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FULL BENCH—Appeals against decision of Industrial Magistrate—

2025 WAIRC 00681

**APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 65/2023 GIVEN
ON 5 APRIL 2024 AND 14 AUGUST 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2025 WAIRC 00681
CORAM	:	SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG COMMISSIONER T KUCERA
HEARD	:	THURSDAY, 12 DECEMBER 2024
DELIVERED	:	FRIDAY, 8 AUGUST 2025
FILE NO.	:	FBA 11 OF 2024
BETWEEN	:	COASTAL R.E. PTY LTD ATF COASTAL UNIT TRUST Appellant AND JASON JOWETT Respondent
FILE NO.	:	FBA 12 OF 2024
BETWEEN	:	JASON JOWETT Appellant AND COASTAL R.E. PTY LTD ATF COASTAL UNIT TRUST Respondent
FILE NO.	:	FBA 18 OF 2024
BETWEEN	:	COASTAL R.E PTY LTD ATF COASTAL UNIT TRUST Appellant AND JASON JOWETT Respondent

ON APPEAL FROM:

Jurisdiction : **INDUSTRIAL MAGISTRATES COURT**
Coram : **INDUSTRIAL MAGISTRATE D. SCADDAN**
Citation : **[2024] WAIRC 00149; [2024] WAIRC 00766**
File No : **M 65 OF 2023**

CatchWords : Industrial Law WA - Appeal from Industrial Magistrates Court - Entitlement to long service leave - Commission based remuneration employment relationship - Relationship between contract of employment and *Long Service Leave Act 1958* - Construction of s 5 of *Long Service Leave Act 1958* - Contracting out of entitlement to long service leave - Whether s 5 contracting out limited to accrued or crystallised entitlement only - Legislative history and construction of *Long Service Leave Act 1958* - Consideration of set-off principles - Appeal upheld

Legislation : *Industrial Relations Act 1979* (WA)
Fair Work Act 2009 (Cth)
Long Service Leave Act 1958 (WA)
Interpretation Act 1984 (WA)
Legislation Act 2021 (WA)
Industrial Relations Legislation Amendment Act 2021 (WA)
Industrial Relations Act 1999 (Qld) (repealed)
Legislation Act 2021 (WA)
Industrial Relations Legislation Amendment and Repeal Act 1995 (WA)

Result : Appeal in FBA 11 of 2024 upheld
Appeal in FBA 12 of 2024 dismissed
Appeal in FBA 18 of 2024 dismissed

Representation:

Mr D Howlett (of counsel) on behalf of Coastal R.E. Pty Ltd atf Coastal Unit Trust

Mr S Farrell (as agent) on behalf of Mr Jason Jowett

Case(s) referred to in reasons:

Allina Pty Ltd v Federal Commissioner of Taxation (1991) 28 FCR 203
Conroy's Smallgoods v Australasian Meat Industry Employees Union [2023] FCAFC 59
Construction, Forestry, Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd [2012] FCA 45; (2012) 213 FCR 549
Grain Elevators Board (Vic) v Dunmunkle Corporation [1946] HCA 13
Hepples v Federal Commissioner of Taxation [1991] HCA 39
Interlego AG v Croner Trading Pty Ltd [1992] FCA 624; (1992) 39 FCR 348
James Turner Roofing v Peters [2003] WASCA 28; (2003) 132 IR 122
Jowett v Coastal R.E Pty Ltd atf Coastal Unit Trust [2024] WAIRC 00149
Jowett v Coastal R.E Pty Ltd atf Coastal Unit Trust [2024] WAIRC 00766
Maughan Thiem Auto Sales Pty Ltd v Cooper [2014] FCAFC 94
Maurice Alexander Management Pty Ltd v Sato [2023] ICQ 14
Moate v I.P.C Pty Ltd (ACN 061 746 996) [2020] WAIRC 00390; (2020) 100 WAIG 519
Mount Lawley Pty Ltd v Western Australian Planning Commission [2004] WASCA 149
Nekros Pty Ltd v Baker [2006] WAIRC 05764
Poletti v Ecob (No 2) [1989] FCA 779
Prichard v M 6:8 Legal Pty Ltd [2024] WASCA 4
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
Public Transport Authority of Western Australia v Yoon [2017] WASCA 25
Qantas Airways Ltd v Transport Workers Union of Australia [2023] HCA 27
R v Sieders [2008] NSWCCA 187

Ray v Radano [1967] AR (NSW) 471
Re The Honourable G D Kierath, Minister for Heritage; Ex Parte City of Fremantle [2000] WASCA 156; (2000) 22 WAR 342
Sea Shepherd Australia Ltd v State of Western Australia [2014] WASC 66
Shire of Mount Magnet v Atlantic Vanadium Pty Ltd [2025] WASC 274
Spall v Minister for Home Affairs [2024] FCA 849
Sydney Seaplanes Pty Ltd v Page [2021] NSWCA 204; (2021) 393 ALR 485
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34
Tabcorp Holdings Ltd v Victoria [2016] HCA 4
UnionsWA Incorporated v Not Applicable [2025] WAIRC 00129
United Construction Pty Ltd v Birighitti [2002] WAIRC 06242
Wardman v Macquarie Bank Limited [2023] FCAFC 13
WorkPac Pty Ltd v Rossato [2020] FCAFC 84; (2020) 278 FCR 179
Worsley Alumina Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers Western Australian Branch & Ors (1996) 76 WAIG 4150
Worsley Timber 2000 Pty Ltd (in Liq) v Commissioner of State Revenue [2007] WASC 155
Wyloo Metals Pty Ltd v Quarry Park Pty Ltd [2024] WASCA 38

Reasons for Decision

COSENTINO SC:

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Introduction

- 1 The appellant, Coastal R. E. Pty Ltd employed the respondent, Jason Jowett, as a real estate agent for just under 10 years, from 2012 to 2020. During the employment, Coastal paid Mr Jowett remuneration in the form of commission only on real estate

sales Mr Jowett brokered.

- 2 After the employment ended, Mr Jowett claimed he was entitled to payment in respect of:
 - (a) Payment on termination of accrued but untaken annual leave under s 90(2) of the *Fair Work Act 2009* (Cth) (**FWA**); and
 - (b) Payment on termination of accrued but untaken long service leave under s 8(3) and s 9(2A) of the *Long Service Leave Act 1958* (WA) (**LSL Act**).
- 3 These claims and other incidental claims were prosecuted by Mr Jowett in the Industrial Magistrates Court (**IMC**), which has jurisdiction to enforce the FWA and awards made under it, as well as, jurisdiction to enforce the current LSL Act.
- 4 On 5 April 2024, Industrial Magistrate Scaddan made orders upholding Mr Jowett's claims for payment in respect of annual leave under the FWA and payment in respect of long service leave. Her Honour's reasons for decision were published on 5 April 2024: *Jowett v Coastal R.E. Pty Ltd atf Coastal Unit Trust* [2024] WAIRC 00149 (**Primary Decision**). Her Honour deferred for further hearing and determination 'the issue of set-off'. By this her Honour was referring to Coastal's foreshadowed claim that any liability for annual leave and long service leave could be reduced by the amount of over-award commissions Coastal paid to Mr Jowett.
- 5 The 'set-off' question and penalties were then determined on the papers, her Honour declining to reduce the long service leave payment by reference to over-award commission, issuing reasons on 14 August 2024: *Jowett v Coastal R.E. Pty Ltd atf Coastal Unit Trust* [2024] WAIRC 00766 (**Set-Off and Penalty Decision**).
- 6 In FBA 11 of 2024 Coastal has appealed against the Industrial Magistrate's findings as to its liability to pay long service leave to Mr Jowett. In FBA 18 of 2024 Coastal appeals her Honour's finding that there is no ability to 'set-off' amounts it paid to Mr Jowett against that liability. In FBA 12 of 2024 Mr Jowett has appealed against the IMC's method of calculating the long service leave liability, and the amount awarded to him in respect of it.
- 7 Because the appeals only relate to the LSL claim, which arises under State laws, the appeals lie to the Full Bench of the Western Australian Industrial Relations **Commission** under s 84 of the *Industrial Relations Act 1979* (WA) (**IR Act**).
- 8 For the reasons that follow, I would dismiss Coastal's appeal in FBA 11 of 2024 but uphold its appeal in FBA 18 of 2024. Because I consider the appeal in FBA 18 of 2024 is made out, it is unnecessary for me to deal with Mr Jowett's cross-appeal. Accordingly, these reasons are in two parts:
 - (a) Part 1 deals with Coastal's appeal from the finding that the current LSL Act had been contravened.
 - (b) Part 2 deals with Coastal's appeal from the rejection of its 'set-off' argument.
- 9 Throughout these reasons, unless otherwise stated, references to the LSL Act mean the *Long Service Leave Act 1958* (WA) as in force as of 19 June 2022, that is, prior to the amendments made by Part 4 of the *Industrial Relations Legislation Amendment Act 2021* (WA) which commenced on 1 July 2022. References to 'current LSL Act' means the LSL Act as amended by the 2021 amendments.

Part 1 - Coastal's liability for long service leave on termination

Parties' positions in relation to the Long Service Leave Claim

- 10 Mr Jowett's case at first instance was simply that he was entitled on termination to a proportionate amount of long service leave pursuant to s 8(3) of the current LSL Act, on the basis of having completed a period of continuous employment of 9 years, 11 months and 8 days. He said this equated to 8.61 weeks' ordinary pay.
- 11 Mr Jowett claimed his ordinary pay was \$10,772.85 per week, on the basis that he had earned \$560,188.26 in the 365-day period up to the date of termination. Accordingly, he calculated his claimed entitlement as \$91,082.53.
- 12 Coastal argued that at the time the employment contract was entered into, the LSL Act permitted an agreement between it and Mr Jowett by which Mr Jowett would forego all his entitlements under the LSL Act.
- 13 Coastal relied on the terms of a written agreement between it and Mr Jowett, which it said was in accordance with the LSL Act. The written agreement, made at the commencement of the employment contained the following term (original emphasis):

...

8. Leave

An additional percentage amount has been included in the commission remuneration, so that you are **paid in advance of all leave entitlements** as determined by Legislation, as such any form of leave taken will be taken on an unpaid basis.

Should your employment cease with Realmark whether by your own accord or at Realmark's discretion, no further payment for leave entitlements will be made.

...

- 14 Coastal submitted that the effect of the written agreement was that Mr Jowett had agreed to forego his long service leave entitlements in exchange for an adequate benefit in lieu, being an additional percentage amount in his commission remuneration. This agreement, Coastal said, met the description in s 5 of the LSL Act, and so Coastal had no liability under the LSL Act.
- 15 As a consequence of the 2021 amendments, from 20 June 2022, s 5 of the current LSL Act said:
 5. **Cashing out of accrued long service leave**
 - (1) An employer and an employee may agree that the employee may forego the employee's entitlement, or part of

the employee's entitlement, to long service leave under section 8(2)(a) or (b) if —

- (a) the employee is given an adequate benefit instead of the entitlement; and
 - (b) the agreement is in writing, signed by the employer and employee.
- (2) For the purposes of subsection (1), a benefit is not adequate unless the employee is paid at least the amount of ordinary pay the employee would have received had the employee taken the long service leave or part of the leave.
- (3) Nothing in this section enables the employer and employee to reach the agreement before the employee's entitlement to long service leave has accrued.

16 From this date, Coastal recognised accrual of long service leave.

17 Mr Jowett argued that Coastal could not rely on s 5 of the LSL Act because:

- (a) Where s 5 of the LSL Act speaks of an 'entitlement' to long service leave, it is referring to the accrued entitlement to take a period of leave after reaching a qualifying period of service. An entitlement does not arise before the qualifying period of service has been served.
- (b) Mr Jowett did not have 10 years' service when the LSL Act was amended. Accordingly he did not have an entitlement to take LSL at any time under the LSL Act as it stood prior to the 2022 amendments. While he did have the 7 years of continuous service which would have entitled him to payment of a pro-rata amount on termination, he was not terminated prior to 20 June 2022 when the amendments came into effect, so he did not have that entitlement either.
- (c) Section 5 of the LSL Act did not permit an agreement to forego a future entitlement.
- (d) In any event, the written agreement did not provide an adequate benefit in lieu because the value of the future entitlement to long service leave could not be assessed and the additional percentage attributable to it was indeterminable. Further, the 'additional percentage' was allocated to all forms of leave without breaking it down into components for different types of leave.

The Industrial Magistrate's reasons for upholding the LSL claim

18 Her Honour recited the relevant agreed and uncontested facts at [11]-[38] of the Primary Decision. The facts relevant to the long service leave claim are, in summary:

- (a) Mr Jowett was employed according to the terms of a contract of employment dated 2 November 2012.
- (b) During the entire employment period Mr Jowett was paid on a commission only basis.
- (c) The *Real Estate Industry Award 2010* and then the *Real Estate Industry Award 2020 (REIA or REIAs)* applied. The minimum commission for commission-only employees under the REIAs was 31.5% of the gross commission paid for the sale of a property.
- (d) The contract was varied by agreement on 8 July 2021 with effect from 1 July 2021, to increase the percentage of gross commission payable to Mr Jowett from 60% plus superannuation (of 93% total commission) to 70% including superannuation (of 100% total commission) on gross commission up to \$900,000 and from 65% plus superannuation to 75% including superannuation on gross commission over \$900,000.
- (e) To resolve a dispute that had arisen between them, in July 2021 Coastal agreed that it would pay \$118,000 to Mr Jowett (less tax and superannuation). This amount was paid in two equal instalments in August 2021 and July 2022.
- (f) From time to time Mr Jowett requested Coastal to pay amounts of the commission owing to him to be salary sacrificed to additional superannuation payments. Mr Jowett also requested that Coastal pay to his wife, from the commissions owing to him, invoices she raised for providing administrative assistance to Mr Jowett. Coastal complied with these requests.
- (g) The employment was for a period of 9 years, 11 months and 8 days from 13 November 2012 to 20 October 2022.
- (h) At the end of the employment Coastal paid Mr Jowett \$1,671.72 in lieu of accrued long service leave.

19 The Industrial Magistrate observed that to the extent that there was a factual dispute between the parties, it largely related to the characterisation of payments that were made to Mr Jowett, or his wife, or to superannuation, for the purpose of calculating the quantum of his claims.

20 After summarising the parties' respective contentions about the question of whether s 5 of the LSL Act applied to Mr Jowett (at [158]-[164]), the Industrial Magistrate proceeded to consider the meaning of s 5. Her Honour referred to the principles of statutory construction at [166]:

In summary, principles of statutory construction include consideration of the text itself as used in the context in which it applies, context includes consideration of the general purpose and policy of a provision and may include consideration of extrinsic materials, extrinsic materials cannot, however, be used for the purpose of re-writing the text, extrinsic materials may be used to determine the meaning conveyed by the text where the provision is ambiguous or obscure or the ordinary meaning leads to absurdity or unreasonableness, and care must be taken in having regard to the purpose or object of the Act concerned and the specific purpose of the particular provision being construed needs to be identified: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355; *Kizon v Lee* [2013] WASC 221.

21 Her Honour then made some brief observations about the history of the provision, noting it was inserted with effect from 16 January 1996, in circumstances where s 5 previously enabled exemption from the LSL Act in the following terms ([170]-[171])

of the Primary Decision):

[170] Section 5 prior to 16 January 1996 countenanced an alternative scheme having prospective application, notwithstanding the arrangement (if approved) would apply when a person commenced employment, or to an existing employee. What an example scheme did or might look like is somewhat of an enigma.

[171] However, unlike the terms of s 5 prior to 16 January 1996, the amended s 5 did not purport to wholly exempt an employer from the LSL Act but enabled an employee and employer to agree to forego *the entitlement to long service leave*.

- 22 At [172] of the Primary Decision her Honour noted that there is little commentary on the 1996 amendment, however her Honour referred to *Worsley Alumina Pty Ltd v Australian Workers' Union & Ors* (1996) 76 WAIG 4150 (*Worsley*) as one case which referred to the amendments. Her Honour also referred to *Public Transport Authority of Western Australia v Yoon* [2017] WASCA 25; 97 WAIG 249 (*Yoon*) at [42] and *Nekros Pty Ltd v Baker* [2006] WAIRC 05764; (2006) 86 WAIG 3361 (*Nekros*), concluding at [178]:

From the limited discussion of s 5 of the LSL Act (pre-June 2022) the following can be distilled:

[178.1] section 5 as amended was designed to give greater flexibility to individuals;

[178.2] this flexibility was mainly directed to 'cashing out' of the entitlement to long service leave under s 5; and

[178.3] the option crystallised on the realisation or accrual of the entitlement to long service leave.

- 23 Her Honour added the proviso that 'cashing out' of long service leave may not be the only option in foregoing an entitlement under s 5 of the LSL Act, however, in her view, the cases demonstrated as a theme that the option to forego the entitlement 'crystallises on the realisation or accrual of the entitlement to long service leave': Primary Decision [179], [184].

- 24 As to whether a future, not yet crystallised entitlement to take long service leave could be foregone under s 5, her Honour referred to *United Construction Pty Ltd v Birighitti* [2002] WAIRC 06242; (2002) 82 WAIG 2409 where the Full Bench of the Commission observed in relation to a claim under the LSL Act prior to the 1996 amendments, that the employee's entitlement to long service leave [188]:

...could not be a matter the subject of weekly instalment payments. A period of long service leave which he was eligible to take in accordance with the eligibility provisions of the LSL Act was his entitlement, subject to the pro-rata provisions of the Act which were not applicable to this argument, only when he had served the required 15 years.

- 25 Her Honour found these observations were 'relevant to the prior provision enabling limited opting out of the LSL Act': Primary Decision [189].

- 26 At [190] her Honour stated:

Nothing in the language of the section expressly prohibited an employee and employer making an agreement for the future forgoing of long service leave entitlement. There may have been employees who wanted to bolster their wages in the present rather than wait for 10 years to cash out long serve[sic] leave. In fact, it might even have been advantageous for them and their family to do so. By way of example, paying out a mortgage faster or paying for school fees.

- 27 But then at [191] her Honour concluded that the limited contracting-out of long service leave entitlement under s 5 of the LSL Act was not intended to extend to the payment in advance to forego a future long service leave entitlement by way of a wages component. Her Honour's reasons for this conclusion are set out at [191]:

However, for the following reasons, in my view, the limited contracting-out of long service leave entitlements in s 5 of the LSL Act (pre-June 2022) was not intended to extend to the payment in advance to forego future long service leave entitlements:

[191.1] the entitlement to long service leave is fundamentally predicated on rewarding employees for continual long service: *Yoon* at [42];

[191.2] the entitlement to long service leave, being to take leave on ordinary pay, arises when an employee has completed at least 10 years of continual service: s 8(1) and s 8(2)(a) of the LSL Act;

[191.3] a pro rata entitlement to an amount of long service leave arises where an employee has completed at least seven years but less than 10 years of continuous employment where the employment is terminated;

[191.4] the payment for the amount of long service leave is at ordinary pay where the applicable ordinary pay is, subject to limited exceptions, at the time when any period of long service leave commences or is deemed to commence: s 4(1) and s 4(2) of the LSL Act;

[191.5] relevant to commission-only employees, the applicable ordinary pay is the average weekly rate earned in the 12 months immediately preceding the commencement of long service leave: s 4(2) of the LSL Act;

[191.6] this is also consistent with the judicial commentary on the LSL Act and s 5;

[191.7] the calculation of the value or benefit of forgoing future long service leave entitlement or pro rata long service entitlement is uncertain and arguably vague where the comparator is adequacy; and

[191.8] an employee may not become eligible for long service leave entitlement or pro rata long service entitlement if their employment is terminated earlier, where upon the status of any agreement for the payment in advance to forego future long service entitlement is equally uncertain.

- 28 Her Honour considered the 2021 amendments to s 5 ‘put beyond doubt the prior position’: [193].
- 29 It therefore followed that, in her Honour’s view, cl 8 of the contract was inconsistent with the limited contracting out provisions of s 5 and therefore unenforceable: [195].
- 30 Her Honour went on to provide reasons why, in the event that she was wrong about the construction of s 5, she was not satisfied that the benefit under the contract was adequate for the purpose of meeting the conditions of s 5 of the LSL Act.

Coastal’s Grounds of Appeal

- 31 Coastal’s Amended Grounds of Appeal list 13 grounds relating to the above reasoning. By the first ground of appeal, Coastal alleges that the Industrial Magistrate erred in the construction of s 5 of the LSL Act. Grounds 2, 3, 5, 6, 9, 10 and 11 are really particulars of why Coastal says the Industrial Magistrate so erred. They all concern her Honour’s approach to the construction of s 5 and her conclusion as to its meaning. It is therefore appropriate to deal with all of these paragraphs of the Amended Grounds of Appeal together.
- 32 Additionally, the Amended Grounds of Appeal allege:
- (a) Error in the form of insufficiency of reasons: Ground 5.
 - (b) Error of fact in concluding that the commission paid to Mr Jowett over the minimum rate was not solely attributable to leave, or that the percentage attributable to leave was not ascertainable: Ground 8.
 - (c) Error in concluding that it was necessary to break down the over-minimum commission payments into components: Grounds 12 and 13.

The Alleged construction error grounds - What is the meaning of ‘entitlement to long service leave under this Act’ in s 5 of the LSL Act?

Principles

- 33 The correctness standard applies to the grounds of appeal which challenge the Industrial Magistrate’s construction of s 5 of the LSL Act. The Full Bench is required to reach its own view as to the proper construction of the section, without according any deference to the views adopted by the Industrial Magistrate. It is unnecessary for the Full Bench to deal with the appellant’s contentions which point to alleged methodological errors by the Industrial Magistrate in arriving at her conclusions as to construction: *Prichard v M6:8 Legal Pty Ltd* [2024] WASCA 4 at [35].
- 34 The principles of statutory construction 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]-[206] (citations omitted):
- [200] The focus of statutory construction is upon the text of the provisions having regard to their context and purpose.
- [201] 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.
- [202] The context includes the legislative history and extrinsic materials.
- [203] 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.
- [204] 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.
- [205] 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.
- [206] 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.

- 35 These principles mean that context should be considered at the first stage and in its widest sense: *SZTAL 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. While context includes the existing state of the law and the history of the legislative scheme, the examination of legislative history and extrinsic materials is not an end in itself. *Shire of Mount Magnet v Atlantic Vanadium Pty Ltd* [2025] WASC 274 at [9] and [53]–[54]

36 Identifying the purpose of a statutory provision can be difficult. Justice Bell explained the difficulties of identifying statutory purpose and its role in construction in *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204; (2021) 393 ALR 485 (*Sydney Seaplanes*) at [36]-[39] (citations omitted):

[36] It will not, however, always be easy to identify or discern the purpose of any given statute or statutory provision, and care must be taken against ascribing an overly broad purpose based upon *a priori* assumptions as to the legislation's intended reach: *Palgo Holdings Pty Ltd v Gowans* at [28]. Furthermore, a statute may have multiple purposes and, as enacted, may (and often will) give effect to political and policy compromises such that the legislative purpose, whatever may have been intended originally, is obscured...

...

[39] The purpose of a statute or statutory provision, or the "mischief" which a statute is intended to address, may sometimes also be identified in an explanatory memorandum to a parliamentary bill or in the second reading speech although these sources of potential enlightenment, particularly the explanatory memorandum, are frequently of limited utility in this regard, often being little more than summaries or paraphrases of provisions of the bill. Although the occasions when such assistance will in fact be given have been said to be "rare", they nevertheless sometimes present themselves: *Lacey v Attorney-General (Qld)*.

Coastal's submissions

37 Coastal's Outline of Submissions in support of its grounds of appeal are primarily directed at the methodology employed by the Industrial Magistrate in reaching her conclusions as to the proper construction of s 5 of the LSL Act. Coastal says the Industrial Magistrate failed to 'begin with a consideration of the text itself' instead impermissibly relying on historical considerations and extrinsic materials to displace the clear meaning of the text.

38 Coastal submits that the meaning of s 5 of the LSL Act is clear and unambiguous.

39 Coastal says the meaning of 'entitlement' in s 5 of the LSL Act is akin to a 'workplace right' under the FWA as described by the High Court in *Qantas Airways Ltd v Transport Workers Union of Australia* [2023] HCA 27; (2023) 412 ALR 134 at [34]-[35] (*Qantas*). The plurality there observed that s 341(1)(a)'s reference to a person having a workplace right if the person 'is entitled to the benefit of a workplace law or workplace instrument' is sufficiently broad to encompass a present entitlement to receive a benefit at some future stage of the employment relationship on the occurrence of an expected event or contingency. Similarly, Coastal says reference to an 'entitlement under this Act' in s 5 is broad enough to encompass entitlements not yet accrued, crystallised or existing but which are due to come into existence in the future.

40 Coastal made much of the fact that the Industrial Magistrate did not expressly refer to or apply the High Court's approach. Having submitted that the starting point for the construction exercise is the text itself viewed in context and having regard to its statutory purpose, it is odd that Coastal viewed the High Court's discussion about workplace rights under the FWA as holding the key to construction of s 5 of the LSL Act. The respective statutory contexts have as much in common as chalk and cheese.

41 The High Court was considering the meaning of s 341, contained in Division 3 of Part 3-1 of the FWA, titled Workplace Rights. The Division contains a number of protections against adverse action, coercion, undue influence and misrepresentations, secured through civil regulatory remedies. Section 341 itself sets out the meaning of 'workplace right'.

42 In contrast, s 5 appears in Part II of the LSL Act, which deals with the construction and application of the LSL Act. The LSL Act more generally is an act 'to provide for the granting of long service leave to certain Western Australian employees and for matters incidental thereto'. It grants a leave benefit whereas Division 3 of the FWA contains protections in employment.

43 The only potential relevance of *Qantas* is that it is illustrative of the general idea that words like 'right', 'entitlement' and 'benefit,' when used in legislation, are capable of being construed narrowly and broadly.

44 Even more tangentially, Coastal relied on *Construction, Forestry, Mining and Energy Union v Jeld-Wen Glass Australia* [2012] FCA 45; (2012) 213 FCR 549 (*Jeld-Wen*). That case concerned the FWA's prohibition on cashing out the entitlement to paid personal/carer's leave, specifically the provision that said 'paid personal/carer's leave must not be cashed out except in accordance with permitted cashing out terms included in a modern award or enterprise agreement under section 101'.

45 Under the terms of individual agreements, *Jeld-Wen* paid employees a weekly allowance of 1.50 hours at their base rate, while absences on sick leave were unpaid. One argument made by *Jeld-Wen* was that the statutory prohibition on cashing out was limited to entitlements that had accrued, and the payments it made were made in advance of employees having an accrued entitlement.

46 Justice Gray rejected this argument, noting at [20]:

...The prohibition is equally capable of application to entitlements yet to be accrued as it is to entitlements already accrued. The mere fact that money was paid in advance would not render the payment any less a payment in substitution for the entitlement than if the payment were made after the entitlement had accrued...

47 *Jeld-Wen* considered the meaning of 'cashing out' in the FWA. It did not consider the meaning of 'entitlement'. Again, it is merely illustrative of the possibility that a not yet accrued leave entitlement can be the subject of a payment in substitution for the entitlement.

48 Coastal also submitted that the Industrial Magistrate should have had regard to the 2021 amendments to s 5 of the LSL Act in finding the construction it contended for. Coastal argued that the 2021 amendments would have been unnecessary if s 5 of the LSL Act was given a narrow construction. It said this was a strong indicator that s 5 of the LSL Act allowed what the parties did in this case to be done.

49 On the other hand, Coastal says the Industrial Magistrate was wrong to have regard to *Worsley*, because it hadn't been cited by any of the parties at first instance, Coastal had no opportunity to make submissions about it, and it was decided in a different

context such that no useful indicators of legislative intent could be drawn from it. Coastal argued *Worsley* was outdated, not on point, distinguishable and provided no reasoning for the conclusions stated in the parts referred to by her Honour.

- 50 Coastal submitted that the cases her Honour placed reliance on provided tenuous support for her Honour's construction and did not logically or persuasively permit the conclusions at [190] of the Primary Decision as to the scheme of the LSL Act. In Coastal's view, this led the IMC, to assume a legislative purpose that is not apparent from the text or its context, resulting in the IMC impermissibly re-engineering the text's meaning.

Mr Jowett's submissions

- 51 Mr Jowett submits that the Industrial Magistrate was correct to look to the historical context to determine s 5's legislative purpose, as the meaning of s 5 is not obvious or plain on its face, there being alternative meanings available. Mr Jowett submits that even if there is some deficiency in the Industrial Magistrate's methodology, including any reference to cases not cited by the parties, or a failure to expressly refer to cases the parties did rely upon, any such deficiency is inconsequential as the construction her Honour favoured was ultimately correct.

Consideration

- 52 Section 5 of the LSL Act is headed 'Limited contracting-out of long service leave'. It says:

An employer and an employee may agree that the employee may forgo his entitlement to long service leave under this Act if —

- (a) the employee is given an adequate benefit in lieu of the entitlement; and
- (b) the agreement is in writing.

- 53 The controversy is what s 5 means when it refers to 'entitlement to long service leave under this Act.' Does this phrase have a wide meaning, so that such entitlements include the right to count service towards an ultimate long service leave entitlement, or a future contingent entitlement? Or does the phrase have a narrow meaning, restricted to an actual entitlement under s 8 to either take long service leave or be paid on termination for accrued and untaken long service leave?
- 54 Both constructions are available. To my knowledge, the construction of s 5 of the LSL Act has not previously been judicially considered. However, the question of whether the right to have service counted as accrual towards a leave entitlement before an accrued right to leave or payment materialises can be characterised as an 'entitlement' has arisen from time to time in different contexts.
- 55 For example, s 113 of the National Employment Standards (NES) under the FWA provides that if there are applicable award-derived long service leave terms in relation to an employee, the employee is entitled to long service leave in accordance with those terms. Section 113 also sets out various exceptions to this general position. The meaning of 'entitled to long service leave' in this provision was considered in *Maughan Thiem Auto Sales Pty Ltd v Cooper* [2014] FCAFC 94; (2014) FCR 1 (*Maughan*) and in *Conroy's Smallgoods v Australasian Meat Industry Employees Union* [2023] FCAFC 59; (2023) ALR 316 (*Conroy's Smallgoods*).
- 56 In *Conroy's Smallgoods*, Raper J observed that the meaning of 'would have entitled the employee to long service leave' is ambiguous given long service leave is an accrual-based entitlement.' At [269], her Honour referred to Katzmann J's consideration of s 113(3) in *Maughan*, where Katzmann J determined that there were two possible interpretations of the phrase 'would have entitled the employee to long service leave', the first being that it simply refers to terms that provide for an entitlement to long service leave, and the second being that it refers to 'an entitlement that would have actually accrued': *Maughan* at [42].
- 57 Katzmann J preferred the first, wide interpretation having regard to the specific legislative context and purpose. While Raper J agreed with and endorsed Katzmann J's analysis in *Maughan*, her Honour also cautioned against overstating the applicability of *Maughan* to the question that was before the Full Court: [271].
- 58 Another example is found in *Maurice Alexander Management Pty Ltd v Sato* [2023] ICQ 14. There, a casual employee claimed an entitlement to long service leave under the *Industrial Relations Act 1999* (Qld) (repealed) in circumstances where her employment was covered by a series of industrial agreements made under the *Workplace Relations Act 1996* (Cth) and the FWA. A 2006 agreement expressly provided for casual loading to be paid 'in lieu of any entitlement to paid annual leave, paid personal leave, long service leave'. The employer argued that the payment of casual loading under the 2006 agreement meant that service while that agreement applied should not be counted as continuous service under the *Industrial Relations Act 1999* (Qld).
- 59 At first instance, the Queensland Industrial Commission held that there was a distinction between an entitlement to long service leave and the accrual leading to an entitlement to long service leave. Further, the entitlement to long service leave only arose after 10 years' continuous service was complete. Accordingly, the 2006 agreement did not operate to exclude service under it from the calculation of the entitlement to long service leave.
- 60 On appeal, Davis P of the Industrial Court of Queensland disagreed with this approach, observing at [36]-[38]:
- [36] As the Industrial Commissioner held, on a particular day, long service leave crystallises as a right to take leave with pay. It crystallises though because the employee has a right to have periods of service counted towards the ultimate entitlement to long service leave. The entitlement to long service leave is a right to paid leave when a specified term of service has been achieved.
 - [37] The casual loading is, in effect, a periodically paid sum which is designed to extinguish various "entitlements". It does that by compensating the employee with inflated pay rates to extinguish the benefit of the otherwise accruing "entitlements".
 - [38] Construed in that context, it is the service which is accruing and which ultimately crystallises into an

entitlement to take paid long service leave. On a proper construction of clause 13.1, “the entitlement” to long service leave is the right to count service under the 2006 agreement towards an ultimate long service leave entitlement. I therefore respectfully disagree with the conclusion reached by the Industrial Commissioner, and ground 2 of the appeal is made out.

- 61 I therefore accept that when s 5 speaks of an ‘entitlement to long service leave under this Act’ and ‘the entitlement’, the words are capable of having a broader meaning than an accrued and crystallised entitlement to long service leave.
- 62 Whether s 5 is intended to have the broad meaning must be determined by reference to the text itself, having regard to its structure, the surrounding text and the legislative history of the scheme in which it sits.

Text, structure, and statutory context

- 63 There is little if anything in the text and structure of s 5 of the LSL Act which reveals much as to its purpose or whether the intention is that it have a broad or narrow application.
- 64 The reference to ‘limited contracting-out’ in the section heading might be thought to give a clue that the section has a narrow application. The section heading is not part of the LSL Act: *Interpretation Act 1984* (WA), s 32(2). As the section heading does not form part of the Act, I cannot have regard to it as a textual consideration. It may be ‘extrinsic material’ which can be taken into account under s 19(1) of the *Interpretation Act*, only if contained in the Bill which passed through parliament: *Re The Honourable G D Kierath, Minister for Heritage; Ex Parte City of Fremantle* [2000] WASCA 156; (2000) 22 WAR 342 at [62] (Wheeler J); *Sea Shepherd Australia Ltd v State of Western Australia* [2014] WASC 66 at [115] (Edelman J).
- 65 There are more signposts of purpose in the wider statutory context. Buss and Murphy JJ comprehensively set out the structure and content of the LSL Act in *Yoon* from [17]-[36]. I respectfully adopt that articulation of the statutory context, without repeating all of it. However, I would highlight that the LSL Act is divided into five parts. The first part is headed ‘Preliminary provisions’ and comprises the LSL Act’s short title and commencement provisions.
- 66 Part II, where s 5 is located, is headed ‘Construction and application of this Act’. The structure and content of Part II is discussed further below.
- 67 Part III is headed ‘Entitlements to long service leave or to payment in lieu thereof’. Section 8 sets out the core provision for long service leave on ordinary pay in respect of periods of continuous service with an employer. Section 9 generally deals with how and when long service leave can be taken. Section 10 permits an agreement to allow leave to be taken in advance of its accrual.
- 68 The Court in *Yoon* recognised that the term ‘long service leave’ as used in s 8 and elsewhere in the LSL Act is not defined, but said at [40]:
- ...[W]hen s 8 is read as a whole, it is apparent that the term encompasses two aspects of entitlement. The first is in the granting and taking of “leave away from the employment whilst maintaining its continuity”: s 6(1)(a)(ii), s 8(1), s 8(2)(a) and (b). The second is a conditional right to payment in lieu of pro-rata long service leave where the employment is terminated before the leave is taken: s 8(2)(c), s 8(3)...
- 69 Part IV is headed ‘Enforcement of the provisions of the Act.’ It confers jurisdiction on the IMC to hear and determine all questions and disputes in relation to rights and liabilities under the LSL Act.
- 70 Part VII is headed ‘Miscellaneous provisions’. It has six sections in four divisions. It includes provisions about the keeping of and access to employment records, a prohibition of employment during long service leave, entitles parties to proceedings to legal representation and confers a regulation making power on the Governor.
- 71 Each of the part and division headings form part of the LSL Act: *Interpretation Act*, s 32(1). They are indicative of the purpose of the sections that fall within those parts and divisions.
- 72 Returning to the structure of Part II, it includes s 4 which contains the definitions of terms used in the LSL Act. It also includes s 6 which sets out what constitutes ‘continuous employment’. Consistent with the heading, these two sections tell the reader how to construe the other provisions of the LSL Act.
- 73 Sections 5 and 7 however are not obviously about construction of the LSL Act. Accordingly, the heading to Part II indicates that these sections are about how the Act applies in the circumstances described in the sections. Section 7 modifies the LSL Act’s application where employment commenced before the operation of the Act: s 7(1). It explains how periods of leave ‘in the nature of long service leave’ or payments in lieu of such leave are to be taken into account in calculating the entitlement to long service leave under the LSL Act: s 7(2). Section 7(3) clarifies that the entitlement to leave under the LSL Act is in substitution for and satisfaction of any long service leave which an employee is otherwise entitled to.
- 74 The construction that Coastal contends for would mean that s 5 does more than simply modify how the LSL Act otherwise applies. It would, in effect, mean that there ceases to be any application of Part III at all. This construction is at odds with the Part heading and structure. It is clear enough that s 5 is intended to create some degree of flexibility in how an employer and an employee can comply with the substantive obligations and recognise the substantive entitlements contained in s 8. But enabling an agreement by which an employee foregoes the substantive entitlements altogether cannot be described as ‘applying’ the LSL Act. It is circumventing the LSL Act.
- 75 In contrast, s 4, which immediately precedes s 5 in Part II deals with the construction of the Act. To that end, it contains a definition of ‘employee’ which is expressed as being subject to subsection 4(3):

...

employee means, subject to subsection (3) —

- (a) any person employed by an employer to do work for hire or reward including an apprentice;

- (b) any person whose usual status is that of an employee;
- (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
- (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee;
- 76 Section 4(3) then says:
- 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).
- 77 The section creates a class of persons who fall outside the s 4(1) categories of ‘employee’: *Yoon* at [57]. Section 4(3) does not simply limit or modify the application of the LSL Act, but rather excludes its application altogether so that, consistent with the long title, its application is less than universal.
- 78 If it was the legislature’s intention that employees and employers could avoid the substantive entitlements of the LSL Act by agreement, it could have done so by excluding persons from the definition of ‘employee’ in s 4, where complying agreements are entered into. That would put beyond doubt that the application of the Act in its entirety could be circumvented by an agreement meeting the relevant conditions.
- 79 The other feature of s 4(3) that is significant is its reference to a person being “entitled to, **or eligible to become entitled to**, long service leave...” (emphasis added). Section 4(3) explicitly recognises that long service leave benefits or rights under other instruments can be contingent or future rights. The plurality in *Yoon* at [59] noted these words in s 4(3):
- ...form a composite phrase upon which, as a whole, the preceding words operate. The preceding words are “a person” who is “by virtue of [an agreement]...”. Read as a whole, and in this context, it appears to be used as an expansive phrase to comprehend an actual or contingent entitlement under another instrument, irrespective of whether it has accrued, or has not yet accrued. In other words, in its context, the phrase appears to be a comprehensive one used by the legislature to refer to an actual or contingent entitlement which any person has under another instrument to long service leave, irrespective of whether it has been accrued or not...
- 80 The expansive or composite phrase in s 4(3) is directed to entitlements under other instruments, not entitlements under the LSL Act. All the same, the legislature has used the composite phrase to denote the inclusion of both actual crystallised entitlements and contingent entitlements. The other side of the coin is that where the legislature has not used the same expansive phrase, but refers only to ‘entitled to’, the legislature is referring only to an actual, crystallised entitlement.
- 81 There are other indications in the statutory context which support the same conclusion that s 5 has a narrow operation. The phrases ‘entitled to long service leave’ and ‘entitlement to long service leave’ are used frequently throughout the LSL Act. A consistent meaning should ordinarily be given to a particular phrase used in a statute or suite of statutory provisions, wherever it appears in the statute or suite of statutory provisions: *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4; (2016) 328 ALR 375 at [65].
- 82 Beyond s 5, the phrase ‘entitlement to long service leave’ is used to refer to the two aspects of an accrued entitlement, that is, the entitlement to be absent from work without loss of continuity of service, and to receive pay in respect of the absence.
- 83 For instance, the phrase ‘the entitlement to long service leave under this Act’ appears in s 4(3) following the words ‘where a person is...entitled to, or eligible to become entitled to’. As previously observed, in *Yoon*, the Court considered Part III involved one comprehensive entitlement which contains two aspects, the granting and taking of leave, and the conditional right to payment in lieu of pro-rata long service leave on termination: [40]. So where s 4(3) referred to ‘the entitlement to long service leave under this Act’, the phrase was taken to mean the specific entitlement or benefits specified in s 8(2) and s 8(3) of the LSL Act: [60]. This construction formed part of the plurality’s reasoning leading to its conclusion that the comparison required by s 4(3) is to be made prospectively by reference to the terms of the respective instruments, rather than at a point in time and from time to time: [61].
- 84 The phrase ‘entitlement to long service leave under this Act’ then appears in s 7(1):
- ...in the calculation of the employee’s **entitlement to long service leave under this Act** not more than 20 years’ continuous employment before the coming into operation of this Act shall be counted.
- (emphasis added).
- 85 Sections 7(2) and 7(3) state:
- (2) Any leave, in the nature of long service leave or, as the case may be, payment in lieu thereof, granted, whether before or after the coming into operation of this Act, under any long service leave scheme and irrespective of this Act to an employee in respect of any period of continuous employment with his employer, shall be taken into account in the calculation of the employee’s **entitlement to long service leave under this Act** as if it were long service leave taken under this Act, or, as the case may be, payment in lieu of long service leave under this Act and to be satisfaction to the extent thereof of any **entitlement of the employee under this Act**.

- (3) The **entitlement to leave under this Act** shall be in substitution for and satisfaction of any long service leave to which the employee may be entitled in respect of employment of the employee by the employer.

(emphasis added).

86 The phrase is associated here with the concept of ‘calculation.’ Section 26, discussed below, also refers to ‘the calculation of the entitlement to, and payment for, long service leave under this Act’. The idea that the relevant entitlement could be a future contingent entitlement, is somewhat incongruent with the concept of ‘the calculation’ of an entitlement.

87 Further, the reference in s 7(3) to ‘leave’, obviously referring to long service leave, highlights that it is the ability to be absent from work that is being referred to. It is unlikely that the word ‘leave’ would be used to refer to the scheme under the LSL Act in the broad sense as including progressive accrual towards a future right.

88 Finally, the other provisions of the LSL Act which make up the LSL scheme support the view that s 5 is intended to operate narrowly. Section 11 lists, without limitation, the questions and disputes which the industrial magistrate has jurisdiction to determine. Of the five ‘questions and disputes’ listed, the first and last reflect the matters provided for in Part II, by reference to:

...

- (a) as to whether a person is or is not an employee, or an employer, to whom this Act applies;
- (b) whether and when and to what extent an employee is or has become entitled to long service leave, or payment in lieu of long service leave;
- (c) as to the ordinary rate of pay of an employee;
- (d) as to whether the employment of the employee was or was not ended by an employer in order to avoid or to attempt to avoid liability for long service leave; and
- (e) with respect to a benefit in lieu of long service leave under an agreement made under section 5.

...

89 Notably, what the section contemplates may be a dispute under s 5 is not whether the LSL Act applies (in contrast to s 11(a)), nor whether the benefit is in lieu of entitlements in a broad sense. The words ‘entitlement to long service leave under this Act’ are not found in s 11(e). Rather it is just long service leave that is contemplated as being the subject of a s 5 agreement. Had the legislature intended s 5 have the broader meaning contended for by Coastal, then it would follow that s 11 would provide for resolution of disputes about benefits in lieu of payment on termination, and long service leave which an employee is eligible to become entitled to. It does not.

90 Section 11(b) also suggests that ‘entitled to’ is referring to the components of a crystallised entitlement to long service leave. It makes no sense to speak of whether and when and to what extent an employee has become entitled to something that remains contingent.

91 Section 26 of the LSL Act says:

26. Keeping of employment records

- (1) An employer must ensure that details are recorded of —
 - (a) each employee’s name and, if the employee is under 21 years of age, the employee’s date of birth;
 - (b) the date on which the employee commenced employment with the employer;
 - (c) the gross and net amounts paid to the employee under the contract of employment, and all deductions and the reasons for them;
 - (d) all leave taken by the employee, whether paid, partly paid or unpaid;
 - (e) details of any agreement made under section 5 between the employer and the employee;
 - (f) such other details as are necessary for the calculation of the entitlement to, and payment for, long service leave under this Act; and
 - (g) other matters prescribed by the regulations.
- (2) The employer must ensure that —
 - (a) the records are kept in accordance with the regulations; and
 - (b) each entry is retained during the employment of the employee and for not less than 7 years thereafter.
- (3) A contravention of subsection (2) is not an offence but that subsection is a civil penalty provision for the purposes of the *Industrial Relations Act 1979* section 83E.
- (4) Subsection (3) extends to a contravention that occurred within the period of 12 months ending on the coming into operation of the *Labour Relations Legislation Amendment Act 2006* Part 7 Division 2 unless the employer was charged with an offence in respect of that contravention.

92 The purpose of the section is to facilitate compliance with the LSL Act and enable its enforcement. There is no exemption from the requirement to keep records of the details listed in s 26 where an agreement is made under s 5 of the LSL Act. Rather, the details of such an agreement must be recorded, along with details such as the date of commencement of employment, the gross and net amounts paid to the employee, leave taken by the employee and such other details as are necessary for the calculation of the entitlement to long service leave under the LSL Act.

