No. 30 of 2021 s. 38.]

80BG. References in new State instruments to federal organisations

(1) In this section —

federal counterpart has the meaning given in the FW (Registered Organisations) Act section 9A.

(2) On and from the relevant day, a term of a new State instrument expressed to refer to a federal organisation is taken to refer to an organisation under this Act of which the federal organisation is a federal counterpart.

(3) If the federal organisation is not a federal counterpart of an organisation under this Act, the federal organisation is taken to be an organisation under this Act representing the declared employees of the relevant declared employer in proceedings or other matters arising under this Act.

(4) Subsection (3) ceases to apply to the federal organisation when the new State instrument ceases to apply to the relevant declared employer and declared employees.

[Section 80BG inserted: No. 30 of 2021 s. 38.]

80BH. Named parties to new State instruments

(1) An organisation of employees or an association of employees may apply to the Commission to make an order naming the organisation or association as a party to a new State instrument.

(2) On the application, the Commission must grant the order if, in the opinion of the Commission, the instrument applies to an employee who is eligible to be a member of the organisation or association.

[Section 80BH inserted: No. 30 of 2021 s. 38; amended: No. 43 of 2024 s. 56.]

80BI. Employment under old federal instrument

(1) Subsection (2) applies in relation to deciding the entitlements of a declared employee under a new State instrument.

(2) Employment of the declared employee with a declared employer before the relevant day that counted under the old federal instrument also counts as employment of the declared employee with the declared employer under the new State instrument.

(3) If, before the relevant day, the declared employee has already had the benefit of an entitlement determined by reference to a period of service, the period of service cannot be counted again under subsection (2) for calculating the declared employee's entitlements of that type under the new State instrument.

[Section 80BI inserted: No. 30 of 2021 s. 38.]

80BJ. Leave accrued immediately before relevant day

(1) This section applies to any paid or unpaid leave accrued under an old federal instrument, the national fair work legislation or a law of this State.

(2) Leave accrued immediately before the relevant day by a declared employee to whom a new State instrument applies is taken to have accrued under the new State instrument.

[Section 80BJ inserted: No. 30 of 2021 s. 38.]

80BK. Leave taken under old federal instrument

(1) A declared employee who was, immediately before the relevant day, taking a period of leave under the old federal instrument or under the FW Act is entitled to continue on that leave under the new State instrument or a law of this State for the remainder of the period.

(2) A declared employee who has, before the relevant day, taken a step under the old federal instrument or the FW Act that the employee is required to take so the employee can, on and from the relevant day, take a period of leave under the old federal instrument or the FW Act, is taken to have taken the step under the new State instrument or a law of this State.

(3) The regulations may deal with other matters relating to how a new State instrument applies to leave that, immediately before the relevant day, is being, or is to be, taken by a declared employee under the old federal instrument or the FW Act.

[Section 80BK inserted: No. 30 of 2021 s. 38.]

[Part IIA: s. 80C-80S deleted: No. 43 of 2024 s. 57;

s. 80T deleted: No. 1 of 1995 s. 30;

s. 80U-80W deleted: No. 43 of 2024 s. 57;
s. 80X-80Z, 80ZA-80ZD: No. 1 of 1995 s. 31.]

Schedule 2 – List of Respondents

First Respondent	City of Melville
Second Respondent	City of Subiaco
Third Respondent	City of Swan
Fourth Respondent	Eastern Metropolitan Regional Council
Fifth Respondent	Shire of Beverley
Sixth Respondent	Shire of Boyup Brook
~~Seventh Respondent~~	~~Shire of Bruce Rock~~
Eighth Respondent	Shire of Capel
Ninth Respondent	Shire of Carnarvon
Tenth Respondent	Shire of Chapman Valley
Eleventh Respondent	Shire of Chittering
Twelfth Respondent	Shire of Coolgardie
Thirteenth Respondent	Shire of Coorow
Fourteenth Respondent	Shire of Cuballing
Fifteenth Respondent	Shire of Cunderdin
~~Sixteenth Respondent~~	~~Shire of Dalwallinu~~
Seventeenth Respondent	Shire of Dandaragan
Eighteenth Respondent	Shire of Dardanup
Nineteenth Respondent	Shire of Denmark
Twentieth Respondent	Shire of Donnybrook-Balingup
Twenty-First Respondent	Shire of Dundas
Twenty-Second Respondent	Shire of East Pilbara
Twenty-Third Respondent	Shire of Gingin
Twenty-Fourth Respondent	Shire of Gnowangerup
~~Twenty-Fifth Respondent~~	~~Shire of Halls Creek~~
Twenty-Sixth Respondent	Shire of Irwin
Twenty-Seventh Respondent	Shire of Jerramungup
Twenty-Eighth Respondent	Shire of Katanning
Twenty-Ninth Respondent	Shire of Kellerberrin
Thirtieth Respondent	Shire of Koorda
Thirty-First Respondent	Shire of Kulin
Thirty-Second Respondent	Shire of Lake Grace
Thirty-Third Respondent	Shire of Meekatharra
~~Thirty-Fourth Respondent~~	~~Shire of Menzies~~
Thirty-Fifth Respondent	Shire of Merredin
Thirty-Sixth Respondent	Shire of Mingenew
Thirty-Seventh Respondent	Shire of Moora
~~Thirty-Eighth Respondent~~	~~Shire of Morawa~~
~~Thirty-Ninth Respondent~~	~~Shire of Mount Magnet~~
Fortieth Respondent	Shire of Mount Marshall
Forty-First Respondent	Shire of Mukinbudin
Forty-Second Respondent	Shire of Murchison
Forty-Third Respondent	Shire of Narrogin
Forty-Fourth Respondent	Shire of Ngannyatjarraku
Forty-Fifth Respondent	Shire of Northam
Forty-Sixth Respondent	Shire of Nungarin

Forty-Seventh Respondent	Shire of Quairading
Forty-Eighth Respondent	Shire of Serpentine-Jarrahdale
Forty-Ninth Respondent	Shire of Shark Bay
Fiftieth Respondent	Shire of Tammin
Fifty-First Respondent	Shire of Trayning
Fifty-Second Respondent	Shire of West Arthur
Fifty-Third Respondent	Shire of Wickepin
Fifty-Fourth Respondent	Shire of Williams
Fifty-Fifth Respondent	Shire of Wongan-Ballidu
Fifty-Sixth Respondent	Shire of Wyalkatchem
Fifty-Seventh Respondent	Town of East Fremantle
Fifty-Eighth Respondent	Town of Mosman Park
Fifty-Ninth Respondent	Western Metropolitan Regional Council
Sixtieth Respondent	Shire of Mundaring
Sixty-First Respondent	Shire of Esperance

2025 WAIRC 00388

APPLICATION PURSUANT TO SECTION 80BH TO NAME WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES AS A PARTY TO THE LOCAL GOVERNMENT INDUSTRY AWARD 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	CITY OF MELVILLE AND OTHERS AS REFERRED TO IN THE ATTACHED SCHEDULE
	RESPONDENTS
	AND
	MINISTER FOR INDUSTRIAL RELATIONS
	INTERVENOR
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	THURSDAY, 26 JUNE 2025
FILE NO/S	APPL 164 OF 2024
CITATION NO.	2025 WAIRC 00388

Result Application dismissed

Representation

Mr C Fogliani (of counsel) on behalf of the applicant

Ms D Lamb (of counsel) on behalf of the Shire of East Pilbara

Ms J Flinn (of counsel) on behalf of the Shire of Dundas

Ms R Panetta (of counsel) on behalf of the Minster for Industrial Relations

Order

HAVING heard from Mr Fogliani on behalf of the applicant, Ms Lamb on behalf of the Shire of East Pilbara, Ms Flinn on behalf of the Shire of Dundas, and Ms Panetta on behalf of the Intervenor, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (Act), hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

Schedule – List of Respondents

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Second Respondent	City of Subiaco
Third Respondent	City of Swan
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Fifty-Eighth Respondent	Town of Mosman Park
Fifty-Ninth Respondent	Western Metropolitan Regional Council
Sixtieth Respondent	Shire of Mundaring
Sixty-First Respondent	Shire of Esperance

INDUSTRIAL MAGISTRATE—Claims before—

2025 WAIRC 00349

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00349
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 30 APRIL 2025
DELIVERED	**:**	FRIDAY, 13 JUNE 2025
FILE NO.	**:**	M 94 OF 2024
BETWEEN	**:**	CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION **CLAIMANT** AND OSM AUSTRALIA PTY LTD **RESPONDENT**
CatchWords	**:**	INDUSTRIAL LAW – Construction of a clause of an enterprise agreement — Casual conversion under cl 12.5 of *OSM Australia Pty Ltd and MUA Offshore Oil and Gas Enterprise Agreement 2023* – Timing of expressions of interest and offers of permanent employment – Meaning of fill permanent position – Timing of the commencement of permanent position
Legislation	**:**	*Fair Work Act 2009* (Cth)
Instrument	**:**	*OSM Australia Pty Ltd and MUA Offshore Oil and Gas Enterprise Agreement 2023*
Case(s) referred to in reasons:	**:**	***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813; (2006) 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 ***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 ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828; (2017) 97 WAIG 1595 ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638
Result	**:**	Claim proven in part
Representation:		

Claimant : Ms S. Sayed (of counsel)

Respondent : Mr S. Rogers (of counsel)

REASONS FOR DECISION

Introduction

1 On 8 July 2024, the Construction, Forestry and Maritime Employees Union (**the claimant**) lodged a claim alleging OSM Australia Pty Ltd (**the respondent**) failed to give five casual Integrated Rating (**IR**) positions offers to convert to permanent employment by 19 January 2024 and failed to fill the positions by 26 January 2024 in compliance with cl 12.5(a) and cl 12.5(b) of the *OSM Australia Pty Ltd and MUA Offshore Oil and Gas Enterprise Agreement 2023* (**the OSM Agreement**) (**the Claim**).

2 In failing to give the offers to convert to permanent employment and failing to fill the positions, the claimant alleges that the respondent has contravened s 50 of the *Fair Work Act 2009* (Cth) (**FWA**) in that the respondent has breached cl 12.5(a) and cl 12.5(b) of the OSM 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 s 546(1) and s 546(3) of the FWA.

4 On 9 December 2024, the claimant lodged further and better particulars to the Claim specifying the five casual IR employees who had expressed an interest in permanency and the timeline of communication between the respondent's employees, the respondent and representatives of the claimant.

5 The respondent denies the alleged contravention and says the controversy between the parties involves interpreting the relevant clause in the OSM Agreement. However, the respondent admitted some of the particulars contained in the claimant's further and better particulars of claim.

6 Schedule I of these reasons outlines the jurisdiction, standard of proof and practice and procedure of the Industrial Magistrates Court (**IMC**).

7 Schedule II of these reasons outlines the principles applicable to the construction of an industrial agreement.

Agreed Facts

8 The parties provided a statement of agreed facts[i].

9 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 OSM Agreement on 15 December 2023, and it came into operation on 22 December 2023 with a nominal expiry date of 1 August 2027. The OSM Agreement applies to employees employed by the respondent in any of the classifications contained in the OSM Agreement[ii].

10 The respondent received expressions of interest from (amongst others): Richard Badger on 1 January 2024; Rewi Whaitiri on 20 December 2023; Mitchell Keighran on 11 January 2024; and Matthew Duguid on 12 January 2024.

11 On 19 February 2024, the respondent made offers of permanent employment to Richard Badger, Rewi Whaitiri, Mitchell Keighran and Matthew Duguid.

12 The offers of permanent employment were accepted by: Richard Badger on 21 February 2024; Rewi Whaitiri on 27 February 2024; Mitchell Keighran on 22 February 2024; and Matthew Duguid on 19 February 2024.

13 Richard Badger commenced as a permanent employee on 28 February 2024, Rewi Whaitiri commenced as a permanent employee on 20 March 2024, Mitchell Keighran commenced as a permanent employee on 13 March 2024, and Matthew Duguid commenced as a permanent employee on 13 March 2024.

Other Evidence

Claimant's evidence

14 George Gakis (**Mr Gakis**), Trade Union Official of the Maritime Union of Australia Division of the claimant, states in a witness statement signed on 19 February 2025[iii] that he was involved in the bargaining negotiations for the OSM Agreement.

15 Mr Gakis states that in meetings with the respondent, it was discussed and agreed that within four weeks of registration of the OSM Agreement, the respondent would call for expressions of interest for permanency and provide offers of permanent employment to five IRs. Mr Gakis further stated that on 15 November 2023, the respondent confirmed this position in an explanatory memorandum provided to the employees[iv].

16 On or around 20 December 2023, Mr Gakis states he became aware that most of the casual IRs had not received the respondent's email calling for expressions of interest for permanent employment. He was informed by members that the respondent had not made a 'call for expressions of interest for permanency, but rather, it was a cumbersome process that required' a number of documents, including: covering letter detailing an interest in permanency; updated resume; and other documents including qualifications[v].

17 On 20 December 2023, Mr Gakis emailed Ilana Jewson (**Ms Jewson**), Employee Operations Manager for the respondent, raising the members' concerns about the application process[vi]. On 22 December 2023, Ms Jewson responded to his email informing him that five people had come forward and applied for permanency[vii].

18 In cross-examination, Mr Gakis confirmed he was involved in the bargaining of the OSM Agreement but did not recall the conversations with Warren Harrower (**Mr Harrower**), the respondent's Employee Relations Manager, concerning client issues. He said the respondent did not require client approval.

19 Jeffry Badger (**Mr Badger**), IR employed by the respondent, states that on or around 15 November 2023 he received an explanation sheet from the respondent about the OSM Agreement[viii].

20 Mr Badger states he did not receive any correspondence from the respondent about expressions of interest for permanency. However, on 20 December 2023, he emailed Ilana Jewson expressing an interest in permanent employment. On 12 February 2024, Mr Badger received an email from Ms Jewson informing him that he had been approved for a permanent position, and that 'Sherry' would be in touch with his new contract and confirmation offer[ix].

21 On 29 February 2024, Mr Badger received a copy of a contract of employment[x]. Notably, in an email from Sherry Hernandez Refamonte, Crewing Manager, to Mr Badger on the same day, Mr Badger is informed '[h]owever, duty day being perm will start on the first duty day after this swing'[xi].

22 Notwithstanding that Mr Badger states he commenced permanent employment on 9 April 2024[xii], what he does not state in his witness statement is that he did not sign the contract of employment until 9 April 2024[xiii]. He acknowledged this in cross-examination along with acknowledging that his first duty day at the end of the 'swing' was 9 April 2024[xiv].

Respondent's evidence

23 Warren Harrower, the respondent's Employee Relations Manager, states he was involved in the negotiation of the OSM Agreement with the claimant, including Mr Gakis[xv].

24 Mr Harrower goes into some detail concerning the respondent's business. I do not intend to recount all of this evidence. In summary, the respondent's business is subservient to their clients' needs, including the number of permanent and casual employees it can employ[xvi].

25 As a crewing agent, the respondent's business model is similar to other businesses in the offshore oil and gas industry[xvii].

26 Mr Harrower outlines in detail conversations he had with Mr Gakis, and other representatives of the claimant during the bargaining process for the OSM Agreement, about the respondent's business model and the need for client approval and the costs associated with this, including 'manning' levels. Mr Harrower says that manning levels were a source of dispute between the respondent and the claimant over last five years[xviii].

27 Mr Harrower states that negotiations for the OSM Agreement started in November 2022 and was agreed in principle on 20 October 2023. Mr Harrower said he had several telephone conversations with Mr Gakis about the OSM Agreement, including how the proposed words in cl 12 would work, where the respondent was beholden to its clients' approval[xix].

28 Mr Harrower states cl 12.5 was inserted into the OSM Agreement at the insistence of the claimant to increase the number of permanent employees. Mr Harrower says he discussed the implementation of cl 12.5 with the claimant because he was aware there were practical constraints to the clause. Mr Harrower states that in a telephone conversation with Mr Gakis, he discussed the operation of cl 12.5(a) and asked Mr Gakis what needed to happen in the four - week period after registration, to which Mr Gakis said the intent was to advertise for expressions of interest within that period[xx].

29 Mr Harrower states he then asked Mr Gakis about cl 12.5(b) and what the claimant understood about the obligation imposed on the respondent within those seven days, to which Mr Gakis responded that once an employee returned a signed permanent contract of employment then permanent employment should be implemented within seven days of receipt[xxi].

30 Mr Harrower understood from the conversation that it was common ground between the parties that it would take some time for the respondent to undertake assessments following receipt of expressions of interest for permanency and to obtain client approval. He thought that he and Mr Gakis were aligned in terms of the timing of the process, including that the permanent employment would commence seven days from when a returned signed contract of employment was received[xxii].

31 To Mr Harrower, it made logical sense that only the expressions of interest could be undertaken within the four - week period, and the remaining process would take longer. He understood that Mr Gakis was aware of this and the reasons for it[xxiii].

32 Mr Harrower was informed by the respondent's crewing manager that Mr Badger was offered permanent employment on 29 February 2024, but did not accept the offer because he disputed the terms of his contract. The terms were worked through and Mr Badger accepted the offer on 9 April 2024, commencing permanent employment on the same day[xxiv].

33 Mr Harrower maintained he had a conversation with Mr Gakis regarding the need for client approval and that this was part of the bargaining process. He agreed the OSM Agreement did not contain a clause requiring client approval before converting a casual employee to a permanent employee. He agreed an employee start date could theoretically occur prior to a swing start date but typically this did not happen.

34 Ms Jewson, the respondent's Employee Operations Manager, is responsible for the management of the respondent's crewing operations team, dealing with union officials and day-to-day management of employees on vessels[xxv].

35 Ms Jewson states that the employees' on and off duty periods are considered one period of employment, and in her experience, employees have never changed their terms and conditions mid-swing, which she says is well known by the claimant[xxvi].

36 Ms Jewson also states that employees were consulted about when their permanent employment would start and how they wanted to manage any casual employment entitlements in the interim. She says it was only possible for employees to commence permanent employment at the start of the swing after they accepted their offer of permanent employment[xxvii].

37 On 19 December 2023, Ms Jewson authorised an email to be sent to the IRs on behalf of the respondent via the respondent's eCrew system calling for expressions of interest for permanency[xxviii].

38 It has never been reported to her that there were problems with employees receiving communications via eCrew and eCrew is the method the respondent uses to communicate directly with employees[xxix].

39 On 20 December 2023, Ms Jewson received an email from Mr Gakis advising that preference should be given to the longest serving employees where the number of applications exceeded the five offers. Mr Gakis did not raise any concern with the timing of offers[xxx].

40 On 22 December 2023, Ms Jewson replied to Mr Gakis and informed him five employees had expressed interests at that time[xxxi].

41 Ms Jewson did not receive any further correspondence from Mr Gakis before going on annual leave on 22 December 2023 and returning from leave on 2 January 2024.

42 Ms Jewson provides an example of one of the employees, Mitch Keighran (**Mr Keighran**), being on leave from 6 December 2023 to 10 January 2024, and she states Mr Keighran submitted his expression of interest on 11 January 2024 which was four days before the cut-off date of 15 January 2024[xxxii].

43 The respondent received nine expressions of interest for permanency which necessitated an assessment process part of which involved input by the respondent's clients. The assessment process took 21 working days to fully assess the applicants, from which five were chosen[xxxiii].

44 The respondent made five offers of permanency[xxxiv]:

- Jeffry Badger on 29 February 2024
- Richard Badger on 19 February 2024
- Matthew Duguid on 19 February 2024
- Mitch Keighran on 19 February 2024
- Rewi Whatiri on 27 February 2024

45 The offers were accepted by[xxxv]:

- Jeffry Badger on 9 April 2024
- Richard Badger on 21 February 2024
- Matthew Duguid on 19 February 2024
- Mitch Keighran on 22 February 2024
- Rewi Whatiri on 27 February 2024

46 Ms Jewson states Jeffry Badger did not sign an offer of permanency until 9 April 2024 because he disputed the terms of his employment contract[xxxvi].

47 The IRs who were offered permanency commenced their permanent employment after being on leave and returning to their vessel on the following dates[xxxvii]:

- Jeffry Badger on 9 April 2024
- Richard Badger on 28 February 2024
- Matthew Duguid on 13 March 2024
- Mitch Keighran on 13 March 2024
- Rewi Whatiri on 20 March 2024.

48 Ms Jewson states the above dates were the first date of their return to work following their off - duty period, which she says was within seven days[xxxviii].

49 I accept the witnesses evidence, subject to one proviso being the alleged discussions between Mr Harrower and Mr Gakis. I also note Mr Badger was not forthcoming about all of the facts surrounding the signing of his contract of employment, however, he made appropriate concessions in cross-examination.

50 I prefer the evidence of Mr Harrower about his conversations with Mr Gakis, whose curt denial of the conversations failed to impress where he was involved in the bargaining process representing the claimant. Mr Harrower's recollection of the nature of the conversations with Mr Gakis was detailed and consistent with the lack of detail concerning the operation of cl 12.5 of the OSM Agreement (which will be explained below). Given the relevance to the respondent's business, the nature of Mr Harrower's conversations were credible, notwithstanding he made no notes of his conversations with Mr Gakis.

The Parties' Contentions

51 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[xxxix]. 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[xl]. An industrial agreement must make sense according to the basic conventions of the English language[xli]. 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[xlii]. Narrow and pedantic approaches to the interpretation of an industrial agreement are misplaced[xliii].

The claimant's submissions

52 The claimant says the requirement for the respondent to comply with cl 12.5(a) and (b) of the OSM Agreement is unambiguous, easily understood and needs no additional words to its meaning.

53 The respondent's obligation was to call for expressions of interest and where there were enough applicants, to provide offers of permanency within four weeks. Thereafter, the respondent was required to fill positions within seven days, which according to the Claim was by 26 January 2024.

54 In reply to the respondent's oral submissions, as I understood it, the claimant's position is not that the employee is to be on a vessel within seven days, but the permanent position is to be filled within seven days. That is, it is the employment relationship that is important, not where the employee is located.

The respondent's submissions

55 In summary, the respondent contends that its obligation was to call for expressions of interest within four weeks of the registration of the OSM Agreement. Thereafter, it was not intended the completion of the process occur within four weeks where the respondent was constrained under its business model, and it was required to undertake an assessment process if more than five applicants expressed interest in permanent employment.

56 Further, it was not open to the respondent to fill any permanent position until after an applicant accepted any offer of permanency by way of a written contract of employment.

57 The respondent suggests the timing of these steps is the issue in dispute between the parties. The respondent's submissions will be discussed in more detail below.

What is the Preferred Construction of Clause 12.5(a) and (b)?

Clause 12.5 of the OSM Agreement

58 Clause 12.5 of the OSM Agreement provides:

(a) The Employer will call for expressions of interest for permanent positions and where there are enough applicants, will provide 5 casual IRs with offers to convert to Permanent Employment, within 4 weeks of registration of this Agreement.

(b) The Position will be filled within 7 days, where the applicants return confirmation of permanent employment.

(c) Where less than the 5 casual IR's express interest in the 5 permanent positions in accordance with 12.5(a), the Employer is only obliged to make offers to those employees and not 5 offers.

(d) At the time of making of this EA, there were a total of 5 permanent IRs covered by this EA.

59 Clause 12.6 of the OSM Agreement provides:

(a) Where the number of Employees expressing an interest in a permanent position exceeds the number of positions available, preference will be given to those with the longest service.

60 Clause 12.7 of the OSM Agreement provides:

(a) When a Permanent Employee vacates their permanent position for any reason other than redundancy, the Employer will call for an expression interest with offers to fill the vacated permanent position within 28 days, by a Casual Employee.

(b) The position will be filled within 7 days, where the applicants return confirmation of permanent employment.

(c) Nothing in this clause requires a Casual Employee to convert to permanent employment.

61 Clause 3.1 of the OSM Agreement defines 'Permanent Employee' to mean 'an Employee that is employed as a Full-Time under clause 12 of [the OSM] Agreement'.

62 Clause 12.2(a) of the OSM Agreement provides for two types of employees, Full-Time Employees and Casual Employees. Under cl 12.2(b) of the OSM Agreement, prior to the commencement of employment, the respondent is to provide to the employee a written offer of employment which contains at least the type and, for a Casual Employee, the term of the employment.

63 Clause 12.3 of the OSM Agreement sets out the payment terms for a Casual Employee.

64 Clause 12.4 of the OSM Agreement provides a mechanism for the conversion of a Casual Employee to a Permanent Employee where the Casual Employee works regularly for three consecutive swing cycles in the prior 12 - month period.

65 Clause 12.8 of the OSM Agreement outlines the terms of engagement for Casual Employees.

Text

66 The starting point in the OSM Agreement is the text. Clause 12.5(a) contains two requirements relevant to the respondent: a call for expressions of interest for permanency; and the provision of offers of conversion from casual to permanent employment.

67 The principal issue in dispute between the parties is the timing of those requirements. In part, this dispute may be because the respondent understood the claimant's claim was for offers and commencement of employment to be by 26 January 2024, which I did not understand to be the claimant's argument in the end. However, I note the contravention alleged in the Claim as it relates to cl 12.5(b).

68 The claimant says the text of cl 12.5(a) imposes the two requirements on the respondent to occur within four weeks of registration of the OSM Agreement. As agreed by the parties, the OSM Agreement was registered on 22 December 2023 and four weeks from this date is 19 January 2024.

69 Thereafter, pursuant to cl 12.5(b), the Position[xliv] will be filled within seven days, where the applicants return confirmation of permanent employment.

70 The claimant initially suggested the text of cl 12.5(b) requires any permanent position to be occupied and commenced within seven days of the causal employee's confirmation of permanent employment. However, in closing the claimant suggested the permanent position was to be filled in seven days, but that did not mean the employee was required to be on a vessel within seven days.

71 The claimant submits the text is clear and there is no ambiguity in the words used and their meaning.

72 That is, from the claimant's perspective it is a straightforward lineal requirement of the call for expression of interest and provision of offers by 19 January 2024. Thereafter, any casual employee is to commence permanent employment within seven days of confirming acceptance of permanent employment, although it was unclear in closing whether the claimant maintained this was by 26 January 2024.

73 The respondent says the true situation is not as straightforward and that there are other factors effecting the 'bottom line' obligation contained in cl 12.5(a) and (b) to make offers of permanent employment to casual employees. These other factors include the industrial realities of the offshore oil and gas industry and drafting 'blanks' in cl 12.5(a) and (b). Thus, from the respondent's perspective context is important.

Context and purpose

74 The claimant makes no specific submission on context, principally because the claimant does not accept there is a need to defer to any extraneous material where the plain meaning of the words in cl 12.5(a) and (b) need no further clarification.

75 The respondent appears to take no issue with the purpose behind cl 12.5(a) of the OSM Agreement, which is to convert to permanent employment up to five casual employees otherwise than specified in the casual conversion process outlined in cl 12.4 of the OSM Agreement or in any other industrial law.

76 However, the respondent says that the obligations imposed by cl 12.5(a) and (b) and the OSM Agreement generally is to be considered with regard to the respondent's business, where that knowledge was common to the parties at the time the OSM Agreement was made.

77 In essence, and having regard to the evidence of Mr Harrower and Ms Jewson, the respondent says:

- as a 'crewing agent' providing labour to clients in the offshore oil and gas industry, it has little control over the manning requirements on client boats (subject to safe minimum manning) and any decision to increase the size of its permanent workforce can only be made where there is sufficient demand by the client;
- the terms of the OSM Agreement for a two - crew duty system mean employees work an even - time roster, and the respondent cannot require employees (both casual and permanent) to work outside the regular roster of the two - crew duty system, which may incur civil penalty; and
- the common practice is that employees are engaged for an entire swing; that is, for both the on - duty and off - duty period. Where an employee transitions from casual employment to permanent employment, the transition occurs at the commencement of the next on-duty period (not during the swing).

78 The respondent further says, while cl 12.5 of the OSM Agreement imposes two substantive obligations on the respondent, there are a number of other procedural 'obligations' imposed on the respondent which are not stated in the clause including, amongst other things, those relevant to making offers of employment and changing employees' employment status.

79 In essence, the respondent says:

- the call for expressions of interest must be done in an equitable manner in a reasonable time frame;
- it must then conduct an expeditious assessment of those who expressed interest;
- upon making the offer of employment, the prospective applicant can consider the offer of employment and may negotiate on its terms and return the signed contract of employment;
- upon receipt of the signed contract of employment, within seven days it was obliged to *hold* the newly created permanent position for the prospective employee; and
- the prospective employee commences permanent employment as soon as practicable depending on where they are in their swing cycle.

80 The respondent further says that the claimant's interpretation of cl 12.5(a) and (b) of the OSM Agreement fails to consider the common understanding between Mr Gakis and Mr Harrower of the need for client approval, the time required to complete the conversion process, and the vicissitudes associated with the time of year.

81 The respondent's suggested construction of cl 12.5(a) and (b) of the OSM Agreement is:

- the respondent was required to call for expressions of interest for permanent employment by 19 January 2024, which it did on 19 December 2023 with a deadline for submission being 15 January 2024;
- thereafter there is no chronological deadline for the completion of the assessment of any expressions of interest, and subsequent making of offers of employment, other than it be done expeditiously. The respondent acknowledges there is no express reference to *expeditiously* in the OSM Agreement, but it was the parties' 'obvious' intention that up to five new positions would be created shortly after the commencement of the OSM Agreement. The respondent says the claimant took no issue with the respondent's timelines consistent with its understanding at the time that the assessment process and offers of permanent employment were not subject to any express deadline. The respondent accepts there was some time lag between the expressions of interest being received and the offers of permanent employment being made, but this delay was entirely reasonable having regard to the time of year, client delays, the

assessment process and internal staffing issues. However, once the assessment process was completed, the respondent made the offers of permanent employment and provided proposed contracts of employment; and

- once the offer of permanent employment was confirmed by the applicant's return of a signed contract of employment, the respondent's obligation was to 'fill' the position by appointing the applicant to the permanent position so that it could not be taken by anyone else and to hold it open for that applicant. The respondent disputes the claimant's suggestion the obligation is for the respondent to have an applicant commence permanent employment within seven days of signing a contract of employment, as this would be inconsistent with the industrial reality and would potentially expose the respondent to civil penalties for breaching the OSM Agreement and is incompatible with the two - crew duty system.

Determination on Preferred Construction

82 In part, each party's suggested construction of a term of an enterprise agreement is preferred. In respect of cl 12.5(a) of the OSM Agreement, the claimant's suggested construction is preferred and in respect of cl 12.5(b) of the OSM Agreement, the respondent's suggested construction, in part, is preferred.

Clause 12.5(a)

83 With respect to the respondent, their suggested construction of cl 12.5(a) of the OSM Agreement seeks to strain the language in the clause and infer the inclusion of words that could have easily been inserted during the drafting process.

84 The respondent's reasons for doing so are understandable. That is, the respondent was aware there was a requirement to carry out a truncated casual conversion process for up to five casual IRs. However, the timing of the registration of the OSM Agreement, coupled with other logistical factors, meant the respondent was likely to be under pressure to complete the entire process provided in cl 12.5(a) by 19 January 2024. To its credit, it appears the respondent kept open the timeframe for the submission of expressions of interest to enable as many applicants as possible to express interest in permanent employment bearing in mind the nature of its workforce.

85 However, what then happened is that the respondent was unable to complete the selection process and make offers of permanent employment by 19 January 2024, which is what is clearly stated and contemplated by cl 12.5(a) of the OSM Agreement.

86 Had cl 12.5(a) of the OSM Agreement contemplated an additional period of time between calling for expressions of interests and making offers of permanent employment, it was open for that period of time to be included in the agreement. Alternatively, the respondent could have required more than four weeks from registration of the OSM Agreement to carry out the process in cl 12.5(a), or that the process be subject to client approval.

87 Finally, the respondent could have imposed a shorter time period for the calling of expressions of interest on the basis that its obligations to make offers of permanent employment was by 19 January 2024. Of course, this may have invoked the ire of the claimant and casual IRs who missed the window for expressions of interest, but in the same way cl 12.5(a) is silent on any time frame to assess expressions of interest, it is also silent on the period the respondent leaves open for any call for expressions of interest.

88 That is, it was arguably open for the respondent to call for expressions of interest with a deadline of one day. Thereafter, provided the respondent completed the process by making offers of employment by 19 January 2024 it would have complied with the obligation set out in cl 12.5(a). It might have meant less than five casual employees expressed interest, in which case, arguably, the respondent was then obliged to make less than five offers of permanent employment under cl 12.5(c) of the OSM Agreement.

89 As noted by the respondent, the OSM Agreement is silent on the process by which the respondent assesses the suitability of the casual employees who submit an expression of interest for permanent employment. That the claimant and the respondent's employees considered the respondent's process cumbersome is neither here nor there.

90 The obligation the respondent had under cl 12.5(a) was to complete the call for expressions of interest and make offers of employment for permanent employment by 19 January 2024. How it did so was entirely a matter for the respondent.

91 This interpretation of cl 12.5(a) of the OSM Agreement gives effect to the intention of the parties in agreeing to an expedited casual conversion process for casual employees to convert to permanent employment outside of the usual process under cl 12.4, albeit it appears the inclusion of the clause was at the behest of the claimant.

Clause 12.5(b)

92 Unlike cl 12.5(a) of the OSM Agreement, cl 12.5(b) is not clear in respect of what was intended with the word 'fill', and it is not clear when the seven days is intended to commence from.

93 There are two parts to cl 12.5(b), namely: the Position (or permanent position) will be 'filled' within seven days; and a return confirmation of permanent employment.

94 At least three issues arise. First, what is meant by the word 'fill'? Second, when does the seven days apply from? Third, what is the role of the return of confirmation?

95 That is, cl 12.5(b) is ambiguous and the clause itself suffers from drafting gaps, and, as a result, recourse to the industrial context is instructive. This much can also be seen in Ms Jewson's and Mr Harrower's evidence where each has a slightly different approach to when permanent employment was to commence.

96 Additionally, it may be impractical for a casual employee to commence permanent employment within seven days of returning confirmation of permanent employment in the manner suggested by the claimant.

97 The industry serviced by the OSM Agreement is *offshore* oil and gas where the employees are on a boat or something similar (vessel)[xlv]. There are recognised difficulties associated with the workplace. By way of example, crew changes at sea under

cl 27.2 of the OSM Agreement require union agreement if there are no helicopter facilities or under cl 27.3 of the OSM Agreement the transfer of crew by basket requires strict safety considerations. Therefore, it is entirely possible that a casual employee may be on - swing offshore at the time of confirming permanent employment, and it is unsafe, or agreement cannot be reached to transfer the casual employee to onshore, so the respondent meets the requirement suggested by the claimant in the construction of cl 12.5(b), if the permanent employment position is on a different vessel. It also noted that the bargaining parties agreed at cl 5.2(a) to an ongoing process to achieve overall cost reduction and improvement in the viability of the business, so it is highly unlikely it was intended the respondent incur possible significant costs to give effect to the timing suggested by the claimant in cl 12.5(b).

98 Further, cl 25 of the OSM Agreement sets out the various requirements of the two - crew duty system, including under cl 25.23 where the respondent is to give reasonable notice to employees before transferring employees between vessels.

99 Simply put, in my view, the claimant's suggested construction of cl 12.5(b) of the OSM Agreement does not lead to a harmonious outcome in light of the industrial realities of the particular industry. It is a construction that may lead at best to commercial nonsense and at worst unsafe outcomes or exposes to the respondent to *other* civil penalties. I do not accept this was the intention of the drafters.

100 The respondent's suggested construction of cl 12.5(b) of the OSM Agreement is preferred in part because it: recognises the industrial reality of the industry and how employees work within the industry; recognises that employees and the respondent may negotiate terms of the employment contract (which the respondent is obliged to provide in writing under cl 12.2(b)); and promotes a harmonious outcome with other clauses in the OSM Agreement, including the swing cycles under cl 23.3.

101 That is, and notwithstanding it comes second in cl 12.5(b), the first requirement is for an applicant to confirm acceptance of any offer of permanent employment. This is entirely a matter for the applicant, both in relation to timing and acceptance/refusal, and which then logically triggers the respondent's obligation. Without the applicant accepting an offer for permanent employment, there is nothing for the respondent to do.

102 This is also consistent with cl 12.7(c) of the OSM Agreement where a casual employee is not compelled to convert to permanent employment to replace a permanent employee.

103 Upon the applicant accepting the offer of permanent employment, the respondent then holds or approves the permanent position for the casual employee. In that sense, I accept the use of the word 'fill' in cl 12.5(b) means the permanent position is to be occupied by the applicant or held by the respondent for the applicant and no other.

104 I am not persuaded that the position being 'filled' within seven days, means the permanent position is to commence within seven days. Firstly, it was open to the drafters to use the word 'commence' in a similar way as it is used in cl 12.4(a) of the OSM Agreement. Second, as a matter of practicality, a casual employee may not be available, nor wish, to commence permanent employment within seven days of acceptance of the offer of permanent employment, if, for example, the offer of permanent employment is on a different vessel. Third, there is likely preparatory work for the transition from casual to permanent employment, such as the preparation of a written contract of employment.

105 I am also not persuaded the confirmation of the permanent employment is contingent on a returned signed written offer of employment, although I note the respondent's obligation at the commencement of employment to provide a prospective employee with a written offer of employment under cl 12.2(b) of the OSM Agreement. Again, it was open to the drafters to make clear permanent employment was to commence within seven days of the return of a signed written offer of employment.

106 Furthermore, if there was a written offer of permanent employment signed by an applicant, there would be no need to 'fill' a position because the respondent and the applicant had already agreed the terms of the employment.

107 What is important for the purposes of cl 12.5(b) is the applicant knows they will be a permanent employee because they have a permanent position allocated to them.

108 Thereafter, I accept the respondent's submission that it was intended the applicant commence the permanent position (bearing in mind it might be on another vessel) at the commencement of their next on - swing (or possibly at a time that might be mutually agreed between the applicant and the respondent).

109 I accept this construction for the following reasons:

- other than making provision for five additional permanent employees within four weeks of registration of the OSM Agreement, cl 12.5(a) and (b) are otherwise silent on how it was intended the expedited casual conversion process was to occur in comparison to the ordinary casual conversion process in cl 12.4 of the OSM Agreement (which is also subject to an undertaking to the OSM Agreement);
- it was unlikely to be intended that a casual employee transfer mid-swing to a permanent position under cl 12.5 given the impracticalities in doing so in the industry, which was known to the parties;
- the respondent has other obligations under the OSM Agreement, such as the provision of reasonable notice of transfer, the provision of written offers of employment, the swing cycle requirements in cl 23.3 of the OSM Agreement, and may be subject to civil penalties if it contravened other obligations; and
- the casual employee engagement continues to apply under cl 12.8 of the OSM Agreement.

Application of the Preferred Construction

110 Having regard to the evidence accepted by the Court and the preferred construction of cl 12.5(a) and (b), I find the respondent called for expressions of interest for permanent positions on or around 19 December 2023 in compliance with the first obligation under cl 12.5(a) of the OSM Agreement. Notably, the respondent received in excess of five expressions of interest before the respondent's cut-off date of 15 January 2024.

111 I am satisfied and I find that in using the respondent's eCrew system to send an email to its casual employees, the respondent used the system familiar to its employees for communication of information of the type contemplated in cl 12.5(a) of the OSM Agreement. That Jeffry Badger says he did not get the email is not explained by either party, but notably he submitted an expression of interest and there is no other evidence the respondent's system was defective.

112 On 12 February 2024, five casual employees were informed their applications for permanent employment was successful[xlvi].

113 On 19 February 2024, the respondent made offers of permanent employment to Richard Badger, Rewi Whaitiri, Mitch Keighran, and Matthew Duguid. On 29 February 2024, the respondent made a written offer of permanent employment to Jeffry Badger.

114 In making the offers of permanent employment on either 12 February 2024 or 19 and 29 February 2024, the respondent failed to comply with the second obligation under cl 12.5(a) of the OSM Agreement, where the offers of permanent employment were required to be made by 19 January 2024.

115 That is, even if the email sent on 12 February 2024 could amount to an offer of permanent employment, this still exceeded the time frame required in cl 12.5(a) of the OSM Agreement.

116 No evidence was led by the claimant that the respondent failed to either hold or denied an applicant occupancy of any of the five permanent positions after the five applicants confirmed their acceptance of the offers of permanent employment. Simply put, there is no evidence of any of the five successful applicants accepting any offer of permanent employment. The respondent informed five of the applicants they were successful, and then the respondent moved to formalise their permanency. It is reasonable to assume that the respondent and the successful applicants never countenanced any applicant might refuse an offer of permanent employment having expressed an interest in it.

117 Thereafter, as intended, the five successful applicants/casual employees commenced permanent employment on their next on-swing[xlvii].

118 In those circumstances I cannot be satisfied the respondent contravened cl 12.5(b) of the OSM Agreement by failing to fill the permanent positions within seven days of any return of confirmation of permanent employment. Five casual employees were informed their expression of interest for permanent employment was successful on 12 February 2024 and nothing in the evidence suggests the permanent positions were not filled as a result or not filled within seven days.

119 The manner in which the parties approached cl 12.5 of the OSM Agreement leaves a lot to be desired. In my view, there was a real deficiency in the overall drafting and how cl 12.5 was to operate with the claimant more interested in an easier process and the respondent more interested in a fair and business conscious process. The net result was confusion in the application process.

Conclusion

120 I am satisfied the claimant has proven the respondent contravened cl 12.5(a) of the OSM Agreement by failing to provide five casual employees (IRs) with offers to convert to permanent employment within 4 weeks of registration of the OSM Agreement, notwithstanding the respondent called for expressions of interest within time.

121 In contravening cl 12.5(a) of the OSM Agreement in the manner described, I find the respondent contravened s 50 of the FWA by contravening a term of the OSM Agreement. A contravention of s 50 of the FWA is a contravention of a civil penalty provision.

122 I am not satisfied the claimant has proven the respondent contravened cl 12.5(b) of the OSM Agreement.

123 I will hear from the parties regarding programming orders in respect of the imposition of a civil penalty.

D. SCADDAN

INDUSTRIAL MAGISTRATE

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

Jurisdiction

[1] An employee, an employee organisation 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 an enterprise agreement: 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; (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)

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; (2017) 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).

[ii] Exhibit 1 – Statement of Agreed Facts.

[ii] Clause 4.1 of the OSM Agreement.

[iii] Exhibit 2 – Witness Statement of George Gakis signed on 19 February 2025.

[iv] Exhibit 2 at [3] and attachment GG-01.

[v] Exhibit 2 at [5] and attachment GG-02.

[vi] Exhibit 2 at [6] and attachment GG-03.

[vii] Exhibit 2 at [7] and attachment GG-03.

[viii] Exhibit 3 – Witness Statement of Jeffry Badger signed on 18 February 2025 at [4] and attachment JB-01.

[ix] Exhibit 3 at [6] and attachment JB-02.

[x] Exhibit 3 at attachment JB-03.

[xi] Exhibit 3 at JB-03.

[xii] Exhibit 3 at [8].

[xiii] Exhibit 4 – signed contract of employment of Jeffry Badger.

[xiv] Transcript, p 28 – 29.

[xv] Exhibit 5 - Witness Statement of Warren Harrower signed on 28 March 2025.

[xvi] Exhibit 5 at [13] and [14].

[xvii] Exhibit 5 at [15] and [16].

[xviii] Exhibit 5 at [17] to [23].

[xix] Exhibit 5 at [28] to [30].

[xx] Exhibit 5 at [35] and [36].

[xxi] Exhibit 5 at [37] and [38].

[xxii] Exhibit 5 at [40] to [44].

[xxiii] Exhibit 5 at [50] to [54].

[xxiv] Exhibit 5 at [57] and [58].

[xxv] Exhibit 6 – Witness Statement of Ilana Jewson signed on 19 March 2025.

[xxvi] Exhibit 6 at [12] and [13].

[xxvii] Exhibit 6 at [14] and [15].

[xxviii] Exhibit 6 at [16] to [19] and attachment IJ-X1.

[xxix] Exhibit 6 at [20] to [25].

[xxx] Exhibit 6 at [26] and attachment IJ-X2.

[xxxi] Exhibit 6 at [29] and attachment IJ-X3.

[xxxii] Exhibit 6 at [31] and [32].

[xxxiii] Exhibit 6 at [35] to [47].

[xxxiv] Exhibit 6 at [50].

[xxxv] Exhibit 6 at [51].

[xxxvi] Exhibit 6 at [52].

[xxxvii] Exhibit 6 at 53].

[xxxviii] Exhibit 6 at [53].

[xxxix] ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813; (2006) 153 IR 426, 438 (***City of Wanneroo***).

[xl] ***City of Wanneroo*** 438, 440.

[xli] ***City of Wanneroo*** 440.

[xlii] ***Transport Workers' Union of Australia v Linfox Australia Pty Ltd*** [2014] FCA 829; (2014) 318 ALR 54.

[xliii] ***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.

[xliv] 'Position' is not defined in the OSM Agreement, but the parties proceeded on the basis that 'Position' means permanent position. I accept that is what is intended by the word 'Position' in cl 12.5(b).

[xlv] Exhibit 5 at [12].

[xlvi] Exhibit 5 at WH-3.

[xlvii] Exhibit 6 at [53].

2025 WAIRC 00398

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00398
CORAM	**:**	INDUSTRIAL MAGISTRATE T. KUCERA
HEARD	**:**	TUESDAY, 11 FEBRUARY 2025
DELIVERED	**:**	TUESDAY, 1 JULY 2025
FILE NO.	**:**	M 73 OF 2023
BETWEEN	**:**	CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION
		CLAIMANT
		AND
		QUBE PORTS PTY LTD
		RESPONDENT
CatchWords	**:**	INDUSTRIAL LAW – FAIR WORK – Imposition of pecuniary penalty – Assessment of pecuniary penalties for contraventions of the *Fair Work Act 2009* (Cth) – Contravention of s 50 – Breach of enterprise agreement – Whether conduct of respondent was deliberate – s 557 Single course of conduct – Previous contraventions – Penalty to be paid to claimant
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Crimes Act 1914 (Cth)
Instrument	**:**	*Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020*
Case(s) referred to in reasons:	**:**	***Construction Forestry and Maritime Employees Union v Qube Ports Pty Ltd*** [2024] WAIRC 01041; (2025) 105 WAIG 263
		Australian Building and Construction Commissioner v Pattinson [2022] HCA 13; (2022) 274 CLR 450
		Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 113; (2017) 254 FCR 68; 271 IR 321
		***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2*)** [2018] FCA 1563
		Trade Practices Commission v CSR Ltd [1990] FCA 521
		Callan v Smith [2021] WAIRC 00216; (2021) 101 WAIG 1155
		Fair Work Ombudsman v Blue Sky Kids Land Pty Ltd (in liq) (No 4) [2024] FCA 1475
		Construction Forestry Maritime and Energy Union v Qube Ports Pty Ltd [2023] WAIRC 00976; (2024) 104 WAIG 121
		Ponzio v B&P Caelli Constructions Pty Ltd [2007] FCAFC 65; (2007) 158 FCR 543
		Milardovic v Vemco Services Pty Ltd (No 2) [2016] FCA 244; (2016) 242 FCR 492
Result	**:**	Pecuniary penalty to be paid
Representation:		
Claimant	:	Mr K. Sneddon (of counsel)
Respondent	:	Mr R. Boothman (of counsel)

REASONS FOR DECISION

1 On Tuesday, 17 December 2024, I issued my reasons for decision in ***Construction Forestry and Maritime Employees Union v Qube Ports Pty Ltd*** [2024] WAIRC 01041; (2025) 105 WAIG 263 (**liability decision**).

2 In the liability decision, I concluded that *Qube Ports Pty Ltd* (**respondent**) had breached cl 46.2(b) of the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020* (**agreement**), by failing to train 17 of its employees (**affected employees**) to the minimum standard of a Certificate II in the Transport and Logistics Industry, Skills Council Stevedoring Training Package (**Certificate II**) as required.

3 Having decided the respondent breached the agreement, it follows the respondent contravened s 50 of the *Fair Work Act 2009* (Cth) (**FW Act**), which is a civil remedy provision for which the Industrial Magistrates Court of Western Australia (**Court**) may impose a pecuniary penalty (**contravention**).

4 After the liability decision issued, I directed the parties to each file outlines of submissions on penalty and any other orders sought. Following this, I convened a penalty hearing that was held on 11 February 2025.

5 In the paragraphs to follow, I provide reasons on what I regard is an appropriate disposition for the contravention and the consequential orders to be made.

Principles to be applied to determine an appropriate penalty

6 The approach to be adopted when determining an appropriate penalty in civil penalty proceedings was comprehensively reviewed by the High Court in ***Australian Building and Construction Commissioner v Pattinson*** [2022] HCA 13; (2022) 274 CLR 450 (***Pattinson***). It involves the application of the following principles:

i. The purpose of civil penalties is in the promotion of the public interest in compliance with statutes by the deterrence of further contraventions of the statute.[i]

ii. Civil penalties are imposed primarily if not solely for the purposes of deterrence.[ii]

iii. The objective when imposing a penalty, is to attempt to put a price on a contravention that is sufficiently high to deter repetition by the contravenor and by others, who might be tempted to contravene a statute.[iii]

iv. An 'appropriate' civil penalty will not exceed what is reasonably necessary to achieve the deterrence of future contraventions of a like kind by the contravenor and others.[iv]

v. For general deterrence, it is important for to send a message that the relevant contraventions are serious and not acceptable.[v]

vi. An appropriate penalty must strike a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case.[vi]

vii. Both the circumstances of the contravenor as well as the conduct involved in the contravention may be considered, as both may bear on the need for deterrence.[vii]

viii. Identifying the maximum penalty that applies in a statute for the contravention is an important consideration when determining the penalty to be imposed because it serves as a 'yardstick' against which the assessment of penalties is generally to proceed.[viii]

ix. The maximum penalty is not reserved for the most serious examples of contravening conduct. What is required is that there be some reasonable relationship between the theoretical maximum and the final penalty that is imposed.[ix]

x. When determining penalty, care must be taken to ensure the maximum penalty is not applied mechanically, instead of it being treated as, one of a number of relevant factors to be considered.[x]

xi. A civil penalty must be 'fixed with a view to ensuring that [it] is not such as to be regarded by the [contravenor] or others as an acceptable cost of doing business'.[xi]

7 In addition to the principles referred to, the Court, when assessing a penalty of appropriate deterrent value, must also have regard to a further range of non-exhaustive considerations, which French J set out in ***Trade Practices Commission v CSR Ltd*** **[**1990] FCA 521 at [42] (***CSR***).