- 93 Had the legislature intended that an agreement under s 5 could be made to contract out of the scheme of long service leave generally, rather than limited to accrued long service leave, there would be no need for records to be kept where a s 5 agreement is entered into.
- 94 The statutory context supports the narrow construction of s 5 preferred by the Industrial Magistrate.

Legislative history

- 95 Section 5 was inserted into the LSL Act by the *Industrial Relations Legislation Amendment and Repeal Act No 79 of 1995* (WA), s 47.
- 96 Prior to the commencement of s 5 of the LSL Act, s 5 of the earlier version of the Act allowed an employer to apply to the Board of Reference constituted under the earlier version of the Act to be exempted from the operation of the Act. It was in these terms:

5.

(1) The Board of Reference may exempt an employer from the operation of this Act in respect of his employees if it is satisfied that **there is an existing or proposed scheme, conferring benefits in the nature of long service leave** which in its opinion are or will be, viewed as a whole, not less favourable to the whole of the employees of that employer than the benefits prescribed by this Act.

(2) In order to ensure that the benefits under a **scheme** in relation to which an employer is granted an exemption under subsection (1) of this section remain not less favourable to the whole of the employees of that employer than the benefits prescribed by this Act, the Board of Reference may

- (a) grant the exemption subject to such conditions as it determines are fit to impose; and
- (b) from time to time, add to, vary or revoke any such conditions imposed by it.

(3) An application for an exemption under subsection (1) of this section may be made by an employer.

(emphasis added).

- 97 As the Industrial Magistrate noted at [168]-[169]:

[168] Section 5 of the LSL Act (pre-20 June 2022) was inserted with effect from 16 January 1996. Prior to this, s 5 of the LSL Act enabled exemption from the LSL Act provided there:

- (1) was an alternative existing or proposed scheme which conferred benefits in the nature of long service leave;
- (2) the scheme satisfied a body named the Board of Reference; and
- (3) the existing or proposed scheme was or would be not less favourable to the whole of the employees than the benefit under the LSL Act.

[169] The amended s 5 of the LSL Act contained three noteworthy features, namely:

- [169.1] It removed the oversight of an alternative scheme or arrangement for long service leave between employers and employees;
- [169.2] It gave more freedom to individual employers and employees to agree something other than an entitlement to long service leave provided whatever was agreed was an adequate benefit in lieu of the entitlement and was in writing; and
- [169.3] It dispensed with the idea of a whole of workforce scheme conferring a benefit similar to long service leave.

- 98 Under the earlier version of s 5, when the Board of Reference granted an application made under it, the Act ceased to apply altogether. Further, the Board of Reference could only grant such exemption if there was an alternative scheme which provided employees with benefits in the nature of long service leave. That is, the benefit needed to involve the provision of respite from employment without loss of continuity. The section did not contemplate benefits of a different nature, like extra money.
- 99 The 1996 amendment abolished the Board of Reference. It would therefore appear that s 5 of the LSL Act was introduced to retain the flexibility which the earlier s 5 enabled, but without the involvement of the Board of Reference.
- 100 Because the amendments did not retain the requirement that the benefit be 'in the nature of long service leave', or the reference to a 'scheme', it is also apparent that the amendments were intended to provide greater flexibility as to the nature of the benefits which could be substituted for those under the LSL Act. However, there is nothing which indicates that the purpose or intent of the amendments was to allow an agreement which would circumvent the concept of long service leave entirely. Indeed, the fact that, in contrast to the earlier version, s 5 of the LSL Act, does not expressly provide an exemption from the operation of the Act indicates to the contrary.

- 101 The legislative history does not require a broad construction of s 5.

The subsequent amending Act

- 102 The version of s 5 effected by the 2021 amendments is set out above, but it is convenient to repeat it here:

5. Cashing out of accrued long service leave

- (1) An employer and an employee may agree that the employee may forgo the employee's entitlement, or part of the employee's entitlement, to long service leave under section 8(2)(a) or (b) if —
 - (a) the employee is given an adequate benefit instead of the entitlement; and

- (b) the agreement is in writing, signed by the employer and employee.
- (2) For the purposes of subsection (1), a benefit is not adequate unless the employee is paid at least the amount of ordinary pay the employee would have received had the employee taken the long service leave or part of the leave.
- (3) Nothing in this section enables the employer and employee to reach the agreement before the employee's entitlement to long service leave has accrued.

103 The 2021 amendments effected the following changes:

- (a) The clause heading is changed from 'Limited contracting-out' to 'Cashing out of accrued' long service leave.
- (b) The word 'his' is changed to 'the employee's'.
- (c) There is added reference to 'or part of the employee's entitlement'.
- (d) There is added reference to 'under section 8(2)(a)'.
- (e) The words 'instead of' are substituted for 'in lieu of'.
- (f) There is an added requirement that the agreement be 'signed by the employer and the employee'.
- (g) Subsections (2) and (3) were added.

104 It is proper to look to any amendments to a statutory provision in order to cast light on the meaning of the original words, prior to amendment: see Pearce D *Statutory Interpretation* 9th Edn 3.38 (Pearce), where the learned author cites *Grain Elevators Board (Vic) v Dunmunkle Corporation* [1946] HCA 13; (1946) 73 CLR 70, and Dixon J's observation at 86 that it would have been a strange result if the court had intended the prior legislation as giving a wider exemption than that conferred by the amendment, so that the express exemption the amendment made would have been unnecessary. Cases applying this approach are listed in the Annexure at 3.38 of Pearce and include *Worsley Timber 2000 Pty Ltd (in Liq) v Commissioner of State Revenue* [2007] WASC 155 where this approach was briefly referred to.

105 However, care must be taken to ensure that the amending words were not included to remove possible doubt as to the meaning of the original provision: Pearce 3.39 citing *Allina Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 203, *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 and *Hepples v Federal Commissioner of Taxation* [1991] HCA 39; (1991) 65 ALJR 650; *R v Siders* [2008] NSWCCA 187; (2008) 72 NSWLR 417.

106 In *Interlego AG v Croner Trading Pty Ltd* [1992] FCA 624; (1992) 39 FCR 348, Gummow J (Black CJ & Lockhart J agreeing) noted at 382:

There is a line of authority that an amendment may be taken into account in determining the scope of the prior legislation, at least to avoid a result which would render the amendment unnecessary, or futile or deficient: see especially *Grain Elevators Board (Vic) v Dunmunkle Corporation* [1946] HCA 13; (1946) 73 CLR 70 at 85 - 86; *Hunter Resources Ltd v Melville* [1988] HCA 5; (1988) 164 CLR 234 at 254 - 255; But in doing so caution should be exercised: see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988), §3.26. It is, after all, a curious way of revealing parliamentary intention at the time of passing the earlier provision. As was observed by *Viscount Haldane LC in Re Samuel* [1913] UKLawRpAC 17; [1913] AC 514 at 526:

"It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later enactment would be surplusage. The later Act may have been designed, ex abundante cautela, to remove possible doubts."

See also *Commissioner of Taxation (Cth) v Verzyden* (1988) 88 ATC 4,205 at 4,210; *Downey v Trans Waste Pty Ltd* [1991] HCA 11; (1991) 172 CLR 167 at 177.

107 See also *Hepples v Federal Commissioner of Taxation* [1991] HCA 39; (1991) 173 CLR 492, 539 (McHugh J); *Spall v Minister for Home Affairs* [2024] FCA 849 at [100].

108 The Explanatory Memorandum to the *Industrial Relations Legislation Amendment Bill 2021* (WA) provides at [38] that:

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;

...

109 Given this plain statement of the intent of the 2021 amendments to s 5, no support for Coastal's construction can be gained from reference to those amendments.

110 The fact that the amendments were intended to clarify what the legislature understood to be the existing meaning of s 5 is fortified by the fact that the amending Act contained no savings or transitional provisions preserving the effect of agreements made prior to the amendments.

Conclusion in relation to construction of s 5

111 The statutory context and legislative history reveals the purpose of s 5 of the LSL Act was to enable agreements to be made between an employer and an employee for the employee to forego an entitlement the employee has under s 8 in exchange for an adequate alternative benefit. Section 5 does not apply in the wider sense contended for by Coastal to aspects of the long service leave scheme short of an accrued entitlement.

112 Accordingly, I would dismiss the grounds of appeal that relate to the Industrial Magistrate's construction of s 5 being Grounds 1, 2, 3, 4, 6, 9, 10 and 11.

Ground 5 - Insufficiency of reasons

113 Coastal's fifth ground of appeal alleges:

The Appellant was denied fairness by being denied the ability to know why it lost.

114 Its written submissions just say at [4]:

a. This ground is based on Mount Lawley (see paragraph 26).

115 This ground was not elaborated on in oral argument before the Full Bench.

116 I understand this briefest of submissions to invite attention to *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2004] WASCA 149; (2004) 29 WAR 273 at [26] where the Court said (citations omitted):

...[T]he giving of reasons is a normal (albeit not universal) incident of the judicial process. That is because "the duty is a function of due process: *Public Service Board of New South Wales v Osmond*; *Soulemezis v Dudley (Holdings) Pty Ltd* and *Beale v Government Insurance Office of New South Wales*. That is because "the duty is a function of due process, and therefore of justice": *Flannery v Halifax Estate Agencies Ltd*. Fairness requires that the parties should know why they have won or lost. A requirement to give reasons is likely to produce a more soundly based, rational judgement: *Flannery* and see *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)*. The requirement also furthers judicial accountability: *Soulemezis* and *Beale*.

117 Ironically, Coastal denied the Full Bench the ability to know why it says it was denied the ability to know why it lost. In corresponding brevity, this ground of appeal can be dealt with by noting that reasons for decision were published.

118 The ground is dismissed.

Ground 7 - Was cl 8 permitted by s 5 of the LSL Act?

119 This ground of appeal is directed at the finding at [195] of the Industrial Magistrate's Primary Decision, where her Honour concluded that cl 8 of the contract is inconsistent with and contrary to the limited contracting-out provisions of s 5 of the LSL Act.

120 Coastal's written submissions on this ground say at [6.a]:

This case was not about the enforcement of Mr Jowett's contract and the comment about enforceability is unnecessary and hypothetical. As to the finding that clause 8 of the contract was inconsistent with former s5, the Appellant repeats paragraph 1(c) of the grounds of appeal.

121 The ground was not elaborated upon orally.

122 To the extent that Coastal is critical of a part of the reasons which was 'unnecessary,' it follows that any alleged error is inconsequential and can have no bearing on the outcome of the matter at first instance nor on appeal. As for the balance of the submission, it appears to repeat and rely upon the alleged error in construction of s 5. Accordingly, this ground should be dismissed.

Grounds 8, 12 and 13 - Did cl 8 of the contract provide 'an adequate benefit in lieu'?

123 At [196] and the following paragraphs of the Primary Decision, her Honour considered whether, if she was wrong about the construction and effect of s 5 of the LSL Act, cl 8 satisfied the conditions of s 5. That is, if s 5 of the LSL Act enabled payment in advance in lieu of a future entitlement which had not yet accrued, was the commission paid to Mr Jowett an adequate benefit in lieu of his entitlement to long service leave under the LSL Act? Her Honour concluded that it was not, for the reasons set out in [197]:

For the following reasons, I find cl 8 of the Contract did not satisfy the terms of s 5 of the LSL Act (pre-June 2022 amendments):

[197.1] as already stated, the over-award commission paid to the claimant was a composite additional percentage amount, and it did not distinguish what additional percentage was attributable to annual leave, long service leave, personal leave, compassionate leave or community service leave or what additional percentage was attributable to individual performance;

[197.2] while I accept the over-award commission paid to the claimant was significant, the evidence does not enable an objective assessment of whether the claimant was adequately compensated to forgo future long service leave. The respondent's evidence, is the total effect of the composite additional percentage for a period of five years, rather than a breakdown of how the percentage was attributed over the claimant's employment period;

[197.3] the evidence demonstrates at least from July 2021, the claimant was rewarded with an increase in composite additional percentage commission that had no apparent nexus with any leave; and

[197.4] to the extent the parties reduced the claimant's leave arrangements to writing, I am not satisfied cl 8 complies with the requirement of a written agreement under s 5(b) of the LSL Act (pre-June 2022). The written agreement under s 5 of the LSL Act is to forgo the entitlement to long service leave for an adequate benefit in lieu, whereas the written agreement under cl 8 of the Contract is an additional percentage commission paid in advance for leave to be taken on an unpaid basis. What, in fact, was agreed with respect to long service leave, if anything, was uncertain.

124 Coastal submits that her Honour was wrong to characterise the matter as involving an absence of evidence concerning what the

over-minimum commission payments were attributable to, when there was a file note of the meeting between Mr Jowett and two of Coastal's employees or officers on 8 July 2021 which resulted in the commission payments being varied. Coastal submitted that the file note made it clear that no aspect of the agreement for payment of commission related to performance.

125 The initial written contract, cl 8 of which Coastal relied upon in its defence to the claim, said this about the components of the commission:

7. Working Hours

The hours of work shall be 40 hours per week which may be worked on any day, Monday to Sunday. During these hours you are required to meet the operational requirements of Realmark and to achieve the agreed minimum K.P.I.'s in respect of prospecting, listing presentations, listing stock level and sales plus effective days on market/clearance rates.

You are required to attend the weekly Stock Review Meeting at a nominated Realmark office and any Realmark Agency (group) meetings as determined by Realmark from time to time.

It may occasionally be a requirement of the position to work outside normal working hours as determined by Realmark, in which case the commission remuneration has been set to reflect this.

You are entitled to 1 1/2 rostered days free of duty each week. Such rostered days off may be taken in one of the following ways:

- One consecutive period;
- Two periods; or
- Three periods comprising three half days.

It is your responsibility to ensure that your duties and responsibilities are organised in such a manner as to ensure that you have in fact taken these rostered days off in accordance with the Award and this offer of employment.

8. Leave

An additional percentage amount has been included in the commission remuneration, so that you are paid in advance of all leave entitlements as determined by Legislation, as such any form of leave taken will be taken on an unpaid basis.

Should your employment cease with Realmark whether by your own accord or at Realmark's discretion, no further payment for leave entitlements will be made.

(original emphasis)

126 It also set out various expenses which Mr Jowett was required to himself meet from the commission (cl 1, cl 4, cl 5, Schedule 5), and the expenses Coastal would agree to meet (Schedule 5).

127 The file note which records the variation to the commission terms is reproduced below:

FILE NOTE

*1st 270k @ 60%
eadly only \$130k which is @ 65%*

ATTENDEES: Jason Jowett
Sean Hughes
Gayle Adams

DATE: Thursday 8 July 2021

REF: COMMISSION STRUCTURE & EMPLOYMENT AGREEMENT CONCERNS

This File Note will serve to record the outcome of the above meeting.

Dear Jason

Thank you for your time today to talk through the concerns outlined in your 'proposal' note in a fair minded and balanced manner. Sean and I found the discussion truly beneficial in understanding the reasoning and sentiment behind your proposal.

Outcome 1

Effective 1 July 2021 we agree to the following commission to be paid on Settled Gross Commission Exclusive GST paid to Realmark Coastal on your transactions:

\$0 - \$900,000	<i>20%</i>	70% of 100% Incl Superannuation
\$900,001+	<i>15%</i>	75% of 100% Incl Superannuation

\$18,000

Outcome 2

Realmark Coastal agree to pay, in acknowledgement of your existing Employment Agreement concerns, the sum of \$109,500 as full settlement. This amount to be paid, less tax and Superannuation, over a 2year period in 4 equal amounts. The first payment to be paid by 15 August 2021.

Jason, Sean and I can't tell you in sufficient words how much we value our relationship with you, your professionalism and the quality man that you are. We are so very pleased that you will remain with us and we are excited about working with you to grow your business by adding in the required resources to build your pipeline.

Thank you for today Jason!

*First Payment made
6/8/21
\$59,000
BSB 016 495
Acct 504 339 569
J. Jowett*

GAYLE ADAMS

Accepted by: Jason Jowett

- 128 It is a long stretch to say that this file note reveals anything about what the increased commission is attributable to. All that can be said is that the parties agreed to increase the commission. To the extent that the Industrial Magistrate considered the file note suggested that an increase in the percentage of commission paid was performance based (see [138.2]), that finding does not appear to be supported by the file note itself.
- 129 Whether a benefit will be adequate for the purpose of s 5 of the LSL Act involves an evaluative judgment. In my view, s 5 does not require that a specific component of a payment be identified as attributable to long service leave, as opposed to other forms of leave and other benefits. To the extent that the Industrial Magistrate sought to find evidence that the commission paid above the minimum commission rate was solely attributable to leave, or to find a distinct percentage attributable to long service leave distinct from performance, I consider her Honour was in error. Further, if the original commission rate established by the contract was adequate, any later agreed increase which was not clearly attributable to leave was irrelevant.
- 130 The minimum commission rate payable to Mr Jowett under the REIAs was 31.5% of the employer's net commission (cl 16.7(f)(i)). 'Employer's net commission' is defined by the REIAs to mean at cl 3.1:

...

employer's net commission for a commission - only employee means the employer's gross commission (as defined) less an amount of no greater than 10%

where 'employer's gross commission' is defined to mean:

employer's gross commission for a commission - only employee means the commission received by the employer from a client for a sales or leasing transaction less GST and conjunctive agent fees

- 131 Mr Jowett was paid 60% of 93% of Coastal's gross commission, as defined, allowing for GST. This represents 77% more than the minimum commission rate under the REIAs. As the commission rate exceeded the minimum by such a significant percentage, the Industrial Magistrate could be confident that it adequately compensated for all leave types, by common standards of industrial fairness. For example, it is a longstanding industrial principle that a loading of 20% to 25% for casual employees is adequate compensation for the value of annual leave, leave loading, sick leave, public holidays and termination benefits (see *UnionsWA Incorporated v Not Applicable* [2025] WAIRC 00129; (2025) 105 WAIG 411 at [13]-[14]).
- 132 In circumstances where the commission Coastal agreed to pay to Mr Jowett was at all times at least double the minimum commission Coastal was required to pay, one could easily reach a view that the over-award commission was an adequate benefit in lieu.
- 133 Because I consider her Honour's construction of s 5 of the LSL Act was correct, any error in the first instance reasoning on this point would be immaterial. Nevertheless, I would uphold Coastal's grounds that allege error in the approach to determining whether the benefit in lieu was adequate.

Part 2 - The 'set-off' issue

Parties' positions at first instance

- 134 In the proceedings at first instance, Coastal relied upon cl 8 of the contract in support of its argument that the commissions it paid to Mr Jowett should be taken into account in satisfaction of its obligation to pay for accrued long service leave on termination. Its submissions at first instance were bare and under-cooked. They did not refer to any legal principles or any authorities that have considered this difficult area of the law.
- 135 Coastal simply asserted that:
- (a) The commissions paid to Mr Jowett exceeded the minimum commission he was entitled to under the REIAs.
 - (b) The commission above the minimum was paid on account of or in lieu of leave entitlements.
 - (c) The commission above the minimum well and truly exceeded the value of his leave entitlements.
 - (d) Mr Jowett accepted payment of the over-minimum commission and did not ever seek to take paid leave during his employment.
 - (e) The commission payments were therefore intended to satisfy any leave entitlements.
- 136 Mr Jowett's submissions did not refer to the law either. In fact, Mr Jowett's submissions were confined to the ability to set-off the over-award commission payments against the annual leave liability, and did not address the long service leave aspects at all.
- 137 However, Mr Jowett submitted cl 8 did not clearly establish what part of the commission over the minimum commission rate related to long service leave, and, accordingly it is not possible to apply that payment as a set-off against Coastal's liability for long service leave.

The Industrial Magistrate's Set-Off and Penalty Decision

- 138 After referring to the relevant legal principles derived from *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84; (2020) 278 FCR 179 (*Rossato*), *James Turner Roofing v Peters* [2003] WASCA 28; (2003) 132 IR 122 (*James Turner Roofing*) and *Moate v I.P.C Pty Ltd (ACN 061 746 996)* [2020] WAIRC 00390; (2020) 100 WAIG 519, the Industrial Magistrate referred to cl 8 of the employment contract and noted that the parties understood, and implicitly that they intended, that leave would be unpaid on account of the higher than REIAs commission rate: [55]-[56]. Her Honour also concluded that the parties understood that if Mr Jowett's employment was terminated, there would be no further payment for leave entitlements: [57].
- 139 The Industrial Magistrate referred to a schedule provided by Coastal which calculated the amount over and above the minimum commission rate Mr Jowett received, demonstrating that such amount would have more than satisfied the requirement to pay leave.

140 However, at [60] of the Set-Off and Penalty Decision, her Honour rejected Coastal's suggestion that the entirety of the amount over and above the minimum commission was for leave, because that suggestion was:

...inconsistent with the finding of fact by the IMC that the *increase* in commission amount from 1 July 2021 was not referable to leave but followed on from negotiations between the parties.

(original emphasis)

141 Her Honour noted that at the time the contract was made, the 2010 REIA enabled the payment in advance of annual leave and other leave entitlements under the NES, but this ability was removed from 2 April 2018 when the REIA was amended.

142 Her Honour therefore found that Coastal was entitled to set-off its liability in relation to the annual leave entitlement up until 2 April 2018. Her reasons for so finding were [64]:

For the following reasons, for the period of employment from 13 November 2012 to 2 April 2018, I am satisfied the respondent is entitled to set-off its liability in relation to the Annual Leave Entitlement:

- (a) the claimant was employed in accordance with the 2010 Award and the Contract;
- (b) the common purpose as it related to the payment of the Claimant's Commission, as understood by the parties, was contained in cl 2 and cl 8 of the Contract and this common purpose was also reflected in cl 17.5(a) of the 2010 Award (pre-2 April 2018), and reduced to writing;
- (c) the common purpose was the claimant would be paid as a minimum 29.5% over the minimum award rate, which would then increase as the total sales increased, and that an additional percentage amount [albeit unspecified] had been included for payment *in advance* of all leave entitlements (and thus leave was taken on an 'unpaid' basis);
- (d) there was no evidence the Claimant's Commission went below the minimum income threshold reflected in cl 16.3 of the 2010 Award (pre-2 April 2018);
- (e) the claimant took the benefit of the additional percentage amount over this period and the parties operated in accordance with their common understanding; and
- (f) the appropriation of the money by the respondent is for, if not the same purpose, a very close purpose rather than for a purpose other than satisfaction of an award entitlement.

(original emphasis)

143 However, her Honour considered the effect of the variations to the REIA from 2 April 2018, together with the fact that the contract provided a mechanism to vary it in accordance with the REIA, but the parties did not do so, was that any close connection between the purpose of the appropriation and the desire to satisfy the award entitlement was severed: [66].

144 The long service leave component was dealt with by her Honour at [70] and [71]:

[70] For the following reasons I am not satisfied the respondent is entitled to set-off its liability in relation to the Long Service Leave Entitlement:

- (a) as set out in the Reasons, an entitlement to long service leave crystallises upon an employee completing a certain number of years' continual service;
- (b) the 2010 Award and its successors make no reference to the provision of long service leave entitlements;
- (c) the Contract refers to 'all leave entitlements as *determined by Legislation*', but does not define or expand on what legislation or what leave, and there was no evidence of what the parties understood this to mean (over and above award conditions) at the time the Contract was signed;
- (d) while it might have been desirable, the claimant's continued employment with the respondent was unknown at the time the Contract was signed;
- (f) in the absence of further evidence and specificity in the Contract, it cannot be said with sufficient certainty that a percentage commission paid over the minimum commission-only percentage under the 2010 Award was intended to meet the future, but unknown, obligation of long service leave entitlements. It is open to speculate that it might have been intended, but I am not satisfied to the requisite standard that it was; and
- (g) accordingly, in my view, the purpose of the appropriation by the respondent and any close connection between the purpose of the appropriation and the desire to satisfy any long service leave entitlement was, again, severed.

[71] The outcome of this determination is that the amount of Long Service Leave Entitlement ordered in the Reasons cannot be set-off by the respondent and the respondent is required to pay the whole of the amount ordered.

(original emphasis)

Grounds of appeal and parties' submissions

145 Coastal's appeal involves four grounds which can be summarised as follows:

Ground 1:

That the Industrial Magistrate erred in fact in finding at paragraph 70(c) of the Set-Off and Penalty Decision that there was no evidence of what the parties understood the words in the contract 'all leave entitlements as determined by Legislation' meant.

Ground 2:

That in not being satisfied that the commission paid over the minimum REIA's commission was intended to meet future long service leave entitlements at 70(e) of the Set-Off and Penalty Decision, the Industrial Magistrate erred:

- (a) In fact, as the evidence was clear about what the intention was and the intention is clear on the face of clause 8; and
- (b) In law, in that there is no requirement for evidence of specificity or the parties' understanding of the meaning of the contract.

Ground 3:

That the Industrial Magistrate erred in law and in fact in finding, at 70(f) of the Set-Off and Penalty Decision, that the purpose of the appropriation by the respondent and any close connection between the purpose of the appropriation and the desire to satisfy long service leave entitlements was severed as:

- (a) On the facts, the purpose of the appropriation never changed;
- (b) The contract and the reason for the payment remained the same; and
- (c) Section 5 of the LSL Act was the same until 20 June 2022.

Ground 4:

That the Industrial Magistrate erred in law by not applying *James Turner Roofing*.

- 146 The grounds were not elaborated on in any depth by Coastal's written and oral submissions. Coastal did not make any reference to *Rossato* and while it listed *James Turner Roofing* in its list of authorities, it made no reference to any particular passage or principle derived from that case.
- 147 Mr Jowett's submissions in response to these grounds simply denied there was any error because the legislation is clear on when and how any payment for long service leave is to be made, and in this case, payment was to be made on termination of the employment. Mr Jowett's written submissions and list of authorities contained no authorities in relation to the question of set-off at all.

Principles: When will over-award commission payments operate to satisfy statutory obligations?

- 148 The principles that apply when determining whether payments made by an employer to an employee can be accounted for as discharging statutory or award obligations have been set out in a number of authorities, largely based on observations first made by Sheldon J in *Ray v Radano* [1967] AR (NSW) 471 at 478-479 and adopted and re-expressed in *Poletti v Ecob (No 2)* [1989] FCA 779; (1989) 31 IR 321 at 332-333. More recently, the principles were summarised by Wheelahan J in *Wardman v Macquarie Bank Limited* [2023] FCAFC 13, 322 IR 278 at [131]:

The seminal decision on these questions is that of the New South Wales Industrial Commission in *Ray v Radano*, and in particular the separate reasons for judgment of Sheldon J which have received subsequent appellate approval. Material passages in the reasons of Sheldon J were approved by the Full Court (Keely, Ryan and Gray JJ) in *Poletti v Ecob (No 2)*, where it was held at 333 that if payments are made by an employer in discharge of a contractual obligation, the question whether concurrent statutory obligations are thereby discharged is answered by looking to the contractual purpose of the payment, objectively ascertained. Thus, if there is a coincidence of purpose, or at least a close correlation between the nature of the particular award obligation and the nature of the contractual obligation, then a payment may operate to discharge both obligations: *Australia and New Zealand Banking Group Ltd v Finance Sector Union of Australia* [2001] FCA 1785; 111 IR 227 (*ANZ v FSU*) at [47], [51]-[52] (Black CJ, Wilcox and von Doussa JJ). See also, *Linkhill* at [98] (North and Bromberg JJ). And consistently with the observation by Sheldon J in *Ray v Radano* at 478 that the answer to the problem can be found by applying common sense, it is not necessary that the same label be used for the payments: *ANZ v FSU* at [52]. It follows from these propositions that the terms of a contract of employment need not advert to award or statutory obligations in order that payments made under the contract operate to discharge those concurrent obligations: *James Turner Roofing* at [29] and [44] (Anderson J, Scott J at [52] generally agreeing, and Parker J at [68] concurring).

- 149 In *Rossato*, White J made further observations about the principles derived from the authorities at [865]-[869]:

- [865] For the purposes of the resolution of the present case, the authorities reviewed above may be taken to stand for the following propositions concerning the entitlement of an employer to set off in analogous circumstances:
- (a) the issue may require the application of the parties' contract: *Poletti* at 332. If they agree that a sum of money is paid and received for a specific purpose which is *over and above or extraneous* to an award entitlement, the contract precludes the employer from later seeking to rely on the payment as satisfying an award obligation which is outside the *agreed purpose of the payment*: *ibid*. If the payment was made for the purpose of satisfying *the kind* of award obligation sought to be satisfied, it may be brought into account as satisfaction or part satisfaction of that obligation. If it was paid for some other purpose, then the employer cannot bring the payment into account: *Discount Lounge Centre* at [23]. Stated more generally, an employer cannot later reallocate an amount agreed to be paid to an employee in respect of subject A (for example, ordinary hours of work) to meet a claim in respect of subject B (for example, overtime): *Ray v Radano* at 478-9 (Sheldon J); *Pacific Publications* at 419; *Discount Lounge Centre* at [57]. The focus is on the purpose of the payment. If it arises out of the same purpose as the award obligation, it can be set off: *ANZ v FSU* at [48]-[52]. I will refer to this as the "Contractual Principle";
 - (b) the issue may involve application of the common law principles concerning payment by a debtor to a creditor: *Poletti* at ALR 393-4; IR 332-3. When there are outstanding award or enterprise agreement

entitlements, a payment designated by the employer as being for a purpose *other* than satisfaction of the award entitlement cannot be regarded as having satisfied the award or enterprise agreement: *ibid*. I will refer to this as the “Designation Principle”;

- (c) close regard must be had to the character of the payment on which the employer relies for the claimed set off and the purpose (usually, the agreed purpose) for which it was made; and
- (d) the purpose for which a payment was made will be a question of fact in each case. It may be express or may be implied from the parties’ agreement or from the employer’s conduct: *James Turner* at [21(3)]. The “designation and appropriation” are matters to be determined by reference to *the whole of the evidence*: *ANZ v FSU* at [56].

...

[868] The Contractual and Designation Principles may not be an exhaustive statement of the circumstances in which set off may or may not be appropriate. The parties’ contractual arrangement and the principles of estoppel may be applicable in some circumstances. It is possible that the principles may require some adaptation, at least in the manner of expression, in some circumstances, for example, when the payments are made in compliance (or purported compliance) with statutory or regulatory obligations and not pursuant to the parties’ agreement.

[869] The authorities have expressed the required connection between the purpose with which the payment was made and the award/enterprise agreement in question in various ways. Expressions such as “properly attributable” and “close correlation” have been used and, in *Pacific Publications*, the payment was described as “independent” of the award entitlement. In *Transpetrol*, Rares J suggested that these relationships could be determined flexibly.

(original emphasis)

Consideration of Ground 1 - Relevance of the parties’ understanding of what the contract meant

150 In order that the amounts Coastal paid to Mr Jowett can be understood to have been paid (and received) in satisfaction of his long service leave entitlements, Coastal had to demonstrate that the commission was paid for that agreed purpose. It sought to do so by reference to cl 8 of the Contract.

151 The Industrial Magistrate’s findings in this regard are difficult to reconcile. At [55] her Honour says that the parties understood cl 8 meant that all leave would be unpaid on account of the commission being more than the REIAs minimum commission. Further, her Honour was satisfied that the contract had the effect of entitling Coastal to ‘set-off’ over-award commission payments towards annual leave entitlements accruing under the 2010 Award pre-2 April 2018: [64]. But then at [70] her Honour says that the clause does not define what legislation or leave the clause is directed to, and ‘there was no evidence of what the parties understood this to mean.’

152 Ultimately, what the parties understood the clause to mean was not relevant. The contractual purpose was to be ascertained objectively.

153 In *Rossato*, Bromberg J observed at [234]:

...[I]f a payment is made pursuant to a contract its purpose will be governed by the contract and must be objectively ascertained by reference to the common intention of the parties as understood by a reasonable person in the position of each of the parties taking into account the text of the contract as well as the surrounding circumstances known to the parties and the purpose and object of the transaction: *Toll* at [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

154 To similar effect, Wheelahan J stated at [1007] that the question of whether the discharge of the indebtedness arising under the contracts of employment also operated to satisfy the statutory obligations to pay the entitlements that Mr Rossato claimed:

...[I]nvolves an inquiry that must look to the objective purpose of the payments under the terms of the contracts of employment set against the circumstances known to both parties, and the surrounding statutory framework, which amounts to determining what a reasonable person would have understood by the terms: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52 at [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

155 In my view, the Industrial Magistrate’s reliance on the parties’ subjective understanding meant that her Honour had regard to an irrelevant consideration.

156 Coastal have made out this ground of appeal.

Consideration of Ground 2 - What contractual specificity was required?

157 Coastal’s Ground 2 is directed at paragraph [70(e)] of her Honour’s reasons, by which her Honour concluded that it cannot be said with sufficient certainty that a percentage commission paid over the minimum commission-only percentage under the 2010 Award was intended to meet the future but unknown obligation of long service leave entitlements, thus precluding a conclusion that there was a sufficiently close connection between the purpose of the appropriation and the desire to satisfy long service leave entitlements.

158 Coastal submitted:

- (a) Her Honour ignored the clear meaning of cl 8 of the contract: Appellant’s Outline of Submissions [14].
- (b) Clause 8 was clearly designed to comply with s 5 of the LSL Act: Appellant’s Outline of Submissions [8(c)] and [14].
- (c) The claimant gave evidence as to his understanding of the intent of both the contract, and the later variation to it:

Appellant's Outline of Submissions [7] and [14].

- (d) There was no evidence that the claimant did not understand what his contractual terms meant: Appellant's Outline of Submissions [8(c)], [13] and [14].
- 159 There is a tension between this ground of appeal, which directs the Full Bench's attention to the evidence about the parties' understanding of the contract, and Ground 1, which alleges that the parties' subjective understanding was irrelevant in the face of the clear objective meaning of the contract.
- 160 I have already dealt with the issue of whether the parties' subjective understanding was relevant.
- 161 Additionally, the ground misconstrues her Honour's reasoning. Read in context, her Honour's reference to the lack of specificity and certainty in the contract is not directed to the parties' understanding of what the contract meant, or what its effects would be. Rather, her Honour was highlighting that the contract itself described its purpose in insufficiently clear terms to enable a conclusion that there was a clear connection between that purpose and the entitlement to long service leave the subject of Mr Jowett's claim.
- 162 The authorities do not require that there be 'specificity' in the contract as to, for example, the percentage of an over-award payment that is attributable to a particular entitlement. The authorities do require that there be a close correlation between the purpose of the payment and the entitlement to be satisfied by the payment: *Rossato* [869]. To find the necessary close correlation, one must look to either the expression of the required connection in the contract, or evidence of the employer's conduct from which such connection can be implied: *Rossato* [865]. It necessarily follows that the degree of specificity or generalisation in the contractual expression will be relevant to finding the required connection.
- 163 Clause 8 refers to '[a]n additional percentage amount' being included in the commission remuneration for 'all leave entitlements as determined by Legislation.' The 'additional' percentage is not specified numerically and no apportionment is provided. However, that lack of specificity does not bear on the key issue, or what White J described as 'the focus', namely the purpose of the payment. It is the purpose of the payment which must have the sufficient connection.
- 164 To this end, her Honour has misapplied the test. Clause 8's reference to 'all leave entitlements as determined by Legislation' is sufficiently specific to be connected to long service leave, including future accrued long service leave entitlements, under the LSL Act (and the current LSL Act).
- 165 I would uphold Ground 2 of the appeal.

Ground 3 - Was the connection between the purpose of the appropriation and the long service leave entitlement severed?

- 166 I understand this ground to be directed to the finding at [70(f)] of the Set-off and Penalty Decision, where her Honour concludes that the purpose of the appropriation and any close connection between the purpose of the appropriation and the desire to satisfy any long service leave entitlement was 'severed.'
- 167 Coastal's particulars of this ground are (Form 8 - Notice of Appeal, 7-8):
- ...
- c. ...
- i. On the facts, the purpose of the appropriation never changed;
- ii. The fact of the contract and the reason for the payment (the appropriation) was always the same. The claimant's entitlement to payment of long service leave, on termination was part of "...all leave entitlements as determined by legislation..."
- iii. Section 5 of the long service leave act remained the same until it was amended, with effect from 20 June 2022 (at which time, the Appellant complied with amended section 5);

(original emphasis)

- 168 Coastal made no written submissions or oral submissions directed to this ground of appeal.
- 169 Again, it appears that Coastal have misconstrued the Court's reasons.
- 170 When her Honour uses the term 'severed' she was in effect saying that the purpose of the payment and the entitlement were not sufficiently closely connected. Her Honour's reasons do not turn on there being a change in the purpose of the payment, nor on the enactment of the 2021 amendments to s 5. Rather it is all of the factors her Honour lists at [70] of the Set-off and Penalty Decision that result in her conclusion that there was an insufficient connection between the purpose of the payment, and the entitlement to be paid accrued but unused long service leave on termination.
- 171 Having said that, it is not entirely clear from the Set-off and Penalty Decision why the Industrial Magistrate considered the factors listed at 70(a), (b) and (d) were relevant to determining whether the contract adequately appropriated money to the satisfaction of Coastal's liability for long service leave. It seems to me that the contract objectively reveals a common intention of the parties as understood by a reasonable person in the position of each of the parties that the commission paid to Mr Jowett would be in full satisfaction of his entitlements under the LSL Act, as well as all other leave entitlements derived from legislation.
- 172 It is a significant feature of this case that Mr Jowett's remuneration was by way of a commission. It was not wages paid for time worked. The commission paid to Mr Jowett therefore had a less direct connection with the work he performed, or at least the time he spent doing the work, than would be the case with a wages based remuneration arrangement. This is a relevant factor in assessing the nature and character of the various payments and obligations arising out of the employment relationship, and the degree of closeness of connection required.
- 173 I am mindful that the statutory framework cannot be ignored: Wheelahan J in *Rossato* at [1007]. The LSL Act did not permit

the parties to contract out of long service leave entitlements in the manner in which they did. However, the entitlement provisions of s 8 and s 9 of the LSL Act are not civil penalty provisions. The LSL Act enabled employees to apply to the IMC to enforce rights arising under those sections (entitlement provisions): s11. This contrasts with the position of modern award entitlements. Under s 45 of the FWA, a person must not contravene a term of a modern award. Section 45 is a civil penalty provision.

174 Further, s 84AA(2) of the IR Act provides that:

If in any proceedings under section 83 or 83E the industrial magistrate's court finds that an employee was engaged under an illegal contract at the time a contravention occurred, the court may nonetheless deal with the matter as if the contract was valid.

175 This statutory framework, unlike that which the Full Court of the Federal Court was concerned with in *Rossato*, does not preclude a finding that the relationship between the purpose of the payment and the relevant entitlement was sufficiently closely connected to entitle Coastal to set-off its commission payments made to Mr Jowett against its liability to pay accrued and untaken long service leave.

176 The express terms of the contract are sufficient to show a clear 'coincidence of purpose' between the commissions paid to Mr Jowett under the contract the amounts that would have been due to him under the LSL Act. Payment of the commission over the Award minimum was made for the purpose of satisfying the kind of obligation sought to be satisfied, that is, long service leave entitlements. Indeed, as Kennett J recently observed in *Ord Minnett Holdings Pty LTD v Theodorou* [2025] FCA 721 at [123], it would be a strange result if an employer who entered into an employment contract providing for remuneration by commission only could not bring into account as satisfaction of its obligations those commissions actually paid.

177 I would uphold this ground of appeal. Coastal's payments of commission to Mr Jowett can be set-off and are taken to have satisfied its obligation under the LSL Act.

Ground 4 - What is the principle established by James Turner Roofing?

178 By this ground, Coastal alleges that the Industrial Magistrate erred in law by not applying *James Turner Roofing*. It refers to Justice Anderson's statement at [29] that 'Justice and the law would have parted company'.

179 By advancing this ground, I understand Coastal to implicitly contend that the principle or principles established by *James Turner Roofing* are at odds with the principles applied by her Honour, derived from *Rossato*, in circumstances where the Full Bench is bound to follow the IAC, rather than the Full Bench of the Federal Court if there is a divergence of opinions between those courts.

180 However, Coastal has not identified a divergence of opinion, nor how practically the application of the principles as articulated in *Rossato* would lead to a different result compared with the application of the principles articulated in *James Turner Roofing*.

181 If Coastal is suggesting that *James Turner Roofing* contains a less strict test for set-off than *Rossato*, I would reject that suggestion. Anderson J's statement of the principles is derived from the same authorities as are referred to in *Rossato*, and there is no suggestion that Anderson J intended to expand the law as it was stated in *Ray v Radano*. See White J in *Rossato* at [879].

182 Ultimately, because I would uphold Grounds 1, 2 and 3 in relation to the 'set-off' issue, it is unnecessary for me to deal with this ground.

Disposition

183 I would dismiss the appeal in FBA 11 of 2024 and the Cross-Appeal in FBA 12 of 2024 but uphold the appeal in FBA 18 of 2024.

184 At first instance, Coastal established, and the Industrial Magistrate accepted, that the commission payments made to Mr Jowett considerably exceeded his award wages entitlement and his legislative leave entitlements. His long service leave entitlements were fully satisfied by the commission Coastal paid to him. Accordingly, no order could be made under s 83A of the IR Act for payment in respect of any underpayment.

185 Accordingly, it is appropriate to order that:

- (a) Order 3 of the Orders dated 5 April 2024 by which Coastal was ordered to pay an amount to Mr Jowett in respect of an entitlement to pro rata long service leave on termination of employment be quashed; and
- (b) Order 3 of the Orders dated 14 August 2024 by which a caution was issued in respect of the failure to pay pro rata long service leave upon termination of employment be quashed.

TSANG C:

186 I have had the benefit of reading the Senior Commissioner's draft reasons for decision. I broadly agree with the Senior Commissioner's reasons summarising the decision at first instance, the grounds of appeal, the parties' submissions and the structure and legislative history to the LSL Act; and that the correctness standard applies to the appeal.

187 I adopt the Senior Commissioner's references, including at [9] above.

188 Furthermore, I agree with the Senior Commissioner that Coastal's Grounds of Appeal 5 and 7 in FBA 11 of 2024 should be dismissed for the reasons outlined at [113]–[122] above.

189 I also agree with the Senior Commissioner's reasons (at [123]–[132] above) regarding Coastal's Grounds of Appeal 8, 12 and 13 in FBA 11 of 2024 that the contract (at [13] above) provided 'an adequate benefit in lieu'.

190 For the reasons that follow, and as the contract provided an adequate benefit in lieu, I would allow Coastal's appeal in FBA 11

of 2024 on the Grounds that relate to the proper construction of s 5 of the LSL Act.

191 Consequently, it is unnecessary for me to deal with FBA 12 of 2024 and FBA 18 of 2024.

Principles for statutory construction

192 The principles for statutory construction (at [34]–[36] above) provide that:

- (a) The focus of statutory construction is upon the text of the provision, having regard to its context and purpose;
- (b) The context includes the legislative history and extrinsic materials;
- (c) While the legislative history and extrinsic materials cannot displace the meaning of statutory text, a court may have regard to them to ascertain the mischief which a statutory provision is intended to remedy;
- (d) Legislation must be construed on the basis that its provisions are intended to give effect to harmonious goals; and
- (e) Ultimately, the task of statutory construction is to discern what Parliament is to be taken to have intended.

193 Section 19 of the *Interpretation Act* states:

19. Extrinsic material, use of in interpretation

- (1) Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material –
 - (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
 - (b) to determine the meaning of the provision when –
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or is unreasonable.
- (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes –
 - (a) all matters not forming part of the written law that are set out in an official version of the law under the *Legislation Act 2021*; and
 - (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of Parliament before the time when the provision was enacted; and
 - (c) any relevant report of a committee of Parliament or of either House of Parliament that was made to Parliament or that House of Parliament before the time when the provision was enacted; and
 - (d) any treaty or other international agreement that is referred to in the written law; and
 - (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted; and
 - (f) the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House; and
 - (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the written law to be a relevant document for the purposes of this section; and
 - (h) any relevant material in any official record of proceedings in either House of Parliament.
- (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to –
 - (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; and
 - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

[Section 19 amended: No. 13 of 2021 s. 50.]

194 Section 5 of the LSL Act is headed ‘Limited contracting-out of long service leave’.

195 While s 32(2) of the *Interpretation Act* states that section headings do not form part of the written law, s 19(2)(a) of the *Interpretation Act*, as amended by s 50 of the *Legislation Act 2021* [No. 13 of 2021], states:

- (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes –
 - (a) all matters not forming part of the written law that are set out in an official version of the law under the *Legislation Act 2021*; and

196 Prior to this amendment, s 19(2)(a) of the *Interpretation Act* stated:

- (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that

subsection in the interpretation of a provision of a written law includes –

- (a) all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer; and

197 Accordingly, the s 5 heading would be a matter which may be considered in the interpretation of s 5 pursuant to s 19(2)(a) of the *Interpretation Act*.

198 That section headings are ‘extrinsic material’ which may be taken into account of pursuant to s 19(1) of the *Interpretation Act* was confirmed in *Re The Honourable G D Kierath, Minister for Heritage; Ex Parte City of Fremantle* at [62]–[63] (Wheeler J, Wallwork J agreeing at [19]): (emphasis added)

62 The heading of s 47 is ‘Criteria for entry in the Register’. The heading to a section of a statute does not form part of the statute (*Interpretation Act*, s 32(2)). **In the absence of any statutory provision**, there were divergent views expressed as to whether at common law a court may take account of a heading or marginal note for the purposes of interpreting a statute. A persuasive discussion of the issue leading to a conclusion that such matters will rarely be of significance but may nevertheless be referred to is to be found in *The Ombudsman v Moroney* [1983] 1 NSWLR 317 (per Street CJ). A similar view was taken in *R v Schildcamp* [1971] AC 1. **However, it is not necessary to explore this matter at length, since if a heading is not part of the written law, it may nevertheless be ‘extrinsic material’ which may be taken account of pursuant to s 19(1) of the Interpretation Act.**

63 In the case of this legislation, the heading in question is to be found in the report of the Standing Committee on Legislation presented in relation to the Bill, and therefore would appear to fall under the *Interpretation Act*, s 19(2)(h). In those circumstances, it appears to me that it is proper to refer to the heading so as to ascertain the ‘drift’ or main idea of the section. It appears to me to be an indication, although a weak one, that the section is intended to set out exhaustively the relevant criteria for directing entry.

199 Section 5 was inserted by the *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA) [No. 79 of 1995] (*Amending Act No. 79 of 1995*).

200 A review of the Industrial Relations Legislation Amendment and Repeal Bill 1995 (**Bill**), and the history to the Bill’s introduction to Parliament, indicates that:

- (a) The Bill (No. 82–1) was introduced into the Legislative Assembly on 21 September 1995 and withdrawn on 14 November 1995: *Parliamentary Debates*, Legislative Assembly, 21 September 1995, 8357; *Parliamentary Debates*, Legislative Assembly, 14 November 1995, 10547.
- (b) The Bill (No. 82–1) was revised and replaced by the Bill (No. 108–1), which was introduced into the Legislative Assembly on 14 November 1995: *Parliamentary Debates*, Legislative Assembly, 14 November 1995, 10547.
- (c) In relation to the LSL Act, the only difference between Bill (No. 82–1) and Bill (No. 108–1) is the addition of the words, ‘during the employment of the employee and’ in s 26(2)(b): (emphasis added)

(2) The employer must ensure that –

- (a) the records are kept in accordance with the regulations; and
- (b) each entry is retained **during the employment of the employee and** for not less than 7 years thereafter.

- (d) Accordingly, s 57 of the Bill (No. 82–1) and s 55 of the Bill (No. 108–1), are in the following identical terms:

Section 5 of the Long Service Leave Act is repealed and the following section is substituted –

“ **Limited contracting-out of long service leave**

5. An employer and an employee may agree that the employee may forgo his entitlement to long service leave under this Act if –

- (a) the employee is given a benefit in lieu of the entitlement; and
- (b) the agreement is in writing. ”

- (e) Relevantly, the Bill (No. 82–1) and the Bill (No. 108–1) which include ‘**Limited contracting-out of long service leave**’ as the heading to s 5, would qualify as material that may be considered in accordance with s 19(1) of the *Interpretation Act*, by virtue of being ‘any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted’ under s 19(2)(e) of the *Interpretation Act*, or ‘any relevant material in any official record of proceedings in either House of Parliament’ under s 19(2)(h) of the *Interpretation Act*.

- (f) Accordingly, whether by virtue of s 19(2)(a), s 19(2)(e) or s 19(2)(h) of the *Interpretation Act*, it would be ‘proper to refer to the heading so as to ascertain the ‘drift’ or main idea of the section’: *Minister for Heritage; Ex Parte City of Fremantle* [63] (at [198] above).

201 Given the correctness standard applies and the Full Bench is required to reach its own view as to the proper construction of s 5 of the LSL Act (see [33] above), in addition to the section heading to s 5, ss 19(1) and (2) of the *Interpretation Act* provide for the following extrinsic material to be considered in the interpretation of s 5:

- (a) Commissioner GL Fielding, *Review of Western Australian Labour Relations Legislation, A report to the Hon. GD Kierath, MLA, Minister for Labour Relations* (July 1995) (**Fielding Report**), sent to the Minister for Labour Relations on 3 August 1995 (*Parliamentary Debates*, Legislative Council, 28 November 1995, 11660), and tabled before the Legislative Assembly on 19 December 1995 (*Parliamentary Debates*, Legislative Assembly, 19 December

- 1995, 13345).
- (b) The Department of Productivity and Labour Relations, *The Industrial Relations Legislation Amendment and Repeal Bill 1995 – SUMMARY (Plain English)*, November 1995 (**Department’s Summary of the Bill**).
 - (c) The Department of Productivity and Labour Relations, *Industrial Relations Legislation Amendment and Repeal Bill 1995 – EXPLANATORY NOTES, (Explanatory Memorandum to the Bill)*
 - (d) *Parliamentary Debates*, Legislative Assembly, 21 September 1995, 8357 (**Second Reading of the Bill in the Assembly on 21 September 1995**).
 - (e) *Parliamentary Debates*, Legislative Council, 12 December 1995, 12995 (**Second Reading of the Bill in the Council on 12 December 1995**).
 - (f) *Parliamentary Debates*, Legislative Assembly, 19 December 1995, 13398 (**Debate in the Assembly on 19 December 1995 on the return of the Bill from the Council with amendments**).

Extrinsic material

202 The Fielding Report states: (footnotes omitted) (emphasis added)

Terms of Reference

On the 2nd day of June, 1994 the Minister for Labour Relations announced to the State Parliament that there was to be an independent review of the State’s labour relations legislation, other than that concerned with the system of workplace agreements, with the following Terms of Reference –

1. To enquire into and report to the Minister for Labour Relations on the provisions and operation of the Industrial Relations Act 1979 and related legislation including but not limited to:
 - 1.1 Factories and Shop Act 1963;
 - 1.2 Public and Bank Holidays Act 1972;
 - 1.3 **Long Service Leave Act 1958**;
 - 1.4 Truck Act 1899;
 - 1.5 Masters and Servants Act 1892; and
 - 1.6 Trade Unions Act 1902.
2. Without limiting the generality of the review, where considered appropriate and necessary, to make recommendations for the repeal of, or amendment to any provisions of the legislation, or for any other action, in respect of:
 - 2.1 The structure, role and effectiveness of:
 - 2.1.1 The Western Australian Industrial Relations Commission including its Constituent Authorities;
 - 2.1.2 The Industrial Magistrate’s Court;
 - 2.1.3 The Industrial Appeal Court; and
 - 2.1.4 **Boards of Reference**.
 - 2.2 Those services provided by the Western Australian Industrial Relations Commission for which modest fees should be introduced and the levels of those fees;
 - 2.3 Enhanced protection of individuals’ rights by:
 - 2.3.1 allowing individuals greater access to the Western Australian Industrial Relations Commission;
 - 2.3.2 facilitating the right to freedom of association;
 - 2.4 Facilitating the right to collective organisation and representation;
 - 2.5 The relationship between the State and Federal industrial relations systems with a view to minimising duplication;
 - 2.6 The removal of any unnecessary procedural and legislative obstructions to users of the system of compulsory arbitration; and
 - 2.7 Re-drafting the legislation using plain English and, where appropriate, repealing or consolidating Acts.

...

Chapter 7 – Long Service Leave Act 1958

... Moreover, I recommend that instead of having to seek permission from the Commission to be exempted from its provisions, the Act be amended to authorise parties to common law employment contracts or workplace agreements to contract out of the provisions of the Act in writing. In this way, employees not covered by an award or industrial agreement would be bound by the provisions of the Act, unless they agreed otherwise.

Workplace Agreements

The philosophy underlying the Act is that it should apply only to employees not covered by awards and industrial agreements made by or registered in the Commission. The Workplace Agreements Act 1993 provides that where a workplace agreement is in force, any award or industrial agreement, which once covered the employment, no longer

applies. In consequence, the Long Service Leave Act 1958 currently applies to private sector employees covered by such an agreement. **If, as I recommend, parties are able to contract out of the Act,** employees covered by workplace agreements would be in no different position to other non-award employees.

...

Enforcement

Board of Reference

...

Although Boards of Reference function as efficiently as could be expected, as mentioned in my review of the Industrial Relations Act 1979, the concept of a Board of Reference is not an efficient one. All those who commented on the subject, apart from the Registrar and a firm of city solicitors, were unanimous that Boards of Reference, including the Long Service Leave Boards, should be abolished. ...

I recommend that the Boards of Reference under the Long Service Leave Act 1958 (and under the General Order) be abolished.

Industrial Magistrate's Court

... Boards of Reference do not have authority to make an order or give a direction to enforce compliance with either the Long Service Leave Act 1958 or the Commission's General Order. They only have authority to determine disputes with respect to matters such as the length of service or the status of an employee. Any monetary benefit which flows from such a determination must be enforced in the Industrial Magistrate's Court. It would be more efficient if all these matters were dealt with at the one time by the Court exercising its power to determine the rights and liabilities arising under the Act, rather than simply enforcing determinations of the Board. Although the Industrial Relations Act 1979 expressly gives the Commission power to entertain disputes regarding long service leave entitlements, the Commission has no power to enforce an award or the provisions of the Act which fix the long service leave entitlements. In this respect, the Commission has no more authority than Boards of Reference. ...

I therefore recommend that the jurisdiction previously exercised by the Boards of Reference to determine questions and disputes regarding rights and liabilities under the Act be exercised exclusively by the Industrial Magistrate's Court.

...

Recommendation 223

That the Act be amended to authorise parties to common law employment contracts or workplace agreements to contract out of the provisions of the Act in writing.

(page 410)

...

Recommendation 226

That the jurisdiction previously exercised by the Boards of Reference to determine questions and disputes regarding rights and liabilities under the Act be exercised exclusively by the Industrial Magistrate's Court.

(page 418)

203 The Department's Summary of the Bill states: (emphasis added)

Flexible Long Service Leave

The Long Service Leave Act 1958 is being updated with provisions allowing for greater flexibility in the taking of leave. **Employees can trade-off the leave for another benefit, such as extra pay, if they so choose.**

204 The Explanatory Memorandum to the Bill states: (emphasis added)

PART 9 LONG SERVICE LEAVE ACT AMENDMENTS

This Part amends the Long Service Leave Act 1958 with consequential amendments to other legislation. The Act gives an entitlement to long service leave for those that do not have such a benefit granted by any other instrument. The references to the relative industrial legislation are brought up to date, increased flexibility is made available for the taking of leave **and contracting out provisions are inserted.** The enforcement provisions are made consistent with the enforcement provisions of other instruments which confer benefits on employees.

...

Clause 54

...

Boards of Reference will no longer exist under the Act, with their function being carried out by the industrial magistrate's court.

...

Subclause (3) excludes certain persons from the provisions of the Act by defining them not to be employees. ... This amendment provides that where a person has a long service leave benefit given by an award or industrial agreement, a workplace agreement, **a term of the person's common law contract of employment** or any enactment of the State, the Commonwealth or another State or Territory, then providing that entitlement is at least equivalent to what is available under this Act, such persons are not employees for the purposes of this Act.

Clause 55

Section 5 of the existing Act enabled a Board of Reference to exclude employers from the provisions of the Act if their employees had at least an equivalent long service leave benefit. **That section has been repealed as Boards of Reference will no longer exist. Contracting out provisions have been inserted in lieu.** Any exclusions that have been granted in the past are continued for 6 months or until the relevant employers and employees put their long service leave provisions into a contractual agreement **or enter into a contracting out arrangement as provided by the substituted section (ie the long service leave benefit may be traded off by the parties).** To be valid the contracting out agreement must be in writing.

...

Clause 69

...

The transitional provisions also provide that exemptions from the Act granted under the old section 5, continue **until a contracting out agreement under the new section 5 is entered into** or until 6 months after this Part comes into force. The 6 months may be extended by the Minister on application by an employer.

...

Clause 60

Parts IV, V and VI of the existing Act deal with Boards or Reference, appeals from their determinations and the enforcement of the Act respectively. As there are to be no Boards or Reference, Parts IV and V are redundant and are repealed. The new Part V, replacing Part VI confers jurisdiction on an industrial magistrate's court to deal with claims for long service leave benefits.

Subsection 11(1) of the new Part V specifies some of the issues the industrial magistrate's court can deal with. These were formally the areas of jurisdiction of the Board of Reference. ...

Clause 62

Section 26 is Division 2 of Part VII and relates to the keeping of employment records. The existing section is repealed and replaced with record keeping provisions based on those in the Minimum Conditions of Employment Act and Workplace Agreements Act with special provision for the keeping of records of the amount and type of leave taken by the employee **and details of any section 5 contracting out arrangement that has been entered into.** The records must enable calculations to be made of the amount of long service leave, if any, that any employee is entitled to. It is an offence punishable by a fine of up to \$5000 not to keep records showing the relevant details and the records must be kept for the entire period of employment and for 7 years thereafter.

205 The Second Reading of the Bill in the Assembly on 21 September 1995 notes:

MR KIERATH (Riverton – Minister for Labour Relations) [12.04 pm]: I move –

That the Bill be now read a second time.

...

Part 10: Amendments relating to long service leave –

The Long Service Leave Act 1958 will be generally renovated and new provisions will allow for greater flexibility in the taking of the leave. The Act will continue to apply to all those people who do not have an equivalent or better long service leave entitlement under an award, industrial agreement or workplace agreement, as part of their contract of employment or by virtue of an enactment of a State, Territory or the Commonwealth. **The Act has been made more flexible through the insertion of provisions that enable parties to trade off long service leave for some other benefit if they so wish,** or for leave to be taken in multiple periods, none of which can be less than a week. Boards of reference and the commission in court session will no longer deal with claims for long service leave entitlements. These, and any failure by an employer to keep relevant employment records, will be dealt with in the Industrial Magistrate's Court.

...

This Bill provides a greater empowerment of individuals, and **provides employees and employers with better means of dealing directly with each other and, with respect to long service leave, with greater flexibility.** Furthermore, these provisions will bring to the industrial relations system in this State a greater certainty about the rights and responsibilities of organisations and of their members. In conclusion, while I recognise that some elements of this legislation have been portrayed as controversial, the reality is that, by the provisions of this Bill, the industrial relations legislation of this State will be comprehensively streamlined and modernised.

I commend the Bill to the House.

Debate adjourned, on motion by Ms Warnock.

206 The Second Reading of the Bill in the Council on 12 December 1995 notes: (emphasis added)

Hon AJG MacTIERNAN: ... We are concerned about changes to the Long Service Leave Act **and the capacity to effectively contract out long service leave entitlements.** Although that is not the most earth-shattering provision, it is an erosion of the conditions that Australian workers have had for many years. ...

...

Clause 47: Section 5 repealed and a section substituted –

Hon AJG MacTIERNAN: This clause proposes to repeal section 5 of the Long Service Leave Act and to replace it. The section that is proposed to be repealed held that the alternative scheme had to be approved by a board of reference. **This proposed new section is allowing an employer and an employee to agree that the employee may forgo his or her entitlement to long service leave if the employee is given a benefit in lieu and the agreement is in writing.**

We have a problem with this, as we have with agreeing with many of the pieces of legislation in the industrial arena put forward by the Government. This provision says that it is all about providing choice to employees and employers. Given the inequality of bargaining power, we know that by and large the choice is with the employer and not the employee. That is why we have the industrial relations system in the first instance. We would not bother to have an industrial relations system, an arbitration Act, awards or minimum conditions unless we recognised a profound inequality of bargaining power. When we get these sorts of provisions which purport to justify themselves on the basis of freedom of choice, we are rightly sceptical. The previous arrangements did allow for a contracting out of long service leave entitlements and for alternative arrangements to be put in place, but they were required to be put before a board of reference that would test whether the scheme was adequate. It is very similar to the system in the federal industrial relations arena where a person is entitled to enter into the enterprise agreement but the Industrial Relations Commission maintains an overriding supervisory role to ensure that the employees are not ripped off. That role has been discharged by the board of reference.

We now see a provision where the alternative system is not examined up-front when it is put in place. It may be 15 years down the track before this arrangement is found not to be truly an adequate benefit in lieu. We are opposed to this clause. There is neither a test of adequacy here nor a body to supervise whether the alternative that is given is adequate. This is yet another example of the supposed choice of what is really a provision that leaves employees highly exposed and in many instances will see them losing their entitlement. I move –

Page 54, line 22 – To delete the word ‘a’ and substitute ‘an adequate’.

Hon PETER FOSS: That amendment is acceptable. **The idea of this is to maintain the flexibility of substituting some alternative benefit.** This does give a considerable amount of flexibility but it does make certain that it is purely a nominal amount which is an appropriate substitution.

Hon AJG MacTIERNAN: I thank the Minister for indicating his preparedness to accept the amendment. This improves to some extent the operation of this provision. We still believe, however, that there should be a supervisor which determines the adequacy or otherwise of such an arrangement, and **determines that adequacy at the beginning of the arrangement rather than at the end when it could often be too late.** However, we do not have the numbers and we are grateful for any small concession thrown in our direction.

Amendment put and passed.

Clause, as amended, put and passed.

207 The Debate in the Assembly on 19 December 1995 on the return of the Bill from the Council with amendments notes: (emphasis added)

No 19

Clause 55, page 78, line 19 – to delete the words ‘a benefit’ and substitute ‘an adequate benefit’.

...

Mr KIERATH: I move –

That amendment No 19 made by the Council be agreed to.

Mrs HENDERSON: The amendment relates to long service leave and where, under the Bill, **people are allowed to trade off long service leave.** Members may recall that long service leave was originally provided to allow people in the colony to travel back to Britain. Later, it was provided to allow people a reasonable break after they had worked continuously for a number of years.

The Bill allowed people to trade off, under workplace agreements, their long service leave for any other benefit. The kind of benefit that people would receive in return was not specified. The provision would allow the kind of pressure, to which I drew the attention of the Chamber, in relation to many of my constituents who work in supermarkets. They were presented with workplace agreements which traded off their conditions.

Under the provisions in the Bill, people would have traded off long service leave for very paltry benefits. **The amendment requires that, when people trade off part of their long service leave, they receive an adequate benefit in return.** That is the very minimum. I would like there to be no provision allowing people to trade off long service leave. The intention of long service leave was to give people a reasonable break. I prefer people not to be coerced into trading off that leave. In that respect, I note that there is a notice beside the post office to the effect that workers in this building are under pressure to trade off their conditions, but they want to reject that pressure. I support the amendment which at least requires that, **where there is trading off, people receive an adequate benefit in return for the loss of their long service leave.**

Question put and passed; the Council’s amendment agreed to.

208 As a consequence of the matters at [206]–[207] above, s 5 of the LSL Act, which came into operation on 16 January 1996 when the *Amending Act No. 79 of 1995* received Royal Assent, states: (emphasis added)

Limited contracting-out of long service leave

5. An employer and an employee may agree that the employee may forgo his entitlement to long service leave under this Act if –

- (a) the employee is given **an adequate** benefit in lieu of the entitlement; and
- (b) the agreement is in writing.

Consideration

- 209 Applying the principles at [192] above, I find that the contract (at [13] above) between Coastal and Mr Jowett constituted a written agreement under s 5 of the LSL Act.
- 210 I find that s 5 of the LSL Act has a clear and unambiguous meaning, allowing an employer and an employee to agree to contracting-out of the employee's entitlement to long service leave under the LSL Act.
- 211 The 'drift or main idea of' s 5 is stated in the heading, 'Limited contracting-out of long service leave': see [200(f)] above.
- 212 I find that the word, 'Limited' in the heading, means the limitation on an employer and an employee agreeing to what is in the chapeau to s 5, namely, agreeing to the employee foregoing their entitlement to long service leave under the LSL Act.
- 213 I find that the only 'limitation' on an employer and an employee agreeing to the employee foregoing their entitlement to long service leave under the LSL Act is outlined in ss 5(a) and (b), namely that:
- (a) The employee is to be given a benefit in lieu of the entitlement, which needs to be an adequate benefit in lieu; and
 - (b) The agreement needs to be in writing.
- 214 I find that, properly construed, s 5 does not limit an employer and an employee agreeing to the employee forgoing their entitlement to long service leave under the LSL Act to when the employee has a crystallised entitlement to long service leave under the LSL Act. Rather, s 5 allows an employer and an employee to agree to the employee forgoing a contingent entitlement to long service leave under the LSL Act, for the reasons that follow.
- 215 Section 5 refers to an employer and an employee agreeing to the employee foregoing 'his entitlement to long service leave under this Act'. The phrase, 'his entitlement to long service leave under this Act', only appears in s 5.
- 216 However, the phrase, 'entitlement to long service leave under this Act', appears in s 4(3), ss 7(1) and (2), and in s 26(1)(f) of the LSL Act.
- 217 Section 4(3) uses the phrase, 'the entitlement to long service leave under this Act': (emphasis added)
- 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).
- 218 The Industrial Appeal Court (IAC) determined the proper construction of s 4(3) of the LSL Act in *Yoon*. The IAC said [58]–[64] (Buss and Murphy JJ, Kenneth J agreeing at [81] except regarding the reasons remitting the matter back to the Full Bench for a further hearing): (emphasis added)
- 58 Thirdly, the words '*entitled to, or eligible to become entitled to*' in s 4(3) require consideration. They appear to be a vestige of the language of exclusion in the former version of the LSL Act, which referred to the person not being an employee '*if and while* the person is entitled, or eligible to become entitled, to long service leave [elsewhere]' (emphasis added). The words in question are contained within that part of s 4(3) which provides 'a person is, by virtue of [another instrument] entitled to, or eligible to become entitled to, long service leave'.
 - 59 These words are to be read in the context of s 4(3) and the LSL Act as a whole, including s 8 and s 9. The words 'entitled to, or eligible to become entitled to' form a composite phrase upon which, as a whole, the preceding words operate. The preceding words are 'a person' who is 'by virtue of [an agreement] ...'. Read as a whole, and in this context, it appears to be used as an expansive phrase to comprehend an actual or contingent entitlement under another instrument, irrespective of whether it has accrued, or has not yet accrued. In other words, in its context, the phrase appears to be a comprehensive one used by the legislature to refer to an actual or contingent entitlement which any person has under another instrument to long service leave, irrespective of whether it has been accrued or not. Accordingly, it indicates that the comparison required by s 4(3) does not have its focus on the individual's employment history from time to time (as the comparison is to be undertaken irrespective of any accrual of entitlement), but, rather, on the person's entitlement as appears from the terms of the two respective instruments (the LSL Act and the other instrument).
 - 60 Fourthly, the use of the definite article in the phrase 'the entitlement to long service leave under this Act' suggests that s 4(3) is intended to operate on the basis that **the LSL Act provides for a comprehensive entitlement, albeit comprising successive specific entitlements or benefits with increasing longevity of service**. That is consistent with the structure of s 8, under which s 8(1) provides that an employee 'is entitled in accordance with, and subject to, the provisions of this Act, to long service leave'. **The specific entitlements or benefits which make up 'the entitlement to long service leave under' the LSL Act are specified in s 8(2) and s 8(3)**. The words '[t]he entitlement' with respect to leave under the LSL Act, also appear in s 7(3), discussed below.
 - 61 The foregoing considerations indicate that the comparison required by s 4(3) is to be made prospectively by reference to the terms of the respective instruments, rather than from time to time during the course of the employment history of a particular employee. That construction is confirmed by a consideration of s 7 of the LSL

Act.

62 As noted earlier, s 7(3) provides:

The entitlement to leave under this Act shall be in substitution for and satisfaction of any long service leave to which the employee may be entitled in respect of employment of the employee by the employer.

63 In other words, where the s 4(3) comparison results in the person being an 'employee' for the purposes of the LSL Act, and thereby entitled to leave under the LSL Act, **'[t]he entitlement' under the LSL Act applies** in substitution for, and satisfaction of, 'any' long service leave entitlement under the other instrument. There appears to be no dual operation intended. Section 7(1) is complemented by s 7(2), which refers to the grant of leave 'under any long service leave *scheme* and irrespective of this Act' (emphasis added). The effect of s 7(2) is that where, by virtue of s 4(3), the LSL Act applies, but, in fact, there has been a grant of leave (or a payment in lieu) under any other long service leave 'scheme', then that is taken into account in calculating the employee's entitlement to long service leave under the LSL Act as if it were long service leave taken (or payment in lieu made) under the LSL Act. Sections 7(2) and (3) indicate that when the statutory entitlement **applies**, it applies to the exclusion of the scheme under the other instrument. In other words, it appears that the legislature did not (objectively) intend that the two schemes should operate in tandem. On that basis, there could be no prospect of any doubling-up between the two.

64 That conclusion tends to be confirmed by reference to the long title to the LSL Act. The expression 'the granting of long service leave to certain Western Australian employees' denotes the provision of statutory long service leave to some employees only. Ms Yoon's approach to construction suggests an enactment of a different character. On Ms Yoon's approach, statutory long service leave is provided to virtually all employees (having regard to the breadth of the definition) in order, effectively, to 'top up' aspects of their existing benefits from time to time over the course of their working lives.

219 Relevantly, the IAC in *Yoon* [60]–[61] states:

- (a) The use of 'the' in the phrase, 'the entitlement to long service leave under this Act', suggests that the LSL Act provides for a comprehensive entitlement, albeit comprising successive specific entitlements or benefits with increasing longevity of service.
- (b) The interpretation in the preceding sub-paragraph is consistent with s 8 of the LSL Act, which under s 8(1) provides that an employee 'is entitled in accordance with, and subject to, the provisions of this Act, to long service leave'.
- (c) The specific entitlements or benefits which make up 'the entitlement to long service leave under' the LSL Act are specified in ss 8(2) and (3).
- (d) The comparison required by s 4(3) of the terms of the other instrument and the terms of the LSL Act, is to be made prospectively, rather than from time to time during the course of the employee's employment.

220 Accordingly, the phrase, 'the entitlement to long service leave under this Act' in s 4(3) refers to the comprehensive entitlements under the LSL Act, which comprise of the specific entitlements or benefits in ss 8(2) and (3), which accrue with increasing longevity of service.

221 Given the phrase, 'the entitlement to long service leave under this Act' in s 4(3) refers to entitlements or benefits that accrue with increasing longevity of service, which is a reference to a prospective entitlement, it would be incongruous to construe the phrase, 'his entitlement to long service leave under this Act' in s 5 as meaning only a crystallised entitlement.

222 Likewise, *Yoon* [63] refers to 'the entitlement under the LSL Act' as applying in substitution for, and satisfaction of, 'any' long service leave under the other instrument where the comparison required by s 4(3) results in the person being an 'employee' for the purposes of the LSL Act. Given *Yoon* [61] states that the comparison is to be made prospectively, it follows that the comparison would include prospective entitlements. Therefore, it would be incongruous to construe the phrase, 'his entitlement to long service leave under this Act' in s 5 as meaning only a crystallised entitlement.

223 Sections 7(1) and (2) of the LSL Act use the phrase, 'the employee's entitlement to long service leave under this Act': (emphasis added)

7. Employment before commencement of this Act

- (1) For the purpose of this Act the employment of an employee by the employer by whom he is employed on the coming into operation of this Act shall, subject to the provisions of this section and to those of section 6, be deemed to have commenced on the day on which the employee was first employed by that employer, but in the calculation of **the employee's entitlement to long service leave under this Act** not more than 20 years' continuous employment before the coming into operation of this Act shall be counted.
- (2) Any leave, in the nature of long service leave or, as the case may be, payment in lieu thereof, granted, whether before or after the coming into operation of this Act, under any long service leave scheme and irrespective of this Act to an employee in respect of any period of continuous employment with his employer, shall be taken into account in the calculation of **the employee's entitlement to long service leave under this Act** as if it were long service leave taken under this Act, or, as the case may be, payment in lieu of long service leave under this Act and to be satisfaction to the extent thereof of any entitlement of the employee under this Act.
- (3) The entitlement to leave under this Act shall be in substitution for and satisfaction of any long service leave to which the employee may be entitled in respect of employment of the employee by the employer.

[Section 7 amended by No. 37 of 1964 s. 4.]

224 In considering s 7 of the LSL Act, the IAC in *Yoon* [25]–[26] and [63] states:

- (a) While the heading to s 7 is 'Employment before commencement of this Act', only s 7(1) deals with that topic exclusively.
 - (b) Section 7(1) effectively provides that where an employee was employed when the LSL Act came into operation (24 December 1958), the day their employment commenced is deemed to be their commencement date for the purposes of the LSL Act; except in calculating their entitlement to long service leave under the LSL Act, any period prior to 24 December 1938 will not be counted.
 - (c) Section 7(1) is complemented by s 7(2).
 - (d) Sections 7(2) and (3) indicate that where a person is an 'employee' for the purposes of the LSL Act, is 'when the statutory entitlement applies', and it applies to the exclusion of the scheme under the other instrument.
- 225 Sections 7(1) and (2) use the phrase, 'the calculation of the employee's entitlement to long service leave under this Act'. The IAC in *Yoon* [63] states that this calculation is undertaken 'where, by virtue of s 4(3), the LSL Act applies'. *Yoon* [61] states that the comparison required by s 4(3) 'is to be made prospectively'. Furthermore, that where the s 4(3) comparison results in the person being an 'employee' for the purposes of the LSL Act, is when the statutory entitlement applies: *Yoon* [63].
- 226 Given *Yoon* [61] and [63] states that the phrase in s 4(3), 'the entitlement to long service leave under this Act' and the phrase in ss 7(1) and (2), 'the calculation of the employee's entitlement to long service leave under this Act', refer to a comparison, and a calculation, each of which is to be made prospectively; it would be incongruous to construe the phrase, 'his entitlement to long service leave under this Act' in s 5 as meaning only a crystallised entitlement.
- 227 As it would be incongruous to construe the phrase in ss 7(1) and (2), 'the calculation of the employee's entitlement to long service leave under this Act' as meaning only a crystallised entitlement; the same would apply to the phrase in s 26(1)(f), 'the calculation of the entitlement to, and payment for, long service leave under this Act': (emphasis added)

26. Keeping of employment records

- (1) An employer must ensure that details are recorded of —
 - (a) each employee's name and, if the employee is under 21 years of age, the employee's date of birth;
 - (b) the date on which the employee commenced employment with the employer;
 - (c) the gross and net amounts paid to the employee under the contract of employment, and all deductions and the reasons for them;
 - (d) all leave taken by the employee, whether paid, partly paid or unpaid;
 - (e) details of any agreement made under section 5 between the employer and the employee;
 - (f) such other details as are necessary for **the calculation of the entitlement to, and payment for, long service leave under this Act**; and
 - (g) other matters prescribed by the regulations.
 - (2) The employer must ensure that —
 - (a) the records are kept in accordance with the regulations; and
 - (b) each entry is retained during the employment of the employee and for not less than 7 years thereafter.
- Penalty: \$5 000.

228 Section 26 was inserted by s 54 of the *Amending Act No. 79 of 1995*, which repealed and substituted the previous s 26, which stated:

- 26.** (1) Each employer shall during the employment and for a period of twelve months thereafter or, in the case of termination by death of the employee a period of three years thereafter, keep a record from which can be readily ascertained the name of each employee and his occupation, the date of the commencement of his employment and his entitlement to long service leave and any leave which may have been granted to him or in respect of which payment may have been made under this Act.
- (2) The record referred to in subsection (1) of this section shall be open for inspection in the manner and circumstances prescribed by this Act.

229 The substituted ss 26(1)(e) and 26(2) require the employer to keep a record of the details of the agreement made under s 5 during the employee's employment and for not less than seven years thereafter.

230 The substituted s 26(1)(f) requires the employer to keep 'such other details **as are necessary**' for the calculation of the employee's entitlement to, and payment for, long service leave under the LSL Act.

231 Accordingly, if an employer and an employee have made an agreement under s 5 of the LSL Act, while the employer would be required to keep a record of the details of the s 5 agreement under s 26(1)(e), the requirement for the employer to keep the records referred to in s 26(1)(f) would not arise as it would be **unnecessary** to undertake the calculation referred to in s 26(1)(f).

232 The *Amending Act No. 79 of 1995* also inserted the following transitional provisions into the LSL Act:

- (2) On the commencement day —
 - ...
 - (b) where an exemption has been granted under section 5 of the former provisions to an employer in respect of the employees of that employer, that exemption continues until —

- (i) an agreement is entered into under section 5 of the amended provisions by that employer with each of the employees of that employer; or
 - (ii) the expiry of the period of 6 months, or such extended period as is determined in relation to that employer pursuant to subsection (3), after the commencement day,
- whichever is the earlier.

(3) The Minister may, on the application of an employer who has been granted an exemption under section 5 of the former provisions, extend the period of 6 months referred to in subsection (2)(b)(ii) for such further period as the Minister determines.

233 The former s 5 allowed the Board of Reference, on application by an employer, to exempt an employer from the operation of the LSL Act, if it was satisfied there was an existing or proposed scheme conferring benefits in the nature of long service leave which are, or will be, viewed as a whole, not less favourable to the whole of the employees of that employer than the benefits prescribed by the LSL Act.

234 As outlined in the transitional provisions at [232] above, an exemption granted by the Board of Reference under the former s 5 continues to apply following the commencement of the transitional provisions, until the earlier of:

- (a) Six months, or the extended period determined by the Minister in accordance with subsection (3); and
- (b) The employer entering an agreement under the amended s 5 with **each** employee.

235 Section 4(3) of the LSL Act was inserted by s 46(3) of the *Amending Act No. 79 of 1995*, concurrently with the following (now repealed) definition of 'workplace agreement':

'workplace agreement' means a workplace agreement that is in force under the *Workplace Agreements Act 1993*.

236 At that time, s 4(3)(b) stated: (emphasis added)

- (b) a workplace agreement **or other agreement** between the person and his employer; or

237 Under the LSL Act, and in *Yoon*, s 4(3)(b) states: (emphasis added)

- (b) an employer-employee agreement under Part VID of the *Industrial Relations Act 1979* **or other agreement** between the person and his employer; or

238 Section 7 of the IR Act defines an 'employer-employee agreement' as an agreement provided for by s 97UA of the IR Act:

97UA. Employer and employee may make EEA

A single employer and a single employee may make an agreement, called an employer-employee agreement, that deals with any industrial matter.

[Section 97UA inserted: No. 20 of 2002 s. 4.]

239 In *Yoon*, Ms Yoon's terms of employment were contained in an industrial agreement. Therefore, the IAC in *Yoon* did not need to consider the meaning of 'or other agreement' in s 4(3)(b).

240 As outlined at [235]–[238] above, s 4(3)(b) originally referred to a workplace agreement, and subsequently refers to an employer-employee agreement, which are both registered agreements made between an employer and a single employee. In contrast, s 4(3)(a) refers to an award or industrial agreement, and s 4(3)(c) refers to statutory enactments.

241 Therefore, 'or other agreement' in the context of s 4(3)(b), refers to an agreement made between an employer and a single employee that is not a registered agreement; specifically, a common law contract of employment.

242 This construction is confirmed by the Explanatory Memorandum to the Bill (at [204] above), which states the following in relation to s 4(3): (emphasis added)

This amendment provides that where a person has a long service leave benefit given by an award or industrial agreement, a workplace agreement, **a term of the person's common law contract of employment** or any enactment of the State, the Commonwealth or another State or Territory, then providing that entitlement is at least equivalent to what is available under this Act, such persons are not employees for the purposes of this Act.

243 On this construction, upon the proclamation of the *Amending Act No. 79 of 1995* and despite the repeal of the provisions relating to the Board of Reference, the insertion of ss 4(3), 5 and the transitional provisions, mean:

- (a) An employer previously granted an exemption by the Board of Reference, could continue the exemption (in substance but not in form) by entering into a s 5 agreement with each employee, within six months (or the extended period granted by the Minister under subsection (3) of the transitional provisions) of the date of proclamation of the *Amending Act No. 79 of 1995*.
- (b) An employer could be exempted from the operation of the LSL Act by s 4(3), because of an award, industrial agreement, registered individual agreement, common law contract of employment or statutory enactment containing terms providing for long service leave at least equivalent to the entitlement to long service leave under the LSL Act.
- (c) An employer could enter a s 5 agreement with a single employee.

244 This construction is confirmed by the Explanatory Memorandum to the Bill (at [204] above), which states the following in relation to s 5: (emphasis added)

Section 5 of the existing Act enabled a Board of Reference to exclude employers from the provisions of the Act if their employees had at least an equivalent long service leave benefit. That section has been repealed as Boards of Reference will no longer exist. **Contracting out provisions have been inserted in lieu.** Any exclusions that have been granted in

the past are continued for 6 months **or until the relevant employers and employees put their long service leave provisions into a contractual agreement or enter into a contracting out arrangement as provided by the substituted section (ie the long service leave benefit may be traded off by the parties)**. To be valid the contracting out agreement must be in writing.

...

The transitional provisions also provide that exemptions from the Act granted under the old section 5, continue **until a contracting out agreement under the new section 5 is entered into** or until 6 months after this Part comes into force. The 6 months may be extended by the Minister on application by an employer.

- 245 Specifically, the construction in [243] above is confirmed by the reference at [244] above, to the transitional provisions providing for the exclusions previously granted by the Board of Reference continuing for six months, or until the relevant employers and employees:
- (a) 'put their long service leave provisions into a contractual agreement'; or
 - (b) 'enter into a contracting out arrangement as provided by the substituted section (ie the long service leave benefit may be traded off by the parties)'.
- 246 The use of the word 'or' in [244] above, between the contractual agreement referred to at [245(a)] above and the contracting out arrangement referred to at [245(b)] above, confirms the construction that the contractual agreement and the contracting out arrangement are alternatives.
- 247 That the contractual agreement and the contracting out arrangement at [245] above are alternatives, confirms the construction of s 5 as not limited to crystallised entitlements, for the following reasons.
- 248 As outlined at [233] above, the Board of Reference could exempt an employer from the operation of the LSL Act if it was satisfied that the employer had or was proposing a scheme conferring benefits in the nature of long service leave. Accordingly, [245(a)] above should be understood as referring to an exempted employer putting the **scheme** conferring benefits in the nature of long service leave 'into a contractual agreement'. As outlined at [235]–[243] above, the exempted employer could put the scheme into a contractual agreement under s 4(3)(b).
- 249 Given the former s 5's references to the Board of Reference assessing an existing **or proposed scheme**, and ensuring that the benefits under the scheme **remain** not less favourable to the whole of the employees than the benefits under the LSL Act by granting the exemption subject to conditions, and 'from time to time' adding to, varying or revoking any conditions imposed; it is implicit that the Board of Reference's assessment was undertaken prospectively.
- 250 Likewise, under s 4(3)(b), the contractual agreement is considered prospectively; irrespective of whether or not the entitlements have accrued: *Yoon* [59], [61].
- 251 Specifically, [244] and [245(b)] above, refer to the exemption granted by the Board of Reference (which as noted at [249] above relates to **prospective entitlements) continuing by** the employer entering into a s 5 'contracting out arrangement'. These references confirm the construction of a s 5 contracting-out arrangement as not limited to crystallised entitlements.
- 252 As outlined at [215] above, the phrase 'his entitlement to long service leave under this Act' only appears in s 5, whereas ss 4(3) and 26(1)(f) use the phrase, 'the entitlement to' 'long service leave under this Act'.
- 253 In any event, the phrase in s 5, 'his entitlement to long service leave under this Act' should be construed consistently with the construction in *Yoon* of the phrase in s 4(3), 'the entitlement to long service leave under this Act', for the preceding reasons and for the reasons that follow.
- 254 Section 5 applies to an agreement between an employer and a single employee. Therefore, the reference to 'his' in the phrase, 'his entitlement to long service leave under this Act' refers to a specific employee, agreeing with 'his' employer, to forego 'his' entitlement to long service leave under the LSL Act, in exchange for an adequate benefit in lieu.
- 255 This contrasts with the reference to 'the entitlement' in s 4(3). While s 4(3)(b) refers to an agreement between an employer and a single employee, ss 4(3)(a) and (c) refer to an instrument (such as an award, or in the case of *Yoon*, an industrial agreement) and a statutory enactment, which would apply to an employer and its employees collectively. It is in this context, that s 4(3) refers to 'the entitlement'. Likewise, as ss 7(1) and (2) and 26(1)(f) refer to the calculation of a specific employee's entitlement, the phrases used are respectively, 'the employee's entitlement' and 'the entitlement'.
- 256 Accordingly, the construction of the phrase, 'his entitlement to long service leave under this Act' in s 5 as not limited to crystallised entitlements, is harmonious with the construction and operation of ss 4(3), 7(1) and (2) and 26(1) of the LSL Act.
- 257 The legislative history and extrinsic materials also confirm the construction of s 5 as not limited to crystallised entitlements. Specifically:
- (a) The Minister for Labour Relations, on the Second Reading of the Bill in the Assembly on 21 September 1995 (at [205] above), stated:

Part 10: Amendments relating to long service leave –

... The Act has been made more flexible through the insertion of provisions that enable parties to trade off long service leave for some other benefit if they so wish ...

This Bill provides a greater empowerment of individuals, and provides employees and employers with better means of dealing directly with each other and, with respect to long service leave, with greater flexibility.
 - (b) The Hon Alannah MacTiernan and the Hon Peter Foss, in putting and passing an amendment of s 5(a) that, 'the employee is given **a benefit** in lieu of the entitlement' to 'the employee is given **an adequate** benefit in lieu of the

entitlement', on the Second Reading of the Bill in the Council on 12 December 1995 (at [206] above), stated:

Hon AJG MacTIERNAN: ... We now see a provision where the alternative system is not examined up-front when it is put in place. It may be 15 years down the track before this arrangement is found not to be truly an adequate benefit in lieu. ...

Page 54, line 22 – To delete the word 'a' and substitute 'an adequate'.

Hon PETER FOSS: That amendment is acceptable. The idea of this is to maintain the flexibility of substituting some alternative benefit. This does give a considerable amount of flexibility but it does make certain that it is purely a nominal amount which is an appropriate substitution.

Hon AJG MacTIERNAN: I thank the Minister for indicating his preparedness to accept the amendment. This improves to some extent the operation of this provision. We still believe, however, that there should be a supervisor which determines the adequacy or otherwise of such an arrangement, and determines that adequacy at the beginning of the arrangement rather than at the end when it could often be too late.

- (c) Shadow Minister, Yvonne Henderson, upon the Minister for Labour Relations moving the amendment of s 5(a) that, 'the employee is given **a benefit** in lieu of the entitlement' to 'the employee is given **an adequate** benefit in lieu of the entitlement', and the amendment passing, during the Debate in the Assembly on 19 December 1995 on the return of the Bill from the Council with amendments (at [207] above), stated:

Mrs HENDERSON: The amendment relates to long service leave and where, under the Bill, people are allowed to trade off long service leave. ...

The Bill allowed people to trade off, under workplace agreements, their long service leave for any other benefit. The kind of benefit that people would receive in return was not specified. ...

Under the provisions in the Bill, people would have traded off long service leave for very paltry benefits. The amendment requires that, when people trade off part of their long service leave, they receive an adequate benefit in return. That is the very minimum. I would like there to be no provision allowing people to trade off long service leave. The intention of long service leave was to give people a reasonable break. I prefer people not to be coerced into trading off that leave. ... I support the amendment which at least requires that, where there is trading off, people receive an adequate benefit in return for the loss of their long service leave.

258 Furthermore, the construction of s 5 as not limited to crystallised entitlements gives effect to harmonious goals in respect of s 11 of the LSL Act, which (like ss 4(3) and 5) was also inserted by the *Amending Act No. 79 of 1995*:

11. Industrial magistrate's courts

- (1) An industrial magistrates court has jurisdiction to hear and determine all questions and disputes in relation to rights and liabilities under this Act, including without limiting the generality of the forgoing, questions and disputes –
 - (a) as to whether a person is or is not an employee, or an employer, to whom this Act applies;
 - (b) whether and when and to what extent an employee is or has become entitled to long service leave, or payment in lieu of long service leave;
 - (c) as to the ordinary rate of pay of an employee;
 - (d) as to whether the employment of the employee was or was not ended by an employer in order to avoid or to attempt to avoid liability for long service leave; and
 - (e) with respect to the benefit in lieu of long service leave under an agreement made under section 5.
- (2) Jurisdiction granted under subsection (1) is exclusive to any other court except where an appeal lies to that other court.

[Section 11 inserted: No. 79 of 1995 s.52.]

259 Relevantly, ss 11(1)(a) and 11(2) provide the IMC with exclusive jurisdiction to hear and determine any question or dispute as to whether a person is or is not an employee, to whom the LSL Act applies, under s 4(3). Furthermore, ss 11(1)(e) and 11(2) provide the IMC with exclusive jurisdiction to hear and determine any question or dispute with respect to the benefit in lieu of long service leave under an agreement made under s 5.

260 The legislative history and extrinsic materials confirm a construction of s 5 that provides for ss 5, 11 and 26, each introduced by the *Amending Act No. 79 of 1995*, to operate together. Specifically, the following confirm Parliament's intention of providing greater flexibility, allowing an employer and an employee to agree to the employee trading-off their long service leave entitlement under the LSL Act, while introducing provisions for the IMC to have exclusive jurisdiction over an employer's failure to keep relevant employment records, and to hear and determine any question or dispute of the 'benefit in lieu', which under the former s 5 was the jurisdiction of the Board of Reference:

- (a) The Department's Summary of the Bill (at [203] above).
- (b) The Explanatory Memorandum to the Bill (at [204] above): (emphasis added)

... The references to the relative industrial legislation are brought up to date, **increased flexibility** is made available for the taking of leave and contracting out provisions are inserted. ...

Boards of Reference will no longer exist under the Act, with their function being carried out by the **industrial magistrate's court**. ...

Section 5 of the existing Act enabled a Board of Reference to exclude employers from the provisions of the Act

if their employees had at least an equivalent long service leave benefit. That section has been repealed as **Boards of Reference** will no longer exist. **Contracting out provisions have been inserted in lieu.** ...

As there are to be no Boards or Reference, Parts IV and V are redundant and are repealed. The new Part V, replacing Part VI confers jurisdiction on an **industrial magistrate's court** to deal with claims for long service leave benefits.