8 ***CSR*** was adopted and followed by a Full Bench of the Western Australian Industrial Relations Commission in ***Callan v Smith*** [2021] WAIRC 00216; (2021) 101 WAIG 1155. After the decision in ***Callan v Smith*** issued, ***CSR*** was accepted as binding authority in ***Pattinson***.[xii]

9 The range of considerations as set out in ***CSR*** and ***Callan v Smith*** include but are not limited to the following:

(a) the nature and extent of the conduct which led to the contravention/contraventions;

(b) the circumstances in which the contravening conduct took place;

(c) the nature and extent of any loss or damage sustained as a result of the contravention/contraventions;

(d) whether there had been similar previous conduct by the respondent;

(e) whether the contravention/contraventions are properly distinct or arose out of the one course of conduct;

(f) the size of the business enterprise involved;

(g) whether or not the contravention/contraventions were deliberate;

(h) whether senior management was involved in the contravention/contraventions;

(i) whether the party committing the contravention/contraventions had exhibited contrition;

(j) whether the party committing the contravention/contraventions had taken corrective action;

(k) whether the party committing the contravention/contraventions had cooperated with the enforcement authorities;

(l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

(m) the need for specific and general deterrence.

10 These considerations are not to be regarded as a 'rigid catalogue of matters for attention' as if it were a legal checklist. The Court is still required to determine the appropriate penalty or penalties in the circumstances of the case before it.[xiii]

11 Before applying the relevant principles to determine an appropriate penalty, I will first provide a summary of the parties' submissions on how they should be applied in the present case.

Claimant's submissions on penalty

12 Counsel for the claimant submitted the Court should, having regard to the circumstances of this case, order that the maximum penalty be imposed.

13 The claimant contended the respondent had not shown any contrition for the contravention. It was submitted the respondent had not provided a firm commitment on when the contravention would be rectified.

14 The claimant submitted the respondent had led no evidence that it had learned a lesson from the contravention or that it had taken positive steps to ensure future compliance. It was contended that in these circumstances, there was, in the assessment and imposition of a penalty, a strong and important role for specific deterrence, to ensure future compliance.

15 In addition, the claimant's counsel provided a list of matters in which the respondent was found to have contravened the FW Act (**list of contraventions**).

16 The list of contraventions included the following:

MATTER	CONTRAVENTION	Penalties Imposed
M 76 of 2022	s 50 FW Act s 323 FW Act	$3,500
M 91 of 2022	s 50 FW Act s 323 FW Act	$4,000
M 101 of 2022	s 50 FW Act s 323 FW Act	$11,300
M 95 of 2023	s 50 FW Act	$936
M 119 of 2023	s 50 FW Act	$6,000
M 149 of 2023	s 50 FW Act	$1,500

17 The claimant submitted the outcome of the matters in the list of contraventions demonstrated the respondent had a record of previous non-compliance.

18 The claimant submitted that it did not matter whether the contravention was deliberate or not as the result for the affected employees is the same; since 2011 they had been denied the training they were entitled to receive under the agreement.

19 The claimant submitted the respondent is a large multinational employer. Having regard to the size of the company and its record of recent contraventions, the claimant said a penalty less than the maximum would not act as a deterrent in ensuring compliance.

Witness Statement of Daniel Ortiz

20 For the penalty hearing, Daniel Ortiz, who is the respondent's General Manager for Industrial Relations (**Mr Ortiz**) provided a witness statement.

21 Mr Ortiz stated the respondent has 1,460 employees who work in 19 ports across Australia. He said a separate enterprise agreement applies in each of these ports.

22 In his evidence, Mr Ortiz described how work is allocated to stevedores in Port Hedland. He said that each day, the port's planner feeds information about the nature of each vessel that is scheduled to arrive, the skills required to load / unload it, as well as the number of stevedores required.

23 He said that work is allocated to stevedores with the required skill sets according to the 'allocation priorities' that are contained in cl 3 of the agreement. Mr Ortiz said the 'skills required' are listed in Schedule 2 of the agreement – 'Job classifications' (**Schedule 2**).

24 Mr Ortiz said that based on his experience, stevedores, as part of their work, are trained in all the core and elective units that make up the course for a Certificate II. He said stevedores receive training in line with their job classifications, during their employment with the respondent.

25 Mr Ortiz described a series of criteria under the agreement that affect whether a stevedore is allocated a shift or is promoted to a higher classification. He said the selection criteria and process are set out in Part A, Schedule 1 of the agreement, with a selection process that includes an assessment and selection panel, comprised of foremen (who are themselves stevedores) and managers.

26 Mr Ortiz said the promotion criteria involves an allocation of points to the following categories:

a. whether an employee is fit to perform the role (100 points if fit);

b. whether an employee has received a final warning (100 points if no warning);

c. whether the employee has any disciplinary matters on file (20 points if no disciplinary matter, 5 point deduction for each disciplinary matter);

d. feedback on an employee's performance (up to 20 points);

e. attendance (5 point deduction (up to 20 points) for each unauthorised absence);

f. extent to which an employee has made themselves available for allocated shifts (up to 100 points);

g. skills required for the role (up to 13 points);

h. performance of skills (up to 12 points); and

i. years of service (up to 15 points per year of service).

27 Mr Ortiz said that if an employee receives the maximum number of points (other than for service) and there are no deductions for unauthorised absences, an employee could receive 366 points. Of these, the maximum number of points that can be obtained for the 'skills required' category, even where an employee has all the skills that are necessary for the promotion is 13.

28 He said that being fully trained in the 'skills required', only equates to approximately 3.5% of the points available. Mr Ortiz suggested there will be no effect on an employee's promotional opportunities, where an employee has not attained a Certificate II. He said this is because a Certificate II is not a 'job classification' under Schedule 2 of the agreement and it is not a requirement for any other job classification to have one either.

29 In his statement, Mr Ortiz provided his view on the list of contraventions. He said they each involved underpayments or contraventions which were relatively minor and the respondent was not found to have intentionally disadvantaged employees or maliciously breached enterprise agreements.

30 Mr Ortiz said that while disputes between the respondent and its stevedores are not uncommon, very few reach a court or a tribunal. He suggested this happened because workplace issues can be raised through the port's Employee Representatives Committee (**ERC**), where matters are discussed between the stevedores and managers in that forum and then resolved.

31 Mr Ortiz said the respondent would prefer to deal directly with employees on issues like the provision of training within relevant timeframes, rather than addressing the matter after the fact, as part of litigation.

32 He said he knows the respondent wants its stevedores to be trained in every skill that is relevant to the port where they are employed. Mr Ortiz said that having stevedores trained in as many skills as possible means the respondent can allocate shifts to a broader pool of stevedores, which in turn means there are more employees available to cover periods of leave, there are reduced fatigue risks and the respondent can tender for more work because it has a highly skilled workforce capable of servicing its clients' vessels.

33 In his statement, Mr Ortiz accepted that upskilling and training its workforce is in the respondent's interests as much as it is in the interests of each individual stevedore. Mr Ortiz said the respondent had worked hard to train all its stevedores in as many skills as possible.

34 He described the proceedings as evidence the respondent had not yet done enough and said the respondent will continue to look at ways it can improve its systems to ensure that training is carried out in a timely way.

35 Mr Ortiz stated that it was deeply regrettable to him personally, that the respondent had not been able to train the stevedores at its Port Hedland operations to a Certificate II in a timely manner. Mr Ortiz said the respondent was working hard to ensure this never happens again.

36 He said it was in the respondent's interest for its stevedores to be as well trained as possible. Mr Ortiz also acknowledged the respondent has a responsibility to comply with the agreements which the respondent has entered into.

Respondent's submissions on penalty

37 The respondent submitted that if the Court decides to impose a penalty, it should be nominal. It was contended there is no evidence that the affected employees have suffered any financial loss, which reduces the need for general or specific deterrence.

38 In relation to this argument, the respondent says that at all relevant times, the employment of stevedores at its Port Hedland Operations, in the various classifications under the agreement, did not require them to hold a Certificate II.

39 Referring to the evidence from Mr Ortiz, the respondent submitted that although the respondent did not train its stevedoring employees to the level of a Certificate II during the life of the agreement, other forms of training were provided, to ensure employees would not miss out on allocated shifts or promotional opportunities.

40 It was submitted that despite the deregistration of the respondent's Registered Training Organisation (**RTO**), which occurred in August 2023, the respondent has continued to provide training to its employees. The respondent contended the deregistration of the respondent's RTO gave rise to an unusual confluence of events which justifies a lower penalty.

41 Counsel for the respondent argued the provision of training under the agreement is something that accrues for its benefit, because it improves the efficiency, reliability and competitiveness of the respondent's operations. It was also submitted there is no evidence that the respondent's failure to train its employees to the level of a Certificate II was deliberate or malicious.

42 The respondent submitted that upon becoming aware its RTO was deregistered, steps were taken to obtain its re-accreditation. It was submitted that the respondent has been attempting to arrange training for the employees who have not yet received it. On this basis, the respondent says that it has taken corrective action that will allow the Court to conclude there is no risk the contravening conduct will be repeated.

43 The respondent submitted that it is in a group of companies that has more than 10,000 employees. Within its stevedoring operations, the respondent has 1,800 employees, of which 75 are employed in Port Hedland. It was suggested that the comparatively small number of employees in the context of the respondent's operations when viewed as a whole, belies the need for general deterrence to any appreciable degree.

44 It was submitted that the contravention has a low degree of objective seriousness because:

a. it involves only a small proportion of the respondent's overall operations;

b. there is no evidence that the affected employees suffered any prejudice or loss because of the failure to provide training to the level of a Certificate II;

c. there is no evidence and nor could it be objectively inferred the contravention was deliberate; and

d. the respondent has taken and continues to take steps to remediate the contravention.

45 Referring to the penalty Industrial Magistrate Coleman imposed against the respondent in the M 95 of 2023, ***Construction, Forestry, Maritime, Mining and Energy Union v Qube Ports Pty Ltd*** (**first-aid contravention**) counsel for the respondent

submitted that if a fine is imposed, the respondent should only be ordered to pay 1% of the maximum penalty that applies under the FW Act.

46 The respondent submitted the first aid contravention involved a failure by the respondent to comply with Part B cl 14 of the agreement, which required the respondent to provide first aid training to all new foreman and leading hands at the Port of Port Hedland within six months of being appointed to their roles.

47 The respondent submitted the facts in the present case are apposite with those in the first aid contravention because both matters;

a. deal with the failure to comply with a training requirement;

b. both contraventions occurred at the respondent's Port Hedland operations; and

c. no stevedore missed out on any promotions or other employment benefits because they did not receive training.

48 It was submitted that consistency requires that there not be a significant difference between the penalty imposed in the first aid contravention and the disposition in the present case.

Consideration

49 Having reviewed the parties' submissions, I now provide my reasons for imposing what I consider to be an appropriate penalty in the circumstances of this case.

50 In determining an appropriate disposition, I have had regard to the findings I made in the liability decision as well as the further evidence Mr Ortiz provided for the penalty hearing, which was not challenged.

51 I have also considered the list of contraventions, the circumstances in which those contraventions were committed and the penalties that were imposed.

52 I have not attached any weight to the respondent's evidence regarding its disappointment the claimant had not raised the matter of its non-compliance with cl 46.2(b) of the agreement through the ERC.

53 As s 50 of the FW Act makes clear, compliance with the terms of an enterprise agreement is not optional. It is my view the claimant was, when it became apparent the respondent was in breach of cl 46.2(b), within its rights to bring this claim to the Court and should not face criticism for lawfully representing its members' industrial interests.

Nature and extent of the respondent's conduct

54 Evidence of the respondent's failure to train the affected employees in accordance with cl 46.2(b) of the agreement was confirmed by a survey that was compiled by Joel O'Brien who works as an industrial organizer for the claimant (**members' survey**).[xiv]

55 Despite the number of employees who were affected by the respondent's conduct, counsel for the claimant and for the respondent, noting s 557 of the FW Act, agreed that I should treat the matter as though the respondent had engaged in a sole contravention, rather than committing a breach for each employee who was not trained to the level of a Certificate II.

56 In ***Fair Work Ombudsman v Blue Sky Kids Land Pty Ltd (in liq) (No 4)*** [2024] FCA 1475 at [24] Katzmann J, when dealing with the imposition of a penalty for multiple contraventions of an award and s 45 of the FW Act observed;

> The object of s 557 is to ensure that a contravener is not penalised twice for what is essentially the same wrongdoing: ***Rocky Holdings Pty Ltd v Fair Work Ombudsman*** (2014) 221 FCR 153 (North, Flick and Jagot JJ). Its effect is that, save in relation to a contravention for which a court has previously imposed a pecuniary penalty for an earlier contravention of the same provision, two or more contraventions of any of these provisions are taken to be a single contravention if they were committed by the same person and arose out of a course of conduct in which that person engaged. As the Full Court confirmed in *Rocky Holdings*, when the section speaks of two or more contraventions of s 44 (which deals with contraventions of the National Employment Standards (**NES**)) or s 45 (which deals with contraventions of an award), it is referring to multiple contraventions of a particular provision of the NES and multiple contraventions of a particular clause in an award.

57 It follows from the parties' acknowledgement that because the contravention involved a single course of conduct, as contemplated by s 557 of the FW Act, the maximum penalty that may be imposed for a contravention of a civil penalty provision, applies in the present case.

Maximum potential penalty

58 The maximum pecuniary penalty that may be imposed for the contravention of a civil penalty provision by a natural person is expressed in penalty units, as set out in the table under s 539(2) of the FW Act.

59 Where (as in this case) a contravenor is a body corporate, the maximum penalty the Court may impose under s 546(2)(b) is five times higher than the civil penalty that applies to a natural person.

60 The rate of a penalty unit is determined by s 4AA of the *Crimes Act 1914* (Cth). On the date the proceedings were commenced, and the contravention was alleged, the quantum of a penalty unit was $275.

61 Accordingly, the maximum penalties that apply for a contravention of s 50 of the FW Act are;

i. for a natural person - $16,500 (60 penalty units); and

ii. for a body corporate - $82,500 (5 × 60 penalty units).

62 For the avoidance of any doubt, the maximum pecuniary penalty that may be imposed in the present case is a fine of $82,500.

Extent of the conduct and the circumstances in which the breach occurred

63 In the liability decision, I held that the respondent's failure to train the affected employees to the level of a Certificate II had occurred;

i. before 23 August 2023 when the respondent had access to its own RTO; and

ii. had continued after the respondent's RTO was deregistered.

64 I was able to reach this finding from the responses the affected employees provided in the members' survey, which included information on their length of service with the respondent.[xv]

65 The affected employees' length of service, as revealed by the members' survey, was such that it is likely most of them would have been able to complete a Certificate II before the respondent lost its RTO registration.[xvi]

66 Following the loss of its RTO's registration, the respondent's capacity to both train and assess employees for a Certificate II was removed. While the affected employees may have continued to receive some training at the workplace level, as result of the deregistration of the respondent's RTO, no employee could be assessed on their competence to attain the respective modules that are required to complete a Certificate II.

67 I accept that the capacity of the respondent to deliver training and assessments for a Certificate II was adversely affected following the loss of its RTO's registration. I also accept that without an RTO or the involvement of an external assessor (which the respondent has declined to use because it is conducted by a commercial competitor), the respondent was unable to comply with the requirement under cl 46.2(b) to train employees to the level of a Certificate II.

68 Having said this, there are however, at least two problems with this explanation for the contravention. Firstly, the obligation under cl 46.2(b) of the agreement to train its employees to the level of a Certificate II is not conditional upon the respondent having its own RTO.

69 Secondly and more importantly, the respondent has not explained, despite its obligation under cl 46.2(b) of the agreement, why the affected employees were not trained to the level of a Certificate II or enrolled in courses to attain a Certificate II, before the RTO was deregistered in August 2023, which was after these proceedings were commenced.

70 In other words, the evidence establishes the respondent did not comply with its obligation to train the affected employees to the level of a Certificate II when it had the means and resources at its disposal to do so.

71 The difficulty I have with the loss of the respondent's RTO's registration as providing an excuse for the respondent's conduct, particularly prior to 23 August 2023 is that it weighs against a finding the contravention was inadvertent, the result of an honest but mistaken belief or was completely beyond the respondent's control.

Nature and extent of any loss or damage sustained

72 I accept that there is no direct evidence the affected employees have suffered any quantifiable financial loss or a denial of promotional opportunities. That is not to say the affected employees have not suffered a detriment.

73 The affected employees have sustained a loss in that they have not received the requisite qualification they were entitled to receive, which the respondent agreed to provide under cl 46.2(b) of the agreement.

74 While the respondent may view its failure to provide the affected employees with a Certificate II as more inimical to its interests, the agreement contains a clear commitment the respondent will train its workforce to a specified industry standard. In much the same way a trade certificate provides an employee with a tangible benefit: proof of a qualification, a Certificate II provides a stevedore with a similar outcome.

75 It would therefore be an error to conclude the affected employees have not sustained any loss at all. Such a finding would have the effect of diminishing the significance of a qualification the respondent had agreed to provide, under an enforceable term, in an enterprise agreement. It would also give license to the respondent to pick and choose those parts of the agreement it wants to comply with and to ignore the provisions it deems unnecessary.

Conduct was deliberate

76 Having regard to the matters described in the preceding paragraphs [63] - [71], I do not accept the respondent's submission that the contravention was not intentional.

77 Moreover, it is clear from Mr Ortiz's evidence that the respondent had made a commercial decision that it would not train the affected employees to the level required, because it did not regard a Certificate II as a 'classification', that it was necessary for the allocation of work or required for the promotion of employees into higher classifications.

78 In my view the contravention in this matter is distinguishable from the first-aid contravention. The first-aid contravention involved the respondent's failure to provide first-aid training just outside the required timeframe by which the training had to be provided. It also only involved two employees and was rectified prior to the imposition of the penalty that followed.

79 In the present case, the respondent simply failed to train the affected employees to the standard required under cl 46.2(b) of the agreement. The explanation Mr Ortiz provided in his evidence confirmed the respondent did not view the requirement to train the affected employees to the level of a Certificate II as critical or was something it needed to do.

80 By stating the affected employees have not suffered any loss because of the contravention and explaining that a Certificate II was not needed for promotion or the allocation of work, Mr Ortiz has in effect confirmed the respondent had made a choice not to train the affected employees to the level of a Certificate II.

81 In the circumstances it cannot be said the contravention was inadvertent, an oversight or that it was not intended. Rather the evidence discloses that the contravention involves a case where the respondent had decided to 'take the odds'.[xvii] It is my view that despite there being a risk it would contravene s 50 of the FW Act with its failure to train its stevedores to the level of a Certificate II, the respondent decided to take that chance.

Scale and size of the business

82 The respondent is a large corporation, with operations throughout Australia. While the size of the respondent's workforce in Port Hedland might be small when compared with the respondent's business nationally, I respectfully disagree that it reduces the respondent's culpability to a significant degree.

83 In my view, the size of the respondent's business is such that it has both the means and the resources to ensure the affected employees were trained to the level of a Certificate II. I also note the Court has previously concluded the respondent is a large business that can reasonably be expected to have systems in place to reduce the risk of underpayments to employees.[xviii]

84 Noting the Court's previous finding regarding the size of its business, it is not unreasonable to expect the respondent could also implement systems, to ensure it complies with the requirement to provide training to a specified standard.

Financial position of the respondent

85 The financial position of the respondent in this matter, as in most cases involving the imposition of pecuniary penalty, will not carry any great weight in the assessment of an appropriate disposition.

86 However, as a well-resourced employer, it is expected the respondent will at the very least, have the means to pay a fine and to ensure that corrective action is taken (which includes ensuring the affected employees attain their Certificate IIs).

Previous contraventions

87 This is not the first time the respondent has contravened the FW Act or appeared in a penalty proceeding before this Court.

88 The respondent's most serious recent contravention is that for which a combined fine of $11,300 was imposed by Industrial Magistrate Cosentino in M 101 of 2022 ***Construction Forestry Maritime and Energy Union v Qube Ports Pty Ltd*** [2023] WAIRC 00976; (2024) 104 WAIG 121 (***Qube Dampier contravention***).

89 The conduct at issue in the ***Qube Dampier contravention*** involved two contraventions of the FW Act (one of which was a breach of an enterprise agreement) that gave rise to an underpayment of wages during a single pay period in the amount of $159.25.

90 I accept the respondent's submission that the balance of the matters referred to in the list of contraventions involved individual underpayments at the lower end of the scale of contravening behavior. They did not involve serious and systematic underpayments across the respondent's work force. They were instead breaches involving individual employees and confined to particular ports.

91 I have noted that some of the matters on the list of prior contraventions were admitted without the need for the matter to proceed to a contested hearing and that in each case, corrective action followed. Due to the nature and the extent of the respondent's conduct at issue in the matters on the list of contraventions, the pecuniary penalties the Court imposed were nominal fines, well below the applicable maximum penalties.

92 The contravention in the present case is however quite different to the respondent's previous conduct. Although the contravention in the present case was confined to one regional port and may not have resulted in any direct financial loss or the denial of promotional opportunities, the contravention was deliberate and the number of affected employees is much larger.

93 The circumstances of the contravention are such that while I am inclined to accept a stiffer pecuniary penalty in the present case is justified, I am not having regard to the list of prior contraventions, convinced the respondent has at this stage, plumbed to the depths of serious industrial recidivism.

94 That is not to say the respondent does not have to get it's house in order on the provision of training.

Corrective action, contrition and co-operation

95 This is not a case where the contravention was admitted at an early stage, thereby saving the parties and the Court the costs of a contested hearing. On the contrary, the hearing on liability followed a change in the respondent's plea.

96 The case did however proceed efficiently to the extent that much of the evidence upon which the matter had to be decided was either agreed or not disputed. The issues I was required to decide in the liability decision, were confined to matters of construction.

97 I also note the claimant was unable to establish the respondent had breached cl 46.2(c) of the agreement regarding the requirement for the employer to pay employees for undertaking Certificate II training.[xix]

98 I accept the respondent's decision to defend the action is not an aggravating factor when determining an appropriate penalty. However, by contesting the proceedings, the respondent is unable to claim anything in mitigation that would otherwise have been available if it had admitted the contravention prior to the liability hearing.

99 Although the respondent has (with the evidence from Mr Ortiz that was submitted for the penalty hearing) stated that it is taking corrective action and expressed regret for the contravention, there is no evidence as to when the affected employees will likely undergo their training and assessment for a Certificate II.

100 While the expression of regret Mr Ortiz has sought to convey on the respondent's behalf may present as contrition, until such time as the affected employees have received a Certificate II, it is difficult to conclude this gesture is anything but functionary.

101 Scheduling training and/or assessments after I issued the liability decision is corrective action that could have been taken. Evidence of when the affected employees would likely be undergoing this training and/or assessment, including an update on when the respondent's RTO will likely be re-registered, is something I consider would have bolstered the respondent's arguments in mitigation.

102 Without clearer evidence on when the respondent will take the corrective action that Mr Ortiz says the respondent is committed to delivering, it is difficult to conclude the respondent is prioritising the rectification of its contravention to the level for which a nominal fine is the appropriate response.

Specific and general deterrence

103 In view of the matters noted in the preceding paragraphs [96] - [99], it should be clear that I consider there is a need for specific deterrence in this case. In my view, a pecuniary penalty needs to be imposed that will prompt the respondent to complete the corrective action Mr Ortiz says the respondent is committed to take.

104 I am not satisfied there is evidence which demonstrates the respondent has taken sufficient steps to rectify the contravention. As I have found the contravention was deliberate, even though the affected employees may not have suffered any direct financial loss or been denied promotional opportunities, there is in my view a risk the respondent may again decide to take the odds if a penalty with deterrent effect is not imposed.

105 On the issue of general deterrence, the authorities make it clear that if a penalty is to be imposed, it must be set at a level that will not only deter the respondent from engaging in further contravening conduct, but others who may be contemplating taking a similar path.

106 The penalty cannot be so low that it will be viewed by the respondent or others as an acceptable cost of doing business[xx] and should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like-minded persons or organisations.'[xxi]

107 I am mindful the penalty to be imposed cannot be so high as to be oppressive. It is my view that a pecuniary penalty that operates as a deterrent to the respondent engaging in further contraventions, and which strikes a balance by not being greater than what is necessary to achieve this outcome, can and should be imposed in the present case.

Penalty to be imposed

108 I have already indicated that it would not be appropriate to impose a nominal fine for the contravention. I accept that a larger fine is necessary for specific and general deterrence.

109 In view of the respondent's prior contraventions, it would be inappropriate to impose a nominal fine, particularly when the respondent's conduct in comparison with the list of prior contraventions, was intentional, objectively more serious, affected a greater number of employees and as at the time of the penalty hearing, had not been rectified.

110 In view of the circumstances relevant to determining an appropriate disposition, which I have set out, I consider the fine that should be imposed is one third of the maximum penalty, which is the sum of $27,500.

Penalty to be paid to the claimant

111 The claimant, in its originating application, asked the Court to make an order that any penalty be paid to the claimant. In relation to this, s 546(3) of the FW Act provides:

> Payment of penalty.
>
> (3) The court may order that the pecuniary penalty, or a part of the penalty be paid to:
>
> (a) the Commonwealth; or
>
> (b) a particular organisation; or
>
> (c) a particular person.

112 The matter of how the Court is to exercise its discretion under s 546(3), on who is to receive the penalty in an underpayment of wages claim, was considered by Her Honour Mortimer J (as she then was) in ***Milardovic v Vemco Services Pty Ltd (No 2)*** [2016] FCA 244; (2016) 242 FCR 492.