Subsection 11(1) of the new Part V specifies some of the issues the **industrial magistrate's court** can deal with. These were formally the areas of **jurisdiction** of the Board of Reference. ...

Section 26 is Division 2 of Part VII and relates to the keeping of employment records. The existing section is repealed and replaced with record keeping provisions based on those in the Minimum Conditions of Employment Act and Workplace Agreements Act with special provision for the keeping of records of the amount and type of leave taken by the employee and **details of any section 5 contracting out arrangement** that has been entered into.

- (c) The Minister for Labour Relations, on the Second Reading of the Bill in the Assembly on 21 September 1995 (at [205] above), stated: (emphasis added)

... The Act has been made more **flexible** through the insertion of provisions that enable parties to trade off long service leave for some other benefit if they so wish ... Boards of reference ... will no longer deal with claims for long service leave entitlements. These, and any failure by an employer to keep relevant employment records, will be dealt with in the **Industrial Magistrate's Court**.

... This Bill provides a greater empowerment of individuals, and provides employees and employers with better means of dealing directly with each other and, with respect to long service leave, with greater **flexibility**.

- (d) The Hon Peter Foss on the Second Reading of the Bill in the Council on 12 December 1995 (at [206] above), stated: (emphasis added)

Hon PETER FOSS: ... The idea of this is to maintain the **flexibility** of substituting some **alternative benefit**.

Section 5 of the current LSL Act

261 Coastal argued that s 5 of the current LSL Act, inserted by s 84 of the *Industrial Relations Legislation Amendment Act 2021* (WA), provides further support to its contended construction.

262 However, where I have found that s 5 of the LSL Act has a clear and unambiguous meaning, little may be gained by, and it is in fact unnecessary to, call in aid the language of s 5 of the current LSL Act upon the interpretation of s 5 of the LSL Act: *Allina Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 203 at 212; 99 ALR at 303.

Conclusion

263 For the preceding reasons, I find that:

- (a) Section 5 of the LSL Act, having regard to its context and purpose, has a clear and unambiguous meaning, allowing an employer and an employee to agree to the employee foregoing their contingent entitlement to long service leave under the LSL Act if the employee is given an adequate benefit in lieu of the entitlement and the agreement is in writing; and
- (b) The contract between Coastal and Mr Jowett constituted an agreement under s 5 of the LSL Act, as Mr Jowett was given an adequate benefit in lieu of his contingent entitlement to long service leave under the LSL Act and the agreement was in writing.

264 Consequently, I would dispose of each appeal as follows:

- (a) FBA 11 of 2024 – I would uphold the appeal and set aside:
- (i) Order 3 of the Orders dated 5 April 2024, which required Coastal to pay Mr Jowett \$54,567.22 in respect of his entitlement to pro rata long service leave upon termination of his employment pursuant to s 9(2A)(a) of the LSL Act; and
- (ii) Order 3 of the Orders dated 14 August 2024, by which Coastal was issued a caution in respect of the failure to pay pro rata long service leave upon termination of employment pursuant to s 83(4)(a)(i) of the IR Act.
- (b) FBA 12 of 2024 – I would dismiss the appeal.
- (c) FBA 18 of 2024 – I would dismiss the appeal.

KUCERA C:

265 I have had the benefit of reading the Senior Commissioner's draft reasons and those that were prepared by Commissioner Tsang.

266 I agree with Commissioner Tsang's reasons, including those that relate to the grounds of appeal in FBA 11 of 2024 regarding the correct construction of s 5 of the LSL Act.

267 For the avoidance of doubt this means that like Commissioner Tsang, I also agree with the Senior Commissioner's reasons, dismissing Coastal's appeal Grounds 5 and 7 in FBA 11 of 2024.

268 I had no difficulty in accepting the Senior Commissioner's reasoning in [123]–[132] that Mr Jowett, under the contractual arrangement had with Coastal, was provided with an adequate benefit in lieu of his entitlement to long service leave under the LSL Act.

269 Having agreed with Commissioner Tsang's reasons, which confirms that Coastal and Mr Jowett were prior to 20 June 2022

and by way of a written agreement, able to contract out of the entitlement provisions of the LSL Act, I would also allow Coastal's appeal in FBA 11 of 2024.

270 It therefore follows, that because of my decision in FBA 11 of 2024, I do not have to deal with the appeals in FBA 12 of 2024 and FBA 18 of 2024. Accordingly, I would dismiss both of these appeals.

2025 WAIRC 00687

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 65/2023 GIVEN ON 5 APRIL 2024

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION COASTAL R.E. PTY LTD ATF COASTAL UNIT TRUST	APPELLANT
	-v- JASON JOWETT	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG COMMISSIONER T KUCERA	
DATE	TUESDAY, 12 AUGUST 2025	
FILE NO/S	FBA 11 OF 2024	
CITATION NO.	2025 WAIRC 00687	

Result	Appeal upheld
Representation	
Appellant	Mr J Dasey of counsel
Respondent	Mr S Farrell as agent

Order

HAVING heard from Mr J Dasey of counsel on behalf of the appellant and Mr Farrell as agent on behalf of the respondent, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the appeal be allowed.
2. THAT order 3 of the Orders dated 5 April 2024, which required the appellant to pay the respondent \$54,567.22 in respect of his entitlement to pro rata long service leave upon termination of his employment pursuant to s 9(2A)(a) of the *Long Service Leave Act 1958* (WA) be quashed.
3. Order 3 of the Orders dated 14 August 2024, by which the appellant was issued a caution in respect of the failure to pay pro rata long service leave upon termination of employment pursuant to s 83(4)(a)(i) of the *Industrial Relations Act 1979* (WA) be quashed.

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

[L.S.]

2025 WAIRC 00688

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 65/2023 GIVEN ON 5 APRIL 2024

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JASON JOWETT	APPELLANT
	-v- COASTAL R.E. PTY LTD ATF COASTAL UNIT TRUST	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG COMMISSIONER T KUCERA	
DATE	TUESDAY, 12 AUGUST 2025	
FILE NO/S	FBA 12 OF 2024	
CITATION NO.	2025 WAIRC 00688	

Result	Appeal dismissed
Representation	
Appellant	Mr S Farrell as agent
Respondent	Mr J Dasey of counsel

Order

HAVING heard from Mr Farrell as agent on behalf of the appellant and Mr J Dasey of counsel on behalf of the respondent, the Full bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the appeal be dismissed.

[L.S.]

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

2025 WAIRC 00689

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 65/2023 GIVEN ON 14 AUGUST 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COASTAL R.E PTY LTD ATF COASTAL UNIT TRUST

APPELLANT

-v-

JASON JOWETT

RESPONDENT

CORAM

FULL BENCH

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER C TSANG

COMMISSIONER T KUCERA

DATE

TUESDAY, 12 AUGUST 2025

FILE NO/S

FBA 18 OF 2024

CITATION NO.

2025 WAIRC 00689

Result	Appeal dismissed
Representation	
Appellant	Mr S Farrell as agent
Respondent	Mr J Dasey of counsel

Order

HAVING heard from Mr Farrell as agent on behalf of the appellant and Mr J Dasey of counsel on behalf of the respondent, the Full bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the appeal be dismissed.

[L.S.]

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

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

2025 WAIRC 00433

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, 23 JULY 2025

FILE NO/S

CICS 3 OF 2025

CITATION NO.

2025 WAIRC 00433

Result Order issued

Representation

Applicant Mr L Slaney

Intervenor Mr C Fogliani of counsel 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

Order

THAT the Commission in Court Session, having regard to the application filed by the applicant on 11 July 2025, the effect of which is to seek leave to discontinue the application against the third intervenor and the fourth intervenor, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT as against the third intervenor and the fourth intervenor this application be and is hereby discontinued.

By the Commission in Court Session
 (Sgd.) S J KENNER,
 Chief Commissioner.

[L.S.]



AWARDS/AGREEMENTS AND ORDERS—Variation of—

2025 WAIRC 00686

APPLICATION TO VARY RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT**CORAM**

COMMISSIONER T KUCERA

DATE

TUESDAY, 12 AUGUST 2025

FILE NO/S

APPL 4 OF 2020

CITATION NO.

2025 WAIRC 00686

Result

Award varied

Representation

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

Mr G Hansen on behalf of UnionsWA

Mr R James on behalf of United Workers Union (WA)

Ms B Grubor on behalf of the Australian Hotels Association Western Australia

Order

HAVING heard from Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations, Mr G Hansen on behalf of UnionsWA, Mr R James on behalf of United Workers Union (WA), and Ms B Grubor on behalf of the Australian Hotels Association Western Australia,, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the *Restaurant, Tearoom and Catering Workers' Award* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from 31 July 2025.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

SCHEDULE

Restaurant, Café and Catering (WA) Award**Part 1 – Application and Operation****1. Title**

This award is known as the Restaurant, Café and Catering (WA) Award.

2. Arrangement**Part 1 – Application and Operation****1. Title****2. Arrangement****3. Scope****4. Area****5. Definitions****Part 2 – Contract of Employment****6. Contract of employment and termination****7. Introduction of change****8. Redundancy****9. Anti-discrimination****10. Full time employment****11. Part time employment****12. Casual employment**

Part 3 – Hours of Work

13. Ordinary hours of work
14. Penalty rates
15. Rosters
16. Meal breaks and rest periods
17. Overtime

Part 4 – Leave and Public Holidays

18. Public holidays
19. Annual leave
20. Personal leave
21. Long service leave
22. Bereavement leave
23. Parental leave
24. Family and domestic violence leave

Part 5 – Rates of Pay

25. Wages
26. Minimum adult award wage
27. Option for annualised salary
28. Payment of wages
29. Higher duties
30. Supported wage system
31. Traineeships
32. Superannuation

Part 6 – Allowances and facilities

33. Location allowance
34. Meal allowance
35. Split shift allowance
36. Uniforms and laundering
37. Meals and/or accommodation
38. Protective clothing
39. Work equipment
40. Travelling facilities
41. First aid kit
42. Union facilities

Part 7 – Dispute Resolution

43. Dispute resolution procedure

Part 8 – Record Keeping, Payslips and Right of Entry

44. Employment records and pay slips
45. Right of entry

Part 9 – Named Parties

46. Named parties to the award

Schedule A – Classifications**Schedule B – School Canteen Employees****Schedule C – No reduction****3. Scope**

- 3.1 This award applies to all employers (including catering employers) in the restaurant and catering industry, as defined in Clause 5 – Definitions of this award, and their employees employed in the classifications specified in Clause 25 – Wages of this Award.
- 3.2 This award also applies to:
 - (a) employers that supply labour on an on-hire basis to host employers in the restaurant and catering industry in

respect of on-hire employees employed in the classifications mentioned in this Award, and those on-hire employees, while engaged in the performance of work covered by this Award; and

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

3.3 This Award does not apply to employers and employees who are covered by the following awards:

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

3.4 This Award does not apply to employers and employees who are subject to the national industrial relations system.

4. Area

4.1 This Award has effect throughout Western Australia.

4.2 This Award has effect with respect to employers who are connected to the State of Western Australia and their employees while performing work covered by this Award.

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

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

5. Definitions

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

Non-working day means a day of the week an employee is not rostered to work ordinary hours.

Reasonable evidence means evidence that would satisfy a reasonable person.

Restaurant and catering industry means:

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

Spread of shift means the time which elapses from the employee's actual starting time to the employee's actual finishing time on each work day.

Standard hourly rate means the minimum hourly rate of pay for a full time or part time Level 4 employee as set out in Clause 25 – Wages of this award.

Standard meal allowance means an allowance that is equal to the amount prescribed for meals under Clause 21.2 of the Restaurant Industry Award 2020.

Note: The Restaurant Industry Award 2020 is a modern award that applies to employers and employees in the national industrial relations system. The meal allowance contained in Clause 21.2 of the Restaurant Industry Award is usually adjusted from 1 July each year.

Standard split shift allowance means an allowance that is equal to the amount prescribed under clause 21.3 of the Restaurant Industry Award 2020.

Note: The Restaurant Industry Award 2020 is a modern award that applies to employers and employees in the national industrial relations system. The split shift allowance contained in Clause 21.3 of the Restaurant Industry Award is usually adjusted from 1 July each year.

Standard tool and equipment allowance means an allowance that is equal to the amount prescribed under clause 21.4 of the Restaurant Industry Award 2020.

Note: The Restaurant Industry Award 2020 is a modern award that applies to employers and employees in the national

industrial relations system. The tool and equipment allowance contained in Clause 21.4 of the Restaurant Industry Award is usually adjusted from 1 July each year.

Part 2 – Contract of Employment

6. Contract of employment and termination

6.1 Types of employment

An employee may be employed on a full time, part time or casual basis.

6.2 Probation

A newly hired full time or part time employee may be subject to a probation period not exceeding 3 months. The purpose of the probation period is to enable the employee and employer to assess each other for suitability for ongoing employment.

6.3 Stand down

An employer may stand down without pay any employee who cannot be usefully employed due to the following circumstances:

- (a) industrial action by employees or any union, association or organisation; or
- (b) a breakdown or failure of the employer's machinery or any stoppage of work by any cause the employer cannot reasonably prevent.

6.4 Termination of employment

Notice of termination by employer – full time and part time employees

- (a) In order to terminate the employment of a full time or part time employee the employer must give the employee the following notice in writing.

Period of continuous service with the employer	Minimum period of notice
Not more than 1 year	1 week
More than 1 year but less than 3 years	2 weeks
More than 3 years but less than 5 years	3 weeks
More than 5 years	4 weeks

- (b) An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed 2 years' continuous service with the employer, is entitled to one week's notice in addition to the notice prescribed in Clause 6.4(a).
- (c) Payment in lieu of the notice prescribed in Clauses 6.4(a) and 6.4(b) must be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu.
- (d) In calculating any payment in lieu of notice, the employer must pay the employee an amount that is equal to, or exceeds, the total of all amounts that, if the employee's employment had continued until the end of the required notice period, the employer would have become liable to pay to the employee because of the employment continuing during that period. That total must be worked out on the basis of:
 - (i) the employee's ordinary hours of work (even if they are not standard hours); and
 - (ii) the amounts ordinarily payable to the employee in respect of those hours, including for example, allowances, loadings and penalties; and
 - (iii) any other amounts payable under the employee's contract of employment.
- (e) The period of notice in this subclause does not apply to those employees who are exempt from receiving notice under Subdivision A of Division 11 of Part 2-2 of the *Fair Work Act 2009*, as amended from time to time.
- (f) For the purpose of this subclause an employee's continuity of service has the same meaning as prescribed in section 22 of the *Fair Work Act 2009*.

6.5 Notice of termination by employee – full time and part time employees

A full time or part time employee must give the employer notice of termination in accordance with the following table.

Period of continuous service with the employer	Minimum period of notice
Not more than 1 year	1 day
More than 1 year but not more than 2 years	1 week
More than 2 years	2 weeks

6.6 Casual employees

An employer or employee may terminate a casual employment arrangement with one hour's notice.

6.7 Time off during notice period – full time and part time employees

- (a) During a period of notice of termination given by the employer, an employee will be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment. The time off is to be taken at times that are convenient to the employee in consultation with the employer.
- (b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee may, at the request of the employer, be required to produce proof of attendance at an interview or they will not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

6.8 Statement of employment

An employer must, in the event of termination of employment, provide upon request to the employee who has been terminated, a written statement specifying the period of employment and the classification or type of work performed by the employee.

7. Introduction of change

7.1 Employer's duty to notify

- (a) Where an employer has made a decision to introduce changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and, if an employee nominates a union to represent them, the union.
- (b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs.

7.2 Employer's duty to discuss change

- (a) The employer must consult with the employees affected and, if an employee nominates a union to represent them, the union, about the introduction of the changes referred to in Clause 7.1, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals) and measures to avoid or minimise the adverse effects of the changes on employees, and must give prompt consideration to matters raised by the employees and/or their union in relation to the changes.
- (b) The discussion must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in Clause 7.1.
- (c) For the purpose of the consultation, the employer must provide in writing to the employees concerned and, if an employee nominates a union to represent them, the union, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees, provided that any employer is not required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

8. Redundancy

8.1 Consultation before terminations

- (a) Where an employer has made a decision that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer must consult with the employees directly affected and, if an employee nominates a union to represent them, the union.
- (b) The consultation must take place as soon as is practicable and cover, amongst other matters, the reasons the proposed terminations are required, measures to avoid or minimise the terminations and measures to mitigate any adverse effects of any terminations on the employees.
- (c) For the purposes of the consultation the employer must, as soon as practicable, provide in writing to the employees concerned and, if an employee nominates a union to represent them, the union, all relevant information about the proposed terminations, including the reasons for the proposed terminations, the number and categories of employees likely to be affected, and the number of employees normally employed and the period over which the terminations are likely to be carried out.
- (d) The employer is not required to disclose confidential information the disclosure of which would be adverse to the employer's interests.

8.2 Transfer to lower paid duties

- (a) Where an employee is transferred to lower paid duties for reasons of redundancy, the employee is entitled to the same period of notice of transfer they would have been entitled to if they had been terminated.
- (b) The employer may, at the employer's option, make payment in lieu of notice for an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.
- (c) The amounts must be worked out on the basis of:

- (i) the ordinary working hours to be worked by the employee; and
- (ii) the amounts payable to the employee for the hours including for example, allowances, loading and penalties; and
- (iii) any other amounts payable under the employee's contract of employment.

8.3 Severance pay

- (a) In addition to the period of notice provided in Clause 6 – Contract of employment and termination, and subject to any further order of the Commission, employers who employ 15 or more employees must pay the following amount of severance to any full time or part time employee whose employment is terminated by reason of redundancy.

Period of continuous service	Severance pay
Less than 1 year	nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

“Weeks’ pay” means the ordinary time rate of pay for the employee concerned. Provided that such rate excludes:

- (i) overtime;
 - (ii) penalty rates;
 - (iii) disability allowances;
 - (iv) shift allowances;
 - (v) special rates;
 - (vi) fares and travelling time allowances;
 - (vii) bonuses; and
 - (viii) any other ancillary payments of a like nature.
- (b) Severance payments will not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.
- (c) For the purpose of this clause continuity of service will not be broken on account of:
- (i) any interruption or termination of the employment by the employer if the interruption or termination has been made with the intention of avoiding the obligations of this clause in respect of leave;
 - (ii) any absence from work where leave has been granted by the employer; or
 - (iii) any absence with reasonable cause, if the employee can supply sufficient proof.

Provided that in the calculation of continuous service any time an employee is absent from work, except time for which the employee is entitled to claim paid leave, will not count as time worked.

- (d) Service by an employee with a business which has been transferred from one employer to another will also constitute continuous service for the purpose of this clause, provided the employee's service has been deemed continuous in accordance with Part II, Division 3 of the Long Service Leave Act 1958.

8.4 Employee leaving during notice

Where an employee is terminated because of redundancy, the employee may resign from their employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause as they would be if they had remained with the employer until the expiry of the notice. However, in this situation, the employee will not be entitled to payment in lieu of notice in accordance with Clause 6 – Contract of employment and termination.

8.5 Alternative employment

An employer, in a particular redundancy case, may apply to the Commission to have the severance payment varied if the

employer obtains acceptable alternative employment for an employee.

8.6 Transmission of business

- (a) The provisions of this clause are not applicable where a business is transferred from one employer to another employer in any of the following circumstances:
- (i) Where the employee accepts employment with the new employer which recognises the period of continuous service which the employee had with the old employer (and any other prior employers for that business) to be continuous service of the employee with the new employer; or
 - (ii) Where the employee rejects an offer of employment with the new employer:
 - (aa) in which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the old employer; and
 - (bb) which recognises the period of continuous service which the employee had with the old employer (and any other prior employers for that business) to be continuous service with the new employer.
- (b) The Commission may vary the provisions of Clause 8.6(a) if it is satisfied that it would operate unfairly in a particular case.

8.7 Notice to Centrelink

Where a decision has been made to terminate employees due to redundancy, the employer must notify Centrelink as soon as possible giving all relevant information about the proposed terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.

8.8 Employees exempted

- (a) This clause does not apply where employment is terminated as a consequence of conduct that justifies instant dismissal or to casual employees.
- (b) Apart from the requirement to consult with affected employees in accordance with Clause 8.1, this clause does not apply to apprentices, trainees, probationary employees or employees engaged for a specific period of time or for a specified task or tasks.

8.9 Incapacity to pay

An employer in a particular redundancy case may apply to the Commission to have the severance pay varied on the basis of the employer's incapacity to pay.

9. Anti-discrimination

- 9.1 It is the intention of the parties to this award to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of those attributes prescribed in the *Equal Opportunity Act 1984* including, but not limited to, age, breastfeeding, family responsibility, family status, gender history, impairment, marital status, political conviction, pregnancy, race, religious conviction, sex, sexual orientation and publication of details on the Fines Enforcement Registrar's website.
- 9.2 Accordingly, in fulfilling their obligations under Part 7 – Dispute Resolution of this award, the parties must make every endeavour to ensure that neither the award provisions nor their operation are directly or indirectly discriminatory in their effects.

10. Full time employment

- 10.1 A full time employee is a person who is engaged to work 76 hours per fortnight.

11. Part time employment

- 11.1 A part time employee is a person who is engaged to work at least 20 and fewer than 76 ordinary hours per fortnight.
- 11.2 A part time employee must be engaged and paid for at least 3 consecutive hours of work on each occasion they are required to attend work.
- 11.3 A part time employee must be paid the applicable minimum hourly rate of pay under Part 5 – Rates of Pay.
- 11.4 A part time employee is entitled to overtime under Clause 17 – Overtime and penalty rates under Clause 14 – Penalty rates.
- 11.5 Notwithstanding any other provision of this award, a part time employee and their employer may, by agreement, increase the ordinary hours to be worked in any particular fortnight to a maximum of 76 ordinary hours. These extra hours are to be paid for at ordinary rates of pay.

12. Casual employment

- 12.1 A casual employee is a person who is engaged and paid as such, applying s 7B of the *Industrial Relations Act 1979*.
- 12.2 A casual employee may be engaged for a maximum of 76 ordinary hours per fortnight.
- 12.3 A casual employee must be engaged and paid for at least 2 consecutive hours of work on each occasion they are required to attend work.

- 12.4 In addition to the minimum hourly rate of pay under Clause 25 – Wages, a casual employee must be paid the following loading for ordinary hours of work:

Day	Additional Loading
Monday to Friday inclusive	25%
Saturdays and Sundays	50%
Public Holidays	125%

NOTE: A summary of the award that includes detailed pay schedules can be found at <http://www.lgirs.wa.gov.au/awardssummaries>.

- 12.5 When a shift commences on one day and ends on the following day, each hour worked will be paid at the rate applying to the day on which that hour of work is actually performed.
- 12.6 A casual employee is entitled to overtime under Clause 17 – Overtime.

Part 3 – Hours of Work

13. Ordinary hours of work

13.1 All employees

- (a) The ordinary hours of work are to be rostered so an employee is not required to commence work on more than 10 days in each fortnight.
- (b) The ordinary hours of work are exclusive of meal breaks.
- (c) Where an ordinary hours work period commences prior to midnight on any day, that work period is deemed to have been worked on the day the ordinary hours work period commenced. However, the employee must be paid the appropriate penalty rates and loadings according to the actual hours worked in that work period.
- (d) The employer has the right to roster the ordinary hours of work for each employee according to the needs of the business, but the employer must, in the following circumstances, seek the agreement of each employee:
 - (i) where the employee is to be rostered over more than 7 consecutive days; or
 - (ii) where the ordinary hours of work exceed 8 on any day.
- (e) Where an employee's roster includes work periods where more than 8 ordinary hours are regularly worked, 2 of the employee's non-working days must be consecutive.
- (f) The roster for each employee must provide for a minimum of 10 consecutive hours' break between the finish of ordinary hours on one day and the commencement of ordinary hours on the following day.
- (g) A break of less than 10 but not less than 8 consecutive hours may apply in the following circumstances:
 - (i) a change in shift at the employee's request;
 - (ii) a changeover of the roster;
 - (iii) by agreement between the employer and employee (recorded and signed by both parties in the time and wages record on each occasion).

13.2 Full time employees

- (a) A full time employee must not be rostered for less than 4 nor more than 10 ordinary hours per day (exclusive of meal breaks).
- (b) The maximum spread of hours for a full time employee (including an employee working split shifts) is 12.
- (c) If an employee is rostered for split shifts, each shift must be at least 3 consecutive hours (exclusive of meal breaks).

13.3 Part time employees

- (a) A part time employee must not be rostered for less than 3 nor more than 10 ordinary hours per day (exclusive of meal breaks).
- (b) The maximum spread of hours for a part time employee (including an employee working split shifts) is 12.
- (c) If an employee is rostered for split shifts, each shift must be at least 3 consecutive hours (exclusive of meal breaks).

13.4 Casual employees

- (a) A casual employee must not be rostered for less than 2 nor more than 10 ordinary hours per day (exclusive of meal breaks).
- (b) The maximum spread of hours for a casual employee (including an employee working split shifts) is 12.
- (c) If an employee is rostered for split shifts, each shift must be at least 2 consecutive hours (exclusive of meal breaks).

13.5 Requests for flexible working arrangements

Part 4A of the Minimum Conditions of Employment Act 1993 deals with requests for flexible working arrangements.

14. Penalty rates**14.1 Weekday evenings (full time and part time employees only)**

A full time or part time employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday (inclusive), must be paid 10% of the Standard hourly rate for each such hour or part thereof worked, in addition to their ordinary hourly rate.

14.2 All employees

An employer must pay an employee the following penalty rates for work performed during ordinary hours:

Day worked	Full time and part time employees	Casual employees
	% of hourly rate	% of hourly rate (inclusive of casual loading)
Saturday	50%	50%
Sunday	50%	50%
Public holiday	150%	125%

NOTE: A summary of the award that includes detailed pay schedules can be found at <http://www.lgirs.wa.gov.au/awardsummaries>.

15. Rosters

15.1 The following rostering provisions apply to full time and part time employees.

15.2 A roster of ordinary working hours must be exhibited in each establishment in a place that is readily seen by employees or distributed through accessible electronic means.

15.3 The roster must show:

- (a) the name of each employee; and
- (b) the hours to be worked by each employee, each day, including starting and finishing times.

15.4 The roster may be inspected as an employment record pursuant to Part II, Division 2F – Keeping of and access to employment records and pay slips of the *Industrial Relations Act 1979*.

15.5 Rosters must be published at least one week in advance, and may only be altered:

- (a) on account of an employee's absence on personal leave or other unplanned leave; or
- (b) by the employer giving at least 3 days' notice of an alteration; or
- (c) by mutual consent between the employer and employee (recorded and signed by both parties in the time and wages record).

16. Meal breaks and rest periods

16.1 Each employee is entitled to an unpaid meal break of between 30 minutes and one hour after not more than 6 hours of work.

16.2 Where it is not possible for the employer to grant a meal break on any day, the meal break must be treated as time worked and the employee must be paid 50% of their ordinary hourly rate extra:

- (a) from when the meal break was due to be taken;
- (b) until either the employee is allowed to take the break or the shift ends.

16.3 Where an employee is required to work 6 or more consecutive hours in a shift the employee is also entitled to one paid rest break of 10 minutes, to be taken at a time agreed between the employer and the employee. The employer must not require the paid rest break be taken in the first or last hour of any shift.

16.4 An employee must not be required to work more than 6 hours consecutively before either a paid or unpaid break is taken.

17. Overtime

17.1 Overtime is payable for all work performed by an employee (including a casual employee) outside of the rostered ordinary hours of work or outside the maximum daily spread of hours.

Note: For casual employees, overtime is calculated on the base rate of pay (excluding the casual loading).

17.2 (a) Overtime worked between Monday and Friday (inclusive), must be paid for at the rate of time and a half for the first 2 hours and double time after 2 hours.

(b) All overtime worked on a Saturday or Sunday must be paid for at the rate of double time.

(c) All overtime worked on a Public Holiday must be paid for at the rate of double time and one half.

17.3 If an employee is recalled to work overtime after leaving the employer's establishment, the employee must be paid for at least 3 hours at overtime rates.

17.4 (a) Wherever reasonably practicable overtime will be arranged so that employees have at least 8 consecutive hours off duty between the work of successive days.

(b) Where an employee (other than a casual employee) works so much overtime that there are fewer than 8 hours

between finishing overtime on one day and commencing ordinary work on the next day, the employee will be released until they have had at least 8 consecutive hours off duty without loss of pay for ordinary working time occurring during the absence.

- (c) If, on the instructions of the employer, an employee (other than a casual employee) resumes work or continues work without having had 8 consecutive hours off duty, the employee must be paid at double time until they are released from duty and they are then entitled to be absent until they have had 8 consecutive hours off duty without loss of pay for ordinary working time occurring during that absence.

17.5 In the calculation of overtime each day stands alone, except:

- (a) when an employee works overtime which continues beyond midnight on any day, the time worked after midnight is deemed to be part of the previous day's work for the purpose of this clause; and
- (b) the overtime work must be paid for at the overtime rate applicable for the day upon which the overtime work is actually performed.

Example: An employee who works 3 hours of overtime between 11.00pm on Friday and 02:00 am on Saturday would be paid for time and one half for the first hour of overtime (between 11.00pm and 12 midnight on the Friday) and double time for the next 2 hours (between 12 midnight and 02:00am on the Saturday).

17.6 An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee. If such an arrangement is entered into:

- (a) The time off must be equivalent to the overtime rate that otherwise would have been paid.
Example: An employee who worked 2 overtime hours at the rate of time and one half is entitled to 3 hours' time off.
- (b) The time off must be taken within 8 weeks of it being accrued (at a time agreed between the employer and the employee) or be taken in conjunction with a future period of annual leave.
- (c) An employee who is unable to take the time off in accordance with Clause 17.6(b) must be paid for the time off not taken.
- (d) Upon termination, an employee must be paid for all accrued time off which remains owing to the employee.

17.7 (a) An employer may require an employee to work reasonable overtime at overtime rates.

- (b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
- (i) any risk to the employee's health and safety that might reasonably be expected to arise if the employee worked the overtime;
 - (ii) the employee's personal circumstances (including any family responsibilities);
 - (iii) the conduct of the operations or business in relation to which the employee is required or requested to work the overtime;
 - (iv) any notice given by the employer of the requirement or request that the employee work the overtime;
 - (v) any notice given by the employee of the employee's intention to refuse to work the overtime;
 - (vi) whether any of the overtime is on a public holiday in the area of the State where the employee is required or requested to work the overtime;
 - (vii) the employee's hours of work over the 4 weeks ending immediately before the employee is required or requested to work the overtime; and
 - (viii) any other relevant matter.

Part 4 – Leave and Public Holidays

18. Public holidays

18.1 The following days or the days observed in lieu will be allowed as paid public holidays for full time and part time employees:

- New Year's Day,
- Australia Day,
- Labour Day,
- Good Friday,
- Easter Sunday,
- Easter Monday,
- Anzac Day,
- Western Australia Day,
- Sovereign's Birthday,
- Christmas Day

- Boxing Day.

Note: Part time employees are entitled to the above public holidays if they would ordinarily work on the day the public holiday falls on.

- 18.2 When any of the days mentioned in Clause 18.1 fall on a full time employee's non-working day, the public holiday is to be observed on the next rostered working day. In this case the substituted day is a public holiday with pay and the day for which it is substituted is not a public holiday.
- 18.3 An employer and employee may agree to substitute another day for a day that would otherwise be a public holiday under this award. Any such agreement must be in writing and be signed by the employer and the employee.
- 18.4 Where a day is proclaimed as a public holiday or public half-holiday under section 7 of the *Public and Bank Holidays Act 1972*, either throughout the State or within a district or locality as is specified in the proclamation, that day will be a public holiday or a public half-holiday for the purposes of this award within the area specified in the proclamation.
- 18.5 All employees required to work on a public holiday must be paid for a minimum of 4 hours work. The 4-hour minimum does not apply in the case of an employee who, having commenced an ordinary hours shift on the day preceding the public holiday, works less than 4 hours on the public holiday.
- Note: The *Minimum Conditions of Employment Act 1993* deals with the right of employees to be absent from work on a public holiday, the right of employers to request an employee to work on a public holiday, and the rights of an employee to refuse a request to work on a public holiday.
- 18.6 Alternate arrangements (full time and part time employees only)
- (a) An employer may reach agreement with a full time or part time employee for the employee to receive time off in lieu of public holiday penalty rates. In this situation the employee is paid at ordinary time rates for each hour worked and they must then be rostered off duty in ordinary hours (without deduction of pay) for a period equal to the number of hours worked on the public holiday multiplied by time and a half.
- Example: An employee who works 4 hours on a public holiday would be paid for 4 hours at ordinary rates, and they would then be entitled to a further 6 hours of time off in lieu.
- (b) The rostered time off referred to in Clause 18.6(a) must be taken within 8 weeks of the date of accrual at a time agreed between the employer and employee. Alternatively, the employer and employee may agree to the rostered time off being taken in conjunction with a future period of annual leave.
- (c) If the rostered time off referred to in Clause 18.6(a) is not taken within 8 weeks of the date of accrual, or in conjunction with a future period of annual leave, the employer must make payment for the rostered time off in the employee's next pay period.
- (d) On termination, an employee must be paid for all rostered time off in lieu of public holidays that remains owing to the employee.

19. Annual leave

- 19.1 Annual leave is a minimum condition of employment provided for in the *Minimum Conditions of Employment Act 1993*.
- Note: The provisions of this clause only detail annual leave provisions that are additional to and/or more favourable than what is contained in the *Minimum Conditions of Employment Act 1993*.
- 19.2 Transfer of business
- Where a business has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with section 7H of the *Long Service Leave Act 1958*, any annual leave accrued with the old employer will transfer to the new employer and may be taken in accordance with this clause and the *Minimum Conditions of Employment Act 1993*.
- 19.3 Taking annual leave
- (a) Annual leave is to be taken at times agreed between the employer and employee.
- (b) An employer and employee may agree to the employee taking annual leave in advance of it accruing.
- Note: under the *Minimum Conditions of Employment Act 1993* annual leave accrues on a weekly basis.
- (c) If an employee's employment terminates and the employee has taken a period of annual leave that exceeds what the employee has accrued, the employee is liable to pay the employer an amount representing the difference between the amount received by the employee for the period of leave taken and the amount payable for the leave that otherwise would have accrued.
- 19.4 Annual leave loading
- (a) During a period of annual leave an employee must be paid annual leave loading. The loading is whichever is the higher of:
- (i) 17.5% of the employee's ordinary rate of pay; or
- (ii) any additional rates prescribed by this award for work performed in ordinary hours, if the employee would otherwise have worked those hours had they not been on annual leave.
- (b) The loading prescribed by Clause 19.4(a) does not apply to pro rata leave paid out on termination that does not relate to a completed year of service.

19.5 The provisions of Clause 19 – Annual leave do not apply to casual employees.

20. Personal leave

20.1 Personal leave is provided for in the Minimum Conditions of Employment Act 1993.

Note: The provisions of this clause only detail personal leave provisions that are additional to and/or more favourable than what is contained in the Minimum Conditions of Employment Act 1993.

20.2 Adjustment of personal leave

If, in the first or successive years of service with the employer, an employee is absent on personal leave for a period longer than the employee’s accrued entitlement to paid personal leave, payment may be adjusted at the end of that year of service, or at the time the employee’s services terminate if before the end of that year of service, to the extent that the employee has become entitled to further paid personal leave during that year of service.

20.3 Replacement of paid personal leave during annual leave

- (a) Subject to the provisions of this subclause, an employee who suffers personal ill health or injury during annual leave may apply for and the employer must grant paid personal leave in place of paid annual leave.
- (b) An application to replace annual leave with paid personal leave:
 - (i) must be made within 7 days of resuming work; and
 - (ii) is only available if the employee produces a certificate from a medical practitioner confirming they were confined to their residence or a hospital as a result of personal ill health or injury for a period of 7 consecutive days or more.
- (c) Replacement of paid annual leave by paid personal leave must not exceed the period of paid personal leave the employee was entitled to and will not be made with respect to fractions of a day.
- (d) Where paid personal leave has been granted by the employer in accordance with this clause, that portion of the annual leave equivalent to the paid personal leave is replaced by the paid personal leave.
- (e) Payment for replaced annual leave is to be at the rate of pay applicable at the time the leave is subsequently taken, provided that if annual leave loading has already been paid to the employee pursuant to Clause 19 – Annual Leave, the leave loading is deemed to have been paid with respect to the replaced annual leave.

20.4 Employee notice

When accessing personal leave the employee must, as soon as reasonably practicable, advise the employer of their inability to attend for work, the nature of the illness, injury or caring responsibilities, and the estimated duration of the absence. This advice, other than in extraordinary circumstances, should be given to the employer within 2 hours of the commencement of the absence.

20.5 Transfer of business

Where a business has been transferred from one employer to another and the employee’s service has been deemed continuous in accordance with section 7H of the Long Service Leave Act 1958, the employee’s paid personal leave balance with the old employer at the date of the transfer will be credited to the employee at the commencement of service with the new employer and may be claimed in accordance with the this clause and the Minimum Conditions of Employment Act 1993.

21. Long service leave

The provisions of the Long Service Leave Act 1958 are hereby incorporated in, and are deemed to be part of, this award.

22. Bereavement leave

Bereavement leave is provided for in the Minimum Conditions of Employment Act 1993.

23. Parental leave

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

24. Family and domestic violence leave

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

Part 5 – Rates of Pay

25. Wages

25.1 The wages prescribed in this clause are payable on and from the beginning of the first pay period commencing on or after 1 July 2025.

25.2 The minimum wages payable to adult full time and part time employees under this award are as follows:

Level	Classification	Minimum Hourly Rate	Minimum Weekly Rate (full time)
		\$	\$
Level 1	Food & Beverage Attendant Grade 1	25.08	953.00
	Kitchen Attendant Grade 1		
	Guest Services Grade 1		

	Gardener		
	General Hand		
	Yardperson		
Level 2	Food & Beverage Attendant Grade 2	25.93	985.20
	Cook Grade 1		
	Kitchen Attendant Grade 2		
	Night Porter		
	Storeperson Grade 1		
	Doorperson/Security Officer Grade 1		
	Guest Services Grade 2		
Level 3	Food & Beverage Attendant Grade 3	26.55	1008.90
	Cook Grade 2		
	Kitchen Attendant Grade 3		
	Guest Services Grade 3		
	Storeperson Grade 2		
	Timekeeper/Security Officer Grade 2		
	Forklift Driver		
	Handyperson		
Level 4	Cook Grade 3	27.77	1055.10
	Storeperson Grade 3		
	Food & Beverage Attendant Grade 4 (Tradesperson)		
	Guest Service Grade 4		
Level 5	Cook Grade 4	29.28	1112.60
	Food & Beverage Supervisor		
	Guest Services Supervisor		
Level 6	Cook Grade 5	29.97	1138.70

Note 1: Casual employees receive the applicable hourly rate of pay outlined above, plus the relevant casual loading outlined in Clause 12 – Casual employment.

Note 2: A summary of the award that includes detailed pay schedules can be found at <http://www.lgirs.wa.gov.au/awardsummaries>.

25.3 Junior employees

- (a) The minimum wages payable to junior employees under the age of 20 (Levels 1, 2 and 3) for ordinary hours of work are as follows:

Age	% of the appropriate adult rate (Levels 1, 2 or 3)
Under 16 years of age	50
16 years of age	60
17 years of age	70
18 years of age	80
19 years of age	90
20 years of age and over	Full adult rates

- (b) Junior employees under the age of 20 employed at Level 4, 5 or 6 must be paid full adult rates.

25.4 Apprentices

The minimum wages payable to apprentices are as follows:

4 year term	3.5 year term	3 year term	Age	% of standard weekly rate
1st year	0 – 6 months		Under 21	42%
			21 or over	75%*
2nd year	7 – 18 months	1 st year	Under 21	55%
			21 or over	75%*
3rd year	19 – 30 months	2 nd year	All ages	75%
4th year	31 – 42 months	3 rd year	All ages	88%

* This is equivalent to the minimum adult apprentice wage

26. Minimum adult award wage

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

26.2 The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38-hour week is \$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.

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

26.4 Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by results, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

26.5 Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

26.6 The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

26.7 Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.

26.8 Subject to this clause the minimum adult award wage shall –

- (a) Apply to all work in ordinary hours.
- (b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

26.9 Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 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.

26.10 Adult Apprentices

- (a) 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.
- (b) The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38-hour week is calculated as follows: divide \$791.30 by 38 and multiply by the number of ordinary hours prescribed for a full-time apprentice under the award.
- (c) The minimum adult apprentice wage is payable from the beginning of the first pay period commencing on or after 1 July 2025.
- (d) Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.
- (e) The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on superannuation and during any period of paid leave prescribed by this award.
- (f) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

27. Option for annualised salary

27.1 As an alternative to being paid by the week according to the rates in this award, an employer and a full time or part time employee may enter into a written agreement for the employee to be paid an annualised salary that is at least 25% more than the amounts prescribed in Clause 25 – Wages multiplied by 52 for the work being performed.

27.2 Where a written agreement for an annualised salary is entered into, the agreement must specify:

- (a) the annualised salary that is payable;
- (b) which of the provisions of this award will be satisfied by payment of the annualised salary; and

- (c) how the agreement may be terminated by either party.
- 27.3 In such cases, there is no requirement to pay:
- (a) Penalty rates (Clause 14);
- (b) Overtime (Clause 17); or
- (c) Annual leave loading (Clause 19.4),
- provided that the salary paid over a year is sufficient to cover what the employee would have been entitled to if all award penalty rate, overtime and annual leave loading obligations had been complied with.
- 27.4 The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.
- 27.5 An employee being paid according to this clause will be entitled to a minimum of 8 days off per 4-week cycle. If the employee is required to work on a public holiday, they are entitled to a day off in lieu or a day added to their annual leave entitlement.
- 27.6 Annualised salary not to disadvantage employees
- (a) The annualised salary must be no less than the amount the employee would otherwise have received under this award for the work performed over the year (or if the employment ceases or the agreement terminates earlier, over such lesser period as has been worked).
- (b) The employer must, each 12 months from the commencement of the annualised salary arrangement (or within any 12 month period upon the cessation of employment or termination of the agreement), calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised salary actually paid to the employee. Where the latter amount is less than the former amount, the employer must pay the employee the amount of the shortfall within 14 days.
- (c) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised salary arrangement agreement for the purpose of undertaking the comparison required by Clause 27.6(b). This record must be signed by the employee or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

28. Payment of wages

- 28.1 The employer may elect to pay employees in cash or by means of a credit transfer to a bank, building society or credit union account specified in the name of the employee. The day that the credit transfer is credited to the employee's account is be deemed to be the date of payment.
- 28.2 Wages may be paid either for the actual hours worked each pay period or an amount being the weekly average of the wages accruing over the roster cycle.
- 28.3 Payment must be made within 3 trading days from the last day of the pay period and if in cash must be made during the employee's ordinary working hours.
- 28.4 If an employee is paid in cash and they are not rostered to work on a pay day, the employee may request that their wages be paid prior to the pay day, in which case the employer must make payment accordingly.
- 28.5 The employer must not change the method of payment to employees, or the frequency of payment to employees, without first giving them at least 4 weeks' notice of such change.
- 28.6 The employer may elect to pay employees weekly or fortnightly.
- 28.7 The method of introducing a fortnightly pay system will be by the payment of an additional week's wages in the last weekly pay before the change to fortnightly pays, to be repaid by equal fortnightly deductions made from the next and subsequent pays. Provided the period for repayment must not be less than 20 weeks, or some other method agreed upon by the employer and the employee.
- 28.8 An employee who lawfully terminates their employment, or is dismissed for reasons other than misconduct, must be paid all wages due to them by the employer on the day of termination of their employment or as soon as practicable after the date of termination of their employment.

29. Higher duties

- 29.1 If an employee is required to perform the duties of a higher classification under this award for 2 or more hours, the employer must pay the employee the applicable rate of pay for the higher classification while they are undertaking that work.
- 29.2 If an employee is required to perform the duties of a higher classification under this award for more than half of any day or shift, they must be paid for the whole day or shift at the rate prescribed for the higher classification.
- 29.3 In the event that no record is kept of the actual times an employee was required to perform the duties of a higher classification on any day or shift, the employee must be paid for the whole day or shift at the rate prescribed for the higher classification.
- 29.4 Any employee who is required to perform duties carrying a lower prescribed rate of pay will do so without any loss of pay.

30. Supported wage system

- 30.1 Definitions

This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award. In the context of this clause, the following definitions will apply:

- (a) **approved assessor** means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual’s productive capacity within the Supported Wage System.
- (b) **assessment instrument** means the tool provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.
- (c) **disability support pension** means the Commonwealth Government pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme.
- (d) **supported wage system (SWS)** means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in the Supported Wage System Handbook. The Handbook is available from the following website: www.jobaccess.gov.au.
- (e) **SWS wage assessment agreement** means the document in the form required by the Department of Social Services that records the employee’s productive capacity and agreed wage rate.

30.2 Eligibility criteria

- (a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.
- (b) This clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers compensation legislation or any provision of this award relating to the rehabilitation of employees who are injured in the course of their current employment.

30.3 Supported wage rates

- (a) Employees to whom this clause applies will be paid the applicable percentage of the minimum rate of pay prescribed by this award for the class of work which the person is performing according to the following schedule:

Assessed Capacity	% of Prescribed Award Rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

- (b) Provided that the minimum amount payable must not be less than \$109.00 per week.
- (c) Where an employee’s assessed capacity is 10%, they must receive a high degree of assistance and support.

30.4 Assessment of capacity

- (a) For the purpose of establishing the percentage of the award rate to be paid to an employee under this award, the productive capacity of the employee will be assessed in accordance with the SWS by an approved assessor, having consulted the employer and employee and, if the employee so desires, the union.
- (b) All assessments made under this clause must be documented in a SWS wage assessment agreement and retained by the employer as a time and wages record.

30.5 Lodgement of SWS wage assessment agreement

- (a) All SWS wage assessment agreements under the conditions of this clause, including the appropriate percentage of the award wage to be paid to the employee, must be lodged by the employer with the Commission.
- (b) All SWS wage assessment agreements must be agreed and signed by the employee and employer parties to the assessment. Where the union is not a party to the assessment, the assessment will be referred by the Commission to the union by certified mail and the agreement will take effect unless an objection is notified to the Commission within 10 working days.

30.6 Review of assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review will be in accordance with the procedures for assessing capacity under the SWS.

30.7 Other terms and conditions of employment

Where an assessment has been made, the applicable percentage will apply to the wage rate only. Employees covered by the provisions of this clause will be entitled to the same terms and conditions of employment as all other employees covered by this award paid on a pro-rata basis.

30.8 Workplace adjustment

An employer wishing to employ a person under the provisions of this clause must take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the area.

30.9 Trial period

- (a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.
- (b) During the trial period the assessment of capacity will be undertaken and the proposed wage rate for a continuing employment relationship will be determined.
- (c) The minimum amount payable to the employee during the trial period must be no less than \$109.00 per week.
- (d) Work trials should include induction or training as appropriate to the job being trialled.
- (e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment will be entered into based on the outcome of assessment under Clause 30.4 – Assessment of capacity.

31. Traineeships

The minimum rates of pay and conditions of employment applicable to Trainees will be those set out in Schedule E – National Training Wage of the Miscellaneous Award 2020 as amended from time to time. Provided that any reference to "this award" in Schedule E to the Miscellaneous Award 2020 is to be read as referring to the Restaurant, Café and Catering (WA) Award.

Note: The Miscellaneous Award 2020 is a modern award that applies to employers and employees in the national industrial relations system. The rates of pay for trainees are usually adjusted from 1 July each year.

32. Superannuation

32.1 The employer must contribute on behalf of the employee in accordance with the requirements of the Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993 as varied from time to time.

32.2 Contributions must be paid into one of the following funds:

- (a) any complying fund nominated by the employee; or
- (b) the employee's stapled fund; or
- (c) Hostplus Super Fund, which will become the "nominated fund" if no fund is nominated by the employee and there is no stapled fund.

32.3 For the purposes of this clause the employee's ordinary time earnings will include base classification rate, shift and weekend penalties and any other all purpose allowance or penalty payment for work in ordinary time and in respect of casual employees the casual loading.

32.4 Employee's options

- (a) Within 14 days of commencing employment, the employer must notify the employee of the employee's entitlement to nominate a complying fund.
- (b) Any failure by the employee to nominate a fund will not affect the employee's eligibility to receive contributions.
- (c) The employee and employer will be bound by the nomination of the employee unless the employee and employer agree to change the complying superannuation fund or scheme to which contributions are to be made.
- (d) The employer must not unreasonably refuse to agree to a change of complying fund requested by an employee.

32.5 Employees' additional voluntary contributions

The employer will deduct additional contributions from an employee's wages and pay them to the fund in compliance with both of the following:

- (a) the rules of the fund; and
- (b) the directions of the employee; but not otherwise.

Part 6 – Allowances and facilities

33. Location allowance

- 33.1 Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee will be paid the following weekly allowances when employed in the following towns.

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

- 33.2 Except as provided in Clause 33.3, an employee who has:

- (a) a dependant must be paid double the allowance prescribed in Clause 33.1 of this clause;
- (b) a partial dependant must be paid the allowance prescribed in Clause 33.1 of this clause plus the difference between that rate and the amount the partial dependant is receiving by way of a district or location allowance.
- 33.3 Where an employee:
- (a) is provided with board and lodging by their employer, free of charge; or
- (b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;
- the employee must be paid 66^{2/3} per cent of the allowances prescribed in Clause 33.1.
- 33.4 Subject to Clause 33.2, junior employees, casual employees, part time employees, apprentices receiving less than the adult rate and employees employed for less than a full week must receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.
- 33.5 Where an employee is on annual leave or receives payment in lieu of annual leave, they must be paid for the period of leave the location allowance to which they would ordinarily be entitled.
- 33.6 Where an employee is on long service leave or other approved leave with pay (other than annual leave) they will only be paid location allowance for the period of leave they remain in the location in which they are employed.
- 33.7 For the purposes of this clause:
- (a) **Dependant** means –
- (i) a spouse or defacto partner; or
- (ii) a child where there is no spouse or defacto partner;
- who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.
- (b) **Partial Dependant** means a “dependant” who receives a location allowance which is less than the location allowance prescribed in Clause 33.1 or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.
- 33.8 Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of Clause 33.1 will be an amount as may be agreed between the Chamber of Commerce and Industry of Western Australia and UnionsWA or, failing such agreement, as may be determined by the Commission.
- 33.9 Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices will be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing) for Perth, measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest 10 cents.
- 34. Meal allowance**
- If an employee is required to work overtime beyond the end of their shift for more than 2 hours on any day without being notified of that requirement on or before the previous day, the employer must:
- (a) pay the employee a standard meal allowance; or
- (b) supply the employee with a meal.
- 35. Split shift allowance**
- 35.1 Clause 35.2 applies to any full time or part time employee who is required to work any of their ordinary hours on any day in more than one period, other than for meal and rest breaks.
- 35.2 The employer must pay the employee a standard split shift allowance for each separate work period that day.
- 36. Uniforms and laundering**
- 36.1 For the purpose of this clause a “special uniform” will consist of articles or clothing such as monogrammed or coloured jackets, dresses, blouses, overalls, aprons, caps, collars, cuffs or other special apparel which the employer may require an employee to wear whilst on duty; provided that the ordinary apparel usually worn by Waiters and Stewards will not be deemed to be special uniforms within the meaning of this clause.
- 36.2 If an employee is required to wear a special uniform for the purposes of their employment, the employer must supply the special uniform free of charge or pay for its purchase. The uniform will remain the property of the employer.
- 36.3 Subject to Clause 36.4, an employer requiring a special uniform to be worn, as described in Clause 36.1, will launder such clothing at their own expense or otherwise will pay to the employee concerned \$7.20 per fortnight worked as a laundry allowance. The laundry allowance will be halved for employees who work less than 38 ordinary hours each fortnight.
- 36.4 Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments will be laundered at the employer's expense or otherwise the employee will be paid \$11.00 per fortnight worked as a laundry allowance. The laundry allowance will be halved for employees who work less than 38 ordinary hours each fortnight.
- 36.5 Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 43 – Dispute resolution procedure of this award.

37. Meals and/or accommodation

- 37.1 No employee is compelled to take meals and/or utilise accommodation on the employer's premises, and it must not be a condition of employment that any employee will do so.
- 37.2 Where, by mutual consent, meals and accommodation are provided, the employer will be entitled to deduct the following maximum amounts per fortnight from an employee's wage:
- (a) Full meals and accommodation of 42 meals per fortnight:
 - (i) Single accommodation \$180.45
 - (ii) Shared accommodation \$135.45
 - (b) Individual meals \$3.35 each
 - (c) Junior employees who are in receipt of less than a full adult rate will not have amounts deducted in excess of 70% of the rates prescribed in Clause 37.2(a).
 - (d) The rates prescribed in Clause 37.2(a) will be reduced pro rata for any period less than a fortnight.
- 37.3 Mutual consent for the purpose of this clause means a document which the employee has signed agreeing to the amount of meals and accommodation offered by the employer. Such an agreement may be cancelled by either party by giving 14 days' written notice to the other party.
- 37.4 Employees who utilise accommodation on the employer's premises will be provided with the following:
- (a) a common sitting room apart from their bedroom;
 - (b) a properly equipped bathroom; and
 - (c) access to a laundry at such times as are mutually agreed upon between the employee and the employer.
- 37.5 Subject to Clause 37.4(c), where an employee is required to use a coin operated washing machine and/or dryer in a laundry, the meals and accommodation charges for that employee will be reduced by the amount of \$3.85 per fortnight.
- 37.6 Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 43 – Dispute resolution procedure of this award.

38. Protective clothing

- 38.1 Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, will be supplied with rubber gloves free of charge by the employer or be reimbursed for the cost of the rubber gloves. For this purpose, the employer may require the employee to show evidence of that cost.
- 38.2 Where the conditions of work are such that employees are unable to avoid their clothing becoming dirty or wet, they will be supplied with suitable protective clothing by the employer free of charge.
- 38.3 Where the conditions of work are such that employees are unable to avoid their feet becoming wet, they will be supplied with suitable protective footwear by the employer free of charge.
- 38.4 All articles supplied remain the property of the employer and must be returned when required in good order and condition, fair wear and tear expected.
- 38.5 Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 43 – Dispute resolution procedure of this award.

39. Work equipment

- 39.1 All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be used by the employee for the purpose of carrying out their duties, will be supplied by the employer free of charge.
- 39.2 The employer must pay a cook or an apprentice cook who is required to provide and use their own tools a standard tool and equipment allowance.
- 39.3 The employer must reimburse an employee for the cost of purchasing any towels, tools, knives, choppers, implements, utensils or other materials that the employee is required to provide and use and that are not supplied or paid for by the employer and in respect of which a tool and equipment allowance is not payable under Clause 39.2.

40. Travelling facilities

- 40.1 Where an employee is detained at work until it is too late to travel by the last ordinary bus, train or other regular public transport to their usual place of residence the employer will provide alternative transport free of charge.
- 40.2 If an employee is required to start work before the first ordinary means of public transport as described in Clause 40.1 is available to transport them from their usual place of residence to the place of employment, the employer will provide alternative transport free of charge.
- 40.3 Clauses 40.1 and 40.2 do not apply to an employee who usually has their own means of transport.
- 40.4 Working at an alternative location
An employer must pay an employee who works away from their usual work location at their minimum hourly rate for any excess time spent travelling both ways between the employee's residence and the alternative location.
- 40.5 Distance work
In addition to Clause 40.4, the employer must pay the employee for the cost of transport both ways between the

employee's residence and their place of work when all the following circumstances are met:

- (a) the employee is engaged for work that requires the employee to travel 80 kilometres or more from their usual place of work to take up the engagement; and
- (b) the employee performs their work to the satisfaction of their employer for a period of up to 4 weeks; and
- (c) the employee is willing to complete the full period of the engagement.

41. First aid kit

Employers must provide and continuously maintain in a place easily accessible to all employees an adequate first aid kit.

42. Union facilities

42.1 Display of information

A copy of this award, if supplied by the union, must be exhibited by the employer on the business premises in a place that is conveniently and readily seen by each employee.

42.2 The Secretary of the union, or any other duly accredited representative of the union, is permitted to post notices relating to union business in a place that is conveniently and readily seen by each employee.

42.3 Union delegates

In an establishment a union delegate may be elected by the employees. This delegate must be recognised by the employer and must be allowed all necessary time during working hours to submit to the employer industrial matters affecting the employees they represent and to attend to any industrial dispute or industrial matter that may arise affecting the employees in that establishment.

42.4 The union and an employer may agree to further delegates having regard for the size of the establishment and the shift arrangements for the work performed.

42.5 Prior to the intended dismissal of a union delegate, the employer must notify the union of the reasons for the dismissal.

- 42.6 (a) At each employer's establishment the union will be allowed to convene one "union meeting" each year, during ordinary working hours, in accordance with the following conditions:–
- (i) the meeting is to be held on any day of the week other than a Thursday, Friday or Saturday, Sunday or public holiday;
 - (ii) the duration of the meeting will not exceed 3 hours;
 - (iii) the time, date and venue of the meeting must be agreed between the union and the employer;
 - (iv) each employee attending the meeting during ordinary rostered working hours must be paid for those hours, provided the employee produces satisfactory evidence of having attended the meeting to their employer.
- (b) For the purposes of this subclause and by agreement between the union and the employer, the term "union meeting", may mean several individual meetings held at different times, dates and venues to discuss the same subject matter provided that an employee is only entitled to attend or be paid for attending one meeting each year.

42.7 For the avoidance of doubt, "agreement" in this clause may not be unreasonably withheld.

Part 7 – Dispute Resolution

43. Dispute resolution procedure

43.1 Subject to the *Industrial Relations Act 1979* (as amended), in the event of a problem, grievance, question, dispute, claim or difficulty that affects one or more employees, or arises from the employee's work or contract of employment, the provisions of this clause will apply.

43.2 At first instance the matter will be raised with the supervisor/manager as appropriate.

43.3 In the event that the matter is unresolved it may be raised with the employer by the individual concerned (or his/her representative), or the shop steward or union official involved.

43.4 If the matter is still not resolved it may be referred to the Western Australian Industrial Relations Commission for determination, and if necessary, arbitration.

43.5 The parties will attempt to resolve the matter prior to either party referring the matter to the Western Australian Industrial Relations Commission.

43.6 Nothing in this clause is to be read so as to exclude an organisation party to or bound by the award from representing its members.

Part 8 – Record Keeping, Payslips and Right of Entry

44. Employment records and pay slips

An employer must keep employment records and provide pay slips in accordance with Part II, Division 2F – Keeping of and access to employment records and pay slips of the *Industrial Relations Act 1979*.

45. Right of entry

Conditions regarding right of entry by authorised representatives of the union are dealt with in Part II, Division 2G –

Right of entry and inspection by authorised representatives of the *Industrial Relations Act 1979*.

Part 9 – Named Parties

46. Named parties to the award

Union Party

46.1 United Workers Union (WA)

Employer Parties

46.2 Restaurant and Catering Industry Association of Employers of Western Australia Inc
Western Australian Hotels and Hospitality Association Incorporated (Union of Employers)
Meals on Wheels
Perth City Council
The City of Stirling
Yule Brook College Parents and Citizens' Association Incorporated

Schedule A – Classifications

- A.1 **Food and Beverage Attendant Grade 1** means an employee who is engaged in any of the following:
- (a) picking up glasses;
 - (b) general assistance to food and beverage attendants of a higher grade not including service to customers;
 - (c) removing food plates;
 - (d) setting and/or wiping down tables;
 - (e) cleaning and tidying of associated areas.
- A.2 **Food and Beverage Attendant Grade 2** means an employee who is engaged in any of the following:
- (a) supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;
 - (b) assisting in the cellar or bottle department;
 - (c) undertaking general waiting duties of both food and/or beverage including cleaning of tables;
 - (d) receipt of monies;
 - (e) attending a snack bar;
 - (f) engaged on delivery duties.
- A.3 **Food and Beverage Attendant Grade 3** is an employee who is required to perform work above and beyond the skills of a Food and Beverage Attendant Grade 2 and is engaged in any of the following:
- (a) supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;
 - (b) assisting in the cellar or bottle department, where duties could include working up to 4 hours per day (averaged over the relevant work cycle) in the cellar without supervision;
 - (c) undertaking general waiting duties of both food and liquor including cleaning of tables;
 - (d) receipt and dispensing of monies;
 - (e) engaged on delivery duties; or
 - (f) in addition to the tasks performed by a food and beverage attendant grade 2 the employee is also involved in:
 - (i) the operation of a mechanical lifting device; or
 - (ii) attending a wagering (e.g. TAB) terminal, electronic gaming terminal or similar terminal.
 - (g) and/or means an employee who is engaged in any of the following:
 - (i) full control of a cellar or liquor store (including the receipt, delivery and recording of goods within such an area);
 - (ii) mixing a range of sophisticated drinks;
 - (iii) supervising food and beverage attendants of a lower grade;
 - (iv) taking reservations, greeting and seating guests;
 - (v) training food and beverage attendants of a lower grade.
- A.4 **Food and Beverage Attendant (Tradesperson) Grade 4** means an employee who has the appropriate level of skills and experience or who has completed an appropriate qualification and carries out specialised skilled duties in a fine dining room or restaurant.
- A.5 **Food and Beverage Supervisor** means an employee who has the appropriate level of skills and experience or who has completed an appropriate qualification and who has the responsibility for supervision, training and co-ordination of food and beverage staff, or stock control for a bar or series of bars.

Kitchen

- A.6 **Kitchen Attendant Grade 1** means an employee engaged in any of the following:
- (a) general cleaning duties within a kitchen or food preparation area and scullery, including the cleaning of cooking and general utensils used in a kitchen and restaurant;
 - (b) assisting employees who are cooking;
 - (c) assembly and preparation of ingredients for cooking; or
 - (d) general pantry duties.
- A.7 **Kitchen Attendant Grade 2** means an employee who has the appropriate level of skills and experience, and who is engaged in specialised non-cooking duties in a kitchen or food preparation area, or supervision of kitchen attendants.
- A.8 **Kitchen Attendant Grade 3** means an employee who has the appropriate level of skills and experience or who has completed an appropriate qualification, and has the responsibility for the supervision, training and co-ordination of kitchen attendants of a lower grade.
- A.9 **Cook Grade 1** means an employee who carries out cooking of breakfasts and snacks, baking, pastry cooking or butchering.
- A.10 **Cook Grade 2** means an employee who has the appropriate level of skills and experience or who has completed an appropriate qualification and who performs cooking duties including baking, pastry cooking or butchering.
- A.11 **Cook (Tradesperson) Grade 3** means a “commi chef” or equivalent who has completed an apprenticeship or an appropriate qualification, and who is engaged in cooking, baking, pastry cooking or butchering duties.
- A.12 **Cook (Tradesperson) Grade 4** means a “demi chef” or equivalent who has completed an apprenticeship or an appropriate qualification, and who is engaged to perform general or specialised cooking, butchering, baking or pastry cooking duties and/or supervises and trains other cooks and kitchen employees.
- A.13 **Cook (Tradesperson) Grade 5** means a “chef de partie” or equivalent who has completed an apprenticeship or a specialist qualification in cooking, butchering, baking or pastry cooking who performs any of the following:
- (a) general and specialised duties including supervision or training of other kitchen staff;
 - (b) ordering and stock control; or
 - (c) solely responsible for other cooks and other kitchen employees in a single kitchen establishment.

Guest Service

- A.14 **Guest Service Grade 1** means an employee who performs any of the following:
- (a) laundry and/or linen duties which may include minor repairs to linen or clothing such as buttons, zips, seams, and working with flat materials;
 - (b) performs general cleaning duties; or
 - (c) parking guest cars.
- A.15 **Guest Service Grade 2** means an employee who is engaged in any of the following:
- (a) assisting in the dry cleaning process; or
 - (b) cleaning duties using specialised equipment and chemicals.
- A.16 **Guest Service Grade 3** means an employee who has the appropriate level of skills and experience and who is engaged in any of the following:
- (a) supervising guest service employees of a lower grade;
 - (b) major repair of linen and/or clothing including basic tailoring and major alterations and refitting; or
 - (c) dry cleaning.
- A.17 **Guest Service Grade 4** means an employee who has completed an apprenticeship or an appropriate qualification or who has the appropriate level of skills and experience to perform the work of a tradesperson in dry cleaning or tailoring.

Stores Stream

- A.18 **Storeperson Grade 1** means an employee who receives and stores general and perishable goods and cleans the store area.
- A.19 **Storeperson Grade 2** means an employee who, in addition to the duties for a storeperson Grade 1, may also operate mechanical lifting equipment such as a forklift or who may perform duties of a more complex nature.
- A.20 **Storeperson Grade 3** means an employee who has the appropriate skills and experience and who:
- (a) implements quality control techniques and procedures;
 - (b) understands and is responsible for a stores/warehouse area or a large section of such an area; and
 - (c) has a highly developed level of interpersonal and communications skills; and
 - (d) is able to supervise and provide direction and guidance to other employees including the ability to assist in the provision of on-the-job training and induction; and
- who may perform indicative tasks such as:
- (e) liaising with management, suppliers and customers with respect to stores operations; detailing and co-ordinating activities of other storepersons and acting in a leading hand capacity for in excess of 10 storepersons; and

- (f) Maintaining control registers including inventory control and being responsible for preparation and reconciliation or regular reports or stock movements, dispatches, etc.; and
- (g) Supervising the receipt and delivery of goods, records, outgoing goods, responsible for the contents of a store.

Security stream

- A.21 **Doorperson/security officer Grade 1** means a person who assists in the maintenance of dress standards and good order at an establishment.
- A.22 **Timekeeper/security officer Grade 2** means a person who is responsible for the timekeeping of employees, the security of keys, the checking in and out of delivery vehicles or the supervision of doorperson/security officer Grade 1 employees.

Schedule B – School Canteen Employees

- B.1 Without limiting the scope of this Award, the provisions of this clause only apply to canteen employees employed in government schools.
- B.2 This clause does not apply to canteen employees employed by the Director General of the Department of Education.
- B.3 To the extent that the provisions of this clause are inconsistent with the provisions in any other clause of this Award, the provisions of this clause prevail.
- B.4 Definitions

Canteen Employee – means an employee who works in a school canteen.

Committee – means a person or persons delegated with the function of overseeing the management of a school canteen.

Canteen Employee Grade 2 – means a canteen employee who is engaged in any of the following:

- (a) Supplying, dispensing, warming or generally preparing light snack meals;
- (b) Undertaking general serving duties of both food and/or refreshments;
- (c) Maintaining canteen cleanliness;
- (d) Attending a canteen customer service counter;
- (e) Receipt of monies and dispensing change;
- (f) Delivery duties to classrooms, when required.

Note: A canteen employee Grade 2 is entitled to be paid the same rate as a Food and Beverage Attendant Grade 2.

Canteen Employee Grade 3 – means a canteen employee who coordinates volunteers and a maximum of 2 other canteen employees per week, and/or in addition to Grade 2 is engaged in any of the following:

- (a) Controls canteen stock (including the weekly receipt, recording and ordering of basic pro forma stock);
- (b) In consultation with Committee, coordinates rosters for staff and volunteers;
- (c) In consultation with Committee, coordinates and/or prices snack food menus.

Note: A canteen employee Grade 3 is entitled to be paid the same rate as a Food and Beverage Attendant Grade 3.

Canteen Supervisor Grade 4 – means a canteen employee who supervises volunteers and more than 2 other canteen employees and/or in addition to Grade 3 manages canteen stock (including responsibility for stock take and budgeted ordering).

Note: A canteen employee Grade 4 is entitled to be paid the same rate as a Food and Beverage Attendant Grade 4.

- B.5 Canteen employees will commence employment at a level not lower than a Canteen Employee Grade 2.
- B.6 Part time Canteen Employees

- (a) Notwithstanding the provisions of Clause 11 – Part time employment, a canteen employee may be employed for less than 20 ordinary hours per fortnight, provided they are employed for no less than 3 hours per day on a regular and rostered basis on set hours of the day and set days of the week.
- (b) A part time canteen employee rostered for less than 20 ordinary hours per fortnight must be paid in accordance with Clause 17 – Overtime for hours worked in excess of their rostered hours.
- (c) Notwithstanding any other provisions of this Award, a part time canteen employee who works 20 or more hours per fortnight may, by agreement with their employer, increase their ordinary hours in any particular fortnight to a maximum of 76 ordinary hours. Such extra hours are paid for at ordinary rates of pay.
- (d) A part time canteen employee is entitled to receive payment for wages, annual leave and personal leave on a pro-rata basis in the same proportion as the number of hours worked each fortnight bears to 76 hours.

Schedule C – No reduction

- C.1 Despite the provisions of this award, an existing employee (including a casual employee) as at 31 July 2025 who continues to be employed with the same employer after that date must not be paid less than they would have been paid for the same work under the provisions of the award as it stood prior to that date.

VARIATION RECORD

RESTAURANT, CAFÉ AND CATERING (WA) AWARD

Delivered 12/11/79 at 59 WAIG 1671.Section 93(6)
 Consolidation 19/06/85 at 65 WAIG 1275.Section 93(6)
 Consolidation 07/10/88 at 68 WAIG 2608.Section 93(6)
 Consolidation 13/10/92 at 72 WAIG 2389.Section 93(6)
 Consolidation 25/03/97 at 77 WAIG 1014.Section 93(6)
 Consolidation 03/10/00 at 80 WAIG 5238
 Consolidation 31/07/25 at Unreported

CLAUSE NO.	EXTENT OF VARIATION	ORDER NO.	OPERATIVE DATE	GAZETTE REFERENCE
Part 1 – Application and Operation				
1. Title				
	Cl.	4/20	31/07/25	Unreported
2. Arrangement				
	Cl.	4/20	31/07/25	Unreported
3. Scope				
	Replaced/Inserted	4/20	31/07/25	Unreported
4. Area				
	Replaced/Inserted	4/20	31/07/25	Unreported
5. Definitions				
	Replaced/Inserted	4/20	31/07/25	Unreported
Part 2 – Contract of Employment				
6. Contract of employment and termination				
	Replaced/Inserted	4/20	31/07/25	Unreported
7. Introduction of change				
	Replaced/Inserted	4/20	31/07/25	Unreported
8. Redundancy				
	Replaced/Inserted	4/20	31/07/25	Unreported
9. Anti-discrimination				
	Replaced/Inserted	4/20	31/07/25	Unreported

10. Full time employment

Replaced/Inserted	4/20	31/07/25	Unreported
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11. Part time employment

Replaced/Inserted	4/20	31/07/25	Unreported
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12. Casual employment

Replaced/Inserted	4/20	31/07/25	Unreported
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Part 3 – Hours of Work**13. Ordinary hours of work**

Replaced/Inserted	4/20	31/07/25	Unreported
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14. Penalty rates

Replaced/Inserted	4/20	31/07/25	Unreported
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15. Rosters

Replaced/Inserted	4/20	31/07/25	Unreported
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16. Meal breaks and rest periods

Replaced/Inserted	4/20	31/07/25	Unreported
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17. Overtime

Replaced/Inserted	4/20	31/07/25	Unreported
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Part 4 – Leave and Public Holidays**18. Public holidays**

Replaced/Inserted	4/20	31/07/25	Unreported
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19. Annual leave

Replaced/Inserted	4/20	31/07/25	Unreported
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20. Personal leave

Replaced/Inserted	4/20	31/07/25	Unreported
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21. Long service leave

Replaced/Inserted	4/20	31/07/25	Unreported
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22. Bereavement leave

Replaced/Inserted	4/20	31/07/25	Unreported
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23. Parental leave

Replaced/Inserted	4/20	31/07/25	Unreported
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24. Family and domestic violence leave

Replaced/Inserted	4/20	31/07/25	Unreported
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Part 5 – Rates of Pay**25. Wages**

Replaced/Inserted	4/20	31/07/25	Unreported
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26. Minimum adult award wage

Replaced/Inserted	4/20	31/07/25	Unreported
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27. Option for annualised salary

Replaced/Inserted	4/20	31/07/25	Unreported
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28. Payment of wages

Replaced/Inserted	4/20	31/07/25	Unreported
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29. Higher duties

Replaced/Inserted	4/20	31/07/25	Unreported
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30. Supported wage system

Replaced/Inserted	4/20	31/07/25	Unreported
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31. Traineeships

Replaced/Inserted	4/20	31/07/25	Unreported
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32. Superannuation

Replaced/Inserted	4/20	31/07/25	Unreported
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Part 6 – Allowances and facilities**33. Location allowance**

Replaced/Inserted	4/20	31/07/25	Unreported
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34. Meal allowance

Replaced/Inserted	4/20	31/07/25	Unreported
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35. Split shift allowance

Replaced/Inserted	4/20	31/07/25	Unreported
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36. Uniforms and laundering

Replaced/Inserted	4/20	31/07/25	Unreported
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37. Meals and/or accommodation

Replaced/Inserted	4/20	31/07/25	Unreported
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38. Protective clothing

Replaced/Inserted	4/20	31/07/25	Unreported
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39. Work equipment

Replaced/Inserted	4/20	31/07/25	Unreported
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40. Travelling facilities

Replaced/Inserted	4/20	31/07/25	Unreported
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41. First aid kit

Replaced/Inserted	4/20	31/07/25	Unreported
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42. Union facilities

Replaced/Inserted	4/20	31/07/25	Unreported
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Part 7 – Dispute Resolution**43. Dispute resolution procedure**

Replaced/Inserted	4/20	31/07/25	Unreported
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Part 8 – Record Keeping, Payslips and Right of Entry**44. Employment records and pay slips**

Replaced/Inserted	4/20	31/07/25	Unreported
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45. Right of entry

Cl.	4/20	31/07/25	Unreported
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Part 9 – Named Parties**46. Named parties to the award**

Replaced/Inserted	4/20	31/07/25	Unreported
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Schedule A – Classifications

Replaced/Inserted	4/20	31/07/25	Unreported
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Schedule B – School Canteen Employees

Replaced/Inserted	4/20	31/07/25	Unreported
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Schedule C – No reduction

Replaced/Inserted	4/20	31/07/25	Unreported
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VARIATION RECORD
RESTAURANT, CAFÉ AND CATERING (WA) AWARD

RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD

~~Delivered 12/11/79 at 59 WAIG 1671. Section 93(6)
Consolidation 19/06/85 at 65 WAIG 1275. Section 93(6)
Consolidation 07/10/88 at 68 WAIG 2608. Section 93(6)
Consolidation 13/10/92 at 72 WAIG 2389. Section 93(6)
Consolidation 25/03/97 at 77 WAIG 1014. Section 93(6)
Consolidation 03/10/00 at 80 WAIG 5238.~~

CLAUSE NO.	EXTENT OF VARIATION	ORDER NO.	OPERATIVE DATE	GAZETTE REFERENCE
1. Title				
	Cl.	A15/09	30/04/09	89 WAIG 507
(1A. State Wage Principles)				
	Cl. & Title	1457/93	24/12/93	74 WAIG 198

~~(1A. State Wage Principles December 1993)~~

Cl. & Title	985/94	30/12/94	75 WAIG 23
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~~(1A. Statement of Principles December 1994)~~

Cl. & Title	1164/95	21/03/96	76 WAIG 911
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~~(1A. Statement of Principles March 1996)~~

Cl & Title	915/96	7/08/96	76 WAIG 3368
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~~(1A Statement of Principles—August 1996)~~

Cl & Title	940/97	14/11/97	77 WAIG 3177
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~~(1A. Statement of Principles—November 1997)~~

Cl. & Title	757/98	12/06/98	78 WAIG 2579
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~~(1A. Statement of Principles—June, 1998)~~

Del. Cl	609/99	06/07/99	79 WAIG 1843
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2. Arrangement

~~(EDIT NOTE: Schedule of Respondents not listed in this clause)~~

Cl.	386/92	22/02/93	73 WAIG 377
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Cl.	386/92 Corr	22/02/93	73 WAIG 377
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Delete Sch. of Resp. & Ins. Schedule A & B	1526/93	23/12/93	74 WAIG 142
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1A. Title	1457/93	24/12/93	74 WAIG 198
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1A Title	985/94	30/12/94	75 WAIG 23
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Ins. (45)	992/95	09/01/96	76 WAIG 403
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1A. Title	1164/95	21/03/96	76 WAIG 911
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Ins. Appendix—Resolution...	693/96	16/07/96	76 WAIG 2768
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Ins. Appendix—S.49B...	694/96	16/07/96	76 WAIG 2789
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1A. Title	915/96	7/08/96	76 WAIG 3368
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1A	940/97	14/11/97	77 WAIG 3177
1A. Title	757/98	12/06/98	78 WAIG 2579
Del. 1A	609/99	06/07/99	79 WAIG 1843
Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Cl.	131/05	12/05/05	85 WAIG 3225
Cl.	929/05	8/03/06	86 WAIG 509
Cl.	17/06	24/03/06	86 WAIG 791
Cl.	A15/09	30/04/09	89 WAIG 507
(2A. State Wage Case Principles – September 1989)			
Del. cl.	386/92 Corr	22/02/93	73 WAIG 377
3. Area			
Cl.	12/10/23	5/22	104 WAIG 169
4. Scope			
Cl.	12/10/23	5/22	104 WAIG 169
(5. Term)			
Del. Cl.	A15/09	30/04/09	89 WAIG 507
6. Definitions			
(11)	1363/92	14/12/92	73 WAIG 159
Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
(6), Ins (27)	17/06	24/03/06	86 WAIG 791
(1) & (2)	12/10/23	5/22	104 WAIG 169
7. Contract of Service			
Cl.	1363/92	14/12/92	73 WAIG 159
Cl.	582/94 & 381/95	21/02/01	81 WAIG 820

8. Hours

Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
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9. Additional Rates for Ordinary Hours

Cl.	1363/92	14/12/92	73 WAIG 159
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Cl.	1381/92	14/03/93	73 WAIG 163
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Cl.	1782/96	04/02/97	77 WAIG 492
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Cl.	1158/98	28/07/98	78 WAIG 3334
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Cl.	740/00	29/11/00	80 WAIG 5614
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Cl.	1029/01	08/01/02	82 WAIG 301
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Cl.	974/02	28/01/03	83 WAIG 811
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Cl.	635/03	11/3/05	85 WAIG 1219
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Cl.	78/06	21/02/07	87 WAIG 483
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Cl.	46/08	02/12/08	88 WAIG 2290
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10. Overtime

(3); (6)	1363/92	14/12/92	73 WAIG 159
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(7)	17/06	24/03/06	86 WAIG 791
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(10A. Translation of casual Employees)

Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
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Cl.	752/01	01/08/01	81 WAIG 1721
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Cl.	797/02	01/08/02	82 WAIG 1369
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Cl.	569/03	5/06/03	83 WAIG 1899 & 2577
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Del No, Title & Cl	17/06	24/03/06	86 WAIG 791
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11. Casual Workers

Cl.	578/94	06/03/95	75 WAIG 952
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(3)	992/95	09/01/96	76 WAIG 403
(3)	1782/96	04/02/97	77 WAIG 492
Rates & Ins. Text	940/97	14/11/97	77 WAIG 3177
(3)	1158/98	28/07/98	78 WAIG 3334
(3) rates, (b) ins. Text at end.	609/99	01/08/99	79 WAIG 1843
Cl.	654/00	01/08/00	80 WAIG 3379
Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
(4), Ins (6)	17/06	24/03/06	86 WAIG 791
(12. Part Time Workers)			
Cl.	1363/92	14/12/92	73 WAIG 159
(12. Part Time Employees)			
Title	17/06	24/03/06	86 WAIG 791
13. Meal Breaks			
Cl.	1363/92	14/12/92	73 WAIG 159
Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
14. Meal Money			
Cl.	1363/92	14/12/92	73 WAIG 159
Cl.	1782/96	04/02/97	77 WAIG 492
Cl.	1158/98	28/07/98	78 WAIG 3334
Cl.	740/00	29/11/00	80 WAIG 5614
Cl.	1029/01	08/01/02	82 WAIG 301
Cl.	974/02	28/01/03	83 WAIG 811
Cl.	635/03	11/3/05	85 WAIG 1219
Cl.	78/06	21/02/07	87 WAIG 483

Cl	46/08	02/12/08	88 WAIG 2290
15. Sick Leave			
(3)	1363/92	14/12/92	73 WAIG 159
(1)(a)&(b), (4), (6) & (7) - Ins (9), (10) & (11)	17/06	24/03/06	86 WAIG 791
16. Bereavement Leave			
Cl	17/06	24/03/06	86 WAIG 791
(17. Holidays)			
(1), (2)	1363/92	14/12/92	73 WAIG 159
17. Public Holidays			
Title	17/06	24/03/06	86 WAIG 791
18. Annual Leave			
(9), ins. (10)	1363/92	14/12/92	73 WAIG 159
(1)	582/94 & 381/95	21/02/01	81 WAIG 820
(1), (4), (5)(a)(i), (6)(b) & (9)	17/06	24/03/06	86 WAIG 791
19. Long Service Leave			
Cl	17/06	24/03/06	86 WAIG 791
20. Payment of Wages			
(20A. Translation of Full Time & Part Time Employees)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Cl.	A15/09	30/04/09	89 WAIG 507
21. Wages			
Cl.	1363/92	14/12/92	73 WAIG 159
Cl.	1381/92	14/03/93	73 WAIG 163
(1)	016/94	18/04/94	74 WAIG 1283

(†)	578/94	06/03/95	75 WAIG 952
(†)	992/95	09/01/96	76 WAIG 403
Cl.	1782/96	04/02/97	77 WAIG 492
Rates & Ins. Text	940/97	14/11/97	77 WAIG 3177
Cl.	1158/98	28/07/98	78 WAIG 3334
(1)(a) rates, (1)(c)(iii) insert text	609/99	01/08/99	79 WAIG 1843
Cl.	654/00	01/08/00	80 WAIG 3379
(2)	740/00	29/11/00	80 WAIG 5614
Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Cl.	752/01	01/08/01	81 WAIG 1721
Cl.	797/02	01/08/02	82 WAIG 1369
Cl.	569/03	5/06/03	83 WAIG 1899 & 2577
Cl.	570/04	4/06/04	84 WAIG 1521 & 2013
Cl.	576/05	07/07/05	85 WAIG 2083 & 2807
(†)	929/05	08/03/06	86 WAIG 509
Cl.	957/05	07/07/06	86 WAIG 1631 & 2327
Cl.	1/07	01/07/07	87 WAIG 1487 & 2246
Cl.	115/07	01/07/08	88 WAIG 773 & 1455
(†)	A15/09	30/04/09	89 WAIG 507
Cl.	1/09	01/10/09	89 WAIG 735 & 1887
Cl.	2/10	01/07/10	90 WAIG 568 & 1284
Cl.	2/11	01/07/11	91 WAIG 1088 & 1684
Cl.	2/12	01/07/12	92 WAIG 1437
Cl.	1/13	01/07/13	93 WAIG 1105

Cl.	1/14	01/07/14	94 WAIG 1321
Cl.	1/15	01/07/15	95 WAIG 1289
Cl.	1/16	01/07/16	96 WAIG 1138
Cl.	1/17	01/07/17	97 WAIG 1203
Cl.	1/18	01/07/18	98 WAIG 263 & 924
Cl.	1/19	01/07/19	99 WAIG 509 & 1249
Cl.	1/20	01/01/21	100 WAIG 1030
Cl.	1/21	01/07/21	101 WAIG 1032
Cl.	1/22	01/07/22	102 WAIG 983
Cl.	1/23	01/07/23	103 WAIG 1311
(1)	7/25	29/05/25	UNREPORTED

(21A. Minimum Wage—Adult Males and Females)

Cl.	992/95	09/01/96	76 WAIG 403
Min.wage prov	940/97	14/11/97	77 WAIG 3177
Cl.	1158/98	28/07/98	78 WAIG 3334
(1) rate, (7) text	609/99	01/08/99	79 WAIG 1843
Cl.	654/00	01/08/00	80 WAIG 3379
(6)(a)	582/94 & 381/95	21/02/01	81 WAIG 820
Cl.	752/01	01/08/01	81 WAIG 1721
Cl.	797/02	01/08/02	82 WAIG 1369
Cl.	569/03	5/06/03	83 WAIG 1899 & 2577
(9)	1197/03	1/11/03	83 WAIG 3537
Cl.	570/04	4/06/04	84 WAIG 1521

21A. Minimum Adult Award Wage

Cl.	576/05	07/07/05	85 WAIG 2083 & 2807
Title	17/06	24/03/06	86 WAIG 791
Cl.	957/05	7/07/06	86 WAIG 1631 & 2327
Cl.	1/07	01/07/07	87 WAIG 1487 & 2246
Cl.	115/07	01/07/08	88 WAIG 773 & 1455
Cl.	1/09	01/10/09	89 WAIG 735 & 1887
Cl.	2/10	01/07/10	90 WAIG 568 & 1284
Cl.	2/11	01/07/11	91 WAIG 1088 & 1684
Cl.	2/12	01/07/12	92 WAIG 1437
Cl.	1/13	01/07/13	93 WAIG 1105
Cl.	1/14	01/07/14	94 WAIG 1321
Cl.	1/15	01/07/15	95 WAIG 1289
Cl.	1/16	01/07/16	96 WAIG 1138
Cl.	1/17	01/07/17	97 WAIG 1203
Cl.	1/18	01/07/18	98 WAIG 263 & 924
Cl.	1/19	01/07/19	99 WAIG 509 & 1249
Cl.	1/20	01/01/21	100 WAIG 1030
Cl.	1/21	01/07/21	101 WAIG 1032
Cl.	1/22	01/07/22	102 WAIG 983
Cl.	1/23	01/07/23	103 WAIG 1311

~~(22. Junior Workers)~~

22. Junior Employees

Title	17/06	24/03/06	86 WAIG 791
(1)	A15/09	30/04/09	89 WAIG 507

23. Apprentices

Cl.	17/06	24/03/06	86 WAIG 791
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(24. Bar Work)

Cl.	1363/92	14/12/92	73 WAIG 159
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Cl.	1381/92	14/03/93	73 WAIG 163
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Cl.	1782/96	04/02/97	77 WAIG 492
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Cl.	1158/98	28/07/98	78 WAIG 3334
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Cl.	740/00	29/11/00	80 WAIG 5614
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Del. Cl. & Title	582/94 & 381/95	21/02/01	81 WAIG 820
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24. Option for Annualised Salary

Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
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25. Higher Duties**26. Uniforms and Laundering**

(2), (3)	1363/92	14/12/92	73 WAIG 159
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(2), (3)	1782/96	04/02/97	77 WAIG 492
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(2), (3)	740/00	29/11/00	80 WAIG 5614
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(2) & (3)	1029/01	08/01/02	82 WAIG 301
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(2) & (3)	974/02	28/01/03	83 WAIG 811
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(2) & (3)	635/03	11/3/05	85 WAIG 1219
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(4)	17/06	24/03/06	86 WAIG 791
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(2) & (3)	78/06	21/02/07	87 WAIG 483
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(2) & (3)	46/08	02/12/08	88 WAIG 2290
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27. Protective Clothing

(1)	1363/92	14/12/92	73 WAIG 159
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(†)	1782/96	04/02/97	77 WAIG 492
(†)	1158/98	28/07/98	78 WAIG 3334
(†)	740/00	29/11/00	80 WAIG 5614
(†)	1029/01	08/01/02	82 WAIG 301
(†)	974/02	28/01/03	83 WAIG 811
(†)	635/03	11/3/05	85 WAIG 1219
(5)	17/06	24/03/06	86 WAIG 791
(†)	78/06	21/02/07	87 WAIG 483
(†)	46/08	02/12/08	88 WAIG 2290

~~(28. Workers' Equipment)~~

Cl.	1363/92	14/12/92	73 WAIG 159
Cl.	1782/96	04/02/97	77 WAIG 492
Cl.	1158/98	28/07/98	78 WAIG 3334
Cl.	740/00	29/11/00	80 WAIG 5614
Cl.	1029/01	08/01/02	82 WAIG 301
Cl.	974/02	28/01/03	83 WAIG 811
Cl.	635/03	11/3/05	85 WAIG 1219

28. Employees' Equipment

Title	17/06	24/03/06	86 WAIG 791
Cl.	78/06	21/02/07	87 WAIG 483
Cl.	46/08	02/12/08	88 WAIG 2290

~~(29. Limitation of Work)~~

Del. cl.	1363/92	14/12/92	73 WAIG 159
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~~(29. Limitation of Work—DELETED)~~

Ins. title.	1363/92	14/12/92	73 WAIG 159
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29. No Reductions

Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
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30. Board and/or Lodging

Cl	815/05	22/12/2005	86 WAIG 66
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(4)	17/06	24/03/06	86 WAIG 791
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31. Travelling Facilities~~(32. Record)~~

Ins text.(3)(e)	491/98	16/04/98	78 WAIG 1471
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32. Employment Record

Title, (1), (3)(e)&(d)&(4) — Ins (3)(e)&(f)	17/06	24/03/06	86 WAIG 791
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33. Roster

Cl.	1363/92	14/12/92	73 WAIG 159
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Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
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(3)	17/06	24/03/06	86 WAIG 791
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34. Change and Rest Rooms

Cl	17/06	24/03/06	86 WAIG 791
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35. First Aid Kit**36. Posting of Award and Union Notices**~~(37. Deleted)~~

Del. title	386/93	22/02/93	73 WAIG 377
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Del. title	386/93 corr.	22/02/93	73 WAIG 377
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37. Superannuation

Ins. cl.	386/93	22/02/93	73 WAIG 377
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Ins. cl.	386/93 corr.	22/02/93	73 WAIG 377
Ins. Text	599/98	30/06/98	78 WAIG 2559
Cl	17/06	24/03/06	86 WAIG 791
(38. Australian Traineeship System)			
Del. Cl. & Title	582/94 & 381/95	21/02/01	81 WAIG 820
(38. Over Award Payments)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(39. Under Rate Workers)			
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(40. Prohibition of Contracting out of Award)			
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(41. Breakdowns)			
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(42. Location Allowance)			
Cl.	851/92	07/07/92	72 WAIG 2498
Cl.	943/93	01/07/93	73 WAIG 1989
Cl.	714/94	01/07/94	74 WAIG 1869
Cl.	641/95	01/07/95	75 WAIG 2125
Cl.	911/96	01/07/96	76 WAIG 3365
Cl.	1400/97	01/07/97	77 WAIG 2547
Cl.	975/98	01/07/98	78 WAIG 2999
Cl.	690/99	01/07/99	79 WAIG 1843
Cl.	1050/00	01/08/00	80 WAIG 3153

Cl.	718/01	01/08/01	81 WAIG 1559
Cl.	686/02	01/07/02	82 WAIG 1185
Cl.	570/03	01/07/03	83 WAIG 1657
Cl.	696/04	01/07/04	84 WAIG 2145
Cl.	458/05	01/07/05	85 WAIG 1893
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(43. Parental Leave)			
Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(44. Trainees)			
Del. Cl. & Title	582/94 & 381/95	21/02/01	81 WAIG 820
(44. National Training Wage)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(45. Enterprise Flexibility)			
Ins. cl.	992/95	09/01/96	76 WAIG 403
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(46 Changes with Significant Effect and Redundancy)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(47. Right of Entry)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(48. Redundancy)			

Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(49. Anti Discrimination)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(50. No Extra Claims)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(51. Further Claims)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Cl	17/06	24/03/06	86 WAIG 791
(52. Union Delegates & Meetings)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del No, Title & Cl	17/06	24/03/06	86 WAIG 791
(53. Temporary Exemption Clause)			
Ins. Cl.	582/94 & 381/95	21/02/01	81 WAIG 820
Del No, Title & Cl	17/06	24/03/06	86 WAIG 791
(54. School Canteen Workers)			
Ins. Cl	929/05	8/03/06	86 WAIG 791
Del No, Title & Cl	17/06	24/03/06	86 WAIG 791
38. Supported Wage System for Employees with Disabilities			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791
39. Prohibition of Contracting Out of Award			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791

40. Breakdowns

Ins Title & Cl.	17/06	24/03/06	86 WAIG 791
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41. Location Allowance

Ins Title & Cl.	17/06	24/03/06	86 WAIG 791
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Cl.	59/06	01/07/06	86 WAIG 1471
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Cl.	53/07	01/07/07	87 WAIG 2435
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Cl.	9/08	01/07/08	88 WAIG 689
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Cl.	24/09	01/07/09	89 WAIG 729
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Corr. Order Schedule B (7)(a)(i)&(ii)	24/09	01/07/09	89 WAIG 2483
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Cl.	117/10	01/07/10	90 WAIG 561
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Cl.	24/11	01/07/11	91 WAIG 995
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Cl.	6/12	01/07/12	92 WAIG 725
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Cl.	7/13	01/07/13	93 WAIG 461
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Cl.	11/14	01/07/14	94 WAIG 669
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Cl.	118/15	01/07/15	95 WAIG 700
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Cl.	15/16	01/07/16	96 WAIG 631
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Cl.	20/17	01/07/17	97 WAIG 585
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Cl.	20/18	01/07/18	98 WAIG 415
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Cl.	24/19	01/07/19	99 WAIG 615
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Cl.	10/20	01/07/20	100 WAIG 443
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Cl.	2/21	01/07/21	101 WAIG 455
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Cl.	2/22	01/07/22	102 WAIG 427
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Cl.	2/23	01/07/23	103 WAIG 523
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42. Parental Leave

Ins Title & Cl.	17/06	24/03/06	86 WAIG 791
43. National Training Wage			
Ins Title & Cl.	17/06	24/03/06	86 WAIG 791
44. Enterprise Flexibility			
Ins Title & Cl.	17/06	24/03/06	86 WAIG 791
45. Right of Entry			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791
46. Termination, Introduction of Change and Redundancy			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791
47. Anti Discrimination			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791
48. Resolution of Disputes			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791
49. Further Claims			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791
50. Union Delegates and Meetings			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791
51. School Canteen Workers			
Ins Title & Cl	17/06	24/03/06	86 WAIG 791
(Appendix—Resolution of Disputes Requirements)			
Ins—appendix	693/96	16/07/96	76 WAIG 2768
(1),(6), Del. (7)	2053/97	22/11/97	77 WAIG 3079
Del title & appendix	17/06	24/03/06	86 WAIG 791
Schedule A—Named Union Party			

Ins. schedule	1526/93	23/12/93	74 WAIG 142
Sch.	582/94 & 381/95	21/02/01	81 WAIG 820

(Schedule A—Named Parties)

Del & Ins. sch	131/05	12/05/05	85 WAIG 3224
Sch	17/06	24/03/06	86 WAIG 791
Del Sch.	A15/09	30/04/09	89 WAIG 507

Schedule A Named Parties to the Award

Ins Sch.	A15/09	30/04/09	89 WAIG 507
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(Schedule)

Re title schedule	1526/93	23/12/93	74 WAIG 142
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(Schedule B—Respondents)

Respondent deleted	No. — 76/80 Pts 29, 55, 92, 151, 162, 164, 174, 175, 177, 178, 179 & 181	18/04/97	77 WAIG 1260
Delete Respondents	76/80, part 122	09/02/98	78 WAIG 1388
Delete Respondents	76/80, part 28	30/04/98	78 WAIG 1883
Sch.	582/94 & 381/95	21/02/01	81 WAIG 820
Sch	17/06	24/03/06	86 WAIG 791
Del Sch.	A15/09	30/04/09	89 WAIG 507

(Schedule C—Letter to Employees)

Ins. Sch.	582/94 & 381/95	21/02/01	81 WAIG 820
Del Title & Sch	17/06	24/03/06	86 WAIG 791

(Appendix—S.49B—Inspection of Records Requirements)

Ins. appendix	694/96	16/07/96	76 WAIG 2789
Ins. Text	2053(1)/97	22/11/97	77 WAIG 3138
App.	491/98	16/04/98	78 WAIG 1471

Del Title & App	17/06	24/03/06	86 WAIG 791
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~~Appendix—McDonald's Australia Limited Franchisees~~

Ins. App.	582/04 & 381/05	21/02/01	81 WAIG 820
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Del. Respondent; Ins. Respondent	A15/09	30/04/09	89 WAIG 507
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NOTICES—Award/Agreement matters—

2025 WAIRC 00695

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application Nos. APPL 16 OF 2025 & APPL 19 OF 2025

COMMISSION'S OWN MOTION PURSUANT TO SECTION 37D AND S40B TO VARY THE**BAKERS' (METROPOLITAN) AWARD NO. 13 OF 1987 AWARD**

NOTICE is given by the Commission's Own Motion pursuant to section 37D and section 40B of the *Industrial Relations Act 1979* (WA) of the Commission's intention to vary the *Bakers' (Metropolitan) Award NO.13 of 1987 (Award)*. The proposed variations are published in the annexed table.