113 At [40] - [44] Her Honour made the following observations:

> Were I free to do so, I would, in the exercise of the Court's discretion under s 546(3), order that the penalty be payable to the Commonwealth rather than to [the applicant]. However that course is not open to me following the Full Court's decision in ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4. The Full Court's decision requires the Court to make an order that [the respondent] pay the penalty the Court has imposed on it to [the applicant].
>
> That the Full Court's decision in ***Sayed*** requires me to make such an order arises from several aspects of the Full Court's reasons. First, at [72] their Honours identified 'a certain symmetry between the person or entity authorised to prosecute an enforcement proceeding and the person or entity to whom the penalty, if imposed, might be paid'.
>
> [A]t [101] the Full Court [in Sayed] held:
>
> > [T]he power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. We accept that there may be cases … where the penalty, or a part of the penalty, should be paid to another person in the circumstances described by Gray J in ***Plancor*** at [44].
>
> The reference to Gray J in ***Plancor*** is a reference to the following passage of his Honour's reasons in ***Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union*** [2008] FCAFC 170; 171 FCR 357 at [44]:
>
> > [T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons… in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the ***Gibbs*** … exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.

Subject then to the '***Gibbs*** exception' [***Gibbs v The Mayor, Councillors and Citizens of City of Altona*** [1992] FCA 553; 37 FCR 216 AT 223-4], the Full Court's decision in ***Sayed*** is authority for the proposition that where a proceeding is brought by an applicant on his or her own behalf, the discretion in s 546(3) is to be exercised to make any penalty the Court orders payable to that applicant. Aside from the identity of the person who brings the proceedings, and taking into account the '***Gibbs*** exception', the Full Court's judgment does not appear to provide for any other basis upon which a penalty should be made payable to another person or entity set out in s 546(3).

114 The reasoning in the authorities I have referred to lays out the path I am required to take in exercising this discretion. For this reason, I will order the penalty be paid to the claimant under s 546(3) of the FW Act.

Conclusion

115 For the reasons set out, I have determined that a fine of $27,500 is an appropriate penalty in this case.

116 The quantum of the pecuniary penalty is in my view, appropriate having regard to all the circumstances of this matter including the following:

i. the respondent has previously contravened the FW Act;

ii. while, because of the contravention, the affected employees may not have suffered any direct financial loss or denial of promotional opportunities, they have been deprived of an entitlement to be trained and assessed to the level of a Certificate II, which they were entitled to receive under cl 46.2(b) of the agreement;

iii. noting the size and scale of its business, the respondent ought to have taken greater care to ensure it complied with its obligations under cl 46.2(b) of the agreement;

iv. as at the date of the penalty hearing, the affected employees were still not trained to the level of a Certificate II as required;

v. as the respondent made a deliberate choice to engage in the contravention, it should be deterred from repeating conduct of this kind.

117 Noting the statutory maximum penalty for the contravention, I do not consider the quantum of the fine to be imposed is an oppressive response to the contravention.

118 It is also appropriate that an order be made requiring the respondent to pay the fine to the claimant.

T. KUCERA

INDUSTRIAL MAGISTRATE

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[i] ***Australian Building and Construction Commissioner v Pattinson*** [2022] HCA 13; (2022) 274 CLR 450 (***Pattinson***) at [9].

[ii] ***Pattinson*** at [9] and [15].

[iii] ***Pattinson*** at [15] citing ***Commonwealth v Director, Fair Work Building Industry Inspectorate*** [2015] HCA 46; (2015) 258 CLR 482 at 506 [55].

[iv] ***Pattinson*** at [9].

[v] ***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*** [2017] FCAFC 113; (2017) 254 FCR 68; 271 IR 321, at [98].

[vi] ***Pattinson*** at [41] and [46] - [47] citing ***Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd*** [2016] FCAFC 181; (2016) 340 ALR 25 at [156].

[vii] ***Pattinson*** at [55].

[viii] ***Pattinson*** at [46] - [47] also see Flick J in ***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)*** [2018] FCA 1563 at [19].

[ix] ***Pattinson*** at [55].

[x] ***Pattinson*** at [53].

[xi] ***Pattinson*** at [17], citing ***Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*** [2012] FCAFC 20; (2012) 287 ALR 249 at 265 [62].

[xii] ***Pattinson*** at [54].

[xiii] ***Callan v Smith*** at [91].

[xiv] Liability Decision at [24] - [31].

[xv] Liability Decision at [113] - [119].

[xvi] Liability Decision at [115].

[xvii] ***Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)*** [2018] FCA 480 at [17].

[xviii] ***Construction Forestry and Maritime Employees Union v Qube Ports Pty Ltd*** 2024 WAIRC 00792 at [54].

[xix] Liability Decision at [89] - [92].

[xx] ***Pattinson*** at [98].

[xxi] ***Ponzio v B&P Caelli Constructions Pty Ltd*** [2007] FCAFC 65; (2007) 158 FCR 543 at [93].

2025 WAIRC 00402

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00402
CORAM	**:**	INDUSTRIAL MAGISTRATE C. TSANG
HEARD	**:**	MONDAY, 23 JUNE 2025
DELIVERED	**:**	MONDAY, 23 JUNE 2025
FILE NO.	**:**	M 51 OF 2025
BETWEEN	**:**	NIGEL BRUCE SMITH
		CLAIMANT
		AND
		CFC CONSOLIDATED PTY LTD AS TRUSTEE FOR THE CFC EMPLOYMENT TRUST
		RESPONDENT
CatchWords	**:**	Application for leave to be represented in proceedings by lawyer under section 548(5) of the *Fair Work Act 2009* (Cth)
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Industrial Magistrate's Court (General Jurisdiction) Regulations 2005 (WA)
Instrument	**:**	*CFC Consolidated Pty Ltd as Trustee for the CFC Employment Trust – Perth Linehaul Enterprise Agreement 2019*
Cases referred to in reasons:	**:**	***Al Jorany v AHG Services (WA) Pty Ltd*** [2019] FCCA 2598
		Annese v General Crane Services Pty Ltd [2019] FCCA 2661
		Arnold v Fletcher International WA [2025] WAIRC 00030
		Cangemi v Specialist Diagnostic Pathology Services Pty Ltd [2014] FCCA 187
		Corcoran v Bansley Pty Ltd [2011] FMCA 440
		D'Sylva v Ellenbrook Family Medical Centre Pty Ltd [2020] FCCA 1171
		Evans v Oxford Shop Pty Ltd [2020] FCCA 2730
		Hughes v Mainrange Corporation Pty Ltd [2009] FMCA 1025
		Kotaidis v Fujitsu Australia Ltd [2020] FCCA 3334
		Renouf v RAC Finance Ltd [2017] FCCA 142
		Transport Workers' Union of Australia v Transit Systems WA Pty Ltd [2012] FMCA 637
Result	**:**	Application granted
Representation:		
Claimant	:	On his own behalf
Respondent	:	Mr K Hodge (of counsel) with leave

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing and edited by her Honour to insert headings and include complete citations)

1 On 30 May 2025, the respondent (**CFC**) applied for leave for it to be legally represented in the proceedings pursuant to s 548(5) of the *Fair Work Act 2009* (Cth) (***FW Act***) (**Application**).

2 The Application was supported by an affidavit, affirmed by Giles Lenz, CFC's Executive General Manager – People & Capability (**Affidavit**), outlining the reasons for the Application as including:

(a) CFC anticipating multiple similar claims being made against it for which legal representation will be of assistance.

(b) Assistance to the court, including to:

(i) Demonstrate that the *CFC Consolidated Pty Ltd as Trustee for the CFC Employment Trust – Perth Linehaul Enterprise Agreement 2019* (**Agreement**) does not apply to 2-Up Drivers, including the claimant (**Mr Smith**).

(ii) Illustrate the custom and practise that has applied to 2-Up Drivers since 23 September 2019.

(iii) Analyse the alleged 'hours deducted' and the alleged underpayment calculation.

(iv) Narrow the issues given the claim involves contested facts and interpretation.

(c) CFC not having in-house industrial experience to satisfactorily represent itself.

(d) The cumulative exposure, given Mr Smith's allegations apply to 84 other 2-Up Drivers, and the potential prejudice to CFC if legal representation was refused.

3 The Application was opposed by Mr Smith, for reasons including:

(a) The unfair power imbalance between him and CFC.

(b) The amount claimed making it unviable for him to seek legal representation.

(c) Legal representation may lead to technical legal arguments, when the claim is a simple one involving:

(i) Whether or not an employee should be paid for all work completed or not?

(ii) His reliance on CFC's Perth Depot Human Resources Manager agreeing 'that we should be paid for all work carried out and all unlawful deductions were ceased and have been ceased ever since.'

Principles

4 I have had regard to the following decisions:

(a) *Hughes v* ***Mainrange*** *Corporation Pty Ltd* [2009] FMCA 1025.

(b) ***Corcoran*** *v Bansley Pty Ltd* [2011] FMCA 440.

(c) *Transport Workers' Union of Australia v Transit Systems WA Pty Ltd* [2012] FMCA 637.

(d) ***Cangemi*** *v Specialist Diagnostic Pathology Services Pty Ltd* [2014] FCCA 187.

(e) ***Renouf*** *v RAC Finance Ltd* [2017] FCCA 142.

(f) ***Al Jorany*** *v AHG Services (WA) Pty Ltd* [2019] FCCA 2598.

(g) ***Annese*** *v General Crane Services Pty Ltd* [2019] FCCA 2661.

(h) ***D'Sylva*** *v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171.

(i) ***Evans*** *v Oxford Shop Pty Ltd* [2020] FCCA 2730.

(j) ***Kotaidis*** *v Fujitsu Australia Ltd* [2020] FCCA 3334.

(k) ***Arnold*** *v Fletcher International WA* [2025] WAIRC 00030.

5 In ***Corcoran*** [27], Lucev FM of the Federal Magistrates Court of Australia (citing ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 [39]–[42]), stated that there is no closed list of factors to be considered by a court in exercising the discretion to grant leave; with the factors which might be considered including:

(a) The relative complexity or simplicity of the matter.

(b) The objects and purposes of the legislation establishing the court and the court's rules, including the impact on case management considerations.

(c) Whether a party can be effectively represented by the proposed representative, and whether prejudice will be suffered by any party by reason of the appearance or non-appearance of the proposed representative.

(d) The objects and purposes of the provisions concerning small claims proceedings in the *FW Act*.

6 In ***Al Jorany*** [9]–[12], having canvassed ***Corcoran***, ***Cangemi*** and ***Renouf***, Judge Kendall of the Federal Circuit Court of Australia stated: (citations omitted)

9. There are no mandatory considerations when determining whether leave to be represented should be granted pursuant to s.548(5). Having canvassed the authorities the respondent has referred to, the following factors for consideration are relevant (though not definitive):

a. the objects and purposes of the Small Claims Division and also of this Court to provide quick, informal and just resolutions of disputes without undue technicality;

b. the complexity of the matters that arise on the face of the application, be it factual or legal, and whether a lawyer by reason of their training and expertise, might be of assistance to the Court;

c. whether the other party (here the applicant) is represented by a lawyer and any prejudice or unfairness the other party may suffer if leave is granted;

d. the familiarity, and competence, of the proposed legal representatives to provide assistance to the Court on the complexities or technicalities that arise; and

e. whether the party seeking leave to be represented has an in-house lawyer or employee capable of conducting the matter satisfactorily.

10. Section 548(5) of the FW Act is an 'exception' to the norm. Leave for a lawyer to appear in the Small Claims division in most cases will not be necessary and will be assumed not to be required.

11. These provisions are designed to enable self-represented litigants greater access to the legal system and to provide more accessible procedures that operates informally and without regard to legal forms and technicalities: FW Act, s.548(3).

12. Overall, the respondent must satisfy the Court that it is necessary for the Court to exercise the discretion

to grant leave in circumstances where the intention of the small claims procedure appears to be that legal representation is normally not necessary.

7 The factors in ***Al Jorany*** [9] were cited in ***Annese*** [15], ***D'Sylva*** [21], ***Evans*** [8], ***Kotaidis*** [10], and ***Arnold*** [3].

Consideration

8 Section 548(3)–(7) of the *FW Act* states:

Procedure

(3) In small claims proceedings, the court is not bound by any rules of evidence and procedure and may act:

(a) in an informal manner; and

(b) without regard to legal forms and technicalities.

(4) At any stage of the small claims proceedings, the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment.

Legal representation

(5) A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.

(6) If the court grants leave for a party to the proceedings to be represented by a lawyer, the court may, if it considers appropriate, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.

(7) For the purposes of this section, a person is taken not to be represented by a lawyer if the lawyer is an employee or officer of the person.

9 Relevantly, by s 548(7) of the *FW Act*, a lawyer who is an employee or officer of a party to a small claim proceeding does not need to seek the leave of the court to represent that party in the proceedings.

10 Consequently, and applying ***Al Jorany*** [9(a)] and [10]–[12], CFC has the onus of satisfying me that it is *necessary* that I exercise the discretion to grant leave for it to be represented by its *external lawyers*, Squire Patton Boggs (**SPB**), in these proceedings.

11 Applying ***Al Jorany*** [9(b)] and considering the complexity of the proceedings, I note that:

(a) In the Originating Claim, Mr Smith seeks orders for CFC to pay $21,000 for failing to comply with the Agreement.

(b) In the Response, CFC denies that the Agreement covered or applied to Mr Smith's employment; contending that his employment is governed by a common law employment contract.

(c) Implicit in [11(a)–(b)] above, is an issue of whether the court has jurisdiction to hear Mr Smith's claim.

(d) In ***Mainrange*** [2], Lucev FM of the Federal Magistrates Court of Australia stated that a jurisdictional objection 'is a pure legal issue' and that: (emphasis added)

> [T]he Court takes the view, for better or worse, that a lawyer, by reason of training and expertise, ought to have the ability to provide the Court with the appropriate and logical arguments based on research to be of assistance to the Court in a case such as this, **where a legal issue of this type, namely jurisdiction, arises**.

12 Considering the matters at [11] above, coupled with that at [3(c)(ii)] above, I disagree with Mr Smith that the proceedings involve a simple underpayment claim. Rather, the proceedings will involve a mixed question of fact and law, including but not limited to the interaction of the Agreement and the common law employment contract, and pertinently whether the Agreement covers and applies to Mr Smith's employment.

13 Applying ***Al Jorany*** [9(c)], I have considered Mr Smith's submissions at [3(a)–(b)] above and in the entirety of his Response to Respondent's Application.

14 In ***Arnold*** [13], this court differently constituted, in circumstances where the facts were largely uncontentious and it was common ground that Mr Arnold was covered by the relevant award, found that:

> Mr Arnold has not submitted that he will be prejudiced by the granting of leave. I do not consider Mr Arnold would be prejudiced as, if Mr Arnold remains unrepresented, the Court is able to assist him to participate in the proceedings meaningfully and fairly.

15 While in ***Arnold***, Mr Arnold had not submitted that he would be prejudiced by the granting of leave; the findings at ***Arnold*** [13] are apposite in these proceedings, specifically where, unlike ***Arnold***, there lacks common ground in these proceedings regarding the coverage and applicability of the underlying industrial instrument.

16 Applying ***Al Jorany*** [9(d)], I note that while the Affidavit does not appear to address the competence of SPB to provide assistance to the court in these proceedings, the following filed documents suggest that SPB have familiarity with these proceedings:

(a) On 15 May 2025, Kim Hodge of SPB (**Mr Hodge**) prepared and lodged on behalf of CFC, a *Form 23 – Notice of Appointment of Lawyer or Agent* (**Form 23**).

(b) On 16 May 2025, CFC filed its Response, which 'was prepared and filed by [Mr Hodge].'

(c) On 26 May 2025, CFC filed a *Form 3 – Affidavit of Service on a Person* in which a Law Graduate of SPB (**SPB Law Graduate**), affirmed to serving Mr Smith with a sealed copy of the Response and the Form 23.

(d) On 30 May 2025, CFC filed the Application 'prepared by [Mr Hodge]' and the Affidavit 'prepared and lodged by [CFC] by [Mr Hodge].'

(e) On 6 June 2025, CFC filed a *Form 3 – Affidavit of Service on a Person* in which the SPB Law Graduate, affirmed to serving Mr Smith with a sealed copy of the Application, Affidavit and Orders issued by the court on 30 May 2025.

17 Applying ***Al Jorany*** [9(e)], Mr Lenz stated the following in the Affidavit [16], which was not challenged by Mr Smith:

> Due to staff turnover and availability the Respondent does not have the necessary in-house industrial experience to satisfactorily represent itself in the Court regarding this claim.

18 The court is bound by reg 5 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA):

> **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.*]

19 Considering each of the factors in ***Al Jorany*** [9], on balance, I find that when considered as a whole, and in the absence of a finding of any significant prejudice to Mr Smith, given the court's concerns with the complexity of the issues that arise, and the court's obligations to ensure that proceedings are dealt with in accordance with reg 5, the court will be aided by the grant of leave for CFC to be represented by SPB.

20 Accordingly, the court will issue an order on the following terms:

> Pursuant to s 548(5) of the *Fair Work Act 2009* (Cth), the respondent has leave to be represented in the proceedings by a lawyer until further order.

C. TSANG

INDUSTRIAL MAGISTRATE

2025 WAIRC 00364

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00364
CORAM	**:**	INDUSTRIAL MAGISTRATE R. COSENTINO
HEARD	**:**	WEDNESDAY, 16 APRIL 2025
DELIVERED	**:**	WEDNESDAY, 18 JUNE 2025
FILE NO.	**:**	M 95 OF 2024
BETWEEN	**:**	PHOOLWUNTEE DEVI KULLUP
		CLAIMANT
		AND
		SOUTH METROPOLITAN HEALTH SERVICE AS AGENT FOR THE STATE OF WESTERN AUSTRALIA
		RESPONDENT
CatchWords	**:**	INDUSTRIAL LAW (WA) – long service leave – s 4A of the *Long Service Leave Act 1958* (WA) – whether long service leave entitlements of the *WA Health System - HSUWA - PACTS Industrial Agreement 2022* are at least equivalent to Long Service Leave Act entitlement – test for equivalence in s 4A – whether test is global or several – whether Long Service Leave Act applies to the claimant – whether claimant was an employee for the purpose of the former LSL Act definition of employee – whether service with employer deemed continuous under former LSL Act – no deeming effect – claim dismissed
Legislation	**:**	*Long Service Leave Act 1958* (WA)
		Industrial Relations Act 1979 (WA)
		Industrial Relations Legislation Amendment Act 2021 (WA)
		Minimum Conditions of Employment Act 1993 (WA)

		Interpretation Act 1984 (WA)
		Fair Work Act 2009 (Cth)
Instrument	**:**	*WA Health System – HSUWA – PACTS Industrial Agreement 2022*
		Serco – HSUWA Fiona Stanley Hospital Agreement 2019
Case(s) referred to in reasons:	**:**	***Public Transport Authority v Yoon*** [2017] WASCA 25; (2017) WAIG 249
		Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
		Wyloo Metals Pty Ltd v Quarry Park Pty Ltd [2024] WASCA 38
		SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362
		Western Australian Planning Commission v Southregal Pty Ltd [2017] HCA 7; (2017) 259 CLR 106
		Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union [2018] FCAFC 223; (2018) 268 FCR 128
		James Cook University v Ridd [2020] FCAFC 123; (2020) 278 FCR 566
		Australian Industry Group v Fair Work Australia [2012] FCAFC 108; (2012) 205 FCR 339
Result	**:**	Claim dismissed
Representation:		
Claimant	:	Mr S. Kemp (of counsel)
Respondent	:	Mr J. Carroll (of counsel)

REASONS FOR DECISION

1 The claimant, Phoolwuntee Devi Kullup worked as Chef de Partie in Fiona Stanley **Hospital's** patient catering services from September 2014 until she resigned in May 2024. She worked at the Hospital for just under 10 years in total. For slightly shy of seven years, her employer was **Serco** Australia Pty Ltd. For the last few years, her employer was the respondent, South Metropolitan **Health Service** as agent for the State of Western Australia. She performed the same services for the Health Service as she had done for Serco.

2 When Ms Kullup's employment ended, the *WA Health System – HSUWA – PACTS* ***Industrial Agreement*** *2022* applied to her employment. Under the 2022 Industrial Agreement, long service leave accrued and was payable on termination of employment after 10 years' continuous service. Ms Kullup did not have 10 years' continuous service to qualify for the 2022 Industrial Agreement's entitlement.

3 Under the *Long Service Leave Act 1958* (WA) as at 9 May 2024 (**LSL Act**), an employee to whom the LSL Act applied was entitled to payment instead of long service leave upon termination of employment after at least seven years of continuous service.[1]

4 In these proceedings, Ms Kullup claims that:

a. the LSL Act applied to her when her employment with the Health Service ended;

b. her period of service with Serco is deemed to be employment with the Health Service for the purpose of the transmission of business provisions of the former LSL Act; and

c. she was therefore entitled to payment in lieu of long service leave on termination of her employment under s 9(2A) of the LSL Act.

5 Ms Kullup seeks orders for:

a. payment of $14,171.45 pursuant to s 83A(1) of the *Industrial Relations Act 1979* (WA) **(IR Act**)

b. a pecuniary penalty to be imposed on the Health Service pursuant to s 83(4)(a)(ii) of the IR Act, paid to her pursuant to s 83F(2)(b);

c. interest; and

d. costs.

6 The Health Service denies Ms Kullup is entitled to payment on termination for long service leave under the LSL Act because:

a. the effect of s 4A(4) of the LSL Act is that the LSL Act did not apply to Ms Kullup, as she had a separate entitlement under the 2022 Industrial Agreement that was at least equivalent to the LSL Act entitlements; and

b. Ms Kullup's employment with Serco does not count towards the entitlement under the LSL Act in any event, because it is not part of continuous service. She therefore did not have seven years continuous service to qualify for any entitlement under the LSL Act.

7 The question of whether the LSL Act applies to Ms Kullup involves first, ascertaining the true meaning of s 4A(4) of the LSL Act, and in particular, what entitlement is or entitlements are to be compared for the purpose of the section. Then it

involves a comparison between the relevant entitlement(s) to determine whether the relevant entitlement(s) under the 2022 Industrial Agreement is or are at least equivalent to the relevant entitlement(s) under the LSL Act.

8 The question of whether Ms Kullup's service with Serco counts as continuous service only needs to be determined if the LSL Act applied to Ms Kullup. If this question needs to be determined, its determination involves:

a. whether the definitions of 'employee' and 'employer' in s 4(3) of the former LSL Act apply when applying the test in s 6 of the former LSL Act for transmission of business;

b. if yes, whether Ms Kullup was entitled to long service leave entitlements prior to the alleged transmission of business by virtue of a Commonwealth enactment for the purpose of s 4(3) of the former LSL Act;

c. if yes, whether Ms Kullup's entitlements by virtue of that enactment were at least equivalent to the entitlements under the LSL Act, so she was excluded from the definition of 'employee' for the purpose of s 6 of the former LSL Act at the time of the alleged transmission; and

d. if the answer to a. is no or the answer to c. and d. is yes, whether the insourcing of certain services from Serco to the Health Service was a transmission of business for the purpose of s 6(4) of the former LSL Act.

Jurisdiction

9 Section 11 of the LSL Act confers jurisdiction on the Industrial Magistrates Court (**IMC**) to hear and determine all questions and disputes in relation to rights and liabilities under the LSL Act, including whether a person is or is not an employee to whom the LSL Act applies.

10 Under s 83 of the IR Act, a person to whom an entitlement provision applies under the LSL Act is able to apply to the IMC for enforcement of the entitlement provision. A provision of Part III of the LSL Act is an 'entitlement provision'.[2]

11 If the LSL Act applies to the claimant, then the claimant is a person entitled to apply to the IMC for enforcement of it.

12 If a contravention of an entitlement provision is proved, the IMC may impose a pecuniary penalty.[3]

13 In proceedings brought under s 83(1), if it appears to the IMC that an employee has not been paid an amount to which the employee was entitled to be paid under an entitlement provision, the IMC must order the respondent to pay the amount by which the employee has been underpaid.[4]

14 The parties agreed that if a contravention is proved, the IMC should reconvene to determine what orders should be made under s 83 and s 83A.

Agreed Facts

15 The hearing as to whether a contravention was proved proceeded on the basis of uncontentious facts, set out in an Agreed Statement of Facts and agreed documents.

16 The Agreed Statement of Facts is Schedule I to these reasons.

What must be compared under s 4A(4) of the LSL Act?

17 The *Industrial Relations Legislation* ***Amendment Act*** *2021* (WA) repealed the former s 4(3) of the LSL Act, and inserted s 4A.[5]

18 Section 4A says:

> **4A. Employees with equivalent separate LSL entitlements**
>
> (1) In this section —
>
> *award, agreement or enactment* means —
>
> (a) an award or industrial agreement; or
>
> (b) an agreement between an employer and employee (including an employer - employee agreement); or
>
> (c) an enactment of the State, the Commonwealth, another State or a Territory;
>
> *entitlement*, in relation to long service leave or payment on termination instead of long service leave, includes an eligibility to become entitled to the long service leave or payment on termination instead of long service leave;
>
> *WA LSL* means long service leave, or payment on termination instead of long service leave, under Part III.
>
> (2) For the purposes of this section, a *separate LSL entitlement* is an entitlement to long service leave, and a payment on termination instead of long service leave, under an award, agreement or enactment.
>
> (3) For the purposes of this section, a payment (whether in the form of a loading, other additional incremental payment or otherwise) instead of an entitlement under subsection (2) is not a *separate LSL entitlement*.
>
> (4) This Act does not apply to an employee who has a separate LSL entitlement to take long service leave and to be paid on termination instead of long service leave that is at least equivalent to the entitlement to WA LSL to take long service leave and to be paid on termination instead of long service leave.
>
> (5) Subsection (6) applies to an employee —
>
> (a) who becomes entitled to WA LSL in relation to employment with an employer; and
>
> (b) who, immediately before becoming entitled to WA LSL, had a separate LSL entitlement in relation to employment with the employer.

(6) Any long service leave taken by, or payment on termination instead of long service leave made to, the employee under the separate LSL entitlement must be taken into account in the calculation of the employee's entitlement to WA LSL as if it were taken, or paid on termination, as WA LSL.

The parties' submissions

19 It is common ground that if the conditions of s 4A(4) are met, the LSL Act does not apply to an employee. It is also agreed that for the purpose of making the necessary comparison under s 4A(4), the comparison must be undertaken prospectively, that is, based on a comparison of the terms of the competing instruments at the time each applies, and not retrospectively by reference to individual circumstances that change from time to time.[6]

20 The parties have different views as to how the comparison for equivalence under s 4A(4) should be undertaken. Should the respective entitlements be compared severally or globally?

21 Ms Kullup argues for a severable approach: that s 4A(4) excludes the operation of the LSL Act only where the relevant industrial instrument both:

a. provides an entitlement to take long service leave that is at least equal to the entitlement under the LSL Act to take long service leave; *and*

b. provides an entitlement to be paid on termination instead of long service leave that is at least equal to the entitlement under the LSL Act to be paid on termination instead of long service leave.

22 In other words, the equivalency comparison must compare separately the entitlement to take long service leave, and the entitlement to payment on termination. If either of these two entitlements is not at least equivalent to the statutory entitlement, s 4A(4) does not apply.

23 Ms Kullup draws support for this construction from the words used in the section itself, together with its departures from the historical provision from which the section originated, specifically s 4(3) which said:

4. Interpretation

…

(3) Where a person is, by virtue of —

(a) an award or industrial agreement;

(b) an employer-employee agreement under Part VID of the *Industrial Relations Act 1979* or other agreement between the person and his employer; or

(c) an enactment of the State, the Commonwealth or of another State or Territory,

entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of 'employee' in subsection (1).

24 Ms Kullup's counsel noted that in ***Public Transport Authority* v *Yoon*** [2017] WASCA 25; (2017) WAIG 249, the Industrial Appeal Court (**IAC**) found that s 4(3)'s reference to 'entitled to long service leave' encompasses two entitlements provided for by s 8 of the LSL Act, being the entitlement to take long service leave, and the conditional right to be paid on termination. The **Explanatory Memorandum** to the Industrial Relations Legislation Amendment Bill 2021 (WA) confirms at [547] that s 4A(4) was introduced to *replace* s 4(3), while acknowledging the two aspects of the entitlement to long service leave by reference to the decision in ***Yoon***. However, where the Explanatory Memorandum at [558] suggests that s 4A(4) *replicates the effect* of the former s 4(3), Ms Kullup submits the Explanatory Memorandum is wrong.

25 The Health Service argues that s 4A operates on a global comparison, in the same manner as the former s 4(3), despite differences in structure and wording effected by the Amendment Act. The Health Service says its construction is supported by the legislative history of the provision, and the intention that s 4A replace s 4(3). In ***Yoon***, the IAC considered the meaning and application of s 4(3), relevantly finding that the comparison required by s 4(3) must be undertaken in a global way, involving a broad and evaluative analysis weighing the comprehensive benefits provided under the two instruments overall.

26 The Health Service says that s 4A was not intended to change the approach as set out in ***Yoon***. This is evident from the definitions of 'entitlement' and 'WA LSL' in s 4A, which each reflect the observations of the IAC as to the elements of the previous s 4(3). Specifically, the new defined terms in s 4A use language that is consistent with the IAC's description of one comprehensive entitlement, albeit comprising successive specific entitlements or benefits. None of the Amendment Act's changes to s 8 and s 9 and their structure, which featured in the IAC's reasoning about the meaning of s 4(3), make substantive changes which affect the IAC's analysis that there is only one comprehensive entitlement, or would mean that the IAC's analysis was no longer applicable.

Principles of Statutory Construction

27 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute.[7] The principles were recently and relevantly summarised by the Court of Appeal in ***Wyloo Metals Pty Ltd v Quarry Park Pty Ltd*** [2024] WASCA 38 at [200] – [208] (citations omitted):

> The focus of statutory construction is upon the text of the provisions having regard to their context and purpose.
>
> The statutory text is the surest guide to Parliament's intention. A decision as to the meaning of the text requires consideration of the context, in its widest sense, including the general purpose and policy of the provision.
>
> The context includes the legislative history and extrinsic materials.
>
> At common law, apart from any reliance upon s 19 of *the Interpretation Act 1984* (WA), a court may have regard to reports of law reform bodies to ascertain the mischief which a statutory provision is intended to remedy.

> However, legislative history and extrinsic materials cannot displace the meaning of statutory text. Further, the examination of legislative history and extrinsic materials is not an end in itself.
>
> The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose.
>
> Recently, in ***ENT19 v Minister for Home Affairs,*** Gordon, Edelman, Steward and Gleeson JJ made these observations:
>
> > The context of the words, consideration of the consequences of adopting a provision's literal meaning, the purpose of the statute and principles of construction may lead a court to adopt a construction that departs from the literal meaning of the words of a provision. One such principle is that legislation must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. As expressed by Gageler J in ***SAS Trustee Corporation v Miles,*** 'statutory text must be considered from the outset in context and attribution of meaning to the text in context must be guided so far as possible by statutory purpose on the understanding that a legislature ordinarily intends to pursue its purposes by coherent means'. Where conflict appears to arise in construing an Act, 'the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions', and this 'will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Ultimately, the task in applying the accepted principles of statutory construction is to discern what Parliament is to be taken to have intended.

28 These principles mean that context should be considered at the first stage and in its widest sense.[8] Context may encompass the structure of the Act and surrounding provisions.

The Long Service Leave Act's text and context

29 Section 4A(4) has multiple, and duplicated, references to 'entitlements'.

30 The defined terms 'separate LSL entitlement,' 'entitlement' and 'WA LSL' (**definitional words**), all involve a compositional concept: a single composite entitlement with separate distinct components. The separate distinct components of the entitlements are then described again in s 4A (**duplicated words**).

31 One might expect the definitional words to operate as a device to save repetition in s 4A(4) and make it easier to read. However, they do not appear to have been deployed in this way.

32 Ms Kullup argues that if the equivalence comparison was to be between the composite 'separate LSL entitlement' and composite 'WA LSL' entitlement, s 4A(4) could have been expressed without the duplicated words. It could have said:

> This Act does not apply to an employee who has a separate LSL entitlement that is at least equivalent to the entitlement to WA LSL.

33 If the duplicated words must be given meaning and effect, and not be regarded as superfluous[9] then the duplicated words must mean something different to the definitional words. The difference, according to Ms Kullup, must be that the duplicated words import two separate and distinct elements for comparison. The use of the duplicated words shows that the equivalence comparison must be performed on the distinct components of the long service leave entitlement, rather than the composite entitlement that is defined.

34 The Health Service argues that duplication within s 4A is a plain drafting error, because importing the definitions into s 4A(4) makes the provision nonsensical.

35 The Health Service's contended for construction means that the duplicated words in s 4A(4) are superfluous. This is against the general construction principle that all words must be given some meaning and effect. However, it is doubtful what meaning and effect they can sensibly be given which would make a clear path to Ms Kullup's contended for construction.

36 Ms Kullup emphasises the role of the word 'and' in the phrase 'to take long service leave and to be paid on termination instead of long service leave'. She says this indicates that what is being compared is two entitlements, compared separately.

37 The first difficulty with this argument is that it sits uneasily with the section's structure. Structurally, it is more natural to read the duplicated words as qualifying the preceding definitional words.

38 The second difficulty is that it involves disharmony with the Act's scheme, and inconsistency with the Act's concept of long service leave entitlements as a comprehensive, composite entitlement. It does not 'give effect to harmonious goals'.[10] The meaning given to the phrase 'to take long service leave and to be paid on termination instead of long service leave' is inconsistent with the concept, embodied in the definition of WA LSL, that long service leave under Part III is a single, composite entitlement.

39 In *Statutory Interpretation in Australia*, the learned author records that the general principle that words should be given meaning and effect is subject to the overriding consideration that it may be impossible to give full and accurate meaning to every word.[11] The learned author cites the plurality in ***Western Australian Planning Commission v Southregal Pty Ltd*** [2017] HCA 7; (2017) 259 CLR 106 at [55] (citations omitted):

> Lastly, whilst it must be accepted that words chosen by the legislature should be given meaning and endeavours should be made to avoid them being seen as redundant, they should not be given a strained meaning, one at odds with the scheme of the statute. Moreover, it has been recognised more than once that Parliament is sometimes guilty of 'surplusage' or even 'tautology'. The possibility that Parliament may not have appreciated that the reference in s 177(2)(b) was not necessary, and was liable to confuse, is not a reason for giving it a literal interpretation.

40 In ***Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union*** [2018] FCAFC 223; (2018) 268 FCR 128, the Full Court of the Federal Court of Australia said at [86]:

> It has been recognised that, in some instances, it may not be possible to give a sensible meaning or operation to every word. Thus, for example, in ***Ajinomoto Company Inc v NutraSweet Australia Pty Ltd*** [2008] FCAFC 34; 166 FCR 530, Black CJ, Sundberg and Weinberg JJ acknowledged at [114] that all words must, prima facie, be given some meaning and effect, but that this general principle was 'subject to the overriding consideration that it may be impossible to give a full and accurate meaning to every word. In such cases it is the duty of the court to give the words the construction that produces the greatest harmony and the least inconsistency'.

41 This is a case where the meaning of the duplicated words is impossible to discern, such that they should be regarded as superfluous rather than be given a strained meaning. It may be that the drafters sought to qualify the preceding definitional words to put beyond doubt that the entitlements being compared must comprise both an entitlement to take long service leave as well as an entitlement to be paid on termination. In the end, the words do not appear to have any work to do.

42 The LSL Act's long title indicates the Act's scope and purpose. An Act's long title is part of the Act and is to be taken into account in considering the context in which the other provisions appear.[12] The LSL Act's long title is:

> An Act to provide for the granting of long service leave to *certain* Western Australian employees and for matters incidental thereto (emphasis added).

43 In ***Yoon***, the plurality described the long title as denoting a scheme for 'the provision of statutory long service leave to some employees only' [64]. It is not a purpose of the LSL Act to create a universal scheme of long service leave for all employees.

44 Part III of the LSL Act contains the substantive long service leave entitlements. These entitlements are conferred on 'an employee'.

45 'Employee' is defined expansively in Part II Division 1 of the LSL Act as meaning:

> *employee* —
>
> (a) means —
>
> (i) a person who is employed by an employer to do work for hire or reward, including as an apprentice; or
>
> (ii) a person whose usual status is that of an employee;
>
> and
>
> (b) includes a casual or seasonal employee;[13]

where 'employer' means:

> *employer* includes any of the following employing 1 or more employees —
>
> (a) a person or public authority as defined in the IR Act;
>
> (b) except as provided in the *Foreign States Immunities Act 1985* (Commonwealth) section 12, a foreign state or consulate;
>
> (c) a related body corporate of the employer if the employer is itself a body corporate.[14]

46 The heading of Part II is headed 'Construction and application of this Act.' Section 4A appears in Division 1 of Part II.

47 As indicated in the heading to Part II, s 4A is about the application of the Act, that is, whether the Act applies to an employee as defined.

48 Section 4A is the only section of the Act which is about who the LSL Act does and does not apply to. There is no other section which delineates the LSL Act's scope, so as to limit the application of the Act to 'certain' employees as referred to in the long title. Provided a person is an employee as defined, unless s 4A(4) is triggered, the LSL Act applies.

49 This structure contrasts with the *Minimum Conditions of Employment Act 1993* (WA) (**MCEA**) which has as its long title 'An Act to provide for minimum conditions of employment for employees in Western Australia and for related purposes.' Its purpose is 'to provide for fair and enforceable minimum conditions of employment'.[15] Section 5 of the MCEA says:

> **5. Minimum conditions extend to and bind all employers and employees**
>
> (1) The minimum conditions of employment extend to and bind all employees and employers and cannot be displaced by an industrial instrument or contract of employment.
>
> (2) A provision in, or condition of, an industrial instrument or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect and the minimum condition is taken to be the term of the industrial instrument or contract of employment instead.
>
> (3) A provision in, or condition of, an agreement or arrangement that purports to exclude the operation of this Act has no effect, but without prejudice to other provisions or conditions of the agreement or arrangement.
>
> (4) A purported waiver of a right under this Act has no effect.
>
> (5) This section has effect subject to section 8.[16]

50 The LSL Act contains no words like these, making it clear that long service leave entitlements extend to and bind all employees and employers, and cannot be displaced by an industrial instrument or contract of employment. The Amendment Act also amended the MCEA. The legislature must therefore be taken to have been cognisant of the difference between the MCEA and the LSL Act in this regard.

51 Long service leave entitlements under the LSL Act are not universal minimum conditions. This is important context for giving meaning to s 4A(4).

52 The practical effect of Ms Kullup's contended for construction is that only when an industrial instrument or enactment provides for both equivalent entitlements to take long service leave and equivalent entitlements to be paid on termination as contained in the LSL Act, would the LSL Act cease to apply. The LSL Act's component entitlements would become, in effect, universal minimum conditions for all employees. Indeed, Ms Kullup's contended for construction would make s 4A practically redundant. A separate LSL entitlement could not ever displace the entitlements under the LSL Act, which then begs the question as to what purpose is served by the Act not applying to an employee in the circumstances s 4A(4) describes?

53 A final textual consideration is that s 4A(4) is expressed in the singular: 'a' separate LSL entitlement is compared with 'the' WA LSL entitlement. Under s 10 of the *Interpretation Act 1984* (WA), words in the singular number include the plural, unless the intent and object of the Act, or something in the subject or context of the Act is inconsistent with such application.[17] Section 4A(4) is directed at determining whether the Act applies to 'an employee'. The subject of the section is singular. The subject is therefore inconsistent with the application of the rule in s 10.

54 Accordingly, the use of the singular preceding 'separate LSL entitlement' and 'WA LSL entitlement' is also indicative of a long service leave entitlement being a single, composite entitlement.

Legislative history & extrinsic materials

55 Prior to the enactment of s 4A(4), the LSL Act's carve out was achieved by an exclusion, in s 4(3), from the definition of 'employee' as set out in paragraph [23] above.

56 The IAC considered the meaning of this exclusion in ***Yoon***. Ms Yoon's employment was covered by an industrial agreement which contained certain entitlements to long service leave. When she left her employment, she was not eligible for pro-rata entitlements under the industrial agreement. However, she claimed an entitlement under the LSL Act to pro-rata long service leave after seven years. The first issue before the IAC was the nature of, and circumstances in which the comparison required by s 4(3) was to be undertaken. The second issue was the manner of comparison: whether the comparison was global, or several.

57 At [39] the plurality noted that prior to the commencement of s 4(3) of the LSL Act, persons were excluded from the entitlement to LSL under the LSL Act if their terms of employment were regulated by certain awards or industrial agreements, which may not have provided for long service leave, and also if they were covered for long service leave elsewhere.

58 Considering s 8 of the LSL Act, the plurality noted that the term 'long service leave' is not defined, but, when s 8 is read as a whole, it is apparent that the term encompasses two aspects of entitlement, namely, the granting and taking of leave while maintaining continuity of employment, and a conditional right to payment in lieu of pro-rata long service leave on termination.[18]

59 After concluding, at [60], that the phrase 'the entitlement to long service leave under this Act' operates on the basis that the LSL Act provides for a comprehensive entitlement, the plurality resolved the second construction issue in favour of the Authority's contended for global approach, stating at [72] – [73]:

> The word 'equivalent' ordinarily means equal in value, measure, effect or significance. The task of identifying whether there is at least equivalence between two instruments is necessarily a broad and evaluative one involving the overall weighing of the benefits provided under the two respective instruments. The evaluation is to be undertaking having regard to the objectives of the LSL Act, referred to in [42] above.
>
> That conclusion is confirmed by, but not dependent upon, the further observation that a legislative intention that a comparison be undertaken prospectively between a legislative entitlement to long service leave on the one hand, and an entitlement under an award or industrial agreement on the other is not a novel one, as the decision in Kennedy indicates. In Kennedy, the Commission observed:
>
> > As this comparison has to be made without advance knowledge of how particular individuals may fare ultimately in their employment, it must be based on an estimate of what is likely to be best for the majority of individuals involved - in other words, on the principle of the greatest good for the greatest number. The only way to do this is to examine each set of provisions as a whole, weighing the various pros and cons and arriving at a final balance on an overall basis. This means that the workers have to be considered as a group over the whole range of their possible employment. This may involve speculation often on imprecise material but, in the end, the answer must be 'Yes' or 'No'. To answer 'Yes and No' is not permissible (citations omitted).

60 The legislature has indicated its approval of the IAC's interpretation of 4(3) in ***Yoon***. The Explanatory Memorandum refers to the recommendations of the 2018 Ministerial Review of the State Industrial Relations System (**Ministerial Review**), to 'modernise the *Long Service Leave Act 1958* and introduce penalties for non-compliance.' At [38] the Explanatory Memorandum says:

> 38. The Bill amends the LSL Act to:
>
> a) clarify the absences that do not break an employee's continuous employment, and the absences that do and do not count towards the length of an employee's continuous employment. This includes specific provisions relating to casual and seasonal employees, and apprentices;
>
> b) clarify existing provisions relating to the cashing out of long service leave;
>
> c) replace existing transmission of business provisions with transfer of business provisions, based on the FW Act transfer of business provisions;
>
> d) provide for increased flexibilities regarding the taking of long service leave;

e) enable a long service leave entitlement to be enforced under s 83 of the IR Act and so ensure that contraventions attract a penalty consistent with the treatment of contraventions of other minimum employment entitlements; and

f) repeal spent provisions.

61 Notably, this summary of the purposes of the amendments does not include any suggestion that the scope of the LSL Act's application is to be amended.[19]

62 The Explanatory Memorandum describes the introduction of s 4A as, in effect, replacing the existing s 4(3):

> 547. Section 4A, in effect, *replaces* existing s 4(3).
>
> 548. An employee's entitlement to long service leave under the LSL Act comprises an entitlement to take leave (in accordance with existing s 8(1) and s 8(2)(a) and (b)), and a conditional right to payment in lieu of long service leave on termination (in accordance with existing s 8(2)(c) and s 8(3)): ***Public Transport Authority of Western Australia v Yoon*** [2017] WASCA 25 at [40]. Both entitlements are paid on an employee's ordinary pay.
>
> …
>
> 557. The comparison under s 4A(4) is whether an employee's entitlement to take long service leave and to be paid for long service leave on termination under the separate LSL entitlement is at least equivalent to the entitlement to take paid long service leave on ordinary pay and be paid on termination instead of long service leave on ordinary pay under Part III of the LSL Act. If this comparison demonstrates that the employee's separate LSL entitlement is at least equivalent to Part III of the LSL Act, the LSL Act will not apply to that employee.
>
> 558. This provision *replicates* the effect of existing s 4(3) (emphasis added).

63 The Explanatory Memorandum's reference to s 4(3) being *replaced* is consistent with the fact that the enactment of s 4A introduced a new mechanism for limiting the scope of the LSL Act's application. Rather than the carve out being contained in an exclusion from the definition of 'employee', the carve out is expressed as the Act not applying to those who fall within s 4A(4).

64 In contrast, the comparative exercise is *replicated* not *replaced*.

65 I disagree with Ms Kullup's submission that the Explanatory Memorandum is wrong in its description of the effect of s 4(3). The legislative history and the Explanatory Memorandum support the view that it was not the legislature's intention to alter the comparison required or to alter the substantive effect of s 4(3).

66 Accordingly, s 4A(4) does not require separate comparison of the components making up a long service leave entitlement. Rather, the comparison is a single comparison of the composite entitlements, assessed globally.

Is the LSL entitlement under the Industrial Agreement at least equivalent to WA LSL?

67 The 2022 Industrial Agreement was registered on December 2022. It is agreed that is the relevant date for the purpose of the comparison required by s 4A(4), noting that s 4A commenced operation on 20 June 2022.

68 The Health Service provided a table comparing the relevant provisions of the LSL Act and the Industrial Agreement for comparison purposes. This is attached as Schedule II to these reasons. In summary, under the LSL Act an employee is entitled to 8 and 2/3 weeks of long service leave after 10 years continuous service and payment instead of long service leave upon termination of employment after at least seven years of continuous service.[20]

69 The Industrial Agreement grants employees 13 weeks of long service leave on the completion of 10 years of continuous service[21] and payment on termination in lieu of long service leave proportionate to the employee's length of service if the employee:

a. has completed 10 years of continuous service; or

b. retires at or over the age of 55 years; or

c. retires on the grounds of ill health and the employee has completed not less than 12 months' continuous service before the date of retirement; or

d. is retired by the employer for any other cause and the employee has completed not less than three years' continuous service; or

e. dies and has completed not less than 12 months' continuous service.[22]

70 Both the LSL Act and the Industrial Agreement provide for payment at the employee's ordinary pay excluding shift penalties.[23]

71 Schedule II shows that there is only one way in which the LSL Act entitlement is more favourable than the 2022 Industrial Agreement entitlement. That is where an employee ceases employment with between seven and 10 years continuous employment, where none of the circumstances listed in paragraph [69] above apply.

72 Otherwise, the 2022 Industrial Agreement entitlement is equivalent to or more favourable than the LSL Act entitlement. In particular:

(a) If one of the circumstances identified in paragraph [69] applies, the pro-rata entitlement arises earlier than under the LSL Act, including with just one years' service.

(b) In those circumstances the pro-rata entitlement is greater (being proportional to 13 weeks per 10 years' service or 13 weeks per seven years' service).

(c) After 10 years of employment, an employee under the 2022 Industrial Agreement has 4 1/3 more weeks LSL than a LSL Act employee.

(d) A LSL Act employee 'catches up' to a 2022 Industrial Agreement employee by 15 years' employment (13 weeks' total LSL).

(e) After 17 years' service, a 2022 Industrial Agreement employee has 26 weeks total LSL, which is double the leave an LSL Act employee is entitled to at that point (13 weeks).

(f) Under the 2022 Industrial Agreement an employee has access to portability provisions which allow for service with other Commonwealth, State or Territory employers to be recognised for the purposes of LSL as long as the break between service is not more than one week.

73 On a broad evaluation of the package of entitlements under the 2022 Industrial Agreement compared with WA LSL as defined in the LSL Act, the 2022 Industrial Agreement entitlements are 'superior'.[24]

74 Accordingly, the 2022 Industrial Agreement contains a separate LSL entitlement that meets the condition in s 4A(4) of being at least equivalent to WA LSL.

75 As a consequence, the LSL Act did not apply to Ms Kullup when her employment terminated.

Was there a transmission of business from Serco to the Health Service?

76 Because I have concluded that the LSL Act did not apply to Ms Kullup it is not strictly necessary for me to consider the remaining issues in this case. However, for completeness and in case I am wrong in my construction of s 4A(4), I will briefly set out my reasoning in relation to whether there was a transmission of business for the purpose of s 41.

77 It is not in dispute that s 41 of the LSL Act has the effect that the transmission of business provisions of the former LSL Act (s 6) applies. Section 41 says:

> **41. Business transmitted before commencement day**
>
> (1) This section applies in relation to the transmission, as defined in former section 6(5), of a business before the commencement day.
>
> (2) For the purposes of determining whether an employee in the business has had continuous employment with an employer, on and after the commencement day —
>
> (a) former sections 6 and 8 continue in operation; and
>
> (b) Part II Division 3 does not apply.

78 Section 6 of the former LSL Act says:

> **6. What constitutes continuous employment**
>
> …
>
> (2) For the purposes of this Act, the employment of an employee whether before or after the commencement of this Act shall be deemed to be continuous notwithstanding —
>
> (a) the transmission of a business as referred to in subsections (4) and (5);
>
> ….
>
> (4) Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called the transmittor) to another employer (herein called the transmittee) and an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee — the period of the continuous employment which the employee has had with the transmittor (including any such employment with any prior transmittor) shall be deemed to be employment of the employee with the transmittee.
>
> (5) In subsection (4) —
>
> transmission includes transfer, conveyance, assignment or succession, whether voluntary or by agreement or by operation of law, and transmitted has a corresponding meaning.

79 The Health Service says s 6 must be read by importing the relevant defined terms in the former LSL Act, namely the definitions of 'employee' and 'employer' including the exclusion in s 4(3) reproduced at [23] above.

80 The Health Service argues that s 50 of the *Fair Work Act 2009* (Cth) (**FWA**) is a Commonwealth enactment by virtue of which Ms Kullup was entitled to long service leave, read with the long service leave provided for by the *Serco – HSUWA Fiona Stanley Hospital Agreement 2019* (**Serco Agreement**) which applied at the time Ms Kullup ceased working for Serco and commenced working for the Health Service. It further says that the entitlement was at least equivalent to long service leave under the former LSL Act, so Ms Kullup did not come within the definition of 'employee' by operation of s 4(3)(c). Consequently, Ms Kullup was not an employee and Serco was not an employer for the purpose of s 6.

81 The Serco Agreement is an enterprise agreement made under Part 2-4 of the FWA. It covered Ms Kullup and Serco and applied at the time of the purported transmission of business on 2 August 2021.

82 Ms Kullup's case is that s 41 of the LSL Act does not import or preserve the definitions of employee and employer from the former LSL Act, for the purpose of applying s 6. Ms Kullup says that even if it did, the source of Ms Kullup's entitlement was the Serco Agreement, not the FWA. It is agreed that the Serco Agreement is not an award or instrument referred to in s 4(3) because it was not made under the IR Act.