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

The proposed variations which relate to scope and incidental variations made pursuant to s 37D are those made to clauses 1, 4, 5, 6, 7, 12, 13, 14, 15, 17, 18, 19, 23, 24 and 31 of the Award as set out in the annexed table.

All other proposed variations are proposed to be made pursuant to s 40B.

A hearing for the purpose of affording interested persons an opportunity to be heard in relation to the proposed variations will be held at the Commission, Level 18, 111 St Georges Terrace Perth on Tuesday, the 9th day of September 2025 at 10:00 AM.

Any person who wishes to be heard in relation to the proposed variations should contact Senior Commissioner Cosentino's Chambers by email at Chambers-Cosentino@waipc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

11 AUGUST 2025

SCHEDULE

Delete the entire contents of the *Bakers' (Metropolitan) Award No. 13 of 1987* (with the exception of the variation record table, which shall remain annexed to the Award marked as superseded and struck through) and insert the following in lieu thereof:

BAKING INDUSTRY AWARD

1. - TITLE

This award shall be known as the Baking Industry Award.

2. - MINIMUM ADULT AWARD WAGE

- (1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.
- (2) The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38-hour week is \$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.
- (3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case decisions.
- (4) Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by results, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.
- (5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.
- (6) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.
- (7) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.
- (8) Subject to this clause the minimum adult award wage shall –
 - (a) Apply to all work in ordinary hours.

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

(9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 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.

(10) Adult Apprentices

- (a) 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.
- (b) The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38-hour week is calculated as follows: divide \$791.30 by 38 and multiply by the number of ordinary hours prescribed for a full-time apprentice under the award.
- (c) The minimum adult apprentice wage is payable from the beginning of the first pay period commencing on or after 1 July 2025.
- (d) Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.
- (e) The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on superannuation and during any period of paid leave prescribed by this award.
- (f) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

3. - ARRANGEMENT

PART 1 – GENERAL

1. Title
2. Minimum Adult Award Wage
3. Arrangement
4. Area
5. Scope
6. Definitions

PART 2 – EMPLOYMENT RELATIONSHIP

7. Contract of Employment
8. Flexible Working Arrangement Requests
9. Introduction of Change
10. Termination of employment
11. Redundancy

PART 3 – HOURS

12. Hours
13. Overtime

PART 4 – WAGES AND ALLOWANCES

14. Wages and Allowances
15. Penalty Rates
16. Higher duties
17. Fares and Travelling
18. Location Allowance
19. Apprentices
20. Supported Wage
21. Payment of Wages
22. Superannuation
23. Savings Provision

PART 5 - LEAVE

24. Public Holidays
25. Annual Leave
26. Personal Leave
27. Long Service Leave
28. Bereavement Leave
29. Parental Leave
30. Family and Domestic Violence Leave

PART 6 - OTHER

31. Protective Equipment and Uniforms
32. Records and Right of Entry
33. Posting of Award and Union Notices
34. Dispute Resolution Procedure

Schedule A - Parties to the Award

4. – AREA

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

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

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

5. – SCOPE

- (1) This award applies to employers in the Baking Industry and their employees in the classifications listed in Clause 14 - Wages and Allowances to the exclusion of any other State award.
- (2) This award also applies to:
 - (a) employers that supply labour on an on-hire basis to host employers in respect of on-hire employees employed in the classifications provided in Clause 14 –Wages and Allowances of this award, and those on-hire employees, while engaged in the performance of work covered by this award; and
 - (b) employers that provide group training services for apprentices and/or trainees in the Baking Industry in respect of apprentices and/or trainees employed in one or more of the classifications mentioned in this award, and those apprentices and/or trainees, while engaged by a host employer in the performance of work covered by this award.
- (3) This award does not apply to:
 - (a) employers and employees who are subject to the national industrial relations system; and
 - (b) employees who are covered by the *Transport Workers (General) Award*.

6.- DEFINITIONS

- (1) "Assistant" means an employee, not being a Baker, Pastrycook or apprentice, who assists in the operations involved in the making and baking of bread, cakes or pastries, but does not handle, mix, mould or bake dough. Indicative tasks of an Assistant include sweeping up, scrubbing tables, greasing tins, sifting and emptying flour, pre-heating ovens, packaging products, preparing and weighing ingredients, papering tins, washing utensils, labelling, simple icing and piping, operating machines and other similar work.
- (2) "Bakehouse" means any establishment exclusively or principally manufacturing, making, baking or ornamenting bread, yeast goods, cakes, pies, pastries, pastry products or sponge goods for resale in another business.
- (3) "Baker" means an employee who is competent by training and experience to perform and who may be required to perform any or all of the operations involved in the baking of bread. Such operations, without limiting the definition, include the mixing, handling, moulding or baking of dough. Provided that such a baker may be required by the employer to perform any general work in connection with the bakehouse.
- (4) "Baking Industry" means the manufacturing, making and baking of bread, yeast goods, cakes, pies, pastries, pastry products and sponge goods for sale and includes bakeries, patisseries and bakehouses.
- (5) "Cake Decorator" means a person skilled in the art and employed in decorating and ornamenting cakes.
- (6) "Leading Hand" means an employee who has charge of the work and of one or more employees, including apprentices. Where an employer is himself substantially engaged in doing the actual work of an operative employee and also exercising supervision of the work in the bakehouse, they may be classed as a Leading Hand, but not otherwise.
- (7) "Modern Award" means the *Food, Beverage and Tobacco Manufacturing Award 2020* made under the *Fair Work Act 2009* (Cth).
- (8) "Pastrycook" means an employee other than an Assistant, Baker or apprentice who is employed in manufacturing, making, baking or ornamenting cakes, pastry, sponge goods and yeast goods for sale.
- (9) "Single Hand Baker" means a Baker who is employed in a bakehouse where there is no other person regularly employed in the mixing, handling or baking of dough, except where the employer regularly and substantially works in the bakehouse.
- (10) "Single Hand Pastrycook" means a tradesperson pastrycook employed in a bakehouse where there is no other tradesperson pastrycook employed.

7. - CONTRACT OF EMPLOYMENT

- (1) An employer may engage an employee on either a full time, part time or casual basis subject to the terms of this Award. On engagement the employer must notify the employee in writing whether the employment is full time, part-time or casual and if the employment is for a fixed term, the end date of the fixed term.
- (2) Part-time employees are entitled to be paid the ordinary hourly rate for their classification in respect of all hours worked by the employee
- (3) A part time employee shall receive payment for wages, annual leave, personal leave and long service leave on a pro-rata basis in the same proportion as the number of hours regularly worked each week bears to 38 hours.
- (4) Casual Employment
 - (a) "Casual employee" means an employee determined to be a casual employee in accordance with s 7B of the *Industrial Relations Act 1979* (WA).
 - (b) At the time of engagement an employee must be notified in writing that the engagement is on a casual basis.
 - (c) A casual employee may be engaged for not more than 38 ordinary hours per week nor more than 7.6 hours in one day.
 - (d) Where this award refers to a penalty rate, overtime rate or shift loading, that rate or loading, for a casual employee, will be calculated on the ordinary hourly rate before the casual loading is applied.
 - (e) Work performed by casual employees in excess of the hours specified in clause (c) shall be paid for at overtime rates of pay.
 - (f) The minimum period of engagement for a casual employee shall be 3 consecutive hours on any day.

- (g) The period of notice an employer or employee is to give to terminate casual employment is one hour. If the required period of notice is not given by the employer, one hour's wages must be paid in lieu of notice.
- (5) An employer may direct an employee to carry out such duties and to use such tools and equipment as are within the limits of the employee's skills, competence and training provided that such duties are not designed to promote deskilling and are consistent with the employer's obligation to provide a safe and healthy workplace.
- (6) **Standing Down of Employees**
- (a) (i) The employer is entitled to deduct payment for any day or part of a day on which an employee (including an apprentice) cannot be usefully employed because of industrial action by the union party to this award, or by any other association or union.
- (ii) If an employee is required to attend for work on any day but because of failure or shortage of electric power work is not provided, such employee must be entitled to two hours' pay and further, where any employee commences work the employee must be provided with four hours' employment or be paid for four hours' work.
- (b) The provisions of subclause (6)(a) of this clause also apply where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented but only if, and to the extent that, the employer and the union concerned so agree.

8. - FLEXIBLE WORKING ARRANGEMENT REQUESTS

Employees may make a request for a flexible working arrangement in accordance with s 39F and s 39G of the *Minimum Conditions of Employment Act 1993* (WA). Any such request must be dealt with and determined in accordance with Part 4A of the *Minimum Conditions of Employment Act 1993* (WA).

9. - INTRODUCTION OF CHANGE

- (1) **Employer's Duty to Notify**
- (a) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have "significant effect" on employees, the employer must notify the employees who may be affected by the proposed changes and their Union.
- (b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration must be deemed not to have "significant effects".
- (2) **Employer's Duty to Discuss Change**
- (a) The employer must discuss with the employees affected and their union, the introduction of the changes referred to in subclause (1) of this clause among other things, the effects the changes are likely to have on employees, measures to avoid or minimise the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their Union in relation to the changes.
- (b) The discussion must commence as soon as is practicable after a definite decision has been made by the employer to make the changes referred to in subclause (1) of this clause.
- (c) For the purpose of such discussion, the employer must provide in writing to the employees concerned and their union, all relevant information about the changes including the nature of the changes proposed; the expected effect of the changes on employees and other matters likely to affect employees provided that any employer must not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

10. - TERMINATION OF EMPLOYMENT

- (1) An employer must give the employee written notice of termination in accordance with the following table:

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

- (2) Employees over 45 years of age with two or more years of continuous service at the time of termination, shall receive an additional week's notice.
- (3) Where the relevant notice is not provided, the employee shall be entitled to payment in lieu. Provided that employment may be terminated by part of the period of notice and part payment in lieu.
- (4) In calculating any payment in lieu of notice, the employer must pay the employee an amount that is equal to, or exceeds, the total of all amounts that, if the employee's employment had continued until the end of the required notice period, the employer would have become liable to pay to the employee because of the employment continuing during that period. That total must be worked out on the basis of:
- (a) the employee's ordinary hours of work (even if they are not standard hours); and
- (b) the amounts ordinarily payable to the employee in respect of those hours, including for example, allowances, loadings and penalties; and
- (c) any other amounts payable under the employee's contract of employment.
- (5) The period of notice in this clause shall not apply in the case of dismissal for serious misconduct, that is, misconduct of a kind such that it would be unreasonable to require the employer to continue the employment during the notice period.
- (6) (a) For the purpose of this clause continuity of service is not broken on account of -
- (i) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;
- (ii) any absence from work for which an employee is entitled to claim leave as prescribed by this award or on

- account of leave lawfully granted by the employer; or
- (iii) any absence with reasonable cause, proof whereof must be upon the employee.
- (b) Service by the employee with a business which has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with the *Long Service Leave Act 1958 (WA)* also constitutes continuous service for the purpose of this clause.
- (7) Notice of Termination by Employee: The notice required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned.
- (8) Time Off During Notice Period
Where an employer has given notice of termination to an employee who has completed one month's continuous service, that employee is, for the purpose of seeking other employment, entitled to be absent from work up to a maximum of 8 hours without deduction of pay. The time off must be taken at times that are convenient to the employee after consultation with the employer.
- (9) Statement of Employment
The employer must, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of employment and the classification or the type of work performed by the employee.
- (10) Except for subclause (9), this clause does not apply to casual employees.

11. - REDUNDANCY

- (1) Discussions Before Terminations
- (a) Where an employer had made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and that decision may lead to termination of employment, the employer must hold discussions with the employees directly affected and with their union.
- (b) The discussion must take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) of this subclause and must cover among other things, any reasons for the proposed termination, measures to avoid or minimise the termination and measures to minimise any adverse affect of any terminations on the employees concerned.
- (c) For the purpose of such discussion the employer must provide in writing to the employees concerned and their union, all relevant information about the proposed terminations including the reasons for the proposed termination, the number and categories of employees likely to be affected and the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that any employer must not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.
- (2) Transfer to Lower Paid Duties
Where an employee is transferred to lower paid duties for reasons set out in subclause (1)(a) of this clause the employee must be entitled to the same period of notice of transfer as the employee would have been entitled to had the employment been terminated, and the employer may at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former ordinary weekly rate of wage and the new lower ordinary weekly rate of wage for the number of weeks of notice still owing.
- (3) Severance Pay
- (a) Employers who engage 15 or more employees at the time of any redundancies
In addition to the period of notice prescribed in subclause (1) and (2) of clause 10 - Termination of this award and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in subclause (1)(a) of this clause is entitled to the following amount of severance pay in respect of a continuous period of service.

Period of Continuous Service	Severance Pay
Less than 1 year	Nil
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks
3 years but less than 4 years	7 weeks
4 years but less than 5 years	8 weeks
5 years but less than 6 years	10 weeks
6 years but less than 7 years	11 weeks
7 years but less than 8 years	13 weeks
8 years but less than 9 years	14 weeks
9 years but less than 10 years	16 weeks
10 years and over	12 weeks

"Weeks pay" means the ordinary weekly rate of wage for the employee concerned.

- (b) Employers who engage less than 15 employees at the time of any redundancies:
In addition to the period of notice prescribed in subclause (1) and (2) of clause 10 - Termination of this award and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in subclause (1)(a) of this clause is entitled to the following amount of severance pay in respect of a continuous period of service.

Period of Continuous Service	Severance Pay
Less than 1 year	Nil
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks

3 years but less than 4 years	7 weeks
4 years and over	8 weeks

"Weeks pay" means the ordinary weekly rate of wage for the employee concerned.

- (c) For the purpose of this clause continuity of service is not broken on account of:
- (i) Any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;
 - (ii) Any absence from work on account for which an employee is entitled to paid leave as prescribed by this award or on account of leave lawfully granted by the employer; or
 - (iii) Any absence with reasonable cause, proof whereof must be upon the employee.
Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim paid leave as prescribed by this award must not count as time worked.
- (d) Service by the employee with a business which has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with the *Long Service Leave Act 1958 (WA)* also constitutes continuous service for the purpose of this clause.
- (4) Employee Leaving During Notice
An employee whose employment is to be terminated for reasons set out in subclause (1)(a) of this clause may terminate employment during the period of notice and, if so, must be entitled to the same benefits and payments under this clause had the employee remained with the employer until the expiry of such notice. Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice.
- (5) Alternative Employment
An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an employee.
- (6) Time Off During Notice Period
- (a) During the period of notice of termination of employment given by an employer, an employee whose employment is to be terminated for reasons set out in subclause (1)(a) of this clause is, for the purpose of seeking other employment, entitled to be absent from work during each week of notice up to a maximum of one day without deduction of pay.
 - (b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee must, at the request of the employer, be required to produce proof of attendance at an interview or the employee must not receive payment for the time absent. For this purpose, a statutory declaration will be sufficient.
- (7) Notice to Centrelink
Where a decision has been made to terminate the services of 15 or more employees in the circumstances outlined in subclause (1)(a) of this clause, the employer must notify Centrelink thereof as soon as possible giving relevant information including the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out.
- (8) Employees With Less Than One Year's Service
This clause does not apply to employees with less than one year's continuous service and the general obligation on employers should be no more than to give relevant employees an indication of the impending redundancy at the first reasonable opportunity and to take such steps as may be reasonable to facilitate the obtaining by employees of suitable alternative employment.
- (9) Employees Exempted
This clause must not apply where employment is terminated as a consequence of conduct that justifies instant dismissal or in the case of casual employees, apprentices or employees engaged for a specific period of time or for a specified task or tasks.
- (10) Incapacity to Pay
An employer, in a particular redundancy case may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.
12. – HOURS
- (1) The ordinary hours of work shall be an average of 38 per week to be worked on one of the following basis:
- (a) 38 hours within a work cycle not exceeding seven consecutive days; or
 - (b) 76 hours within a work cycle not exceeding 14 consecutive days; or
 - (c) 114 hours within a work cycle not exceeding 21 consecutive days; or
 - (d) 152 hours within a work cycle not exceeding 28 consecutive days.
- (2)
- (a) The ordinary hours of work shall be worked in no more than 5 shifts with a maximum of 10 ordinary hours in any one shift.
 - (b) The 5 shifts referred to in subclause (a) shall be worked on consecutive days and at least one of the days not worked in a 7 day cycle must be Saturday or Sunday.
- (3) The ordinary daily working hours shall be worked continuously except for meal breaks and rest periods.
- (4) A meal break of not less than 30 minutes shall be allowed to each employee such that an employee shall not be compelled to work for more than 5 hours without a meal break.
- (5) Where a shift exceeds four hours, an employee is entitled to a rest period of not less than 10 minutes, counted as time worked, taken at a time that is convenient to the employer.
- (6) Employees are entitled to a break of 10 consecutive hours between successive shifts.
- (7) At least 7 days prior the commencement of a weekly roster period, the employer must provide the weekly roster to

employees, showing the time each employee is to commence work on each shift during that week for which they are rostered. The roster may be provided in an electronic form that is readily accessible to employees.

13. - OVERTIME

- (1) All time worked on any day or in any week in excess of or outside the weekly ordinary hours prescribed under Clause 12 shall be paid for at the rate of time and one half for the first two hours and double time thereafter.
- (2) All overtime worked on a Sunday shall be paid at the rate of double time.
- (3) In the computation of overtime rates, each day shall stand alone.
- (4) Notwithstanding anything contained in this award –
 - (a) Subject to the provisions of Part 2A of the *Minimum Conditions of Employment Act 1993 (WA)*, an employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement.
 - (b) No organisation, party to this award, or employee covered by this award, shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of this subclause.
- (5) For the purposes of any calculations necessary under this award:-
 - 8 to 22 minutes shall be deemed 1/4 hour
 - 23 to 37 minutes shall be deemed 1/2 hour
 - 38 to 52 minutes shall be deemed 3/4 hour
 - 53 to 67 minutes shall be deemed one hour
- (6)
 - (a) An employee required to work overtime for two hours or more shall be supplied with a meal by their employer or paid an allowance equal to the amount specified in clause 20.3(a) of the Modern Award as varied from time to time.
 - (b) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall provide such meal or pay an amount equal to the amount specified in clause 20.3(a) of the Modern Award as varied from time to time for each such meal.
 - (c) An employee called on to work for more than five hours after commencing work who has not been granted a meal break shall be paid at overtime rates until the meal break is granted or until the end of the shift, whichever is earlier.
 - (d) The provisions of paragraphs (a) and (b) of this subclause do not apply:
 - (i) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that they will be required, or
 - (ii) to any employee who lives in the locality in which the place of work is situated in respect of any meal for which they can reasonably go home.
- (7)
 - (a) An employee (other than a casual employee) who works so much overtime between the end of their ordinary hours on one day and the commencement of their ordinary hours on the next day that they have not had at least 10 consecutive hours off duty between those times shall, subject to this subclause, be released after completion of such overtime until they have had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.
 - (b) If, on the instructions of the employer, such employee resumes or continues work without having had such 10 consecutive hours off duty, they shall be paid at double rates until they are released from duty for such period and the employee shall then be entitled to be absent until they have had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

14. – WAGES and allowances

- (1) The minimum weekly ordinary wages payable under this award are:

Classification	Award Rate
	\$
Doughmaker	1053.70
Single Hand Baker	1053.70
Single Hand Pastrycook	1034.10
Baker	1032.70
Pastrycook	1031.20
Cake Decorator	975.30
Assistant	953.00

- (2) A casual employee shall be paid an hourly rate equal to 1/38th of the ordinary rate for the relevant classification in which they are employed plus 25% casual loading. A casual employee is entitled to a minimum payment of 2 hours for any single shift.
- (2) In addition to the total wage prescribed in this clause a Leading Hand shall be paid an allowance equal to the applicable percentage of the weekly rate for a Doughmaker, rounded to the nearest 10 cents, as set out below:

- | | % of Dough maker rate |
|---|-----------------------|
| (i) if placed in charge of less than four other employees (per week) | 2.7 |
| (ii) if placed in charge of four but less than ten other employees (per week) | 4.4 |
| (iii) if placed in charge of ten and less other employees (per week) | 6.8 |
| (iv) if placed in charge of 20 or more other employees (per week) | 8.8 |
- (5) Laundry Allowance
Where the employer requires uniforms to be worn they shall be supplied, laundered and remain the property of the employer, provided that in lieu of the employer laundering the same, the employee shall be paid \$5 per week towards the costs of laundering.
- (6) Employees aged under 21
- (i) Employees aged under 21 shall be paid the following percentages of the appropriate adult rate for the work upon which they are engaged.
- | | |
|--------------------------------|-----|
| | % |
| Under 16 years of age | 45 |
| Between 16 and 17 years of age | 60 |
| Between 17 and 18 years of age | 70 |
| Between 18 and 19 years of age | 80 |
| Between 19 and 20 years of age | 90 |
| Between 20 and 21 years of age | 100 |
- (ii) If an employee aged under 21 has completed an apprenticeship in the Baking industry, and is employed as a tradesperson, they are entitled to be paid the adult tradesperson rate of pay.

15. PENALTY RATES

- (1) For working ordinary hours (other than on a Public Holiday) an employee shall be paid the following rates expressed as a percentage of the ordinary hourly rate applicable between 6:01 a.m. and 6:00 p.m. on any day of the week, other than Saturday or Sunday:

	Midnight to 6:00 a.m.	6:01 a.m. to 6:00 p.m.	6:01 pm to midnight
Monday to Friday inclusive	136%	100%	136%

- (2) All work performed on Saturdays shall be paid at the rate of time and half.
- (3) All work performed on Sundays shall be paid at the rate of double time.
- (4) Where an employee is required to work on a public holiday as prescribed by this award, the employee shall be paid at the rate of time and a half for the first 7.6 hours of work and double time thereafter, with a minimum payment of 4 hours at double time and half.
- (5) Payment of the rates prescribed in this clause shall only be for each hour worked in the specified time periods and shall not be cumulative with overtime penalties.

16. - HIGHER DUTIES

Employees called upon to perform duties for which a higher rate is prescribed than that which they are in receipt of, shall be paid such higher rate for such time as they are actually performing such higher duties, if so employed for less than four hours and, if employed for four hours or more, they shall receive a day's pay at such higher rate.

17. - FARES AND TRAVELLING TIME

An employee relieving in any location outside the town or city of their ordinary place of work shall be paid their reasonable cost of transport including travelling expenses from the employee's home to the place of work and return.

18. - LOCATION ALLOWANCES

- (1) Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

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

- (2) Except as provided in subclause (3) of this clause, an employee who has:
- (a) a dependant shall be paid double the allowance prescribed in subclause (1) of this clause;

- (b) a partial dependant shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.
- (3) Where an employee:
- (a) is provided with board and lodging by their employer, free of charge; or
- (b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the *Act*;
- such employee shall be paid 66 2/3 per cent of the allowances prescribed in subclause (1) of this clause.
- (4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.
- (5) Where an employee is on annual leave or receives payment in lieu of annual leave they shall be paid for the period of such leave the location allowance to which they would ordinarily be entitled.
- (6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) they shall only be paid location allowance for the period of such leave they remain in the location in which they are employed.
- (7) For the purposes of this clause:
- (a) "Dependant" shall mean -
- (i) a spouse or defacto partner; or
- (ii) a child where there is no spouse or defacto partner;
- who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.
- (b) "Partial Dependant" shall mean a "dependant" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.
- (8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and UnionsWA or, failing such agreement, as may be determined by the Commission.
- (9) Subject to the making of a General Order pursuant to s 50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing) for Perth, measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

19. - APPRENTICES

- (1) The maximum number of apprentices allowed to any employer shall be in the proportion of one to every four or fraction of four trade qualified employees employed. Provided that the employer who is bona fide working as a baker shall be regarded as a trade qualified employee permanently employed.
- (2) Apprentices shall, with the approval of the employer and the union, be interchangeable between bakeries for the purpose of experience and their services shall be deemed to be continuous for Long Service Leave and all other benefits, provided they return to their original employer.
- (3) Apprentices (percentage of the Baker's rate per week)
- | | |
|-----------------------------|----|
| Four year term: | % |
| First year | 42 |
| Second year | 55 |
| Third year | 75 |
| Fourth year | 88 |
| Three and a half year term: | |
| First six months | 42 |
| Next following year | 55 |
| Next following year | 75 |
| Final year | 88 |
| Three year term: | |
| First year | 55 |
| Second year | 75 |
| Final year | 88 |

20. - SUPPORTED WAGE SYSTEM

- (1) Definitions
- This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award. In the context of this clause, the following definitions will apply:
- (a) "Approved Assessor" means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
- (b) "Assessment Instrument" means the tool provided for under the Supported Wage System that records the

assessment of the productive capacity of the person to be employed under the Supported Wage System.

- (c) “Disability Support Pension” means the Commonwealth Government pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991* (Cth), as amended from time to time, or any successor to that scheme.
- (d) “Supported Wage System (SWS)” means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in the Supported Wage System Handbook. The Handbook is available from the following website: www.jobaccess.gov.au.
- (e) “SWS Wage Assessment Agreement” means the document in the form required by the Department of Social Services that records the employee’s productive capacity and agreed wage rate.
- (2) Eligibility Criteria
- (a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.
- (b) This clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers compensation legislation or any provision of this award relating to the rehabilitation of employees who are injured in the course of their current employment.
- (3) Supported Wage Rates
- (a) Employees to whom this clause applies will be paid the applicable percentage of the minimum rate of pay prescribed by this award for the class of work which the person is performing according to the following schedule:
- | Assessed Capacity | % of Prescribed Award Rate |
|-------------------|----------------------------|
| 10% | 10% |
| 20% | 20% |
| 30% | 30% |
| 40% | 40% |
| 50% | 50% |
| 60% | 60% |
| 70% | 70% |
| 80% | 80% |
| 90% | 90% |
- (b) Provided that the minimum amount payable must not be less than the amount set by the Western Australian Industrial Relations Commission under s 50A(1)(a)(iii) of the *Industrial Relations Act 1979* (WA).
- (c) Where an employee’s assessed capacity is 10%, they must receive a high degree of assistance and support.
- (4) Assessment of Capacity
- (a) For the purpose of establishing the percentage of the award rate to be paid to an employee under this award, the productive capacity of the employee will be assessed in accordance with the SWS by an Approved Assessor, having consulted the employer and employee and, if the employee so desires, the Union.
- (b) All assessments made under this clause must be documented in a SWS Wage Assessment Agreement and retained by the employer as a time and wages record.
- (5) Lodgement of SWS Wage Assessment Agreement
- (a) All SWS Wage Assessment Agreements under the conditions of this clause, including the appropriate percentage of the award wage to be paid to the employee, must be lodged by the employer with the Commission.
- (b) All SWS Wage Assessment Agreements must be agreed and signed by the employee and employer parties to the assessment. Where the Union is not a party to the assessment, the assessment will be referred by the Commission to the Union by certified mail and the agreement will take effect unless an objection is notified to the Commission within 10 working days.
- (6) Review of Assessment
- The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review will be in accordance with the procedures for assessing capacity under the SWS.
- (7) Other Terms and Conditions of Employment
- Where an assessment has been made, the applicable percentage will apply to the wage rate only. Employees covered by the provisions of this clause will be entitled to the same terms and conditions of employment as all other employees covered by this award paid on a pro-rata basis.
- (8) Workplace Adjustment
- An employer wishing to employ a person under the provisions of this clause must take reasonable steps to make changes in the workplace to enhance the employee’s capacity to do the job. Changes may involve redesign of job duties, working time arrangements and work organisation in consultation with other employees in the area.
- (9) Trial Period
- (a) In order for an adequate assessment of the employee’s capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.
- (b) During the trial period the assessment of capacity will be undertaken and the proposed wage rate for a continuing employment relationship will be determined.
- (c) The minimum amount payable to the employee during the trial period must be no less than the amount set by the Western Australian Industrial Relations Commission under s 50A(1)(a)(iii) of the *Industrial Relations Act 1979* (WA).
- (d) Work trials should include induction or training as appropriate to the job being trialled.
- (e) Where the employer and employee wish to establish a continuing employment relationship following the

completion of the trial period, a further contract of employment will be entered into based on the outcome of assessment under subclause (4) – Assessment of Capacity.

21. - PAYMENT OF WAGES

- (1) Each employee shall be paid the appropriate rate shown in Clause 14. – Wages and Allowances of this award. Subject to subclause (2) of this clause payment shall be pro-rata where less than the full week is worked.
- (2) Wages shall be paid as follows:
 - (a) Actual ordinary hours:
In the case of an employee whose ordinary hours of work are such that the employee works the same number of ordinary hours each week, wages shall be paid weekly or fortnightly according to the actual ordinary hours worked each week or fortnight.
 - (b) Average of ordinary hours:
Subject to subclauses (3) hereof, in the case of an employee whose ordinary hours of work are averaged during a particular work cycle, wages shall be paid weekly or fortnightly according to a weekly average of ordinary hours worked even though more or less ordinary hours may be worked in any particular week of the work cycle.
- (3) Method of Payment:
An employee may be paid wages by cash or electronic transfer into a bank or building society account specified by the employee. Where wages continue are paid in cash, payment may be made during the employee's time, provided that the employee is kept waiting no longer than 15 minutes.
- (4) Payslips:
The employer must provide pay slips in accordance with s 49DA of the *Industrial Relations Act 1979* (WA) and the *Industrial Relations (General) Regulations 1997* (WA).
- (5) Calculation of Hourly Rate:
The ordinary rate per hour shall be calculated by dividing the appropriate weekly rate by 38.

22. – SUPERANNUATION

- (1) The *Superannuation Guarantee (Administration) Act 1992* (Cth), the *Superannuation Guarantee Charge Act 1992* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation (Resolution of Complaints) Act 1993* (Cth) deals with the superannuation rights and obligations of employers and employees.
- (2) The employer must make superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.
- (3) The employee shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the employee.
- (4) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable.
- (5) The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the complying superannuation fund or scheme to which contributions are to be made.
- (6) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee.

23. - SAVINGS PROVISION

- (1) This clause applies to employees who were employed by an employer bound by this award as at [XXXX].
- (2) If an employee was entitled to receive a rate of pay, allowance or benefit under the award which applied to the employee immediately prior to [date] which is greater than the rate of pay, allowance or benefit contained in this award, the employee shall continue to be entitled to be paid the greater rate of pay or allowance and to receive the greater benefit.

24. – PUBLIC HOLIDAYS

- (1) An employee is entitled to be absent from work without loss of pay on a day or part of a day that is a public holiday mentioned in Schedule 1 of the *Minimum Conditions of Employment Act 1993* (WA). Provided that another day may be taken as a holiday by written agreement between the parties in lieu of any of the days mentioned in Schedule 1 of the *Minimum Conditions of Employment Act 1993* (WA). Such agreement must be signed by the employer and the employee.
- (2) When any of the days mentioned in paragraph (a) hereof other than Easter Sunday falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.
- (3) An employer may request that an employee work on a day or part day that is a public holiday if the request is reasonable. The employee may refuse the request if it is not reasonable, or the refusal is reasonable. The factors which determine whether a request or refusal are reasonable are set out in s 30 of the *Minimum Conditions of Employment Act 1993* (WA).
- (4) When work is performed on any of the days mentioned in paragraph (a) the employee shall be paid at the rate of double time and a half for all hours worked.
- (5)
 - (a) At the request of an employee who works on any prescribed public holiday, and with the agreement of the employer, paid time off in lieu of payment for the work done may be taken. Such time off in lieu, when taken during ordinary hours, shall compensate for the penalty premium at which the time off in lieu accrued. For example, two and one half ordinary hours compensates for one hour of double and one half time.
 - (b) The taking of paid time off in lieu of payment for work done on any prescribed public holiday shall be agreed at the

time of the employee accepting the offer to work on the public holiday otherwise payment in accordance with paragraph (4) of this subclause shall be made.

- (c) Subject to the limitations imposed by paragraphs (a) and (b) of this subclause, part payment and part paid time off in lieu of payment for work done on any prescribed holiday may be agreed between the employee and employer.

25. - ANNUAL LEAVE

- (1) Annual leave is provided for in the *Minimum Conditions of Employment Act 1993* (WA).
- (2) (a) During a period of annual leave an employee shall be paid a loading being the greater of:
- (i) 17.5% calculated on the employee's ordinary wage as prescribed; or
 - (ii) The penalty loadings prescribed by clause 15 - Penalty Rates for shifts which the employee would have been rostered to work had the employee not been on leave during the relevant period.
- (b) The loading prescribed by this subclause shall not apply to proportionate leave on termination.
- (3) The provisions of this clause shall not apply to casual employees.

26. - PERSONAL LEAVE

- (1) Personal leave is as provided for in the *Minimum Conditions of Employment Act 1993* (WA).
- (2) If an employee is absent on the ground of personal ill health or injury for a period longer than their entitlement to paid personal leave, payment may be adjusted at the end of the relevant year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid personal leave during that year of service.
- (3) (a) Subject to the provisions of this subclause an employee who suffers personal ill health or injury during the time when the employee is absent on annual leave may apply for and the employer shall grant paid personal leave in place of paid annual leave.
- (b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to their place of residence or a hospital as a result of personal ill health or injury for a period of seven consecutive days or more and the employee produces a certificate from a registered medical practitioner that the employee was so confined.
- (c) Replacement of paid annual leave by paid personal leave shall not exceed the period of paid personal leave to which the employee was entitled at the time the employee proceeded on annual leave and shall not be made with respect to fractions of a day.
- (d) Where paid personal leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid personal leave is hereby replaced by the paid personal leave.
- (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in clause 25 - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.
- (4) Where a business has been transferred from one employer to another and the employee's employment has been deemed continuous in accordance with the *Long Service Leave Act 1958* (WA), the paid personal leave standing to the credit of the employee at the date of transfer from service with the old employer shall stand to the credit of the employee at the commencement of service with the new employer and may be claimed in accordance with the provisions of this clause.
- (4) Other than the entitlement to unpaid carer's leave, the provisions of this clause do not apply to casual employees

27. - LONG SERVICE LEAVE

The provisions of the *Long Service Leave Act 1958* (WA) shall be deemed to be part of this award.

28. - BEREAVEMENT LEAVE

Bereavement leave is as provided for in the *Minimum Conditions of Employment Act 1993* (WA).

29. - PARENTAL LEAVE

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

30. - FAMILY AND DOMESTIC VIOLENCE LEAVE

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

31.- PROTECTIVE EQUIPMENT AND UNIFORMS

- (1) Each employer shall be required to provide suitable accommodation for employees to change their working clothes and suitable washing facilities.
- (2) Where the conditions of work are such that employees are unable to avoid their clothing becoming excessively wet or dirty, they shall be supplied with suitable protective clothing or materials. Such protective clothing or materials shall remain the property of the employer and shall be returned when required in good order and condition, fair wear and tear excepted.

32. - RECORDS AND RIGHT OF ENTRY

- (1) An employer must keep employment records and provide pay slips in accordance with Part II, Division 2F Keeping of and access to employment records and pay slips of the *Industrial Relations Act 1979* (WA) and section 26 of the *Long Service Leave Act 1958* (WA).
- (2) Conditions regarding right of entry by authorised representatives of the union are dealt with in Part II, Division 2G Right of entry and inspection by authorised representatives of the *Industrial Relations Act 1979* (WA).

33. - POSTING OF AWARD AND UNION NOTICES

- (1) An employer shall provide a notice board of reasonable dimensions to be erected in a prominent position in the employer's establishment upon which an accredited union representative shall be permitted to post union notices.
- (2) A copy of this award shall be allowed to be posted on the notice board referred to in subclause (1) of this clause or provided to employees by electronic means.

34. - DISPUTE RESOLUTION PROCEDURE

Any questions, disputes or claims arising in relation to this award, or in relation to employment generally shall be dealt with in the following manner:

- (1) In the first instance all the facts of the dispute matter or grievance will be discussed without delay between the employee/s concerned and the appropriate supervisor/s. The appropriate Shop Steward/s to be present if requested by the employee/s.

- (2) If not settled, the matter shall be discussed between an accredited Union Representative and the delegated Officer of the employer.
- (3) If agreement has not then been reached, the matter shall be discussed between a Management Representative of the employer and an appropriate Official of the Union.
- (4) If the matter is still not settled, it shall be submitted to the Western Australian Industrial Relations Commission for decision which shall, subject to any appeal in accordance with the *Act*, be final.
- (5) Until the matter is determined, work shall continue in accordance with the pre-dispute conditions. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this subclause.
- (6) The parties will co-operate to ensure that these procedures are carried out expeditiously.
- (7) In the event of a work stoppage, such employees as are necessary shall, where appropriate, complete production in process to avoid spoilage and clean the plant according to hygiene requirements before stopping work.

SCHEDULE A - PARTIES TO THE AWARD

The following organisation is a party to this award:

United Workers Union (WA)

2025 WAIRC 00694

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. CICS 5 OF 2025

COMMISSION'S OWN MOTION PURSUANT TO SECTION 37D TO VARY THE METAL TRADES (GENERAL)

AWARD

NOTICE is given by the Commission's Own Motion pursuant to section 37D of the *Industrial Relations Act 1979* (WA) of the Commission's intention to vary the scope of the *Metal Trades (General) Award* and make other consequential changes. The proposed variations which relate to scope are published in the annexed table.

A copy of the application and proposed variations may be inspected at my office by appointment at 111 St Georges Terrace, Perth.

A hearing for the purpose of affording interested persons an opportunity to be heard in relation to the proposed variations will be held at the Commission, Level 18, 111 St Georges Terrace Perth on Tuesday, the 9th day of September 2025 at 10:30 AM.

Any person who wishes to be heard in relation to the proposed variations should contact Chief Commissioner Kenner's Chambers by email at Chambers-Kenner@wairc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

25 JULY 2025

METAL TRADES (GENERAL) AWARD

Current Award Clause	Proposed Variation
<p>1.1 - Title</p> <p>This Award shall be known as the "Metal Trades (General) Award" as amended and consolidated and to the extent shown in the First Schedule to this Award replaces the several awards and industrial agreements set forth in that schedule and, with respect to construction work, replaces the several orders set out in the said schedule.</p>	<p>1.1 - Title</p> <p>This Award shall be known as the "Manufacturing, Maintenance and Metal Trades Award" and consolidates and replaces the awards listed in Schedule 1.</p>
<p>1.3 - AREA AND SCOPE</p> <p>1.3.1</p> <p>(a) This Award applies to employers in the "metal trades and associated industries and occupations" and to all employees employed by those employers in any classification mentioned in Clause 4.8 - Wages and Supplementary Payments of PART 1 - GENERAL or Clause 13. - Wages of PART 2 - CONSTRUCTION WORK of this Award.</p> <p>(b) For the avoidance of doubt, this Award also continues to apply to all employers and employees who were previously bound by the Award prior to CICS 15 of 2022.</p> <p>Note: A list of the industries the Award previously applied to prior to CICS 15 of 2022 is included at Appendix 5.</p>	<p>1.3 - AREA AND SCOPE</p> <p>1.3.1</p> <p>(a) This Award applies to employers in the "manufacturing, maintenance, metal trades and associated industries and occupations" and to all employees employed by those employers in any classification mentioned in Clause 4.8 - Wages and Supplementary Payments of PART 1 - GENERAL or Clause 13. - Wages of PART 2 - CONSTRUCTION WORK of this Award.</p> <p>(b) For the avoidance of doubt, this Award also continues to apply to all employers and employees who were previously bound by the Award prior to CICS 15 of 2022.</p> <p>Note: A list of the industries the Award previously applied to prior to CICS 15 of 2022 is included at Appendix 5.</p>

<p>1.3.2 This Award also applies to:</p> <p>(a) employers that supply labour on an on-hire basis to host employers in the “metal trades and associated industries and occupations” in respect of on-hire employees employed in the classifications mentioned in this Award, and those on-hire employees, while engaged in the performance of work covered by this Award; and</p> <p>(b) employers that provide group training services for apprentices and/or trainees in the “metal trades and associated industries and occupations” in respect of apprentices and/or trainees employed in one or more of the classifications mentioned in this Award, and those apprentices and/or trainees, while engaged by a host employer in the performance of work covered by this Award.</p> <p>Exclusion to scope clause</p> <p>1.3.3 This Award does not apply to:</p> <p>(a) employees who are on-hired to electrical contracting businesses or to employers who are engaged in the electrical contracting industry as defined under the terms of the Electrical Contracting Industry Award R 22 of 1978.</p> <p>(b) employers and employees who are subject to the national industrial relations system.</p>	<p>1.3.2 This Award also applies to:</p> <p>(a) employers that supply labour on an on-hire basis to host employers in the “manufacturing, maintenance, metal trades and associated industries and occupations” in respect of on-hire employees employed in the classifications mentioned in this Award, and those on-hire employees, while engaged in the performance of work covered by this Award; and</p> <p>(b) employers that provide group training services for apprentices and/or trainees in the “manufacturing, maintenance, metal trades and associated industries and occupations” in respect of apprentices and/or trainees employed in one or more of the classifications mentioned in this Award, and those apprentices and/or trainees, while engaged by a host employer in the performance of work covered by this Award.</p> <p>Exclusion to scope clause</p> <p>1.3.3 This Award does not apply to:</p> <p>(a) employees who are on-hired to electrical contracting businesses or to employers who are engaged in the electrical contracting industry as defined under the terms of the Electrical Contracting Industry Award R 22 of 1978.</p> <p>(b) employers and employees who are subject to the national industrial relations system.</p>
<p>1.6 - DEFINITIONS AND CLASSIFICATION STRUCTURE</p> <p>1.6.1 General: ... “Metal trades and associated industries and occupations” means the metal working and engineering and fabricating industries, including any of the following:</p> <ol style="list-style-type: none"> (1) mechanical and electrical engineering. (2) smithing, welding, metal moulding, metal machining, metal pressing and stamping, boilermaking, diecasting, galvanising, tinning, steel pickling and plastic moulding. (3) casting or fabricating in synthetic resins, or similar materials and including the production of synthetic resins, powders, tablets, etc, as used in such processes. (4) tool, die, gauge and mould making. (5) porcelain enamelling, and the manufacture of porcelain enamels, oxides, glazes and similar materials. (6) electroplateware manufacturing and electroplating of all types. (7) japanning, enamelling, painting etc, of metallic articles. (8) drawing and insulation of wire for the conducting of electricity. (9) generation and distribution of electric energy. (10) production by mechanical means of industrial gases. (11) making, assembling, repairing and maintenance of vehicles and metal motor body parts. (12) making, repairing, reconditioning and maintenance of motor engines, and/or parts thereof, and of the mechanical and electrical parts including the transmission and chassis of motor cars, motor cycles and other motor driven vehicles. (13) selling, handling, retreading, storing, distributing, 	<p>1.6 - DEFINITIONS AND CLASSIFICATION STRUCTURE</p> <p>1.6.1 General: ... “Manufacturing, maintenance, metal trades and associated industries and occupations” means the metal working and engineering and fabricating industries, including any of the following:</p> <ol style="list-style-type: none"> (1) mechanical and electrical engineering. (2) smithing, welding, metal moulding, metal machining, metal pressing and stamping, boilermaking, diecasting, galvanising, tinning, steel pickling and plastic moulding. (3) casting or fabricating in synthetic resins, or similar materials and including the production of synthetic resins, powders, tablets, etc, as used in such processes. (4) tool, die, gauge and mould making. (5) porcelain enamelling including wet and dry porcelain enamelling, and the manufacture of porcelain enamels, oxides, glazes and similar materials. (6) electroplateware manufacturing and electroplating of all types. (7) japanning, enamelling, painting etc, of metallic articles. (8) drawing and insulation of wire for the conducting of electricity. (9) generation and distribution of electric energy. (10) production by mechanical means of industrial gases. (11) building, making, assembling, repairing and maintenance of vehicles, caravan and metal motor body parts. (12) making, repairing, reconditioning and maintenance of motor engines, and/or parts thereof, and of the mechanical and electrical parts including the transmission and chassis of motor cars, motor cycles and other motor driven vehicles. (13) selling, handling, retreading, storing, distributing,

<p>(14) fitting, and/or repairing of tyres made of any material. hand and machine engraving.</p> <p>(15) installation of all classes and types of electrical wiring equipment and plant, and the repair and maintenance thereof.</p> <p>(16) manufacture of ceramic articles for use in the metal trades industries.</p> <p>(17) the manufacture, making, construction, assembling, erection, reconditioning, installation, maintenance, testing and/or repair of:</p> <ul style="list-style-type: none"> (a) agricultural implements. (b) badges and name-plates (including chemical engraving). (c) bicycles. (d) bolts, nuts, screws, rivets, washers and similar articles. (e) bridges and girders. (f) bright steel bars, rods, shafting, etc. (g) electrical advertising equipment (including neon signs). (h) electrical machinery, apparatus and appliances (including valve and globe manufacturing). (i) fluorescent lighting. (j) insulation materials and articles. (k) lifts and elevators. (l) metal furniture. (m) perambulators. (n) radios, telephones and X-ray machines. (o) recording, measuring and controlling devices for electricity, fluids, gases, heat, temperature, pressure, time, etc. (p) refrigerators, stoves and ovens. (q) safe and strong-rooms. (r) scales and machines for measuring mass and equipment. (s) ships and boats. (t) ventilating and air-conditioning plant and equipment. (u) watches and clocks, including cases. (v) water fittings. (w) wet and dry batteries. (x) window frames. <p>(18) The manufacture, making, assembly, processing, treatment, fabrication and preparation of all products made from, or containing, steel, iron, metal, sheet metal, tin, brass, copper and nonferrous metal.</p> <p>(19) Making, manufacture, treatment, installation, maintenance, repair and reconditioning of any articles, part or component, whether of metal and/or other material in any of the above industries.</p> <p>(20) Making, manufacture, installation, construction, maintenance, repair and reconditioning of plant, equipment, buildings and services (including power supply) in establishments connected with the industries and work described in this clause and maintenance work generally.</p> <p>(21) Every operation, process, duty and function carried on or performed in or in connection with or incidental to any of the above industries.</p> <p>...</p>	<p>fitting, and/or repairing of tyres made of any material.</p> <p>(14) hand and machine engraving.</p> <p>(15) installation of all classes and types of electrical wiring equipment and plant, and the repair and maintenance thereof.</p> <p>(16) manufacture of ceramic articles for use in the metal trades industries.</p> <p>(17) the manufacture, making, construction, assembling, erection, reconditioning, installation, maintenance, testing and/or repair of:</p> <ul style="list-style-type: none"> (a) agricultural implements. (b) badges and name-plates (including chemical engraving). (c) bicycles. (d) bolts, nuts, screws, rivets, washers and similar articles. (e) bridges and girders. (f) bright steel bars, rods, shafting, etc. (g) cannisters. (h) circulating radiators. (i) electrical advertising equipment (including neon signs). (j) electrical machinery, apparatus and appliances (including valve and globe manufacturing). (k) fluorescent lighting. (l) gates, fences and frames. (m) insulation materials and articles. (n) lifts and elevators. (o) metal furniture. (p) perambulators. (q) radios, telephones and X-ray machines. (r) recording, measuring and controlling devices for electricity, fluids, gases, heat, temperature, pressure, time, etc. (s) refrigerators, stoves and ovens. (t) safe and strong-rooms. (u) scales and machines for measuring mass and equipment. (v) ships and boats. (w) ventilating and air-conditioning plant and equipment. (x) watches and clocks, including cases. (y) water fittings. (z) wet and dry batteries. (za) window frames. <p>(18) The manufacture, making, assembly, processing, treatment, fabrication and preparation of all products made from, or containing, galvanised iron, steel, iron, metal, sheet metal, sheet-tin, tin, brass, copper and nonferrous metal.</p> <p>(19) Making, manufacture, treatment, installation, maintenance, repair and reconditioning of any articles, part or component, whether of metal and/or other material in any of the above industries.</p> <p>(20) Making, manufacture, installation, construction, maintenance, repair and reconditioning of plant, equipment, buildings and services (including power supply) in establishments connected with the industries and work described in this clause and maintenance work generally.</p> <p>(21) Mixing, fixing or applying thermal insulating material including the fixing of protective coverings of canvas, sheet metals, fabrics, plastics, bituminous fibre glass, or other similar materials to such insulation but not including the installation of building grade insulation material in walls and ceilings</p> <p>(22) Every operation, process, duty and function carried on</p>
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	<p>or performed in or in connection with or incidental to any of the above industries.</p> <p>Add the following two (2) new definitions after “Manufacturing, maintenance, metal trades and associated industries and occupations”:</p> <p>"Sheetmetal worker - first class" shall mean a worker required:</p> <p>(1) to work from blue prints, drawings or measurements (whichever is required of them) for completed articles and to make the articles throughout; or</p> <p>(2) to do work the ability to do which involves the ability to do the work specified in paragraph (1) hereof.</p> <p>The expression "blue prints, drawings or measurements" means blue prints, drawings or measurements furnished by the customer to the employer for the purpose of specifying the nature and/or dimensions of the articles, ordered or part thereof, or blue prints, drawings or measurements of a similar nature but the expression does not include drawings, sketches or measurements supplied to the individual workman to understand the nature of and to carry out the work required of him.</p> <p>"Sheetmetal worker - second class" shall mean a tinsmith or sheetmetal worker, other than a sheetmetal worker - first class, employed in manufacturing or partly manufacturing articles out of any class of sheetmetal of ten gauge or lighter and including wire work in connection with such articles.</p>																																												
<p>2.3 - REDUNDANCY</p> <p>...</p> <p>2.3.3 Severance Pay</p> <p>(1) In addition to the period of notice prescribed in 2.1.2(1) in Clause 2.1 - Contract of Service, of this Award, for ordinary termination, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in 2.3.1 shall be entitled to the following amount of severance pay in respect of a continuous period of service.</p> <table border="1" data-bbox="414 1456 829 2060"> <thead> <tr> <th><u>PERIOD OF CONTINUOUS SERVICE</u></th> <th><u>SEVERANCE PAY</u></th> </tr> </thead> <tbody> <tr> <td>Less than 1 year</td> <td>Nil</td> </tr> <tr> <td>1 year and less than 2 years</td> <td>4 weeks' pay</td> </tr> <tr> <td>2 years and less than 3 years</td> <td>6 weeks' pay</td> </tr> <tr> <td>3 years and less than 4 years</td> <td>7 weeks' pay</td> </tr> <tr> <td>4 years and less than 5 years</td> <td>8 weeks' pay</td> </tr> <tr> <td>5 years and less than 6 years</td> <td>10 weeks' pay</td> </tr> <tr> <td>6 years and less than 7 years</td> <td>11 weeks' pay</td> </tr> <tr> <td>7 years and less than 8 years</td> <td>13 weeks' pay</td> </tr> <tr> <td>8 years and less than 9 years</td> <td>14 weeks' pay</td> </tr> <tr> <td>9 years and less than 10 years</td> <td>16 weeks' pay</td> </tr> </tbody> </table>	<u>PERIOD OF CONTINUOUS SERVICE</u>	<u>SEVERANCE PAY</u>	Less than 1 year	Nil	1 year and less than 2 years	4 weeks' pay	2 years and less than 3 years	6 weeks' pay	3 years and less than 4 years	7 weeks' pay	4 years and less than 5 years	8 weeks' pay	5 years and less than 6 years	10 weeks' pay	6 years and less than 7 years	11 weeks' pay	7 years and less than 8 years	13 weeks' pay	8 years and less than 9 years	14 weeks' pay	9 years and less than 10 years	16 weeks' pay	<p>2.3 - REDUNDANCY</p> <p>...</p> <p>2.3.3 Severance Pay</p> <p>(1) In addition to the period of notice prescribed in 2.1.2(1) in Clause 2.1 - Contract of Service, of this Award, for ordinary termination, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in 2.3.1 shall be entitled to the following amount of severance pay in respect of a continuous period of service.</p> <table border="1" data-bbox="1069 1456 1484 2060"> <thead> <tr> <th><u>PERIOD OF CONTINUOUS SERVICE</u></th> <th><u>SEVERANCE PAY</u></th> </tr> </thead> <tbody> <tr> <td>Less than 1 year</td> <td>Nil</td> </tr> <tr> <td>1 year and less than 2 years</td> <td>4 weeks' pay</td> </tr> <tr> <td>2 years and less than 3 years</td> <td>6 weeks' pay</td> </tr> <tr> <td>3 years and less than 4 years</td> <td>7 weeks' pay</td> </tr> <tr> <td>4 years and less than 5 years</td> <td>8 weeks' pay</td> </tr> <tr> <td>5 years and less than 6 years</td> <td>10 weeks' pay</td> </tr> <tr> <td>6 years and less than 7 years</td> <td>11 weeks' pay</td> </tr> <tr> <td>7 years and less than 8 years</td> <td>13 weeks' pay</td> </tr> <tr> <td>8 years and less than 9 years</td> <td>14 weeks' pay</td> </tr> <tr> <td>9 years and less than 10 years</td> <td>16 weeks' pay</td> </tr> </tbody> </table>	<u>PERIOD OF CONTINUOUS SERVICE</u>	<u>SEVERANCE PAY</u>	Less than 1 year	Nil	1 year and less than 2 years	4 weeks' pay	2 years and less than 3 years	6 weeks' pay	3 years and less than 4 years	7 weeks' pay	4 years and less than 5 years	8 weeks' pay	5 years and less than 6 years	10 weeks' pay	6 years and less than 7 years	11 weeks' pay	7 years and less than 8 years	13 weeks' pay	8 years and less than 9 years	14 weeks' pay	9 years and less than 10 years	16 weeks' pay
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<p>years 10 years and over 12 weeks' pay</p> <p>"Weeks' Pay" means the ordinary weekly rate of wage for the employee concerned.</p> <p>Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.</p> <p>(2) For the purpose of this clause continuity of service shall not be broken on account of -</p> <p>(a) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;</p> <p>(b) any absence from work on account of paid leave or on account of leave lawfully granted by the employer; or</p> <p>(c) any absence with reasonable cause, proof whereof shall be upon the employee;</p> <p>Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.</p> <p>(3) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with section 6 of the <i>Long Service Leave Act 1958</i> shall also constitute continuous service for the purpose of this clause.</p> <p>...</p>	<p>10 years and over 12 weeks' pay</p> <p>"Weeks' Pay" means the ordinary weekly rate of wage for the employee concerned.</p> <p>Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.</p> <p>(1A) An employee whose period of continuous service is less than one year is shall be entitled to severance pay of \$20 for each completed week of service if they are employed in:</p> <p>(a) the construction, erection or alteration of any other building, structure or civil engineering project, in the installation of industrial and commercial air conditioning and refrigeration systems but not packaged units; or</p> <p>(b) to service and repair industrial and commercial air conditioning and refrigeration systems other than on the business premises, factory or workshop of the employer; or</p> <p>(c) mixing, fixing or applying any thermal insulating material.</p> <p>(2) For the purpose of this clause continuity of service shall not be broken on account of -</p> <p>(a) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;</p> <p>(b) any absence from work on account of paid leave or on account of leave lawfully granted by the employer; or</p> <p>(c) any absence with reasonable cause, proof whereof shall be upon the employee;</p> <p>Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.</p> <p>(3) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with section 6 of the <i>Long Service Leave Act 1958</i> shall also constitute continuous service for the purpose of this</p>
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		clause.
4.8 - WAGES AND SUPPLEMENTARY PAYMENTS		4.8 - WAGES AND SUPPLEMENTARY PAYMENTS
...		...
4.8.2 (1) Leading Hands:		4.8.2 (1) Leading Hands:
In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week -		In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week -
	\$	\$
(a) If placed in charge of not less than three and not more than 10 other employees	31.20	(a) If placed in charge of not less than three and not more than 10 other employees
(b) If placed in charge of more than 10 and not more than 20 other employees	47.70	(b) If placed in charge of more than 10 and not more than 20 other employees
(c) If placed in charge of more than 20 other employees	61.70	(c) If placed in charge of more than 20 other employees
(2) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten (10) other workers.		(2) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten (10) other workers.
...		...
4.8.4 Junior Employees:		4.8.4 Junior Employees:
Under 16 years of age	40% of adult minimum wage	Under 16 years of age
16 years of age	50% of adult minimum wage	16 years of age
17 years of age	60% of adult minimum wage	17 years of age
18 years of age	70% of adult minimum wage	18 years of age
Wage per week for 19 and 20 years of age is expressed as a percentage of Level C13 base rate which includes a supplementary payment and arbitrated safety net adjustment.		Wage per week for 19 and 20 years of age is expressed as a percentage of Level C13 base rate which includes a supplementary payment and arbitrated safety net adjustment.
	%	%
19 years of age	78.5	19 years of age
20 years of age	93	20 years of age
...		...
4.8.6 Tool Allowance:		4.8.6 Tool Allowance:
(1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:		(1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:
(a) \$17.10 per week to such tradesperson; or		(a) \$23.10 per week to such tradesperson; or
(b) in the case of an apprentice a percentage of \$17.10 being the percentage which appears against the year of apprenticeship in 4.8.3;		(b) in the case of an apprentice a percentage of \$23.10 being the percentage which appears against the year of apprenticeship in 4.8.3;
for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of		for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of
		(2) Any tool allowance paid pursuant to 4.8.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

<p>work as a tradesperson or apprentice.</p> <p>(2) Any tool allowance paid pursuant to 4.8.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.</p> <p>(3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.</p> <p>(4) A tradesperson or apprentice shall replace or pay for any tool supplied by the employer if lost through the employee's negligence.</p> <p>...</p>	<p>(3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.</p> <p>(4) A tradesperson or apprentice shall replace or pay for any tool supplied by the employer if lost through the employee's negligence.</p> <p>...</p>
<p>4.9 - TRAINEESHIPS</p> <p>4.9.1 Scope:</p> <p>(1) This clause shall apply to persons:</p> <p>(a) who are undertaking a Traineeship (as defined); and</p> <p>(b) who are employed in the "metal trades and associated industries and occupations" and in a classification covered by this Award.</p> <p>...</p>	<p>4.9 - TRAINEESHIPS</p> <p>4.9.1 Scope:</p> <p>(1) This clause shall apply to persons:</p> <p>(a) who are undertaking a Traineeship (as defined); and</p> <p>(b) who are employed in the "manufacturing, maintenance, metal trades and associated industries and occupations" and in a classification covered by this Award.</p> <p>...</p>
<p>5.2 - SPECIAL ALLOWANCES AND FACILITIES</p> <p>...</p> <p>5.2.2 Dirt Money: An employee shall be paid an allowance of 61 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.</p> <p>...</p> <p>5.2.4 Confined Space: An employee shall be paid an allowance of 74 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.</p> <p>...</p> <p>5.2.21 An employee, holding a Provide First Aid certificate (HLTAID011) or equivalent, appointed by the employer to perform first aid duties, shall be paid \$12.00 per week in addition to the employee's ordinary rate.</p> <p>...</p>	<p>5.2 - SPECIAL ALLOWANCES AND FACILITIES</p> <p>...</p> <p>5.2.2 Dirt Money: An employee shall be paid an allowance of 77 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.</p> <p>...</p> <p>5.2.4 Confined Space: An employee shall be paid an allowance of 97 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.</p> <p>...</p> <p>5.2.21 An employee, holding a Provide First Aid certificate (HLTAID011) or equivalent, appointed by the employer to perform first aid duties, shall be paid \$15.90 per week in addition to the employee's ordinary rate.</p> <p>...</p> <p>Add the following three (3) new subclauses after "5.2.22":</p> <p>5.2.23 The following provisions apply to painters engaged in vehicle and caravan building and repair trades:</p> <p>(a) no surface painted with lead paint shall be rubbed down or scaped by dry process other than by hand.</p> <p>(b) the employer shall provide washing facilities and soap suitable as a solvent for paint mixtures, in a convenient place, for employee use before meals and after knocking off work.</p>

	<p>(i) Where spray painting is carried out, employers must ensure adequate protection of employee health. Employers must provide employees with respirators. Spray painting operations must be carried on in compliance with the relevant Code of Practice under s 274 of the <i>Work Health and Safety Act 2020</i> (WA).</p> <p>(ii) Painters shall be allowed five minutes each day before ceasing work at end of shift to wash and clean up.</p> <p>5.2.24 The following provisions apply to employees engaged in vehicle and caravan building and repair trades:</p> <p>(a) No employee shall be permitted to have a meal in any paint shop, or in such close proximity to any place where painting operations are being carried on as is likely to cause injury to employee health.</p> <p>(b) where practicable, blowers shall be installed in and around wood-working machines where dust is created and likely to affect the health of employees.</p> <p>5.2.25 A sheet metal worker employed at the Alumina Refinery, Kwinana on construction in areas 40,30, 35K, 45, 25, 35f (where operating), 35c (where operating, 50 (A to E tanks) shall be supplied with overalls and boots by the employer.</p>
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13 - WAGES

...

13.2 (1) Classification

	Base Rate \$	Special Payment Adjustment \$	Arbitrated Safety Net \$	Total Rate Per Week \$
(a) Instrumentation and Controls Tradesperson	423.80	96.00	674.10	1193.90
(b) Instrument Tradesperson - Complex Systems	386.60	84.90	655.70	1127.20
(c) Instrument Tradesperson	380.10	80.10	654.40	1114.60
(d) Scientific Instrument Maker	380.10	80.10	654.40	1114.60
(e) Welder - Special Class	371.40	80.10	650.90	1102.40
(f) Welder	362.90	80.10	647.70	1090.70
(g) Electrician - Special Class	386.60	84.90	655.70	1127.20
(h) Electrical Fitter	362.90	80.10	647.70	1090.70
(i) Electrical Installer	362.90	80.10	647.70	1090.70
(j) Boilermaker	362.90	80.10	647.70	1090.70
(k) Tradesperson the greater part of whose time is occupied in marking off and/or template making	367.10	80.10	649.50	1096.70
(l) Mechanical Tradesperson - Special Class	386.60	84.90	655.70	1127.20
(m) Tradesperson	362.90	80.10	647.70	1090.70
(n) Pipe Fitter	362.90	80.10	647.70	1090.70
(o) Fitter - Refrigeration	362.90	80.10	647.70	1090.70
(p) Fitter - Window Frame	362.90	80.10	647.70	1090.70
(q) Motor Mechanic	362.90	80.10	647.70	1090.70
(r) Machinist - Engineering:				

Note: highlighting in table at subclause 13.2 indicates a change.

13 - WAGES

...

13.2 (1) Classification

	Base Rate \$	Special Payment Adjustment \$	Arbitrated Safety Net \$	Total Rate Per Week \$
(a) Instrumentation and Controls Tradesperson	423.80	96.00	674.10	1193.90
(b) Instrument Tradesperson - Complex Systems	386.60	84.90	655.70	1127.20
(c) Instrument Tradesperson Instrument Fitter	380.10	80.10	654.40	1114.60
(d) Scientific Instrument Maker	380.10	80.10	654.40	1114.60
(e) Welder - Special Class	371.40	80.10	650.90	1102.40
(f) Welder	362.90	80.10	647.70	1090.70
(g) Electrician - Special Class	386.60	84.90	655.70	1127.20
(h) Electrical Fitter	362.90	80.10	647.70	1090.70
(i) Electrical Installer	362.90	80.10	647.70	1090.70
(j) Boilermaker including Structural Steel Tradesperson	362.90	80.10	647.70	1090.70
(k) Tradesperson the greater part of whose time is occupied in marking off and/or template making	367.10	80.10	649.50	1096.70
(l) Mechanical Tradesperson - Special Class	386.60	84.90	655.70	1127.20
(m) Tradesperson	362.90	80.10	647.70	1090.70
(n) Pipe Fitter	362.90	80.10	647.70	1090.70
(o) Fitter - Refrigeration	362.90	80.10	647.70	1090.70
(p) Fitter - Window Frame	362.90	80.10	647.70	1090.70
(q) Motor Mechanic	362.90	80.10	647.70	1090.70
(r) Machinist - Engineering:				
First Class	362.90	80.10	647.70	1090.70

	First Class	362.90	80.10	647.70	1090.70		Second Class	327.20	66.80	625.90	1019.90
	Second Class	327.20	66.80	625.90	1019.90	(s)	Certificated Rigger or Scaffolder	345.70	68.90	631.70	1046.30
(s)	Certificated Rigger or Scaffolder	345.70	68.90	631.70	1046.30	(t)	Rigger or Scaffolder - Other	334.70	67.70	628.10	1030.50
(t)	Rigger or Scaffolder - Other	334.70	67.70	628.10	1030.50	(u)	Tool and Material Storesperson	322.90	65.80	624.10	1012.80
(u)	Tool and Material Storesperson	322.90	65.80	624.10	1012.80	(v)	Tradesperson's Assistant	310.20	64.30	620.30	994.80
(v)	Tradesperson's Assistant	310.20	64.30	620.30	994.80	(w)	Tradesperson's Assistant - who from time to time uses a grinding machine	311.70	65.80	621.00	998.50
(w)	Tradesperson's Assistant - who from time to time uses a grinding machine	311.70	65.80	621.00	998.50	(x)	Lagger -				
(x)	Lagger -						first 6 months' experience	310.20	63.40	619.80	993.40
	first 6 months' experience	310.20	63.40	619.80	993.40		2nd and 3rd six months' experience	311.70	65.40	621.00	998.10
	2nd and 3rd six months' experience	311.70	65.40	621.00	998.10		4th and 5th six months' experience	315.90	65.60	622.00	1003.50
	4th and 5th six months' experience	315.90	65.60	622.00	1003.50	(y)	thereafter	317.40	66.60	622.90	1006.90
	thereafter	317.40	66.60	622.90	1006.90	(y)	Grinder using portable machine	315.90	65.70	622.20	1003.80
(y)	Grinder using portable machine	315.90	65.70	622.20	1003.80	(z)	Crane Attendant and Dogger	334.70	67.70	628.10	1030.50
(z)	Crane Attendant and Dogger	334.70	67.70	628.10	1030.50	(aa)	Labourer	291.60	62.10	614.30	968.00
(aa)	Labourer	291.60	62.10	614.30	968.00	(ab)	Sheetmetal Employee - First Class	362.80	80.00	647.60	1090.40
						(ac)	Sheetmetal Employee - Second Class	327.20	66.80	625.90	1019.90
	(2)	A certificated rigger, other than a leading hand, who in compliance with the provisions of the regulations made pursuant to the Occupational Safety and Health Act 1984, is responsible for the supervision of other employees shall be deemed to be a leading hand and be paid the additional rate prescribed for a leading hand placed in charge of not less than three (3) and not more than ten (10) other employees.					(2)	A certificated rigger, other than a leading hand, who in compliance with the provisions of the regulations made pursuant to the Occupational Safety and Health Act 1984, is responsible for the supervision of other employees shall be deemed to be a leading hand and be paid the additional rate prescribed for a leading hand placed in charge of not less than three (3) and not more than ten (10) other employees.			
...	13.4	Construction Allowances				...	13.4	Construction Allowances			
(1)	In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -				(1)	In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -					
(a)	\$55.10 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.				(a)	\$55.10 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.					
(b)	\$49.60 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.				(b)	\$49.60 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.					
(c)	\$29.10 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this				(c)	\$29.10 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.					
	(2)	Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Commission.				(2)	Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Commission.				

<p style="text-align: center;">Award.</p> <p>(2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Commission.</p> <p>...</p>	<p>Add the following as a new subclause “13.5A” after “13.5”:</p> <p>13.5A Air Conditioning and Refrigeration Industry (Construction and Servicing)</p> <p>13.5A.1 This clause applies to employees engaged:</p> <p>(1) in the construction, erection or alteration of any other building, structure or civil engineering project, in the installation of industrial and commercial air conditioning and refrigeration systems but not packaged units; or</p> <p>(2) to service and repair industrial and commercial air conditioning and refrigeration systems other than on the business premises, factory or workshop of the employer.</p> <p>13.5A.2 In addition to the appropriate total wage prescribed in clause 13.2, a leading hand shall be paid:</p> <table style="margin-left: 40px;"> <tr> <td></td> <td style="text-align: right;">\$</td> </tr> <tr> <td>(a) If placed in charge of not less than three and not more than 10 other employees</td> <td style="text-align: right;">26.70</td> </tr> <tr> <td>(b) If placed in charge of more than 10 and not more than 20 other employees</td> <td style="text-align: right;">40.50</td> </tr> <tr> <td>(c) If placed in charge of more than 20 other employees</td> <td style="text-align: right;">52.40</td> </tr> </table> <p>13.5A.3 Where an employer does not provide a tradesperson, second-class sheetmetal employee or an apprentice with the tools ordinarily required by them in the performance of their work the employer shall pay a tool allowance of -</p> <p>(1) \$14.70 per week to such tradesperson or second class sheetmetal employee; or</p> <p>(2) \$14.70 per week to an apprentice.</p> <p>Any tool allowance paid pursuant to this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this subclause.</p> <p>13.5A.4 An employer shall provide for the use of tradesperson, second-class sheetmetal employee and apprentice all necessary power tools, special purpose tools and precision measuring instruments.</p> <p>13.5A.5 A tradesperson, second-class sheetmetal employee or an apprentice shall replace or pay for any tools supplied by the employer, if lost through the employee's negligence.</p>		\$	(a) If placed in charge of not less than three and not more than 10 other employees	26.70	(b) If placed in charge of more than 10 and not more than 20 other employees	40.50	(c) If placed in charge of more than 20 other employees	52.40
	\$								
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<p>15.2 - ALLOWANCES FOR TRAVELLING AND EMPLOYMENT IN CONSTRUCTION WORK</p> <p>15.2.1 An employee, who on any day is required by the employer to report directly to the job, shall be paid an allowance in accordance with the provisions of this subclause to compensate for travel patterns and costs peculiar to the industry, which includes mobility requirements of employees, and the nature of employment in construction work covered by this Award -</p> <p>(1) On places within a radius of 50 kilometres from the General Post Office, Perth - \$17.25 per day.</p> <p>(2) For each additional kilometre to a radius</p>	<p>15.2 - ALLOWANCES FOR TRAVELLING AND EMPLOYMENT IN CONSTRUCTION WORK</p> <p>15.2.1 An employee, who on any day is required by the employer to report directly to the job, shall be paid an allowance in accordance with the provisions of this subclause to compensate for travel patterns and costs peculiar to the industry, which includes mobility requirements of employees, and the nature of employment in construction work covered by this Award -</p> <p>(1) On places within a radius of 50 kilometres from the General Post Office, Perth - \$21.90 per day.</p> <p>(2) For each additional kilometre to a radius of 60</p>								

<p>of 60 kilometres from the General Post Office, Perth – 92 cents per kilometre.</p> <p>(3) Subject to the provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 92 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.</p> <p>(4) In respect of work carried out from an employer's depot situated outside a radius of 60 kilometres from the General Post Office, Perth the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.</p> <p>(5) Where transport to and from the job is supplied by the employer from and to the depot or such other place more convenient to the employee as is mutually agreed upon between the employer and the employee, half the above rates shall be paid, provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.</p> <p>...</p>	<p>kilometres from the General Post Office, Perth – 98 cents per kilometre.</p> <p>(3) Subject to the provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 98 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.</p> <p>(4) In respect of work carried out from an employer's depot situated outside a radius of 60 kilometres from the General Post Office, Perth the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.</p> <p>(5) Where transport to and from the job is supplied by the employer from and to the depot or such other place more convenient to the employee as is mutually agreed upon between the employer and the employee, half the above rates shall be paid, provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.</p> <p>...</p>
<p>15.3 - DISTANT WORK</p> <p>...</p> <p>15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of \$35.30 for any weekend that the employee returns home from the job, but only if -</p> <p>(1) The employee advises their employer or the employer's agent of their intention not later than the Tuesday immediately preceding the weekend in which they so return;</p> <p>(2) The employee is not required for work during that weekend;</p> <p>(3) The employee returns to the job on the first working day following the weekend; and</p> <p>(4) The employer does not provide, or offer to provide, suitable transport.</p> <p>15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of \$15.60 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at</p>	<p>15.3 - DISTANT WORK</p> <p>...</p> <p>15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of \$42.20 for any weekend that the employee returns home from the job, but only if -</p> <p>(1) The employee advises their employer or the employer's agent of their intention not later than the Tuesday immediately preceding the weekend in which they so return;</p> <p>(2) The employee is not required for work during that weekend;</p> <p>(3) The employee returns to the job on the first working day following the weekend; and</p> <p>(4) The employer does not provide, or offer to provide, suitable transport.</p> <p>15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of \$18.55 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.</p> <p>...</p>

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<p style="text-align: center;"><u>SCHEDULE 1</u></p> <p style="text-align: center;"><u>AWARDS, INDUSTRIAL AGREEMENTS AND ORDERS REPLACED</u></p> <p>(1) <u>Awards:</u></p> <table border="0"> <thead> <tr> <th style="text-align: left;"><u>Number</u></th> <th style="text-align: left;"><u>Description</u></th> <th style="text-align: left;"><u>Extent Replaced</u></th> </tr> </thead> <tbody> <tr> <td>1/1954</td> <td>S.W. Land Division.</td> <td>Wholly.</td> </tr> <tr> <td>19/1962</td> <td>Alumina Refinery Construction.</td> <td>Wholly, insofar as it applies to metal trades employees.</td> </tr> <tr> <td>10/1963</td> <td>Apprentices - Alumina Refinery Construction.</td> <td>Wholly, insofar as it applies to metal trades apprentices.</td> </tr> <tr> <td>4/1963</td> <td>Lagging - Alumina Refinery Construction.</td> <td>Wholly.</td> </tr> <tr> <td>12/1963</td> <td>Industrial Construction S.W. Land Division.</td> <td>Wholly, insofar as it applies to metal trades employees.</td> </tr> <tr> <td>26/1950</td> <td>Northern and Eastern.</td> <td>Wholly.</td> </tr> <tr> <td>26/1962</td> <td>Oil Refinery Extensions Construction.</td> <td>Wholly, insofar as it applies to metal trades employees.</td> </tr> <tr> <td>28/1960</td> <td>Ord River.</td> <td>Wholly.</td> </tr> <tr> <td>216/1962</td> <td>Board charges - Ord River.</td> <td>Wholly.</td> </tr> <tr> <td>15/1954</td> <td>Timber Industry.</td> <td>Wholly.</td> </tr> </tbody> </table> <p>(2) <u>Industrial Agreements:</u></p> <table border="0"> <thead> <tr> <th style="text-align: left;"><u>Number</u></th> <th style="text-align: left;"><u>Description</u></th> <th style="text-align: left;"><u>Extent Replaced</u></th> </tr> </thead> <tbody> <tr> <td>5/1958</td> <td>Electrical Trades - Dumbleyung Road Board.</td> <td>Wholly.</td> </tr> <tr> <td>16/1964</td> <td>Apprentices - Laporte Titanium.</td> <td>Wholly, insofar as they apply to metal trades apprentices.</td> </tr> <tr> <td>8/1965</td> <td>Linesmen - Geraldton Municipal Council.</td> <td>Wholly.</td> </tr> <tr> <td>2/1953</td> <td>Apprentices - H.B. Brady Co.</td> <td>Wholly.</td> </tr> </tbody> </table> <p>A reference to any award or industrial agreement in this schedule includes a reference to all amendments or variations of any such award or industrial agreement.</p> <p>(3) <u>Orders:</u></p> <table border="0"> <thead> <tr> <th style="text-align: left;"><u>Number</u></th> <th style="text-align: left;"><u>Description</u></th> <th style="text-align: left;"><u>Extent Replaced</u></th> </tr> </thead> <tbody> <tr> <td>C76/1975</td> <td>Metal Trades (Eneabba)</td> <td>Wholly.</td> </tr> <tr> <td>C16/1976</td> <td>Metal Trades</td> <td>Wholly insofar</td> </tr> </tbody> </table>	<u>Number</u>	<u>Description</u>	<u>Extent Replaced</u>	1/1954	S.W. Land Division.	Wholly.	19/1962	Alumina Refinery Construction.	Wholly, insofar as it applies to metal trades employees.	10/1963	Apprentices - Alumina Refinery Construction.	Wholly, insofar as it applies to metal trades apprentices.	4/1963	Lagging - Alumina Refinery Construction.	Wholly.	12/1963	Industrial Construction S.W. Land Division.	Wholly, insofar as it applies to metal trades employees.	26/1950	Northern and Eastern.	Wholly.	26/1962	Oil Refinery Extensions Construction.	Wholly, insofar as it applies to metal trades employees.	28/1960	Ord River.	Wholly.	216/1962	Board charges - Ord River.	Wholly.	15/1954	Timber Industry.	Wholly.	<u>Number</u>	<u>Description</u>	<u>Extent Replaced</u>	5/1958	Electrical Trades - Dumbleyung Road Board.	Wholly.	16/1964	Apprentices - Laporte Titanium.	Wholly, insofar as they apply to metal trades apprentices.	8/1965	Linesmen - Geraldton Municipal Council.	Wholly.	2/1953	Apprentices - H.B. Brady Co.	Wholly.	<u>Number</u>	<u>Description</u>	<u>Extent Replaced</u>	C76/1975	Metal Trades (Eneabba)	Wholly.	C16/1976	Metal Trades	Wholly insofar	<p style="text-align: center;"><u>SCHEDULE 1</u></p> <p style="text-align: center;"><u>AWARDS REPLACED</u></p> <p>Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979</p> <p>Gate, Fence and Frames Manufacturing Award</p> <p>Sheet Metal Workers' Award No 10 of 1973</p> <p>Thermal Insulation Contracting Industry Award</p> <p>Vehicle Builders' Award 1971</p>
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26/1962	Oil Refinery Extensions Construction.	Wholly, insofar as it applies to metal trades employees.																																																								
28/1960	Ord River.	Wholly.																																																								
216/1962	Board charges - Ord River.	Wholly.																																																								
15/1954	Timber Industry.	Wholly.																																																								
<u>Number</u>	<u>Description</u>	<u>Extent Replaced</u>																																																								
5/1958	Electrical Trades - Dumbleyung Road Board.	Wholly.																																																								
16/1964	Apprentices - Laporte Titanium.	Wholly, insofar as they apply to metal trades apprentices.																																																								
8/1965	Linesmen - Geraldton Municipal Council.	Wholly.																																																								
2/1953	Apprentices - H.B. Brady Co.	Wholly.																																																								
<u>Number</u>	<u>Description</u>	<u>Extent Replaced</u>																																																								
C76/1975	Metal Trades (Eneabba)	Wholly.																																																								
C16/1976	Metal Trades	Wholly insofar																																																								

	(Eneabba)	as it relates to metal trades employees. Wholly.
C232/1975	Metal Trades (James Hardie)	Wholly insofar as it relates to metal trades employees.
C156/1975 CR89A/1977 and CR399/1977	Metal Trades Kwinana Area (Large Industrial or Civil Engineering Projects)	Wholly insofar as it relates to metal trades employees.
C207/1975 CII/1976 CR89C/1977 and C207A/1975	Metal Trades (Pinjarra Alumina Refinery Construction)	Wholly insofar as it relates to metal trades employees.
C166/1975 and CR89B/1977	Metal and Civil Trades (Mt. Newman Mining Projects, Port Hedland)	Wholly insofar as it relates to metal trades employees.
C234/1975	Metal Trades	Wholly.
C10/1976	Metal Trades (C.B.H.)	Wholly.
C116/1976	Metal Trades (Dardanup)	Wholly insofar as it relates to metal trades employees.
CIII/1976	Metal Trades (Newman)	Wholly.
C201/1976 & C15 & R35/1977	Metal Trades Swan Brewery (Construction)	Wholly insofar as it relates to metal trades employees.
C261/1976	Metal and Civil Trades (Telfer)	Wholly insofar as it relates to metal trades employees.
CR211/1977 and CR382/1978	Metal Trades (Muja)	Wholly insofar as it relates to metal trades employees.
CR225, CR233 & CR234/77	Metal Trades (Wellington St. Telephone Exchange)	Wholly.
C316/1978 and C169/1977	Metal Trades (46 M.T.P.A. Hamersley Project)	Wholly insofar as it relates to metal trades employees.
CR179/1978	Metal Trades (B.P. - F.C.C.U. Project)	Wholly.