83 Section 41 is within Part 8 of the LSL Act. Part 8 is headed 'Savings provisions for Industrial Relations Legislation Amendment Act 2021'. It is clear enough from the part heading that the purpose of s 41 is to ensure that the former

transmission of business provisions continue to apply to transactions which occurred before the commencement of the Amendment Act. That is, it is intended to preserve the effect of s 6 of the former LSL Act.

84 If Ms Kullup's approach to s 41 is accepted, the former LSL Act's provisions would not continue to apply, nor would the amended transfer of business provisions apply, but there would be a third, hybrid test for when there is a transmission of business for the purpose of continuity of employment. On this approach, the 'saved' provisions would be altered.

85 There are several difficulties with this approach:

(1) Ms Kullup has not explained why the legislature might have intended to create a new hybrid test, different from that which applied prior to the commencement of the Amending Act and that which applies since the commencement of the Amending Act.

(2) The existence of a third test is inconsistent with the heading to Part 8, which 'saves' the operation of s 6 of the former LSL Act.

(3) Ms Kullup's approach runs against the principle of non-retrospectivity, or the presumption of legality, and she has not attempted to rebut the presumption against retrospectivity.

86 For these reasons, I accept, as the Health Service contends, that the pre-Amendment Act definitions of 'employee' and 'employer' apply when s 41 is read with s 6 of the former LSL Act.

87 Was Ms Kullup entitled to long service leave by virtue of a Commonwealth enactment with respect to Serco?

88 There is no dispute that the Serco Agreement is not itself a law, or a Commonwealth enactment.[25] It does, however, have statutory force.[26] The statutory force is given by the operation of s 50 of the FWA which prohibits the contravention of a term of an enterprise agreement.[27]

89 The Serco Agreement, and the entitlements contained in it, are binding only because of the FWA's provisions for enterprise agreements. This means that the Serco Agreement's long service leave entitlement arose by virtue of a Commonwealth enactment, for the purpose of s 4(3)(c)'s exclusion from the definition of 'employee'.

90 As I understand it, there is no dispute that if the long service leave entitlements under the Serco Agreement were to be compared with the LSL Act's entitlements as required by s 4(3) of the former LSL Act, the Serco Agreement's entitlements are at least equivalent. Clause 5.7 of the Serco Agreement provides for long service leave to be accrued, taken and paid 'in accordance with the *Long Service Leave Act 1958* (WA)' but with the additional benefit of accessing pro rata long service leave any time after completion of seven years' continuous service.

91 So, by the operation of s 4(3), Ms Kullup was not an 'employee' for the purpose of the former LSL Act's definitions. Section 6(2) has a deeming effect only on 'the employment of an employee'. Section 6 accordingly could not have any deeming effect on Ms Kullup's employment with Serco.

92 This conclusion defeats Ms Kullup's reliance on s 41 of the LSL Act read with s 6 of the former LSL Act to establish an entitlement to payment of accrued long service leave on termination of her employment. It means, in effect, that her employment with Serco does not count for the purpose of calculating her continuous service under the LSL Act, and so she would not qualify for the LSL Act's entitlements even if the LSL Act had applied to her when her employment with the Health Service ended.

Disposition and Orders

93 For these reasons, the claim will be dismissed.

R. COSENTINO

INDUSTRIAL MAGISTRATE

SCHEDULE I: STATEMENT OF AGREED FACTS

The parties agree the following -

Contract between Serco and the State of Western Australia

1. The State of Western Australia **(State)** entered into a Facilities Management Services Contract **(Contract)** with Serco Australia Pty Limited **(Serco)** on 30 July 2011 with the initial term of the Contract to expire on 8 August 2021.

2. Under the Contract, Serco was to provide the defined facilities management services for the Fiona Stanley Hospital (**Hospital**) in accordance with the terms and conditions of the Contract. Those services included the patient catering service.

3. The Hospital opened on 3 October 2014 and under the Contract Serco began to provide facilities management services for the Hospital in accordance with the terms and conditions of the Contract.

4. The State entered into a Deed of Amendment (**Deed**) with Serco on 7 March 2020 to extend the term of the Contract to 8 August 2027 and to amend the Contract from the 'Amendment Date', being 2 August 2021.

5. Under the terms of the Deed:

   (a) the Contract was amended to remove the patient catering service as a service provided by Serco under the Contract meaning that Serco was released from its obligation to provide the patient catering service from 1 August 2021;

   (b) the State undertook to provide the patient catering service from 2 August 2021;

(c) the State became entitled to, and did subsequently, use catering equipment that Serco had used in delivering those services.

6. The Deed contained provisions for the State, acting through the respondent, to make offers of employment to Serco employees affected by the Deed following an initial expression of interest by affected by employees.

Claimant's employment

7. The claimant was employed by Serco from 21 September 2014 where she worked until her employment with Serco ended on 1 August 2021. She was engaged to, and did, provide services in patient catering at the Hospital on behalf of Serco.

8. As at 1 August 2021, the claimant's employment was covered by the Serco – HSUWA Fiona Stanley Hospital Agreement 2019.

9. In accordance with the provisions of the Deed, the State, through the respondent, offered the claimant permanent full-time employment as a Chef De Partie to perform duties within the patient catering service at the Hospital.

10. The claimant accepted that offer of employment and, on 2 August 2021, the claimant commenced employment with the State in the position of Chef De Partie, undertaking duties within the patient catering service at the Hospital. Her employment was full time and permanent.

11. The duties that the claimant performed for the respondent at the Hospital were substantially the same as the duties she had previously undertaken for Serco.

12. The State used various items of equipment that Serco had used in the delivery of patient catering services and those items continued to be used by the claimant and others in the provision of those services from 2 August 2021.

13. On her commencement date of her employment with the State the *WA Health System – HSUWA – PACTS Industrial Agreement 2020* (**2020 HSU Agreement**) applied to her employment.

14. The claimant's employment with the State ceased on 9 May 2024 as a result of the claimant's resignation. At the time her employment terminated, the claimant's annual salary was $88,287.

15. At the time that her employment with the State terminated, the *WA Health System – HSUWA – PACTS Industrial Agreement 2022* (**2022 HSU Agreement**) applied to her employment with the State.

16. If the Court holds that the claimant was entitled to payment on termination instead of long service leave under the terms of the *Long Service Leave Act 1958* (WA) based on continuous employment with Serco and then the respondent under that Act, the relevant entitlement is $14,171.45.

Agreed Documents

17. The following are agreed documents:

(a) *Serco – HSUWA Fiona Stanley Hospital Agreement 2019*.

(b) 2020 HSU Agreement.

(c) 2022 HSU Agreement.

(d) Letter to claimant dated 10 July 2020 – Expression of Interest – Pre-Offer of Employment (EOI-POE).

(e) Contract of employment.

(f) Acceptance form for contract of employment.

(g) Undated letter of offer made.

(h) Facilities Management Services Contract dated 30 July 2011.

(i) Deed of Amendment dated 7 March 2020.

SCHEDULE II: COMPARISON TABLE

COMPARISON TABLE

		LSL Act	**HSU Agreement**
1	Any time		Employee retires at or over the age of 55: entitled to payment in lieu of long service leave proportionate to employee's length of service (cl 45.10(a)(i)).
2	1 or more years		Employee retires on the grounds of ill health or employee dies: entitled to payment in lieu of long service leave proportionate to employee's length of service (cl 45.10(a)(ii) and (iv)).

3	3 or more years		Employee retired for any other cause: entitled to payment in lieu of long service leave proportionate to employee's length of service (cl 45.10(a)(iii)).
4	7 to <10 years	If employment terminated by death, or in any circumstance other than serious misconduct: entitled to pro-rata long service leave on the basis of 8 2/3 weeks for each 10 years of continuous employment (s 8(3)).	
5	10 years	8 2/3 weeks leave at ordinary pay (s 8(2)(a)).	13 weeks leave at base rate of pay (cl 45.1).
6	15 years	Additional 4 1/3 weeks at ordinary pay (s 8(2)(b)). (Total = 13 weeks.)	
7	17 years		Additional 13 weeks leave at base rate of pay (cl 45.1). (Total = 26 weeks.)
8	20 years	Additional 4 1/3 weeks at ordinary pay (s 8(2)(b)). (Total = 17 1/3 weeks.)	
9	24 years		Additional 13 weeks leave at base rate of pay (cl 45.1). (Total = 39 weeks.)
10	25 years	Additional 4 1/3 weeks at ordinary pay (s 8(2)(b)). (Total = 26 weeks.)	
11	Other benefits	No portability between different employers (unless transmission / transfer of business).	Portability of service with other Commonwealth, State or Territory employers (cl 45.14). Early access to long service leave for employees within 7 years of preservation age (cl 45.6).

[1] LSL Act s 8(3), s 9(2).

[2] IR Act s 7.

[3] IR Act s 83(4).

[4] IR Act s 83A.

[5] Amendment Act s 83(4), s 84.

[6] ***Public Transport Authority* v *Yoon*** [2017] WASCA 25; (2017) WAIG 249 (***Yoon***) at [61] and [66].

[7] ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 (***Project Blue Sky***) at [69].

[8] ***SZTAL v Minister for Immigration and Border Protection*** [2017] HCA 34; (2017) 262 CLR 362 at [14].

[9] Pearce D, *Statutory Interpretation in Australia* (9th ed, 2019) (**Pearce**) at [2.43].

[10] ***Project Blue Sky*** at [70].

[11] **Pearce** at [2.43].

[12] **Pearce** [4.60].

[13] LSL Act s 4(1).

[14] LSL Act s 4(1).

[15] *Minimum Conditions of Employment Act 1993* (WA) s 2A.

[16] Section 8 deals with cashing out of accrued paid annual leave.

[17] *Interpretation Act 1984* (WA) s 3(1), s 10.

[18] ***Yoon*** [40].

[19] The Final Report of the Ministerial Review recommended that the IR Act be amended to include a Part that provides for minimum conditions of employment for employees covered by the State system, but did not recommend changes which would alter the effect of s 4(3): Ministerial Review recommendations 54 & 56.

[20] LSL Act s 8(2) and s 8(3) read with s 9(2).

[21] Industrial Agreement cl 45.1.

[22] Industrial Agreement cl 41.10.

[23] LSL Act s 7, s 7A, s 8(1), Industrial Agreement cl 3.2, cl 45.1.

[24] Kenneth Martin J in ***Yoon***.

[25] ***James Cook University v Ridd*** [2020] FCAFC 123; (2020) 278 FCR 566 (***Ridd***) at [227].

[26] ***Australian Industry Group v Fair Work Australia*** [2012] FCAFC 108; (2012) 205 FCR 339 at [72].

[27] ***Ridd*** at [227].

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE—Matters dealt with—

2025 WAIRC 00381

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD GIVEN ON 12 MAY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CALEB HODGE
	APPLICANT
	-v-
	MY LEAVE CONSTRUCTION
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 24 JUNE 2025
FILE NO/S	APPL 30 OF 2025
CITATION NO.	2025 WAIRC 00381

Result	Application discontinued
Representation	
Applicant	On his own behalf
Respondent	Ms R Harding (of counsel) & Mr R Lewis (of counsel)

Order

WHEREAS this is an application under s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA);

AND WHEREAS the applicant emailed the Commission on 12 June 2025 and said that he would like to discontinue application APPL 30 of 2025 'in the circumstances of what has been clearly stated that [he is] pressured to withdraw the application';

AND WHEREAS the respondent emailed the Commission on 13 June 2025 stating that it does not consent to the application being discontinued 'in circumstances where it is stated to have been motivated by the concerns outlined in the applicant's email';

AND WHEREAS on 13 June 2025, the Commission asked the applicant to consider the respondent's email dated 13 June 2025 and tell the Commission by 20 June 2025 if he had changed his mind about wanting to discontinue application APPL 30 of 2025. The Commission informed the applicant that if he did not tell the Commission by 20 June 2025 that he had changed his mind, then the Commission will understand that the applicant still wishes to discontinue application APPL 30 of 2025, and will issue an order discontinuing application APPL 30 of 2025;

AND WHEREAS the applicant did not tell the Commission that he had changed his mind about wanting to discontinue application APPL 30 of 2025 by 20 June 2025 or at all;

NOW THEREFORE the Commission, having heard from the parties and pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), orders –

THAT application APPL 30 of 2025 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2025 WAIRC 00361

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FARID BAENA
	APPLICANT
	-v-
	CENTRAL REGIONAL TAFE
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	FRIDAY, 13 JUNE 2025
FILE NO.	U 30 OF 2025
CITATION NO.	2025 WAIRC 00361

Result	Application dismissed
Representation	
Applicant	Mr F Baena
Respondent	Ms I Inkster (of counsel)

Order

WHEREAS on 19 March 2025, the applicant filed a *Form 2 – Unfair Dismissal Application* and, on 9 April 2025, the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application*;

AND WHEREAS on 8 April 2025, the Commission, taking into account the parties' availability, listed a conciliation conference on 28 May 2025;

AND WHEREAS on 26 May 2025, the Commission telephoned the parties informing them that the conference would need to be rescheduled but was unable to reach the applicant by telephone and, on 26 May 2025, the Commission wrote to the parties informing them that the conference would need to be rescheduled and requested the parties to respond;

AND WHEREAS no response was received from the applicant and, on 27 May 2025, the Commission wrote to the parties confirming that the conference had been vacated, and requested the applicant to respond by 28 May 2025;

AND WHEREAS no response was received from the applicant and, on 29 May 2025, the Commission wrote to the parties and requested the applicant to respond by 30 May 2025;

AND WHEREAS on 30 May 2025, the applicant wrote to the Commission stating his present location and, on 30 May 2025, the Commission wrote to the parties and requested the applicant to confirm how he intended to proceed with the matter given his present location by 3 June 2025;

AND WHEREAS no response was received from the applicant and, on 4 June 2025, the Commission wrote to the parties requesting the applicant to respond by 5 June 2025 and informing him that a failure to respond may result in an Order being issued dismissing the matter for want of prosecution;

AND WHEREAS no response was received from the applicant and, on 6 June 2025, the Commission wrote to the parties informing them that given no response had been received from the applicant, the Commission will issue an Order dismissing the matter on 13 June 2025 unless an objection is raised by either party before 4:00pm on 13 June 2025;

AND WHEREAS by 4:00pm on 13 June 2025, no objection was raised by either party;

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

THAT application U 30 of 2025 is dismissed for want of prosecution.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00368

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAYDEN KELLEY
	APPLICANT
	-v-
	PCYC (WESTERN AUSTRALIA POLICE & COMMUNITY YOUTH CENTRE)
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 18 JUNE 2025
FILE NO.	U 54 OF 2025
CITATION NO.	2025 WAIRC 00368

Result	Application dismissed
Representation	
Applicant	Mr J Kelley
Respondent	Ms M Leckey

Order

WHEREAS on 30 April 2025, the applicant filed a *Form 2 – Unfair Dismissal Application*;

AND WHEREAS on 22 May 2025, the Commission wrote to the parties raising concerns as to jurisdiction, and requested the respondent to respond by 28 May 2025 and the applicant to respond by 30 May 2025;

AND WHEREAS on 28 May 2025 and 29 May 2025, the respondent provided their response to the Commission, and, on 29 May 2025, the Commission wrote to the parties and requested the applicant to respond by 30 May 2025;

AND WHEREAS no response was received from the applicant, and, on 3 June 2025, the Commission wrote to the parties and requested the applicant to respond by 5 June 2025;

AND WHEREAS no response was received from the applicant and, on 6 June 2025, the Commission wrote to the parties and requested the applicant to respond by 10 June 2025 and informed the applicant that a failure to respond may result in an Order being issued dismissing the matter for want of prosecution;

AND WHEREAS no response was received from the applicant and, on 11 June 2025, the Commission wrote to the parties informing them that given no response had been received from the applicant, the Commission will issue an Order dismissing the matter on 18 June 2025 unless an objection is raised by either party before 4:00pm on 18 June 2025;

AND WHEREAS by 4:00pm on 18 June 2025, no objection was raised by either party;

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

THAT application U 54 of 2025 is dismissed for want of prosecution.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00376

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2025 WAIRC 00376
CORAM	**:**	COMMISSIONER T KUCERA
HEARD	**:**	FRIDAY, 30 MAY 2025
DELIVERED	**:**	FRIDAY, 20 JUNE 2025
FILE NO.	**:**	U 109 OF 2024
BETWEEN	**:**	PHILLIP GODWELL
		Applicant
		AND
		CHANEL WILIAMS
		Respondent

CatchWords	:	Industrial Law (WA) – Application under s 29(1)(b) of the Industrial Relations Act 1979 (WA) – Jurisdictional objection – Whether employee was dismissed or resigned from his employment – Termination at the initiative of the employer – Application for extension of time under s 29(3) – Application dismissed
Legislation	:	*Industrial Relations Act 1979* (WA)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr P Godwell
Respondent	:	Mr N Williams

Case(s) referred to in reasons:

ABB Engineering Construction Pty Ltd v Doumit (Print N6999, 9 December 1999)

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683

Martin Fedec v the Minister for Corrective Services [2017] WAIRC 00109; (2017) 97 WAIG 273

Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200

O'Meara v Stanley Works Pty Ltd PR973462 [2006] AIRC 496

Pawel v Advanced Precast Pty Ltd [1998] AIRC 643

Rheinberger v Huxley Marketing Pty Ltd (1996) 67 IR 154

Reasons for Decision

1 On 6 November 2024, Phillip Godwell (**applicant**) filed a *Form 2 – Unfair Dismissal Application* under s 29(1)(b) of the *Industrial Relations Act 1979* (**IR Act**), alleging that he was dismissed from his employment on 2 August 2024, in circumstances that were harsh, oppressive and unfair (**application**).

2 In her *Form 2A – Employer Response to Unfair Dismissal Application* (**response**), Chanel Williams trading as Chanelrae Property Styling (**respondent**) raised a jurisdictional objection to the application (**jurisdictional objection**).

3 By the jurisdictional objection, the respondent denied the applicant was dismissed as alleged. The respondent instead claimed the applicant resigned from his employment.

4 In addition, the application was made to the Commission more than 28 days after the applicant's employment with the respondent came to an end.

5 Under s 29(2)(a) of the IR Act, the Commission is unable to hear an application that is not commenced within 28 days of the alleged dismissal, unless the Commission is satisfied it would be unfair not to hear the matter: s 29(3) of the IR Act.

6 On Friday, 30 May 2025, I convened a preliminary hearing to receive evidence and submissions from the parties on the jurisdictional objection and whether it would be unfair not to accept the application out of time (**jurisdictional hearing**).

7 In the reasons to follow, I will explain why, having regard to the circumstances of the case, I have decided the jurisdictional objection in the respondent's favour and made an order dismissing the application.

Issues to be decided

8 For context, it is helpful to extract the provisions of the IR Act that are relevant to the issues to be decided. To this end, those parts of s 29 of the IR Act that give rise to the right of an employee to make an unfair dismissal claim are set out below:

> **29. Who may refer industrial matters to Commission**
>
> (1) An industrial matter may be referred to the Commission —
>
> (a) in any case, by —
>
> …
>
> (c) in the case of a claim by an employee that the employee has been harshly, oppressively or unfairly dismissed from the employee's employment — by the employee; and
>
> …
>
> (2) Subject to subsection (3) — (a) a referral under subsection (1)(c) must be made no later than 28 days after the day on which the employee's employment is terminated; and
>
> …
>
> (3) The Commission may accept a referral that is out of time under subsection (2) if the Commission considers that it would be unfair not to do so.

9 Having regard to these provisions, there are two jurisdictional preconditions an employee is required to establish before they can proceed with an unfair dismissal claim. The first is that an application must be made within 28 days of the date it is alleged an employee was dismissed. Second, an employee must be able to establish they were 'dismissed' from their employment.

10 If an employee cannot meet the first pre-condition, s 29(3) permits the Commission to accept an application that is made outside the 28-day time limit (**extension of time**). Having said this, the Commission is only permitted to grant an extension of time in exceptional circumstances.

11 The principles to be considered on whether to accept an unfair dismissal claim out of time are well settled. In ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** [2004] WASCA 51; (2004) 84 WAIG 683 (***Malik***), the Industrial Appeal Court generally endorsed the principles that were used to decide whether extensions of time in unfair dismissal claims under the then s 170EA of the *Industrial Relations Act 1988* (Cth) in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 (***Brodie-Hanns***).

12 At paragraph [74] EM Heenan J in ***Malik*** said:

> [74] The principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 are apposite. In that case, his Honour was considering the jurisdiction under s 170 EA of the *Industrial Relations Act 1988* (Cth), as it then was, to grant an extension of time. His Honour said, after examining previous applicable authority:
>
> "I agree with respect, that those principles are appropriate to be applied in the circumstances of this matter.
>
> Briefly stated, the principles are:
>
> 1. Special circumstances are not necessary, but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

13 In the context of the present case, the more important consideration amongst those described in ***Brodie-Hanns*** involves an assessment of the merits of the application, particularly whether it is likely the applicant was dismissed from his employment.

14 To make this assessment, it is necessary to first explain to the context in which the application was made to the Commission.

Previous Application

15 The circumstances in which the applicant's employment with the respondent came to an end were the subject of a claim he made to the Fair Work Commission (**FWC)** on 27 August 2024 under Part 3-1 of the *Fair Work Act 2009* (**general protections claim**).

16 In his general protections claim, the applicant alleged the respondent had unlawfully dismissed him from his employment. One of the remedies the applicant sought was an order for compensation: (applicant's general protections Form F8 Application p 6).

17 In the response to the general protections claim, the respondent denied the FWC had the jurisdiction to deal with the matter. The respondent claimed the applicant was not dismissed as alleged and that on 2 August 2024 he had verbally resigned from his employment and given two weeks' notice: (respondent's Form F8A Response to a general protections application involving dismissal at 1.1 - 1.2).

18 Put simply, the respondent raised the same jurisdictional objection to the general protections claim that is at issue in this application.

General protections claim discontinued

19 The applicant's general protections claim, like this application, was listed for a hearing on the jurisdictional objection before Deputy President O'Keefe of the FWC on Monday, 28 October 2024 (**FW hearing**).

20 During the FW hearing it became apparent the respondent was not a national system employer. In other words, it was acknowledged the applicant had commenced proceedings for a dismissal remedy in the wrong jurisdiction.

21 Upon becoming aware of this, the applicant discontinued the general protections claim. He then made the application, which in part explains his delay in commencing his unfair dismissal claim.

Jurisdictional hearing

22 After the application was received by the Commission, an attempt was made to resolve the applicant's unfair dismissal claim matter by conciliation. When the application was not able to be resolved this way, the matter was listed for a jurisdictional hearing on a date that was convenient for the parties.

23 The jurisdictional hearing was held on Friday, 1 June 2025. The applicant was unrepresented. I gave permission for the respondent's father Mr Neil Williams to appear for and make submissions on her behalf.

24 Noting the parties were not legally represented and in view of the Commission's obligations under ss 22B and 26 of the IR Act, I determined that rather than requiring the parties to file fresh evidentiary materials, I would accept the Digital Court Book from the FW Hearing, to decide the jurisdictional objection.

25 The Digital Court Book was accepted into evidence and marked as Exhibit A1. I have, to the extent the information contained in Exhibit A1 is relevant, relied upon its contents to make the factual findings, that are necessary to decide the jurisdictional objection.

26 I also considered the oral submissions the parties made during the jurisdictional hearing, particularly on whether there are reasonable prospects the applicant would likely succeed in establishing that he was dismissed from his employment.

The applicant's employment

27 The applicant commenced employment with the respondent on or around 10 October 2023. He was hired under the terms of a written contract of employment (**contract**) to work in the respondent's property styling business on a part-time basis, as a 'logistics co-ordinator': (applicant's contract Exhibit A1 p 142).

28 Property styling is in effect the work of preparing a property for sale by adding or removing furniture and arranging it to make the property as attractive and appealing to potential buyers as possible.

29 In his role, the applicant was required to collect furniture from a warehouse the respondent operated and to deliver it to empty houses and apartments that were being sold on the open real estate market. The applicant's duties required him to be both a furniture removalist and installer, as well as having an eye for detail on where the furniture needed to be placed: (see Logistics Co-ordinator Position Description Exhibit A1 pp 28-31).

30 The contract confirms the applicant's terms and conditions are those set out in the contract, the *Road Transport and Distribution Award* (**award**) and applicable legislation, which includes the National Employment Standards in the *Fair Work Act 2009* (**FW Act**).

31 On page 2 (Exhibit A1 p 143), the contract states the applicant was employed to work 30 hours per week, according to the following schedule:

Tuesday	8.30am – 4.30pm = 8 hours
Wednesday	8.30am – 4.30pm = 8 hours
Thursday	9.00am – 3.00pm = 6 hours
Friday	8.30am – 4.30pm = 8 hours.

32 During the applicant's employment, the days on which he performed his working hours changed. On the date he ceased working for the respondent, the applicant's working hours were (by agreement) increased to 35 per week: (Exhibit A1 p 7).

33 The applicant's contract on page 2 also included a term which states

> Your hours per week may be averaged over more than one week in accordance with the award (**averaging clause**): (Exhibit A 1 p 143).

34 It is reasonable to say that the way in which the respondent applied the averaging clause became contentious during the applicant's employment.

35 The applicant says that on average, he worked more than the 30 hours per week he had agreed to perform under the contract and that he did not receive any additional remuneration for this extra work.

36 The respondent maintains the applicant did not, on average, work more than the ordinary hours that he was expected to perform under the contract. The respondent also says the applicant seldom if ever, worked any overtime: (Exhibit A 1 p 132).

37 The contract contains a term which states:

> **Penalty rates and overtime**
>
> You may be entitled to overtime rates under your award if you work:
>
> - more than your ordinary hours of work
> - outside the spread of ordinary hours.

38 By way of payment, the contract says the applicant is to be paid an annual salary of $62,400 per annum, which equates to an hourly rate of $40 per hour.

Applicant's Submissions

39 The applicant's submissions were in the main set out in his Outline of Argument which is contained in Exhibit A1 (**applicant's outline**). The applicant did not dispute that he resigned from his employment.

40 Rather, the applicant says that he was forced to resign in response to his employer's conduct, which he said included a disregard for and contraventions of the FW Act, the award and his contract.

41 The applicant's outline repeats a description of incidents that is provided in the Applicant's Statement of Evidence (**applicant's statement**).

42 The applicant's outline suggests the various incidents described in the applicant's statement, formed a pattern of conduct, which in his view:

> could not be said to have created an environment in which the expectation would be for any person to stay employed: (Exhibit A1 paragraph 21 p 15).

Respondent's Submissions

43 The respondent's submissions were in the main provided in a Summary of Response (**respondent's summary**), which is contained in Exhibit A1. In short, the respondent disputed that she had acted in a way to force the applicant to resign from his employment.

44 The respondent submitted the applicant was not dismissed from his employment. She said the applicant resigned voluntarily, following which, he chose to work out a two week notice period.

45 During the jurisdictional hearing, Mr Williams referred to text messages that were exchanged between the applicant and the respondent on Monday, 5 August 2024. These text messages appear on page 33 of Exhibit A1. I have extracted these messages in in full below:

> Hi Phill
>
> Just confirming your verbal resignation on Friday and providing your notice.
>
> Your contract states 1 week notice required.
>
> Kind regards
>
> Chanel
>
> Thanks Chanel,
>
> Please note the contract states 2 weeks notice
>
> Regards,
>
> Phil

46 Mr Williams submitted these text messages provide evidence that confirms the applicant had intended to resign from his employment and that his resignation was not something the respondent had initiated: (Transcript p 16).

Termination at the initiative of the employer

47 The task of deciding whether an employee has been dismissed, requires the Commission to consider whether there was a 'termination at the initiative of the employer': ***Martin Fedec v the Minister for Corrective Services*** [2017] WAIRC 00109; (2017) 97 WAIG 273 (***Fedec***).

48 A Full Bench of the Australian Industrial Relations Commission in ***O'Meara v Stanley Works Pty Ltd*** PR973462 [2006] AIRC 496 ***(O'Meara)*** which was referred to and followed in ***Fedec***, extracted from the authorities, the relevant principles that are to be applied to determine what may give rise to a 'termination at the initiative of the employer.'

49 The authorities referred to in ***O'Meara*** and ***Fedec*** include the decisions in:

Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200 ***(Mohazab)***;

Rheinberger v Huxley Marketing Pty Ltd (1996) 67 IR 154;

Pawel v Advanced Precast Pty Ltd [1998] AIRC 643; (***Pawel***) and

ABB Engineering Construction Pty Ltd v Doumit (Print N6999, 9 December 1999).

50 In the paragraphs below, I have set out the relevant passages from ***O'Meara*** that refer to these authorities:

> "[19] The circumstances in which a resignation, while apparently a termination of employment by the employee, nevertheless constitutes a termination at the initiative of the employer, have been considered in a number of cases. A prominent authority is the decision of a Full Court of the Federal Court of Australia ***in Mohazab v Dick Smith Electronics Pty Ltd*** (***Mohazab***). In that case, the employer made a threat that unless the employee resigned the employer would ask the police to charge the employee with an offence. The analysis of the concept of termination at the initiative of the employer by the Court in that case has not always been quoted in full. It is desirable that we do so in this case. After referring to dictionary definitions of the term "initiative" and the convention giving rise to the statutory provisions, the Full Court said:
>
> > "These definitions reflect the ordinary meaning of the word 'initiative'. Viewed as a whole, the Convention is plainly intended to protect workers from termination by the employer unless there is a valid reason for termination. It addresses the termination of the employment relationship by the employer. It accords with the purpose of the Convention to treat the expression 'termination at the initiative of the employer' as a reference to a termination that is brought about by an employer and which is not agreed to by the employee. Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship. We proceed on the basis that the termination of the employment relationship is what is comprehended by the expression 'termination of employment': Siagian v Sanel (1994) 1 IRCR 1 at 19; 54 IR 185 at 201. In many, if not most, situations the act of the employer that terminates the employment relationship is not only the act that puts in train the process leading to its termination but is, in substance, the entire process. An example would be a situation where the employer decided to dismiss an employee and did so orally or in writing with immediate effect. Other situations may be more complex as exemplified by the circumstances considered by Moore J in Grout v Gunnedah Shire Council (1994) 1 IRCR 143; 57 IR 243 where an employee had given written notice purporting to terminate the employment relationship. The notice was not reasonable but was accepted by the employer which later refused to allow the employee to

withdraw the notice. A question arose as to whether that was a termination of the employment at the initiative of the employer and his Honour held it was. His Honour said at 160-161; 259:

'I have already said that Div 3 concerns termination at the initiative of the employer. The respondent submits that "initiate" means "to begin, commence, enter upon; to introduce, set going, or initiate": see Shorter Oxford English Dictionary. In this matter, it is submitted, it was the applicant and not the respondent that initiated the termination by writing the letter of 18 May. This, in my opinion, gives the expression "termination" in the Act, read in conjunction with Art 3 of the Convention which speaks of "termination … at the initiative of the employer", a narrow meaning that was not intended. A principal purpose, if not the sole purpose, of Div 3 is to provide an employee with a right to seek a remedy in circumstances where the employee did not voluntarily leave the employment. An employee may do some act which is the first in a chain of events that leads to termination. An example would be an employee who engaged in misconduct at work which ultimately led to the employer dismissing the employee. However, that situation and the present are not situations where the termination was at the initiative of the employee. In both instances the step or steps that effectively terminated the employment or purported to do so were taken by the employer.'

In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship. This issue was addressed by Wilcox CJ in APESMA v David Graphics Pty Ltd (unreported, Industrial Relations Court of Australia, July 1995, Wilcox CJ). His Honour, at p 3, referred to the situation of an employee who resigned because 'he felt he had no other option'. His Honour described those circumstances as:

'… a termination of employment at the instance [of] the employer rather than of the employee.'

And at p 5:

'I agree with the proposition that termination may involve more than one action. But I think it is necessary to ask oneself what was the critical action, or what were the critical actions, that constituted a termination of the employment.'"

[20] Moore J, one of the members of the Full Court in Mohazab, addressed the question further in Rheinberger v Huxley Marketing Pty Limited (Rheinberger). His Honour said, after referring to extracts from Mohazab:

"However it is plain from these passages that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable result of the employer's conduct."

[21] In this Commission the concepts have been addressed on numerous occasions and by a number of Full Benches. In Pawel v Advanced Precast Pty Ltd (Pawel) a Full Bench said:

"[13] It is plain that the Full Court in Mohazab considered that an important feature in the question of whether termination is at the initiative of the employer is whether the act of an employer results directly or consequentially in the termination of the employment and that the employment relationship is not voluntarily left by the employee. However, it is to be noted that the Full Court described it as an important feature. It plainly cannot be the only feature. An example will serve to illustrate this point. Suppose an employee wants a pay rise and makes such a request of his or her employer. If the employer declines and the employee, feeling dissatisfied resigns, can the resignation be said to be a termination at the initiative of the employer? We do not think it can and yet it can be said that the act of the employer i.e. refusing the pay rise, has at least consequentially resulted in the termination of the employment. This situation may be contrasted with the position where an employee is told to resign or he or she will be terminated. We think that all of the circumstances and not only the act of the employer must be examined. These in our view, will include the circumstances giving rise to the termination, the seriousness of the issues involved and the respective conduct of the employer and the employee. In the instant case the uncontested factual findings are that the applicant had for almost the whole of his employment performed welding duties; that there was no objective threat to his health and safety involved in the requirement that he undertake welding duties so long as it was not on a continuous basis and that the welding he was required to do was not continuous."

[22] In the Full Bench decision of ABB Engineering Construction Pty Ltd v Doumit (ABB Engineering) it was said:

"Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of

> employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination. The remedies provided in the Act are directed to the provision of remedies against unlawful termination of employment. Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer's conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer's conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary."
>
> [23] In our view the full statement of reasons in Mohazab which we have set out together with the further explanation by Moore J in Rheinberger and the decisions of Full Benches of this Commission in Pawel and ABB Engineering require that there to be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether "the act of the employer [resulted] directly or consequentially in the termination of the employment." 19 Decisions which adopt the shorter formulation of the reasons for decision should be treated with some caution as they may not give full weight to the decision in Mohazab. In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the appellant had no effective or real choice but to resign."
>
> (references removed)

51 Some clear principles emerge from the passages that I have extracted from ***O'Meara***, which include the following:

i. each case will turn on and must be decided on its own facts;

ii. all the circumstances giving rise to the termination must be considered and not just the actions of the employer;

iii. the seriousness of the issues involved must be considered; and

iv. the respective conduct of the employer and the employee must be considered.

Consideration

52 I have reviewed the contents of Exhibit A1. Having considered this material by reference to the principles described in the preceding paragraphs [47] – [51], I am not persuaded Exhibit A1 provides a body of evidence that establishes the applicant was likely placed into a situation where, because of the respondent's conduct, he was forced to or was left with no option but to resign.

53 I am not satisfied the employment relationship between the applicant and the respondent was terminated at the respondent's initiative. It is my view the applicant resigned from his employment and that he did so voluntarily.

54 I accept that at the time of his resignation, the applicant had, a number of grievances relating to his employment, which I will elaborate upon in the paragraphs below.

55 I also accept that when he did resign, the applicant likely acted in haste. That finding however does not rise to a level sufficient to conclude the applicant's employment was terminated at the initiative of the employer.

Dispute between the parties

56 It is my view that in the period from March 2024 until the date of his resignation, the relationship between the applicant and the respondent deteriorated over the way in which the respondent was interpreting and applying the terms of the contract, particularly the averaging clause (Transcript p 10).

57 It seems the applicant formed the view that he would receive no additional payment by way of overtime: (applicant's outline Exhibit A1 p 9).

58 It appears from the respondent's summary, that she seems to have formed the view the applicant was not prepared to be flexible on when he would work his ordinary hours to accommodate the needs of the business: (respondent's summary p 140).

59 The respondent (rightly or wrongly) appears to have had an expectation that because of the averaging clause, she could ask the applicant to work more ordinary hours on days and at times that were not strictly in accordance with, the scheduled hours described in the contract: (respondent's summary p 138).

60 This it seems, was so the applicant could make up for hours on previous working days when the respondent had let the applicant finish early but had continued to pay him for the hours he was scheduled to work under the contract.

61 In short, I accept the respondent had formed a view the applicant was not prepared to go with the ebb and flow of an arrangement that averaged his working hours.

62 While I am prepared to go so far as to accept that there was, at the date of his resignation, a live dispute between the applicant over the applicant's employment arrangements and the hours he was working, I am not prepared to make any findings on whether the employer has breached the terms of the contract or committed any other contraventions.

63 These issues are matters for another forum and which I do not have the jurisdiction to resolve in the context of this application.

64 As it is relevant for context, I am only prepared to observe the parties were, on the date of the applicant's resignation, in dispute over what the applicant regarded were his entitlements under the contract and that this was a source of friction between them.

Verbal resignation on 2 August 2025

65 There is no doubt, the parties' competing views about the other, and the dispute over applicant's working arrangements that I have described in the preceding paragraphs [57]-[64] came to a head on Friday, 2 August 2025.

66 The parties agreed that on this date, the applicant overheard a conversation the respondent was having with Alana Scafetta, who also works for the respondent. This conversation happened at a property where the applicant was installing furniture. I accept the conversation the applicant overheard was one in which the respondent was complaining to Ms Scafetta about his work ethic.

67 When the respondent noticed the applicant was within earshot of her conversation with Ms Scafetta, the respondent asked the applicant to go into an adjoining room so she could speak to him.

68 During the discussion that followed, the applicant said he spoke over the respondent. This is when he said he resigned from his employment. He said he told the respondent he was giving her two weeks' notice: (applicant's outline Exhibit A1 p 8).

69 I accept that the circumstances in which the applicant told the respondent he was resigning were not ideal. It does not automatically follow that a resignation given in haste is not effective though.

Resignation confirmed

70 It is my view that any suggestion the applicant did not intend on following through with his resignation was negated by what happened on Monday 5 August 2024 with the exchange of text messages that I referred to in the preceding paragraph [45].

71 The applicant's text message in reply not only confirmed his resignation, but the length of the notice period he would need to complete and that he intended to work it out.

72 It is my view that when considered objectively, the applicant's action in sending the response he did, gave force and effect to his verbal resignation. His text message was also sent at a time when the parties would have had a reasonable opportunity to reflect on their respective positions.

73 In other words, if there was any doubt about the whether the verbal resignation the applicant had offered on Friday, 2 August was effective, it was removed with his reply text message to the respondent on Monday, 5 August.

Other options available

74 While the applicant may have been dissatisfied with the conversation he overheard between the respondent and Ms Scafetta, the tasks he was being assigned, the way in which his working arrangements were being applied, including the respondent's views on the application of the averaging clause, I do not consider that resigning was the applicant's only possible recourse.

75 It is my view the situation in this case was much like the example referred to in ***O'Meara*** where an employee resigns who is refused a pay rise. As the Full Bench noted in ***Pawel*** at [13] a court or a tribunal is unlikely to find a resignation in such circumstances was at the initiative of the employer.

76 The circumstances in the present case are also comparable with those at issue in ***Kylie Bruce v Fingal Glen Pty Ltd (in Liq)*** [2013] FWCFB 5279 (***Bruce***) which involved an employee resigning in response to her employer's late payment of wages and superannuation.

77 At [24] the Full Bench in ***Bruce*** held:

> In the circumstances of the present case, resignation was a possible and foreseeable result of the Respondent's conduct, and in many respects a reasonable response in the circumstances. However this is not itself sufficient to demonstrate that the Applicant's resignation was in effect a dismissal. Given the other avenues available to the Applicant to pursue her complaints, and taking into account the nature of the Respondent's conduct, we do not consider that the Applicant's resignation was objectively the probable result of the Respondent's conduct, and therefore that the Applicant was forced to resign because of that conduct. In this regard, we note that although there were delays in the payment of wages, the delays were short and the Applicant was paid her wages in full, and that the Applicant did not take any further steps to pursue her complaints other than raising them with the Respondent.

78 It is clear from other text messages that are contained in Exhibit A1 that the applicant is no 'shrinking violet.' An examination of these communications reveals the applicant did not lack the capacity to stand up for himself in his dealings with the respondent.

79 This observation is relevant to the extent that I do not accept that the applicant, relative to the respondent, was in such an unequal power position that his resignation was the probable result following his interactions with the respondent either prior to or on Friday, 2 August 2024 or that he was left with no effective or real choice but to resign.

80 As in ***Bruce***, I consider there were other options available to the applicant to address his claimed grievances. By way of example, the applicant could have sought help from an industrial/employment lawyer or union or made a complaint to the Department of Energy, Mines, Industry Regulation and Safety.

81 The applicant could have raised a dispute under the procedure that is contained in the contract or made an application under s 29(1)(d) of the IR Act.

Tit for tat response

82 From what is contained in the applicant's outline, I have been left with the overwhelming impression that the applicant decided to take the chance the respondent, when faced with the potential disruption to her business his resignation could cause, would try and talk him out of it.

83 It is my view that in the context of their strained employment relationship, the applicant decided to resign as a 'tit for tat response.' His action in giving his resignation however was one that carried with it a great deal of personal risk.

84 Once offered, an employer is entitled to accept an employee's resignation. The potential consequences that flow from a resignation that is either not thought out or is used as a threat, should not be taken lightly.

85 My conclusion in this regard is reinforced by the description of the conversation the applicant says he had with his co-worker Mitchell Raiskums (**Mitch**). The applicant's outline states:

> Back at the warehouse Mitch asked me if I was actually going to quit, to which I responded I didn't know and would wait to hear from Chanel over the weekend and see what she has to say.

86 From this, I accept the applicant was conscious of the risk that he had taken with his verbal resignation on Friday 2 August and the applicant was aware that his employment would come to an end, if the respondent did not try and talk him out of it.

87 When viewed objectively, I consider there is little doubt the applicant in this matter resigned from his employment because he was aggrieved.

88 Regardless of whether the applicant resigned from his employment in frustration, or he consciously intended to use his resignation for leverage in his dispute with the respondent, the result is much the same. A resignation given in protest is still a resignation.

Extension of time

89 Noting my finding, the applicant's employment was not terminated at the initiative of his employer, it follows that I consider the applicant's unfair dismissal claim would have no prospects of success.

90 Having reached this conclusion, there is no need for me to canvass the other criteria referred to in ***Brodie-Hanns*** that I would otherwise be required to consider in determining whether to grant an extension of time.

Conclusion

91 For all the reasons set out in the preceding paragraphs, I have determined the application should be dismissed.

92 An order giving effect to these reasons will shortly follow.

2025 WAIRC 00377

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP GODWELL
	APPLICANT
	-v-
	CHANEL WILIAMS
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	FRIDAY, 20 JUNE 2025
FILE NO/S	U 109 OF 2024
CITATION NO.	2025 WAIRC 00377

Result	Application dismissed
Representation	
Applicant	Mr P Godwell
Respondent	Mr N Williams

Order

HAVING heard from Mr P Godwell on his own behalf and Mr N Williams on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

THAT the application be dismissed.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2025 WAIRC 00355

CITY OF CANNING INDUSTRIAL AGREEMENT 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CITY OF CANNING
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, CLERICAL AND SERVICES UNION (WASU), THE LOCAL GOVERNMENT RACING CEMETRIES EMPLOYEES UNION (LGRCEU)
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	FRIDAY, 13 JUNE 2025
FILE NO/S	AG 9 OF 2025
CITATION NO.	2025 WAIRC 00355

Result	Order issued
Representation	
Applicant	Ms K Groves & Ms D Lamb (of counsel)
Respondent	Mr C Fogliani (of counsel) & Mr W Wood on behalf of the Western Australian Municipal, Clerical and Services Union (WASU) Mr K Trainer & Mr A Johnson on behalf of the Local Government Racing Cemetries Employees Union (LGRCEU)
Intervenor	Mr T Dixon (of counsel) and Mr T Meagher on behalf of the Construction, Forestry, Mining and Energy Union of Workers (CFMEUW)

Order

HAVING heard from Ms K Groves and Ms D Lamb on behalf of the applicant, Mr C Fogliani and Mr W Wood on behalf of the WASU, Mr K Trainer and Mr A Johnson on behalf of the LGRCEU, and T Dixon and Mr T Meagher on behalf of the CFMEUW, the Commission, pursuant to the powers conferred under the Act hereby orders –

1. THAT the City, WASU and LGRCEU (**parties**) are to file any written submissions and materials in support of the application to register the *City of Canning Industrial Agreement 2025* (**application**) by 3 July 2025;
2. THAT the CFMEUW is to file any written submissions and materials in opposition to the application by 31 July 2025;
3. THAT the parties file any submissions in reply by 7 August 2025;
4. THAT the matter be listed for a 1-day hearing on a date to be fixed;
5. THAT the parties and the CFMEUW have liberty to apply.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2025 WAIRC 00382

OVIS COMMUNITY SERVICES ENTERPRISE AGREEMENT 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAT THOMAS HOUSE INC.
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 25 JUNE 2025
FILE NO.	AG 25 OF 2025
CITATION NO.	2025 WAIRC 00382

Result	Direction issued
Representation	
Applicant	Mr S Farrell
Respondent	Mr C Fogliani (of counsel)

Direction

HAVING heard from Mr S Farrell on behalf of the applicant and Mr C Fogliani (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 the question of whether the applicant 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 applicant file **by Wednesday, 30 July 2025**:
   (a) Evidence addressing the jurisdictional issue by affidavit made in accordance with s 9 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA).
   (b) Legal submissions addressing the jurisdictional issue.
3. THAT the respondent file **by Wednesday, 13 August 2025**:
   (a) Any responsive evidence addressing the jurisdictional issue by affidavit made in accordance with s 9 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA).
   (b) Legal submissions addressing the jurisdictional issue.
4. THAT the jurisdictional issue be determined on the papers.
5. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2025 WAIRC 00347

COMMISSION TO MAKE ORDERS AS TO TERMS OF THE CITY OF JOONDALUP INSIDE WORKFORCE AGREEMENT 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CITY OF JOONDALUP AND WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES **APPLICANTS** **-v-** (NOT APPLICABLE) **RESPONDENT**
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	THURSDAY, 12 JUNE 2025
FILE NO.	APPL 31 OF 2025
CITATION NO.	2025 WAIRC 00347

Result	Direction issued
Representation	
First Applicant	Mr C Beetham (of counsel)
Second Applicant	Mr Z Doherty (of counsel)

Direction

HAVING heard from Mr Beetham on behalf of the First Applicant and Mr Doherty on behalf of the Second Applicant, the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the matter be listed for a hearing of 3 days' duration from 4 August 2025 to 6 August 2025 commencing at 10:00 am each day. If a fourth hearing day is required, the hearing will resume on 8 August 2025 at 10:00 am.

2. THAT by 14 July 2025 each party is to file either:

   a) outlines of evidence complying with Practice Note 9 of 2021; or

   b) witness statements complying with Practice Note 9 of 2021

   for all witnesses whose evidence will be relied upon by that party at the hearing of this matter.

   For clarity, a party may file an outline of evidence for one or some witnesses, and witness statements for one or some witnesses, provided that an outline or a statement is filed for each witness to be called by the party.

3. THAT if a party files a witness statement complying with Order 2, the witness statement shall stand as the evidence in chief of the witness subject to the determination of any objections made in accordance with Order 4.

4. THAT if a party objects to a witness statement standing as the evidence in chief of a witness, the party shall file notice of its objection and grounds for objection by no later than 21 July 2025.

5. THAT by 14 July 2025 the parties file written submissions and a list of any authorities relied upon for the hearing of the matter.

6. THAT by 21 July 2025 the parties file any written submissions responsive to those filed by the other party.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2025 WAIRC 00410

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANCES CHRISTINE TESNEAR
	APPLICANT
	-v-
	NASCHA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 8 JULY 2025
FILE NO.	B 21 OF 2025
CITATION NO.	2025 WAIRC 00410

Result	Direction issued
Representation	
Applicant	Mr K Sneddon
Respondent	Ms J Grant

Direction

WHEREAS this is an application pursuant to s 29(1)(d) of the *Industrial Relations Act 1979* (WA) (**The IR Act**);

AND WHEREAS a conciliation conference was held on Tuesday, 8 July 2025;

HAVING heard from Mr K Sneddon on behalf of the Applicant and Ms J Grant on behalf of the respondent, the Commission, pursuant to its powers conferred under the IR Act, hereby DIRECTS –

1. THAT the parties are to provide informal discovery by 8 August 2025.

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 her 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 she intends to rely by 29 August 2025.

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 19 September 2025.

5. THAT the matter be listed for a further conciliation conference not before 19 September 2025.

6. THAT there be liberty to apply on short notice.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

2025 WAIRC 00406

APPLICATION PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION INDUSTRIAL UNION OF WORKERS WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	FIRST INTERVENOR
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	SECOND INTERVENOR
	CITY OF STIRLING
	THIRD INTERVENOR
	CITY OF MELVILLE
	FOURTH INTERVENOR
	CITY OF GOSNELLS
	FIFTH INTERVENOR
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T KUCERA
DATE	FRIDAY, 4 JULY 2025
FILE NO.	CICS 3 OF 2025
CITATION NO.	2025 WAIRC 00406

Result	Direction issued
Representation	
Applicant	Mr L Slaney
Intervenors	Mr R Knox on behalf the Western Australian Municipal, Administrative, Clerical and Services Union of Employees Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA) Mr C Beetham of counsel on behalf of the City of Stirling, the City of Melville and the City of Gosnells

Direction

HAVING heard Mr L Slaney on behalf of the applicant, Mr R Knox on behalf of the WASU, Mr K Trainer on behalf of the LGRCEU, Mr C Beetham of counsel on behalf of the City of Stirling, the City of Melville and the City of Gosnells, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby directs –

(1) THAT as to the Second Intervenor the time for compliance with par (3) of the directions dated 10 April 2025 ([2025] WAIRC 00235) (Directions) be extended to 4 July 2025.

(2) THAT the time for compliance with par (4) of the Directions be extended to 11 July 2025.

(3) THAT the time for compliance with pars (5) and (6) of the Directions be extended to 1 August 2025.

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

By the Commission in Court Session

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2025 WAIRC 00345

APPLICATION PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION INDUSTRIAL UNION OF WORKERS WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	FIRST INTERVENOR
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	SECOND INTERVENOR
	CITY OF STIRLING
	THIRD INTERVENOR
	CITY OF MELVILLE
	FOURTH INTERVENOR
	CITY OF GOSNELLS
	FIFTH INTERVENOR
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T KUCERA
DATE	WEDNESDAY, 11 JUNE 2025
FILE NO.	CICS 3 OF 2025
CITATION NO.	2025 WAIRC 00345

Result	Direction issued
Representation	
Applicant	Mr L Slaney
Intervenors	Mr R Knox on behalf the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
	Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)
	Mr C Beetham of counsel on behalf of the City of Stirling, the City of Melville and the City of Gosnells

Direction

HAVING heard Mr L Slaney on behalf of the applicant, Mr R Knox on behalf of the WASU, Mr K Trainer on behalf of the LGRCEU, Mr C Beetham of counsel on behalf of the City of Stirling, the City of Melville and the City of Gosnells, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby directs –

(1) THAT the time for compliance with par (3) of the directions dated 10 April 2025 ([2025] WAIRC 00235) (Directions) be extended to 19 June 2025.

(2) THAT the time for compliance with par (4) of the Directions be extended to 3 July 2025.

(3) THAT the time for compliance with pars (5) and (6) of the Directions be extended to 24 July 2025.

By the Commission in Court Session

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2025 WAIRC 00385

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 119/2024 GIVEN ON 31 MARCH 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN ROBERT MACDONALD
	APPELLANT
	-v-
	DEPARTMENT OF THE REGISTRAR OF WA INDUSTRIAL RELATIONS COMMISSION, PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENTS
CORAM	FULL BENCH CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 25 JUNE 2025
FILE NO/S	FBA 5 OF 2025
CITATION NO.	2025 WAIRC 00385

Result	Order issued
Representation	
Appellant	In person
Public Transport Authority	Mr J Carroll of counsel

Order

HAVING heard Mr G Macdonald on his own behalf and Mr J Carroll of counsel on behalf of the Public Transport Authority, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

(1) THAT the appellant file a Form 1A application to extend the time to file the appeal, setting out the grounds as to why the extension of time should be granted, by no later than 9 July 2025.

(2) THAT the application for an extension of time to file the appeal be listed for hearing on a date to be fixed by the Full Bench.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2025 WAIRC 00387

APPEAL AGAINST A DECISION OF THE COMMISSION IN COURT SESSION IN CICS 5, 8 & 9 OF 2023 GIVEN ON 28 MARCH 2025

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPELLANT
	-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
	SECOND INTERVENOR
CORAM	SEAWARD J
DATE	WEDNESDAY, 25 JUNE 2025
FILE NO/S	IAC 2 OF 2025
CITATION NO.	2025 WAIRC 00387

Result	Programming order issued

Order

1. The time for the appellant to file and serve its submissions and a list of legal authorities be extended to 3 June 2025.
2. The time for the respondent and each intervenor to file and serve submissions and a list of legal authorities be extended to 1 July 2025.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2025 WAIRC 00350

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, 12 JUNE 2025
FILE NO/S	PRES 1 OF 2022
CITATION NO.	2025 WAIRC 00350

Result	Order issued
Appearances	
Applicant	Ms A McNamara of counsel
Respondent	Ms A McNamara of counsel

Order

HAVING heard Ms A McNamara of counsel on behalf of the applicant and the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT unless otherwise further varied the order made on 27 March 2025 ([2025] WAIRC 00194) be and is hereby extended to 30 September 2025.

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

2025 WAIRC 00396

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIM CLARKE
	APPLICANT
	-v-
	MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	MONDAY, 30 JUNE 2025
FILE NO/S	PRES 8 OF 2024
CITATION NO.	2025 WAIRC 00396

Result	Order issued
Appearances	
Applicant	Mr T Borgeest of counsel
Respondent	No appearance

Order

HAVING heard Mr T Borgeest of counsel on behalf of the applicant and the respondent, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT unless otherwise further varied, the orders made on 17 April 2025 ([2025] WAIRC 00248) be and is hereby extended to 31 August 2025.

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

2025 WAIRC 00378

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 11 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVINDER SINGH
	APPELLANT
	-v-
	DEPARTMENT OF TRANSPORT, WA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T KUCERA - CHAIRPERSON
	MR B HAWKINS - BOARD MEMBER
	MS V DIJKHUIZEN-STRATTON - BOARD MEMBER
DATE	FRIDAY, 20 JUNE 2025
FILE NO	PSAB 1 OF 2025
CITATION NO.	2025 WAIRC 00378

Result	Order issued
Representation	
Appellant	Mr D Singh
Respondent	Mr J Carroll (of counsel)

Order

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

1. THAT discovery is to be informal.
2. THAT the parties are to file any statement of agreed facts and bundle of agreed documents by Thursday, 10 July 2025.
3. THAT by Thursday, 7 August 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 Thursday, 28 August 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 Thursday, 11 September 2025.
6. THAT the respondent is to file an outline of written submissions upon which they intend to rely on by Thursday, 25 September 2025.
7. THAT the appeal is to be listed for a directions hearing not before Thursday, 25 September 2025.
8. THAT there be liberty to apply.

(Sgd.) T KUCERA,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00366

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	TUESDAY, 17 JUNE 2025
FILE NO.	PSAB 3 OF 2025
CITATION NO.	2025 WAIRC 00366

Result	Direction issued
Representation	
Applicant	Mr M Baldwin (of counsel)
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Mr M Baldwin (of counsel) on behalf of the appellant 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), and by consent, hereby directs –

1. THAT the Directions issued on 26 March 2025 ([2025] WAIRC 00191) be vacated.
2. 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 Friday, 5 September 2025 (**Hearing**).
3. THAT discovery be informal.
4. THAT the parties file **by Friday, 13 June 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 4(a)(ii) above.
5. THAT the parties file a bundle of agreed documents **by Monday, 16 June 2025.**
6. THAT the appellant file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 4 July 2025**.
7. THAT the respondent file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 25 July 2025**.
8. THAT the parties notify the Chambers of the Chair **by Friday, 1 August 2025**:
   (a) Their agreed estimate of the number of days required for the Hearing.
   (b) Their availability in the 3-month period from Friday, 5 September 2025.
9. THAT the appellant file an outline of legal submissions **by Friday, 1 August 2025**.
10. THAT the respondent file an outline of legal submissions **by Friday, 22 August 2025**.
11. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00384

APPEAL AGAINST THE DECISION TO DISMISS GIVEN ON 21 NOVEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GORDON MILLER
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 25 JUNE 2025
FILE NO.	PSAB 31 OF 2024
CITATION NO.	2025 WAIRC 00384

Result	Direction issued
Representation	
Applicant	Mr J Tebbutt
Respondent	Mr J 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:

THAT Directions 5 and 6 of the Direction [2025] WAIRC 00331 issued on 12 May 2025, be vacated.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2025 WAIRC 00389

DISPUTE RE UNDERPAYMENT CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	APANUI TRANSPORT PTY LTD & OTHERS
	APPLICANT
	-v-
	BORAL RESOURCES (WA) LTD
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	THURSDAY, 26 JUNE 2025
FILE NO/S	RFT 1 OF 2021, RFT 2 OF 2021, RFT 3 OF 2021, RFT 4 OF 2021, RFT 5 OF 2021, RFT 6 OF 2021, RFT 7 OF 2021, RFT 8 OF 2021, RFT 9 OF 2021, RFT 10 OF 2021, RFT 11 OF 2021, RFT 12 OF 2021, RFT 13 OF 2021, RFT 14 OF 2021, RFT 15 OF 2021, RFT 16 OF 2021, RFT 17 OF 2021, RFT 18 OF 2021, RFT 19 OF 2021, RFT 20 OF 2021, RFT 21 OF 2021, RFT 22 OF 2021, RFT 23 OF 2021, RFT 24 OF 2021, RFT 25 OF 2021, RFT 26 OF 2021, RFT 27 OF 2021, RFT 28 OF 2021
CITATION NO.	2025 WAIRC 00389

Result	Order issued
Representation	
Applicant	Mr S Millman (of counsel) & Mr L Slaney
Respondent	Mr L Izzo

Order

HAVING heard from Mr S Millman of counsel and Mr L Slaney on behalf of the applicants and Mr L Izzo of counsel on behalf of the respondent, the Road Freight Transport Industry Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent –

1. THAT the respondent is to produce the productivity sheets for the period from quarter 1 2023 to present by Friday 4 July 2025;
2. THAT the applicants are to provide a spreadsheet containing further particulars of claim, including information on the applicants' costs inputs by 18 July 2025;
3. THAT the matter is listed for a directions hearing not before 18 July 2025;
4. THAT there be liberty to apply.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

2025 WAIRC 00393

DISPUTE RE ALLEGED CONTRAVENTION OF THE OWNER-DRIVERS (CONTRACTS AND DISPUTES) ACT 2007

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	JOONDALUP TRANSPORT PTY LTD
	APPLICANT
	-v-
	ONSITE RENTAL GROUP OPERATIONS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	FRIDAY, 27 JUNE 2025
FILE NO/S	RFT 1 OF 2025
CITATION NO.	2025 WAIRC 00393

Result	Order issued
Representation	
Applicant	Transport Workers Union of WA
Respondent	Hotchkin Hanly

Order

HAVING heard from the Transport Workers Union of WA on behalf of the applicant and Hotchkin Hanly on behalf of the respondent, the Road Freight Transport Industry Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent –

1. By 24 June 2025, the Applicant provide any Statement in response to the Respondent's evidence dated 17 June 2025. The Statement will only deal with matters raised in the Respondent's evidence.
2. By 1 July 2025, the Respondent provide any Statement in response to any Statement filed by the Applicant pursuant to paragraph 1 of these orders.
3. The time for compliance with Order 5 of the Orders dated 7 May 2025 is extended to 24 June 2025.
4. The time for compliance with Order 6 of the Orders dated 7 May 2025 is extended to 1 July 2025.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

2025 WAIRC 00395

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATALIE WARNOCK
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 30 JUNE 2025
FILE NO.	U 3 OF 2025
CITATION NO.	2025 WAIRC 00395

Result	Order issued
Representation	
Applicant	Mr C Fogliani (of counsel)
Respondent	Mr M McIlwaine (of counsel)

Order

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 on it under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the hearing listed for 1 July 2025 and 2 July 2025 be vacated.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2025 WAIRC 00383

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATALIE WARNOCK
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 25 JUNE 2025
FILE NO.	U 3 OF 2025
CITATION NO.	2025 WAIRC 00383

Result	Direction issued
Representation	
Applicant	Mr C Fogliani (of counsel)
Respondent	Mr M McIlwaine (of counsel)

Direction

WHEREAS the applicant has applied for leave to:

(1) Obtain, file and serve expert evidence about her Autism Spectrum Disorder for use in the proceedings; and

(2) Amend her unfair dismissal application and list of issues for hearing and determination to factor in the expert evidence about her Autism Spectrum Disorder (**Application**).

AND WHEREAS the respondent objects to the Application.

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

1. THAT the applicant file any evidence and legal submissions in support of the Application **by 12:00pm on Thursday, 26 June 2025**;
2. THAT the respondent file any evidence and legal submissions in opposition to the Application **by 4:00pm on Friday, 27 June 2025**.
3. THAT the Application be listed for hearing on **Monday, 30 June 2025 at 2:15pm**.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2025 WAIRC 00372

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAMERON MITCHELL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 19 JUNE 2025
FILE NO/S	U 21 OF 2025
CITATION NO.	2025 WAIRC 00372

Result	Application accepted out of time
Representation	
Applicant	Mr C Mitchell
Respondent	Mr J Carroll (of counsel)

Order

WHEREAS on 4 March 2025 the applicant filed a *Form 2 – Unfair Dismissal Application*;

AND WHEREAS on 5 March 2024 the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application* raising jurisdiction that the application was filed out of time*;*

AND WHEREAS on 5 June 2025 a directions hearing was held and directions issued;

AND WHEREAS on 19 June 2025 the respondent emailed chambers advising of the respondent's changed position on the application to proceed out of time.

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

1. THAT the Directions [2025] WAIRC 00331, issued on 5 June 2025, be vacated;
2. THAT the application be accepted out of time; and
3. THAT a conciliation conference be listed between the parties.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2025 WAIRC 00412

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYLIE MEDLEY
	APPLICANT
	-v-
	CITY OF JOONDALUP
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	WEDNESDAY, 9 JULY 2025
FILE NO.	U 51 OF 2025
CITATION NO.	2025 WAIRC 00412

Result	Direction issued
Representation	(on the papers)
Applicant	Ms A Thampoe (of counsel)
Respondent	Mr A Sinanovic (of counsel)

Direction

HAVING heard from Ms A Thampoe on behalf of the Applicant and Mr Sinanovic 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 matter is listed for a two-day hearing on Wednesday 26 November 2025 at 10:00 a.m. and Thursday 27 November 2025 at 10:00 a.m.

2. THAT the Parties lodge with the Commission an agreed statement of facts by no later than 5:00 pm on 15 August 2025.

3. THAT the Applicant lodge with the Commission and then provide a stamped copy upon the Respondent any signed witness statements and bundle of any documents upon which she intends to rely upon by no later than 5:00 pm on 5 September 2025.

4. THAT the Respondent lodge with the Commission and then provide a stamped copy upon the Applicant any signed witness statements and bundle of any documents upon which it intends to rely upon by no later than 5:00 pm on 29 September 2025.

5. THAT the Applicant lodge with the Commission and then provide a stamped copy upon the Respondent any signed witness statements and bundle of documents which she intends to rely upon solely in reply to the material lodged by the Respondent by no later than 5:00 pm on 20 October 2025.

6. THAT the Applicant lodge with the Commission and then provide a stamped copy upon the other party an outline of written submissions by no later than 5:00 pm on 3 November 2025.

7. THAT the Respondent lodge with the Commission and then provide a stamped copy upon the Applicant an outline of written submission in opposition to the claim by no later than 5:00 pm on 17 November 2025.

8. THAT 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 Senior Commissioner.

9. THAT the parties have liberty to apply at short notice.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2025 WAIRC 00405

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PRECIOUS CHINAEMEREM AMUTA
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	FRIDAY, 4 JULY 2025
FILE NO.	U 58 OF 2025
CITATION NO.	2025 WAIRC 00405

Result	Direction issued
Representation	
Applicant	Mr P C Amuta (on his own behalf)
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Mr P C Amuta on his own behalf and Mr M McIlwaine (of counsel) on behalf of the respondent at the Directions Hearing on 3 July 2025, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the jurisdictional objection that the applicant is not eligible to make a claim of unfair dismissal because he was not dismissed (**Jurisdictional Objection**) be listed for a half-day hearing **not before Thursday, 4 September 2025**.
2. THAT the respondent file **by Friday, 8 August 2025**:
   (a) Any outlines of witness evidence and documents in support of the Jurisdictional Objection; and
   (b) An outline of submissions in support of the Jurisdictional Objection.
3. THAT the applicant file **by Friday, 22 August 2025**:
   (a) Any outlines of witness evidence and documents contesting the Jurisdictional Objection; and
   (b) An outline of submissions contesting the Jurisdictional Objection.
4. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2025 WAIRC 00362

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES' UNION, THE AUSTRALIAN WORKERS' UNION
	APPLICANTS
	-v-
	WORKSAFE COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 16 JUNE 2025
FILE NO/S	WHST 2 OF 2025, WHST 3 OF 2025
CITATION NO.	2025 WAIRC 00362

Result	Programming orders issued

Representation

Applicants	Mr M Quinn (of counsel) & Mr J Shintaro (as agent)
Respondent	Ms H Wreford (of counsel)

Programming orders

HAVING heard from Mr M Quinn (of counsel) on behalf of the Construction, Forestry and Maritime Employees' Union, Mr J Shintaro (as agent) on behalf of the Australian Workers' Union, and Ms H Wreford (of counsel) on behalf of the WorkSafe Commissioner, the Work Health and Safety Tribunal, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA) and the *Work Health and Safety Act 2020* (WA), orders –

1. THAT by Friday, 27 June 2025, the parties file in the Registry a statement of agreed facts and bundle of agreed documents;
2. THAT by Monday, 7 July 2025, the WorkSafe Commissioner file in the Registry outlines of any evidence and any documents (not being agreed documents) upon which she seeks to rely;
3. THAT by Thursday, 17 July 2025, the Construction, Forestry and Maritime Employees' Union and the Australian Workers' Union file in the Registry outlines of any evidence and any documents (not being agreed documents) upon which they seek to rely;
4. THAT by Monday, 28 July 2025, the WorkSafe Commissioner file in the Registry written submissions;
5. THAT by Thursday, 7 August 2025, the Construction, Forestry and Maritime Employees' Union and the Australian Workers' Union file in the Registry written submissions;
6. THAT by Monday, 18 August 2025, the WorkSafe Commissioner file reply submissions in the Registry if she wishes to do so;
7. THAT there be informal discovery; and
8. THAT these matters are to be listed on dates to be fixed.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2025 WAIRC 00360

APPLICATION FOR EXTERNAL REVIEW - S229 - WHS ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	THE AUSTRALIAN WORKERS' UNION
	APPLICANT
	-v-
	WORKSAFE COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 13 JUNE 2025
FILE NO/S	WHST 3 OF 2025
CITATION NO.	2025 WAIRC 00360

Result	Order issued
Representation	
Applicant	Mr J Shintaro (as agent)
Respondent	Ms H Wreford (of counsel)

Order

WHEREAS the Construction, Forestry and Maritime Employees' Union and the Australian Workers' Union filed notices of application on 31 March 2025 in applications WHST 2 of 2025 and WHST 3 of 2025 respectively;

AND WHEREAS the WorkSafe Commissioner filed responses to those applications on 17 April 2025;

AND WHEREAS on 5 May 2025 the Construction, Forestry and Maritime Employees' Union wrote to the Work Health and Safety Tribunal (**Tribunal**) to ask that applications WHST 2 of 2025 and WHST 3 of 2025 be joined;

AND WHEREAS on 7 May 2025, the Australian Workers' Union and the WorkSafe Commissioner confirmed they consent to applications WHST 2 of 2025 and WHST 3 of 2025 being joined;

NOW THEREFORE the Tribunal, having heard from the parties and by consent, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), the *Work Health and Safety Act 2020* (WA), orders –

1. THAT applications WHST 2 of 2025 and WHST 3 of 2025 be joined;
2. THAT applications WHST 2 of 2025 and WHST 3 of 2025 be heard and determined together; and
3. THAT evidence in one application be evidence in the other application.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2025 WAIRC 00359

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES' UNION
	APPLICANT
	-v-
	WORKSAFE COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 13 JUNE 2025
FILE NO/S	WHST 2 OF 2025
CITATION NO.	2025 WAIRC 00359

Result	Order issued
Representation	
Applicant	Mr M Quinn (of counsel)
Respondent	Ms H Wreford (of counsel)

Order

WHEREAS the Construction, Forestry and Maritime Employees' Union and the Australian Workers' Union filed notices of application on 31 March 2025 in applications WHST 2 of 2025 and WHST 3 of 2025 respectively;

AND WHEREAS the WorkSafe Commissioner filed responses to those applications on 17 April 2025;

AND WHEREAS on 5 May 2025 the Construction, Forestry and Maritime Employees' Union wrote to the Work Health and Safety Tribunal (**Tribunal**) to ask that applications WHST 2 of 2025 and WHST 3 of 2025 be joined;

AND WHEREAS on 7 May 2025, the Australian Workers' Union and the WorkSafe Commissioner confirmed they consent to applications WHST 2 of 2025 and WHST 3 of 2025 being joined;

NOW THEREFORE the Tribunal, having heard from the parties and by consent, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) and the *Work Health and Safety Act 2020* (WA), orders –

1. THAT applications WHST 2 of 2025 and WHST 3 of 2025 be joined;
2. THAT applications WHST 2 of 2025 and WHST 3 of 2025 be heard and determined together; and
3. THAT evidence in one application be evidence in the other application.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2025 WAIRC 00367

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	IGOR GRIGOROVICH
	APPLICANT
	-v-
	DEPARTMENT OF ENERGY, MINES, INDUSTRY REGULATION AND SAFETY, WORKSAFE WA
	RESPONDENTS
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 17 JUNE 2025
FILE NO/S	WHST 5 OF 2025
CITATION NO.	2025 WAIRC 00367

Result	Order issued
Representation	
Applicant	On his own behalf
Respondents	N/A

Order

WHEREAS this is an application to the Work Health and Safety Tribunal (**Tribunal**) for external review under the *Work Health and Safety Act 2020* (WA)*;*

AND WHEREAS on 17 June 2025 the applicant emailed the Tribunal before application WHST 5 of 2025 had been served on the respondent, and informed it that he intended to name 'WorkSafe Commissioner' as the only respondent to application WHST 5 of 2025;

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 the name of the respondent be corrected to 'WorkSafe Commissioner'.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Bunbury-Harvey Regional Council Employees 2024 Enterprise Agreement AG 39/2025	23/06/2025	Bunbury Harvey Regional Council - AUSTRALIND, WA	Australian Services Union Western Australia Branch	Senior Commissioner R Cosentino	Agreement Registered
City of Joondalup Leisure Centre Workforce Industrial Agreement 2025 AG 48/2025	07/07/2025	City of Joondalup	Western Australian Municipal Administrative, Clerical and Services Union	Senior Commissioner R Cosentino	Agreement Registered
City of Melville Inside Workforce Industrial Agreement 2025 AG 36/2025	13/06/2025	City of Melville	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Senior Commissioner R Cosentino	Agreement registered
City of Rockingham Outside Workforce Industrial Agreement 2023 AG 41/2025	19/06/2025	City of Rockingham	Western Australian Municipal, Administrative, Clerical and Services Union of Employees , Local Government, Racing and Cemeteries Employees' Union, Construction, Forestry, Mining and Energy Union of Workers	Senior Commissioner R Cosentino	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Subiaco Inside Staff Industrial Agreement 2025 AG 37/2025	13/06/2025	City of Subiaco	Western Australian Municipal, Clerical and Services Union (WASU)	Senior Commissioner R Cosentino	Agreement registered
Department of Education (Residential College Supervisors) CSA Agreement 2024 AG 30/2025	19/06/2025	Director General, Department of Education	The Civil Service Association of Western Australia Incorporated	Commissioner C Tsang	Agreement registered
Department of Education (School Support Officers) CSA Agreement 2024 AG 27/2025	19/06/2025	Director General, Department of Education	The Civil Service Association of Western Australia Incorporated	Commissioner C Tsang	Agreement registered
Department of Justice - Community Work Officers - Agency Specific Agreement 2024 AG 29/2025	12/06/2025	Department of Justice	The Civil Service Association of WA Incorporated	Commissioner T B Walkington	Agreement Registered
Department of Justice (Youth Custodial Officers) CSA Agreement 2024 AG 33/2025	01/07/2025	Department of Justice	Civil Service Association of Western Australia Incorporated	Commissioner T B Walkington	Agreement registered
Disability Services Commission – United Workers Union (WA) – Disability Support Workers Industrial Agreement 2024 AG 35/2025	19/06/2025	Disability Services Commission	United Workers Union (WA)	Commissioner T B Walkington	Agreement Registered
Shire of Donnybrook Balingup (Outdoor Works and Services) Enterprise Agreement 2024 AG 44/2025	07/07/2025	Shire of Donnybrook Balingup	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement Registered
Shire of Gnowangerup (Operational Works Crew) Industrial Agreement 2024 AG 42/2025	19/06/2025	Shire of Gnowangerup	Local Government, Racing and Cemeteries Employees Union (WA)	Senior Commissioner R Cosentino	Agreement Registered
Shire of Peppermint Grove Industrial Agreement 2025 AG 38/2025	30/06/2025	Shire of Peppermint Grove	Western Australian Municipal, Administrative, Clerical and Services Union of Employees., Local Government, Racing and Cemeteries Employees' Union (WA)	Senior Commissioner R Cosentino	Agreement registered
Shire of Perenjori Industrial Agreement 2025 AG 40/2025	01/07/2025	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Perenjori	Senior Commissioner R Cosentino	Agreement Registered
Town of Cambridge Employees' Collective Agreement 2025 AG 45/2025	01/07/2025	Town of Cambridge	Local Government, Racing and Cemeteries Employees Union, Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Town of Victoria Park Industrial Agreement 2025 AG 47/2025	03/07/2025	Town of Victoria Park	Local Government, Racing and Cemeteries Employees Union (WA), Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement Registered

NOTICES—Appointments—

2025 WAIRC 00390

Designation of Officers

Section 93(1AC)

Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar Western Australian Industrial Commission, within the meaning of section 7 of the *Industrial Relations Act 1979*; and

Pursuant to section 93(1AC) of the *Industrial Relations Act 1979,* **I DESIGNATE**

the person nominated, being KENDRA TONI HAGAN, AS A DEPUTY REGISTRAR to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, from 20 June 2025 until further notice.

SUSAN BASTIAN

CHIEF EXECUTIVE OFFICER

REGISTRAR

DEPARTMENT OF THE REGISTRAR

20 June 2025

NOTICES—General Matters—

2025 WAIRC 00391

NOTICES—General Matters—

Salary Cap for Lodging Claims of Unfair Dismissal or Denial of Contractual Benefits

An employee whose contract of employment provides for a salary greater than $204,600.00 cannot have the Commission decide whether they have been unfairly dismissed or have been denied a benefit to which they are entitled under their contract of employment.

Section 29AA(3) and (4) of the *Industrial Relations Act 1979* (WA) provides that the Commission must not determine a claim for harsh, oppressive or unfair dismissal or a claim for a denied contractual benefit if an industrial instrument does not apply to the employment and the contract of employment provides for a salary which exceeds the prescribed amount.

What is meant by an industrial instrument is defined in section 29AA(5) of the *Industrial Relations Act 1979* (WA) and was discussed by the Full Bench in *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* [2006] WAIRC 05220; (2006) 86 WAIG 2725.

The prescribed amount of the salary is determined by Regulations 5 and 6 of the *Industrial Relations (General) Regulations* 1997 (WA). The amount is adjusted each year on 1 July.

The figure that will apply from 1 July 2025 has been calculated by the Registrar as being $204,600.00. The amount is a matter for the Commission to determine so this figure must be seen as a guide, until such time as the Commission may determine a different amount.