<u>APPENDIX 1</u>		<u>APPENDIX 1</u>	
<u>OLD CLASSIFICATIONS</u>		<u>OLD CLASSIFICATIONS</u>	
(1)	(a)	(1)	(a)
	The following classification structure provides a reference point for task and craft based work titles prior to award restructuring. The following old classifications "line up" previous wage groups with the new career path levels. This Appendix will subsequently be deleted by agreement between the parties.		The following classification structure provides a reference point for task and craft based work titles prior to award restructuring. The following old classifications "line up" previous wage groups with the new career path levels. This Appendix will subsequently be deleted by agreement between the parties.
	(b)		(b)
	C6 A1		C5 AA
	C8 A		C6 A1
	C9 B + C		C7 A2
	C10 D		C8 A
	C11 E, F + G		C9 B + C
	C12 H, I, J + K		C10 D
	C13 L + M		C11 E, F + G
			C12 H, I, J + K
			C13 L + M

	<p>incidental thereto.</p> <p>"Machinist - (Wire)":</p> <p>(a) means an employee who without supervision is required to set up and operate automatic wire working machinery.</p> <p>(b) means an employee who under supervision is required to set up and operate automatic wire working machinery.</p> <p>"Machinist - (Wire) Assistant" means an employee who assists in the loading and unloading of automatic wire working machinery.</p> <p>"Painter of Iron Work" means an employee (other than coach painter or ship painter) who paints iron work using brush or spray or dip equipment including air, airless or electrostatic equipment.</p> <p>"Process Employee" means an employee who under supervision is required to carry out on single purpose machines repetitive operations in connection with the manufacture of gates, fences and frames.</p> <p>"Tool and Material Storeperson" means an employee responsible for the safe custody of, and the recording of issue and/or return of, tools and consumable materials.</p> <p>"Tradesperson" means an employee who in the course of employment works from drawings or prints, or makes precision measurements or applies general trade experience.</p> <p>"Wirer" means an employee who is required to attach wire mesh to tubular or steel frames including cutting the mesh to shape and size.</p> <p>"Welder A" means an employee using electric arc or petrol or coal gas blow pipe on any work other than that of a B or C class welder as defined.</p> <p>"Welder B" means an employee who - (a) uses any of the foregoing types of welding apparatus in filling castings; or (b) welds with the aid of jigs; or (c) operates automatic welding machines for the setting up of which the employee is not responsible; or (d) operates a profile cutting or a straight line cutting machine.</p> <p>"Welder C" means an employee who uses any of the foregoing types of welding apparatus in tacking preparatory to the completion of work by any other employee.</p> <p>Vehicle Building:</p> <p>"Vehicle Builder Level 1" means an employee who undertakes up to 38 hours induction training which may include information on the enterprise, conditions of employment, introduction to supervisors and fellow employees, training and career path opportunities, plant layout, work and documentation procedures, occupational health and safety, equal employment opportunity and quality control/assurance.</p> <p>An employee at this level performs routine duties essentially of a manual nature and to the level of their training -</p> <p>(i) Performs general labouring and cleaning duties.</p> <p>(ii) Exercises minimal judgement.</p>
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	<p>(iii) Works under direct supervision.</p> <p>(iv) May undertake structured training so as to enable them to work at Vehicle Builder - Level II.</p> <p>Pre 18 June 1990 - General Labourer.</p> <p>“Vehicle Builder Level II” means an employee who has completed up to three months' structured training so as to enable the employee to perform work within the scope of this level.</p> <p>At this level an employee performs work above and beyond the skills of an employee at Vehicle Builder - Level I and to the level of their training -</p> <p>(i) Works under direct supervision either individually or in a team environment.</p> <p>(ii) Understands and undertakes basic quality control/assurance procedures including the ability to recognise basic quality deviations and faults.</p> <p>(iii) Understands and utilises basic statistical process control procedures.</p> <p>Indicative of the tasks which an employee at this level may perform are the following -</p> <p>Repetitive work on automatic, semi-automatic or single purpose machines or equipment.</p> <p>Assembles components using basic written, spoken and/or diagrammatic instructions in an assembly environment.</p> <p>Basic soldering or butt and spot welding skills or cutting scrap with oxy-acetylene blow pipe.</p> <p>Uses selected hand tools.</p> <p>Basic maintenance of equipment and cleanliness of work area.</p> <p>Maintains simple records.</p> <p>Uses hand trolleys and pallet trucks.</p> <p>Assists in the provision of on-the-job training in conjunction with tradespersons and supervisor/trainers.</p> <p>Performs basic store functions.</p> <p>Operation of mobile equipment including forklifts, hand trolleys, pallet trucks, overhead cranes and winch operation.</p> <p>Pre 18 June 1990 - Counterhand, Painter's Labourer, 4th Class Welder, Assembler.</p> <p>“Vehicle Builder Level III” means an employee who has completed a Vehicle Building Certificate I or equivalent training to enable the employee to perform work within the scope of this level.</p> <p>At this level an employee performs work above and</p>
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	<p>beyond the skills of an employee at Vehicle Builder Level II and to the level of their training -</p> <ul style="list-style-type: none"> (i) Is responsible for the quality of their own work subject to routine supervision. (ii) Works under routine supervision either individually or in a team environment. (iii) Exercises discretion within their level of skills and training. <p>Indicative of the tasks which an employee at this level may perform are the following -</p> <p>Operates flexibly between assembly stations.</p> <p>Operates machinery and equipment which requires exercising skills and knowledge beyond that of an employee at Vehicle Builder Level II.</p> <p>Non-trade engineering skills.</p> <p>Basic tracing and sketching skills.</p> <p>Receiving, despatching, distributing, sorting, checking, packing (other than repetitive packing in a standard container or containers in which such goods are ordinarily sold), documenting and recording of goods, materials and components.</p> <p>Basic inventory control in the context of a production process.</p> <p>Basic keyboard skills.</p> <p>Ability to measure accurately.</p> <p>Assists one or more tradespersons.</p> <p>Welding which requires use of an electric spot or butt welding machine or cutting scrap or tack welding.</p> <p>Pre 18 June 1990 - Delivery Person, Storeperson, Third Class Welder, Sectional Trimmer, Panel Fixer, Fibreglass Hand Laminator.</p> <p>“Vehicle Builder Level IV” means an employee who has completed a Vehicle Building Certificate II or equivalent training so as to enable the employee to perform work within the scope of this level.</p> <p>An employee at this level performs work above and beyond the skills of an employee at Vehicle Builder Level III and to the level of their training -</p> <ul style="list-style-type: none"> (i) Works from complex instructions and procedures. (ii) Assists in the provision of on-the-job training to a limited degree. (iii) Co-ordinates work in a team environment or works individually under general supervision.
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	<p>(iv) Is responsible for assuring the quality of their own work.</p> <p>Indicative of the tasks which an employee at this level may perform are the following -</p> <p>Use of precision measuring instruments.</p> <p>Machine setting, loading and operation.</p> <p>Responsibility for the operation and co-ordination of a store.</p> <p>Intermediate keyboard skills.</p> <p>Basic engineering and fault finding skills.</p> <p>Basic quality checks on the work of others.</p> <p>Knowledge of the employer's operations as it relates to production processes.</p> <p>Pre 18 June 1990 - Second Class Welder, Metal Finisher, Fibreglass Gun Operator and Mould Preparator.</p> <p>“Vehicle Building Tradesperson Level I” means an employee who holds a Trade Certificate or Tradesperson's Rights Certificate as a -</p> <p>Springmaker, fitter, electrician, body builder, panel beater, first class welder, painter, spray painter, trimmer, signwriter, fitter and turner or auto electrician</p> <p>and is able to exercise the skills and knowledge of that trade.</p> <p>A Vehicle Building Tradesperson - Level I works above and beyond an employee at Vehicle Builder - Level IV and to the level of their training -</p> <p>(i) Understands and applies quality control techniques.</p> <p>(ii) Performs basic draughting and planning skills.</p> <p>(iii) Exercises good interpersonal and communications skills.</p> <p>(iv) Provides trade guidance and assistance.</p> <p>(v) Exercises keyboard skills at a level higher than Vehicle Builder Level II.</p> <p>(vi) Exercises discretion within the scope of this grade.</p> <p>(vii) Performs work under limited supervision either individually or in a team environment.</p> <p>(viii) Operates all lifting equipment incidental to their work.</p> <p>(ix) Performs non-trade tasks incidental to their work.</p> <p>(x) Performs work which while primarily</p>
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	<p>involving the skills of the employee's trade is incidental or peripheral to the primary task and facilitates the completion of the whole task. Such incidental or peripheral work would not require additional formal technical training.</p> <p>(xi) Performs painting, trimming, signwriting, panel beating, fibreglassing or electrical work.</p> <p>“Vehicle Building Tradesperson Level II” means a Vehicle Building Tradesperson - Level I who has completed the following training requirements -</p> <p>33% of the modules towards an appropriate Post Trade Certificate; or</p> <p>x percentage of modules towards an Advanced Certificate; or</p> <p>y percentage of modules towards an Associate Diploma,</p> <p>A Vehicle Building Tradesperson - Level II works above and beyond a Tradesperson at Vehicle Building Tradesperson - Level I and to the level of his/her training -</p> <p>(i) Exercises the skills attained through satisfactory completion of the training for this classification, subject to prescribed standards.</p> <p>(ii) Exercises discretion within the scope of this grade.</p> <p>(iii) Works under general supervision, either individually or in a team environment.</p> <p>(iv) Understands and implements quality control techniques.</p> <p>(v) Provides trade guidance and assistance as part of a work team.</p> <p>(vi) Exercises trade skills relevant to specific requirements of the enterprise at a level higher than Vehicle Building Tradesperson - Level I.</p> <p>Tasks which an employee at this level may perform are subject to the employee having the appropriate Trade and Post Trade Training to enable such particular tasks to be performed.</p> <p>“Vehicle Building Tradesperson Level III” means a Vehicle Builder - Level II who has completed the following training requirements -</p> <p>66% of the modules towards an appropriate Post Trade Certificate; or</p> <p>x percentage of modules towards an Advanced Certificate; or</p> <p>y percentage of modules towards an Associate Diploma.</p> <p>A Special Class Vehicle Builder Tradesperson - Level I works above and beyond a Vehicle Builder Tradesperson - Level II and to the level of their training -</p> <p>(i) Exercises the skills attained through</p>
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	<p>satisfactory completion of the training prescribed for this classification.</p> <ul style="list-style-type: none"> (ii) Provides trade guidance and assistance as part of a work team. (iii) Assists in the provision of training in conjunction with supervisors and trainers. (iv) Understands and implements quality control techniques. (v) Works under minimal supervision, either individually or in a team environment. <p>The following tasks are indicative of what an employee at this level may perform, subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed -</p> <p>Exercises high precision trade skills using various materials and/or specialised techniques.</p> <p>Performs operations on a CAD/CAM terminal in the performance of routine modifications to NC/CNC programmes.</p> <p>Works on complex machinery and equipment which utilises hydraulic and/or pneumatic principles and in the course of such work, is required to read and understand hydraulic and pneumatic circuitry which controls fluid power systems; or</p> <p>Works on complex or intricate electrical interconnected low voltage circuits.</p> <p>“Vehicle Building Tradesperson Level IV” means an Advanced Vehicle Builder who has completed the following training requirements -</p> <ul style="list-style-type: none"> an appropriate Post Trade Certificate; or x percentage of modules towards an Advanced Certificate; or y percentage of modules towards an Associate Diploma. <p>An Advanced Vehicle Builder works above and beyond a Special Class Vehicle Builder and to the level of their training -</p> <ul style="list-style-type: none"> (i) Exercises the skills attained through satisfactory completion of the training prescribed for this classification, subject to the standards prescribed by the Implementation Manual. (ii) Is able to provide trade guidance and assistance
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	<p>as part of a work team.</p> <ul style="list-style-type: none"> (iii) Provides training in conjunction with supervisors and trainers. (iv) Understands and implements quality control techniques. (v) Works under minimal supervision, either individually or in a team environment. <p>The following tasks are indicative of what an employee at this level may perform, subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed -</p> <p>Works on machines or equipment which utilise complex mechanical, hydraulic and/or pneumatic low voltage circuitry and controls, or a combination thereof.</p> <p>Works on machinery or equipment which utilises complex electrical/electronic circuitry and controls.</p> <p>Works on instruments which make up a complex control system which utilises some combination of electrical, electronic, mechanical or fluid power principles.</p> <p>Applies advanced computer numerical control techniques in machining or cutting or welding or fabrication.</p> <p>“Advanced Tradesperson/Production Technician - Vehicle Building” means a Vehicle Building Tradesperson - Level IV who has completed –</p> <p>An Advanced Certificate; or</p> <p>Y modules of an Associate Diploma.</p> <p>An Advanced Tradesperson/Production Technician works above and beyond a Vehicle Building Tradesperson - Level IV and to the level of his/her training -</p> <ul style="list-style-type: none"> (i) Provides technical guidance or advice within the scope of this level; (ii) Prepares reports of a technical nature on specific tasks or assignments as directed or within the scope of discretion at this level; (iii) Has an overall knowledge and understanding of the operating principle of the systems and equipment on which the tradesperson is required to carry out their task; (iv) Assists in the provision of on the job training in conjunction with supervisors and trainers. <p>The following are indicative of tasks which an employee at this level may perform subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed -</p>
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	<p>Through a systems approach is able to exercise high level diagnostic skills on complex forms of machinery, equipment and instruments which utilise some combination of electrical, electronic, mechanical or fluid power principles.</p> <p>Sets up, commissions, maintains and operates sophisticated maintenance, production and test equipment and/or systems involving the application of computer operating skills at a higher level than Vehicle Building Tradesperson Level IV.</p> <p>Works on various forms of machinery and equipment electronically controlled by complex digital and/or analogue control systems using integrated circuitry.</p> <p>Works on complex electronics or instruments or communications equipment or control systems which utilise electronic principles and electronic circuitry containing complex analogue and/or digital control systems using integrated circuitry.</p>
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INDUSTRIAL MAGISTRATE—Claims before—

2025 WAIRC 00423

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2025 WAIRC 00423
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : FRIDAY, 6 JUNE 2025, THURSDAY, 12 JUNE 2025
DELIVERED : FRIDAY, 18 JULY 2025
FILE NO. : M 23 OF 2024
BETWEEN : DR. MAURICE WALSH

CLAIMANT

AND
 THE SHIRE OF VICTORIA PLAINS

FIRST RESPONDENT

AND
 SEAN FLETCHER

SECOND RESPONDENT

CatchWords : INDUSTRIAL LAW – Determination of preliminary issue – Whether the parties reached a binding settlement agreement at a pre-trial conference – If a binding settlement agreement was reached, the effect of any agreement on the claim – Turns on own facts

Legislation : *Industrial Relations Act 1979* (WA)
Industrial Magistrate’s Court (General Jurisdiction) Regulations 2005 (WA)

Case(s) referred to in reasons: : *Englisch t/as Alpine Property v Sully* [2021] VSC 434
Nurisvan Investment Ltd v Anyoption Holdings Ltd [2017] VSCA 141
Sully v Englisch t/as Alpine Property [2022] VSCA 184; (2022) 406 ALR 456
Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd [1995] NSWCA 166; (1995) 7 BPR 14,551
Farrell v Super Retail Group Ltd [2024] FCA 1515
Ebbott v Arriba Corporate Pty Ltd [2025] FWC 1604
Cardtronics Australasia Pty Ltd v FX Investments Australia Pty Ltd [2020] FCA 218
Mpinda v Fair Work Commission (No 2) [2024] FCA 692

Result : The preliminary issue determined

Representation:

Claimant : Ms J. Flinn (of counsel) as instructed by Butcher Paull & Calder
Respondents : Mr S. Pack (of counsel) as instructed by Kennedys

REASONS FOR DECISION**Background**

- 1 In March 2024, Dr Maurice Walsh (the claimant) lodged a claim against the Shire of Victoria Plains (the Shire) and three officers of the Shire alleging that they collectively breached s 97A of the *Industrial Relations Act 1979* (WA) (the IR Act) by taking damaging action against him where he says he made employment-related inquiries or complaints during his employment (the Claim).
- 2 The claimant sought orders from the Industrial Magistrates Court (IMC), which included damages or compensation for the alleged damaging action taken and the imposition of a pecuniary penalty under s 83E of the IR Act.
- 3 Following the lodging of a response from all respondents on 3 May 2024, where the respondents did not admit the whole of the Claim, the Claim was referred to a pre-trial conference (PTC) before the Clerk of the IMC (the Clerk) pursuant to reg 16 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (the Regulations).
- 4 The purpose of a PTC, amongst other things, is to give the parties an opportunity to settle the case.¹
- 5 Regulation 18(1) of the Regulations provide the general duties and powers of the Clerk at a PTC, which includes the explanation to be given to an *unrepresented* party, and to assist the parties in any attempt to settle the case.
- 6 On 20 June 2024, a PTC was held before the Clerk where the claimant was represented by a lawyer, Michael Baldwin (Mr Baldwin), and the respondents were represented by two lawyers from Kennedys, Mr Alen Sinanovic (Mr Sinanovic) and Ms Anna Blanks (Ms Blanks).
- 7 It is uncontroversial that the PTC was held in two parts: the first part was a joint session with all parties, their lawyers and the Clerk present (Joint Session); and the second part was a private session with each party and their lawyers in separate rooms with the Clerk 'shuttling' between the two private rooms (Private Session).
- 8 The respondents contend that they and the claimant reached a binding settlement agreement (BSA) at the PTC, which resulted in the disposition of the Claim. The claimant disputes that a BSA was reached. The respondents in asserting the existence of a BSA has the onus of proving on the balance of probabilities that a BSA was made at the PTC and was intended to have immediate effect.
- 9 On 17 April 2025, the IMC ordered the question of whether a BSA had been reached be determined as a preliminary issue,² in the following terms:
 - (a) On 20 June 2024 at a pre-trial conference, did the parties reach a BSA with immediate effect?
 - (b) If a BSA with immediate effect was reached, what were the terms of the BSA?
 - (c) If a BSA with immediate effect was reached, was it enforceable or void?
 - (d) What is the effect of the determinations or outcomes of the issues in (a), (b) and (c) above on the claimant's claim? (the Preliminary Issue).
- 10 The Preliminary Issue was programmed to a hearing with the parties relying upon witness statements as evidence adopted at the hearing. Save for Mr Baldwin, the witnesses were also cross-examined on their witness statements at the hearing.
- 11 It is not disputed that there were no notes taken by the witnesses of the outcome at the PTC.

Summary of the Claim

- 12 The Claim was amended in August and November 2024 (the Amended Claim). There are facts disputed by the respondents in the Claim. However, for the purposes of providing context, I will briefly summarise the Claim, accepting that some of the finer details may not wholly accord with the parties' positions.
- 13 It is important to note that at the time of the PTC, the Claim had not been amended and was limited to a claim under s 97A of the IR Act. The Amended Claim introduced new causes of action, including alleged contraventions of the *Local Government Officers' (Western Australia) Award 2021* and alleged contraventions of the *Minimum Conditions of Employment Act 1993* (WA).
- 14 The claimant commenced employment with the Shire on 11 November 2022 in the role of Principal Building Surveyor pursuant to the terms and conditions contained in a letter of appointment of the same date.
- 15 The claimant was employed on a permanent part-time basis to work a set number of hours per week and was paid on an hourly basis.
- 16 In or around June 2023 and January and February 2024, the claimant says he made a number of employment-related complaints, which he says: (1) resulted in the altering of his position to his disadvantage; and (2) on 27 February 2024, resulted in his employment with the Shire being terminated.
- 17 The claimant alleges that the altering of his employment position and the later termination of this employment was taken either in whole or in part because he made the employment-related complaints.
- 18 Along with the Shire, the Claim named Sean Fletcher (Mr Fletcher), the Shire Chief Executive Officer (CEO), Pauline Bantock (Ms Bantock), the Shire President, and Colin Ashe (Mr Ashe), the Shire Deputy CEO, as respondents. The claimant sought civil penalties against all respondents.

19 Just over a month after the PTC, on 29 August 2024, Ms Bantock and Mr Ashe were removed as respondents to the Claim.

The PTC

- 20 Mr Fletcher, Ms Bantock and Mr Ashe gave evidence on behalf of the respondents and Mr Baldwin was summoned by the respondents to give oral evidence at the hearing of the Preliminary Issue.
- 21 The claimant gave evidence on his own behalf.
- 22 Approximately 10 days prior to the PTC, the claimant instructed Mr Baldwin to represent him at the PTC. The claimant and Mr Baldwin both attended the PTC.
- 23 Mr Fletcher, Ms Bantock and Mr Ashe also attended the PTC, along with lawyers Mr Sinanovic and Ms Blanks, also instructed to act on behalf of the Shire.
- 24 The PTC was conducted by the Clerk, Ms Susan Bastian.
- 25 There were some differences in the accounts by witnesses about what occurred or what was said at the PTC, although there were many similarities.

Engagement of Mr Baldwin

- 26 Mr Baldwin is a legal practitioner who has practiced exclusively in employment and industrial law for approximately 20 years. He operates his own firm, Baldwin Legal. Mr Baldwin gave evidence of his experience in employment and industrial law.
- 27 Mr Baldwin was instructed to act for the claimant approximately 10 days before the PTC. Mr Baldwin received instructions from Ben Matthews (Mr Matthews), an Industrial Relations Consultant, to act and he recalled Mr Matthews wanted to settle the claimant's claim. Mr Baldwin understands his role in 'mediations' is to draft an 'advice' for a client on the prospects of their case and advise them accordingly. He considers litigation the last option and settlement of a case the best option. In his experience, more than 95% of matters settle at mediation, although if a client wants to go to trial, then so be it. Mr Baldwin said he makes a judgment as to what is 'reasonable' in settlement offers (based on the range of decisions for penalties and damages) as against the litigation 'costs'.
- 28 Mr Baldwin met the claimant approximately one hour before the PTC and they attended together. The claimant also came to his office either one or two days before the PTC.
- 29 Mr Baldwin made no notes of the PTC and gave his evidence from his own memory. He was aware of the claimant's settlement expectations.

Joint Session

- 30 At the Joint Session, it was generally agreed from all of the evidence that the Clerk discussed the PTC, and the parties were informed that the purpose of the PTC was to get a settlement. The Clerk also informed the parties the discussions at the PTC were confidential and she may have asked the parties to confirm their understanding.
- 31 The Clerk asked the claimant to present his case and the respondent's lawyer, Mr Sinanovic, made a statement in response on behalf of all of the respondents. There was some sharp discussion between Mr Baldwin and Mr Sinanovic concerning the state of the 'pleadings', which applied to all of the respondents.
- 32 There was no or limited discussion about settlement during the Joint Session.
- 33 There was an indication by Mr Baldwin during the Joint Session that Mr Ashe and Ms Bantock be 'removed' or 'dismissed' as parties to the Claim, with Mr Baldwin's evidence being that the focus should be on the actions of the CEO rather than the other individual respondents (that is, Mr Ashe and Ms Bantock).³
- 34 Mr Fletcher said the respondents' lawyers said that he (Mr Fletcher) should not remain a party.⁴
- 35 Subsequent to this, there was a brief disagreement with the Clerk as to whether Mr Ashe and Ms Bantock should remain at the PTC. However, both did remain at the PTC until the end of both the Joint and Private Sessions. Notably, no orders were made at the PTC dismissing the Claim as against Mr Ashe and Ms Bantock.
- 36 Mr Ashe said Mr Sinanovic raised the question about whether the claimant was seeking employment, and the claimant took a while to answer that he was not seeking employment.⁵
- 37 The Joint Session went for about 40 minutes before the parties and their lawyers separated for the Private Session, which lasted approximately two hours and 15 minutes. There may have been some discussion by the Clerk about how the Private Session would work.

Private Session

Mr Baldwin's Evidence

- 38 Once the parties split into the Private Session, Mr Baldwin said that the Clerk came back with a particular monetary offer, which he says was conveyed via Mr Sinanovic. He recalls the amount was \$30,000 and there were no other terms that went with this. The mechanism was to be discussed by a Deed of Settlement (a Deed), and it would include all of the usual clauses, such as confidentiality and non-disparagement. It was expected that a Deed be drawn up and that the drafting of a Deed is uncontroversial. He did not discuss what would be in a Deed but expected it would include reference to full and final settlement; certain waivers; warranties; payment; non-disparagement; and confidentiality.
- 39 There was no discussion about the character of the claimant's dismissal that Mr Baldwin could recall. However, this might be seen in a Deed's recitals along with time served and a reference to certain words to say how the matter was resolved.
- 40 Mr Baldwin's recollection of the offer made to the claimant was that the claimant considered he was entitled to more than the offer of \$30,000, and the claimant struggled to come to terms with an offer of \$30,000 based on previous advice he had been

given (by possibly another lawyer).

- 41 However, by the end of the PTC, Mr Baldwin said the claimant agreed to the offer of \$30,000.
- 42 Mr Baldwin exited the Private Session room and went to speak to Mr Sinanovic in the other Private Session room and informed him that the parties had an agreement. Mr Sinanovic told him that he (Mr Sinanovic) would draft a Deed.
- 43 Mr Baldwin said he was in the other Private Session room with the respondents for about one minute and he was there to deliver the message. He described the one minute as amicable. He acknowledged the other people in the room but denied there was any physical gestures.
- 44 Thereafter, Mr Baldwin said to the claimant to wait and to go down in the lift without the respondents. Mr Baldwin said he and the claimant spoke amicably, but it was a difficult decision for the claimant to make (to accept the offer). From his perspective, he and the claimant left on good terms given the difficult decision the claimant had to make about the agreement.
- 45 On the Monday after the PTC, Mr Baldwin received a Deed from Kennedys and he sent the Deed to the claimant by email at 11.47 am. The Deed had no concerns for him and was in keeping with the agreement.
- 46 Mr Baldwin ceased to act for the claimant on 26 June 2024.
- 47 Mr Baldwin was not cross-examined.

Mr Fletcher, Ms Bantock and Mr Ashe – common evidence

- 48 Mr Fletcher's, Ms Bantock's and Mr Ashe's evidence of their recollection of the Private Session was very similar. Each was asked questions in cross-examination suggesting they may have colluded in some way or adopted each other's witness statements; however, I am satisfied they did not.
- 49 From their perspective the Private Session was straightforward with the Clerk 'shuttling' between the Private Session rooms conveying information between the parties, including references to amounts of money.
- 50 It is consistent with Mr Baldwin's evidence that the claimant wanted a significant amount of money, but the respondents initially offered an amount lower than \$30,000.
- 51 At some point, when the Clerk returned to speak to the respondents, Mr Fletcher said he put forward an offer of \$30,000 on the basis that the claim would be settled and the claimant would stop making disparaging remarks on social media. Mr Fletcher said the Clerk indicated it might take more than that to settle the Claim. The Clerk went to communicate the respondents' offer to the claimant and Mr Baldwin.⁶
- 52 There was more 'shuttling' by the Clerk, but Mr Fletcher maintained the offer to the claimant was \$30,000.⁷

Mr Fletcher

- 53 Once in the Private Session, Mr Fletcher said the Clerk explained the process a bit more. He informed the Clerk, he was happy to settle the matter on the day (meaning at the PTC).
- 54 According to Mr Fletcher, after he said that the offer of \$30,000 'would stand', the Clerk went back to the claimant and Mr Baldwin. When the Clerk came back to the respondents' room, she informed the respondents that an agreement had been reached. The Clerk said the claimant's lawyer would come into the respondents' room, but the claimant did not want to do so.⁸
- 55 Mr Fletcher said the conversation with Mr Baldwin was short and amicable and he shook Mr Fletcher's hand. There was a discussion about putting the agreement in writing and that the respondents' lawyers would prepare it.⁹
- 56 Mr Fletcher said there was no doubt in his mind that an agreement had been reached but there would be something to sign off on.¹⁰
- 57 Following the PTC, on 21 June 2024 at 9.32 am, Mr Fletcher sent an email to Shire councillors recounting his understanding of the outcome of the PTC (the Email).
- 58 The salient parts of the Email include:

In short, the claim was settled. The decision encompasses the following:

- \$30,000 lump sum payment to Dr Walsh. This will be paid by the Shire's insurers directly to lawyers in this matter (Kennedy's) for disbursement...;
- Dr Walsh is to submit a letter of resignation from the Shire. This was agreed by me and thus changes his status from a termination by the CEO to one that is a voluntary departure;
- The Deed of Settlement and Release to be confidential and binding, including Dr Walsh not being able to make disparaging and public comments...

Early on in proceedings, Dr Walsh's lawyer did amend the claim and had [Ms] Bantock and Mr Ashe removed as named parties.

Dr Walsh's lawyer argued that I should be the remaining named party... Our lawyers refuted this statement... Our lawyers also made the case that it didn't make sense to have me named as a party to the claim... By the end of Dr Walsh's submission, his lawyer withdrew me as a named party...

From there, the [Clerk] worked with both sides to reach the final outcome, as set out above.

Just so that it is clear:

- This matter was settled amicably.¹¹

- 59 The cross-examination of Mr Fletcher, Ms Bantock and Mr Ashe went along similar lines.

- 60 In cross-examination, Mr Fletcher said he understood the Shire was the only party left after discussions at the PTC, but he did not recall if Mr Baldwin released him in the Joint Session or made any comments about disparaging remarks. Mr Fletcher agreed he was a named party to the Deed.
- 61 Mr Fletcher did not recall any discussion about the timing of any payment to be made to the claimant, although he said it may have been general, rather than specific in nature. Mr Fletcher had no recollection of any discussion about the Deed containing terms relevant to confidentiality and release of the parties from further claims. He expected that the reference to non-disparagement would be in the Deed.
- 62 When referring to 'the claim' settling in his witness statement, Mr Fletcher meant the IMC claim (or the Claim).
- 63 Mr Fletcher said the situation (at the end of the PTC) seemed positive and an agreement had been reached and that was the end of the matter, with a Deed to be prepared thereafter.

Ms Bantock

- 64 Ms Bantock said the Clerk came and went from the Private Session room quite a few times, with the Clerk asking the respondents questions about settlement. Ms Bantock said the respondents wanted a 'clause in the agreement to prevent the parties from making disparaging comments, as the Shire had previously experienced the distribution of disparaging text messages around the Shire regarding the matter.'¹²
- 65 An offer of \$30,000 was made to the claimant. The claimant would also submit a letter of resignation, and his termination status would change to voluntary departure, and the parties would not make disparaging comments.¹³
- 66 Ms Bantock said the respondents were told by the Clerk and Mr Baldwin (when he came into their room) that 'we had a conclusion.'¹⁴ Her firm understanding was an agreement had been reached and that the settlement payment, resignation and a Deed were to follow.¹⁵
- 67 In cross-examination, Ms Bantock confirmed that in the Joint Session, she understood the conversation between the claimant's lawyer and the respondents' lawyers that she would be 'dropped' from the matter, and nothing was expressed in return for that.
- 68 She was of the view that while things were still in limbo (as a result of the proceedings), the Claim had come to a resolution even without a Deed. The Deed was a fuller version, and she highlighted points in her statement.
- 69 Ms Bantock said there may have been discussions between Mr Fletcher and Mr Sinanovic about a term in the Deed concerning the release and discharge of the parties in future proceedings, but she assumed this was a standard matter. She asked the Clerk for a non-disparagement clause to be included in the Deed.
- 70 Ms Bantock agreed the \$30,000 had not been paid to the claimant, but she said this was not related to the claimant not signing the Deed, but because the claimant had reneged on the agreement already made.

Mr Ashe

- 71 Mr Ashe said that after the Clerk had gone back and forth between the rooms two or three times, the respondents put forward an offer of \$30,000. The claimant would also be allowed to resign, and a Deed would be entered into which would set out that the Claim could not be discussed.¹⁶
- 72 Mr Ashe said that this offer was presented to the Clerk by Mr Sinanovic at the direction of Mr Fletcher.¹⁷
- 73 Mr Ashe said that the Clerk took the offer to the claimant and Mr Baldwin. Mr Baldwin then came into the respondents' room with the Clerk and said words to the effect that they were happy to settle. The claimant did not return to the respondents' room.¹⁸
- 74 Mr Ashe said Mr Fletcher and Mr Sinanovic shook Mr Baldwin's hand.¹⁹
- 75 In his mind, the matter was resolved. A verbal agreement had been reached. There was some tidying up with a Deed and a resignation letter but from his perspective this was the end of the matter.²⁰
- 76 In cross-examination, Mr Ashe said he did not recall any discussion on the timing of the payment to the claimant, the provision of a notice of discontinuance or reference to the release or discharge of the parties.
- 77 Mr Fletcher, Ms Bantock and Mr Ashe all state that on 21 June 2024, Mr Sinanovic sent to them a draft Deed, to which they responded to him that they had no concerns with its contents.²¹

Claimant

- 78 The claimant corrected his witness statement to include the words 'you will need to resign' after 'discuss your matter with anyone' at paragraph 22.²²
- 79 The claimant's evidence about the Joint Session generally accords with the respondents' evidence, including that Mr Baldwin said words to the effect that Ms Bantock and Mr Ashe are 'dropped' from the Claim.
- 80 Once the parties split into the Private Session, the claimant states the Clerk left their room with the respondents, and a short time later came back to their room whereupon there was an exchange between he and the Clerk, as follows:

Clerk: What do you want?

Me: I want my contract paid out.

Clerk: No, no, no you'll never get that. A six month pay out is the highest compensation able to be awarded to you should the matter go to trial. What do you earn a month?

Me: \$10,000.

Clerk: You'll only be entitled to \$30,000 because your matter is not serious, you didn't get [redacted by the Court] in

the workplace.²³

- 81 The claimant said that Mr Baldwin did not say anything in response to what the Clerk said to him. Based on what the Clerk is purported to have said to him, the claimant felt he had no choice and said 'okay' and he believed that the maximum amount which could be claimed was six months of wages.²⁴
- 82 The claimant said the Clerk left their Private Session room again and when she came back, she said words to the effect:
- You'll be sent a document, and you have to agree to it and sign it.
- You won't be permitted to discuss your matter with anyone and you won't be able to take your complaints to the Corruption and Crime Commission once you sign the document. You should just forget about everything and go back to working at the Shire of Laverton. You should know that all CEOs talk to each other.
- This matter has taken a long time today and I have other things to do.²⁵
- 83 The claimant said his understanding was that he was going to have to consider the document he would be sent by email which would contain the proposed settlement, and if he signed it, he would get \$30,000.²⁶
- 84 The claimant said the Clerk then left their Private Session room and the Clerk did not ask them to go into the respondents' Private Session room. He said Mr Baldwin did not say he wanted to go into the other Private Session room to speak with Mr Sinanovic or the respondents, and the claimant did not say he did not want to go into the other Private Session room. Further, the claimant says he was with Mr Baldwin the entire time of the PTC and there was no opportunity for Mr Baldwin to go into the other Private Session room without the claimant knowing about it.²⁷
- 85 The claimant says he and Mr Baldwin left the PTC together and he did not sign anything on the day.
- 86 On 24 June 2024, the claimant was sent an email with an unsigned Deed by Mr Sinanovic, which was marked 'Without Prejudice until Executed'. The claimant says he did not agree to the terms in the Deed and did not sign it.²⁸
- 87 The only matter discussed at the PTC was an amount of money. Other matters in the Deed were not discussed with him at the PTC, and they were not matters to which he agreed to as he says he was not even aware of them.²⁹
- 88 Thereafter, the claimant states in detail the matters he says he did not agree to at the PTC, including setting out in detail the contents of the Deed he did not agree to or says was discussed with him.³⁰ This included the provision of a letter of resignation.
- 89 In summary, the claimant denies the contents of the Deed were discussed with him or that he agreed to its contents at the PTC.

Claimant – Post-PTC Conduct

- 90 On 23 June 2024 at 2.54 pm, the claimant sent an email to the IMC Registry in which he sought clarification of the requirement to submit a Form 28 by Mr Baldwin. In this email, the claimant says he spoke with Mr Baldwin 'on Wednesday at 9.06 pm' for 34 minutes. It is reasonable to infer this was on 19 June 2024 as the PTC was on Thursday, 20 June 2024. The claimant questions why a further Form 28 was required, where one had already been filed with the IMC, and requests a copy of the newly filed Form 28.³¹
- 91 The claimant does not raise any issue with respect to the PTC, including any issue with respect to the offer of \$30,000 or any Deed.
- 92 On 24 June 2024 at 3.46 pm, the IMC Registry responded to the claimant's email.³²
- 93 On 25 June 2024 at 3.13 pm, the claimant sent an email to the IMC Registry requesting a further opportunity to conciliate the Claim at a PTC. The claimant levelled complaints against the Clerk and Mr Baldwin. The gravamen of his complaints is summarised below:
- (a) he felt that a 'deal had already been done' between the parties (excluding him) and that he was never going to be supported fairly at the PTC. He alleges he was placed under pressure by the Clerk and his lawyer to settle;
 - (b) his lawyer did not consult with him before 'dismissing' Mr Ashe and Ms Bantock from the Claim;
 - (c) the Clerk and his lawyer misunderstood the nature of the Claim and said he was only ever going to be eligible to a maximum payment of six months under 'unfair dismissal laws' when his claim was for damaging action, where damages are uncapped;
 - (d) the Clerk misinformed him that he could not make a complaint to the Corruption and Crime Commission, as he would be sworn to silence if he signed a Deed;
 - (e) the Clerk and his lawyer implored him to categorise his termination as a resignation, but he could not see the logic in this as colleagues in the local government sector were aware of his termination, and members of the Shire had not maintained confidentiality about the circumstance of his termination;
 - (f) the claimant said he was stressed and fed false information about what he was able to claim 'which led to me verballing agreeing to the 1st and only offer put forward. He further says, 'I thankfully did not sign a deed of settlement which I received yesterday via, and I will not sign it due the above comments that I have made above and the research after the conference that I have completed. I was under duress and not in an informed position to make a decision on a settlement at the time of mediation'; and
 - (g) the claimant requests a further PTC or to schedule the Claim for a trial.³³
- 94 On 26 June 2024 at 7.54 am, the claimant sent an email to Mr Sinanovic stating:
- (a) he will not sign the Deed and has been in contact with the IMC;
 - (b) the reasons for not signing the Deed include the misunderstanding by the Clerk and his lawyer about the nature of the Claim, where the Clerk misstated to him the maximum amount of compensation he was entitled to;

- (c) he did not provide direction to remove Mr Ashe and Ms Bantock from the 'third-party claim' and they remain on the application;
- (d) he has made a formal complaint about the way in which the PTC was conducted. He says he was stressed and provided with false information and the maximum compensation that could be 'rewarded'; and
- (e) he says:

The \$30,000 settlement offer was considered by me under the prism of a maximum of around \$60,000, which was based on wrong advice. This amount is not satisfactory nor considers the fact that I have lost a combined \$200,000+ per annum income and planned on working another 5+ years in both part time roles. I also have additional information at hand from employees/contractors from other shires that supports my claim.

I was and still am willing to negotiate a fair and reasonable settlement and sign a deed of settlement but it won't be for \$30,000. Otherwise, the matter will be in the hands of the IMC/WAIRC and is still on foot.³⁴

- 95 On 26 June 2024 at 3.37 pm, the IMC Registry sent an email to the claimant in response to his email dated 25 June 2024. The claimant was informed, amongst other things, that the Clerk has now referred to the Claim to trial, and that a further email would be sent to the parties about the next steps.³⁵
- 96 On 28 June 2024, the IMC Registry sent an email to the parties informing them that as the Claim had not settled, the Claim had been referred to trial with a directions hearing to be listed before an Industrial Magistrate.
- 97 On 4 July 2024, and in response to the claimant's email dated 26 June 2024, Mr Sinanovic sent an email to the claimant informing him of the respondents' position on the Preliminary Issue. Mr Sinanovic also informed the claimant that Kennedys hold \$30,000 in their trust account to be paid to him pursuant to the agreement reached at the PTC. He requested the claimant's bank account details so as to transfer the funds. Mr Sinanovic stated:
- We remain of the view that a Deed ought to be executed for the benefit of all parties, but repeat that the execution of a Deed has no bearing on the operation of the agreement reached.
- We reserve all of our clients' rights, including the right to rely on the operation of the agreement as a defence to these proceedings.³⁶
- 98 In cross-examination, the claimant confirmed the orders sought in the Claim was for an amount of money. He agreed he hoped to reach a settlement at the PTC and engaged Mr Baldin to attend the PTC with him.
- 99 The claimant agreed the Joint Session went for about 30 to 40 minutes and, therefore, the Private Session went for a long time. He also agreed he was alone with Mr Baldwin from time to time when the Clerk went back and forth.
- 100 The claimant said the words in paragraph 17 of his witness statement were accurate and was 'pretty much' all that was said. The claimant said the Clerk came to the amount of \$30,000 based on the figures he provided. The claimant agreed that he agreed to the amount of \$30,000 and he agreed that he would be paid \$30,000 and he would be required to 'give up' the Claim. He was not there for nothing.
- 101 The claimant agreed that if he accepted \$30,000, the Claim would go away against the Shire and Mr Fletcher, although he accepted there were no formal orders made at the PTC 'dropping' Mr Ashe and Ms Bantock. However, he understood they would be 'dropped off' the Claim.
- 102 The claimant assumed the agreement would be conveyed to the respondents in the other room. He said the Clerk was gone for about 20 minutes and he was left alone with Mr Baldwin. The Clerk came back and the gist of the conversation was referred to in paragraph 22 of his witness statement. He understood the parties had reached an agreement.
- 103 The Clerk said he must sign the document that was going to be sent to him, but he agreed that no one said there would be a 'cooling off' period or any further negotiations on the content of the document.
- 104 He agreed a deal was done and it would be formalised in writing.
- 105 Unlike what was stated in his witness statement at paragraph 29, he agreed other matters were discussed at the PTC, not just an amount of money. He agreed the Clerk advised that he needed to resign but said this was the only time it was discussed. He agreed that his email to the IMC on 25 June 2024 suggests it was discussed more than once.³⁷ The claimant maintained a resignation had no benefit for him.
- 106 In contrast to his evidence in paragraph 17 of his witness statement, the claimant struggled to accept that the offer of \$30,000 was conveyed from the respondents by the Clerk. He found it hard to accept this was what happened. However, he agreed he accepted the offer of \$30,000.
- 107 The claimant said the only time confidentiality was discussed was the conversation referred to in paragraph 22 of his witness statement, notwithstanding his comments to the IMC Registry in his email dated 25 June 2024. The claimant did not have an explanation for inconsistencies in when he says the issue of confidentiality was discussed.
- 108 The claimant agreed that he understood the Claim would be dismissed even if he did not understand the exact mechanism for how this would be done. He agreed there was no discussion about the legal costs of the Claim at the PTC and that he would receive \$30,000 and no more. However, he understood that no one was paying the lawyers' costs and understood this as a general concept.
- 109 The claimant was challenged on whether his 'complaint' is that the details were not fleshed out at the PTC and that this applies generally to the Deed.
- 110 The claimant disagreed that there was a conversation with the Clerk about the Shire saying things about him and things being said about the Shire with both parties being concerned.

- 111 The claimant maintained that Mr Baldwin did not leave his side during the entirety of the PTC. The claimant denied he could be in any way mistaken about this, notwithstanding the other witness evidence, including Mr Baldwin's oral evidence to the contrary.
- 112 The claimant agreed that when he said the email with the Deed attached was sent by Mr Sinanovic, he meant the email was sent to Mr Baldwin, who then forwarded it to him.
- 113 The claimant agreed that he sent emails to the IMC Registry on 23 and 24 June 2024. It was proposed to the claimant that it was after he received the Deed on 25 June 2025 that he sent a 'complaint' to the IMC Registry on 25 June 2025, suggesting that was when he decided not to sign off on the deal made at the PTC. The claimant disagreed with this proposition.
- 114 The claimant agreed that the email to Mr Sinanovic dated 26 June 2024 was a summary of the email to the IMC Registry dated 25 June 2024. The claimant agreed an offer of \$30,000 was made, he considered it and agreed to it.
- 115 The claimant was shown a copy of Mr Sinanovic's response dated 4 July 2024 and confirmed that he never provided his bank details to the respondents' lawyers.
- 116 In re-examination, the claimant said his evidence about money being the only topic of conversation discussed at the PTC needed to be seen in the context of the conversation detailed in paragraph 22 of his witness statement, and that it was really in reference to the matters not discussed detailed from paragraphs 30 to 40 of his witness statement.

Assessment of the Witness Evidence

- 117 Mr Baldwin was not cross-examined on his oral evidence. Mr Baldwin was reliant on his memory of what occurred at the PTC. Notwithstanding this and noting there were some minor inconsistencies in his evidence as compared to the evidence by other witnesses, there is no other basis upon which I find his evidence unreliable or untruthful. I accept his evidence albeit I also accept there may be some gaps in his evidence.
- 118 Mr Fletcher, Mr Ashe and Ms Bantock gave their evidence in a forthright and truthful manner. There were many things they did not recall, and I also accept their evidence was inconsistent on some minor and peripheral matters, such as whether Mr Baldwin shook hands with Mr Fletcher and/or Mr Sinanovic in the Private Session room.
- 119 For my part, the imperfect recollection of witnesses on whether someone did or did not shake hands is inconsequential to the Claim and does not in any way alter my assessment of the overall credibility and reliability of the witnesses' evidence.
- 120 The consistent and important part of the evidence is that Mr Fletcher, Mr Ashe, Ms Bantock and Mr Baldwin, all stated that Mr Baldwin visited the respondents' Private Session room without the claimant and informed the respondents and their lawyers that an agreement had been reached, and it was agreed Mr Sinanovic would prepare a Deed.
- 121 Further, to the extent Mr Fletcher, Mr Ashe and Ms Bantock used certain words to explain their recollection of events, such as 'dropping' them from the case or reference to a Deed being 'binding', this needs to be seen in the context of them being lay people obviously reliant upon information provided by the lawyers in attendance at the PTC. This does not impact upon their credibility and the reliability of their evidence and only speaks to their personal understanding.
- 122 The claimant's evidence was problematic. I accept to some extent the claimant's evidence truncates the time spent by the parties in the Joint Session and Private Sessions, but the overall tenure of his evidence is that the PTC occurred quickly. This is clearly not the case with the PTC taking just over three hours, and the Clerk 'shuttling' back and forth between the two Private Session rooms. During that time, the claimant was with Mr Baldwin on his own.
- 123 Further, the claimant's evidence was selective. In his witness statement, he states the only matter discussed in the PTC was an amount of money, and he was not aware of the other matters in the Deed as they were not discussed or were discussed only once by the Clerk (albeit he was re-examined on this point and clarified his witness statement at the beginning of his evidence).
- 124 Yet in his email dated 25 June 2024 sent to the IMC Registry, the claimant complains about: being implored by the Clerk and his lawyer to categorise his termination as a resignation (resignation being referred to in the Deed); and being sworn to silence if he signed a Deed, including that he could not make a complaint to the Corruption and Crime Commission (confidentiality being referred to in the Deed). However, he makes no complaint about the contents of the Deed itself. He states that he did not agree at the PTC to instruct his counsel to file a Form 18 – Notice of Discontinuance or to otherwise discontinue the action (the language used in the Deed) but admitted in cross-examination that he understood he agreed to the payment of \$30,000 and he would give up the Claim and the Claim would end.
- 125 In addition, in his email to Mr Sinanovic dated 26 June 2024, similarly, the claimant makes no complaint about the contents of the Deed, and, in fact, informs Mr Sinanovic that he is willing to 'negotiate a fair and reasonable settlement *and* sign a deed of settlement'.³⁸ Notably, he does not suggest he will sign a different deed of settlement or that there are terms in the Deed he will not agree to. The issues raised by the claimant to Mr Sinanovic are limited to the purported misleading information provided by the Clerk and Mr Baldwin and that an amount of \$30,000 is, simply put, too low.
- 126 The claimant's witness statement is his evidence about the lack of discussion on the contents of each clause of the Deed, some of which were, in fact, discussed at the PTC albeit not necessarily using the legal language in the Deed. The clauses of the Deed were considered 'uncontroversial' by his lawyer, Mr Baldwin, and Mr Baldwin said the Deed forwarded to him by Mr Sinanovic reflected the agreement reached at the PTC.
- 127 Tellingly, after the PTC and after receiving the Deed, the claimant makes no complaint about its contents or the lack of discussion on its contents, or his lack of agreement to its contents. The claimant's complaint centres around the amount of money he agreed to, and the reasons why he says he was purportedly misled. The first time the contents of the Deed are raised is in the claimant's witness statement for the Preliminary Issue, notwithstanding the claimant was on notice from 4 July 2024 that the respondents may seek to invoke the agreement they considered had been reached at the PTC.
- 128 Further, even when given an opportunity by the IMC to reconsider his evidence about Mr Baldwin attending upon the

respondents' Private Session room or not leaving his (the claimant's) side, the claimant was intransigent to the possibility he may be mistaken. Given four witnesses, including Mr Baldwin, said that Mr Baldwin attended the respondents' Private Session room, the claimant's evidence that Mr Baldwin did not leave his side for the whole of the PTC, and therefore that there was no opportunity for him to attend the other Private Session room (ergo, Mr Baldwin did not meet with the other respondents) is mystifying.

- 129 At best for the claimant, this compounds the other problems with the claimant's evidence as it relates to the overall credibility and reliability of his evidence. At worst for the claimant, the claimant has been untruthful on this issue where it might have consequences for him. Where it was not squarely put to the claimant that he was untruthful on this issue, I consider that his evidence as it relates to Mr Baldwin not leaving his side during the PTC, and by extension did not attend upon the respondents' Private Session room, is a matter going to the credibility and reliability of his evidence.
- 130 Where the claimant's evidence differs from other more reliable and credible evidence, I am satisfied that the other more reliable and credible evidence should be preferred. This also extends to the content of conversations purportedly in the claimant's Private Session room with the Clerk.

Findings

- 131 Having regard to the credible and reliable evidence accepted by the court, I find as follows.
- 132 Mr Baldwin was instructed to represent and act on behalf of the claimant at the PTC. I find that Mr Baldwin acted in accordance with any instructions provided by the claimant. Contrary to out-of-court statements made by the claimant in his complaints to the IMC Registry, there was no suggestion in the hearing, nor was Mr Baldwin cross-examined on the issue, that Mr Baldwin acted otherwise than in accordance with any instructions provided by the claimant.
- 133 The PTC was held over three hours and rather than making one and only offer, the Clerk 'shuttled' between the two Private Session rooms with a final offer to settle made to the claimant in the amount of \$30,000.
- 134 The final offer of \$30,000 was conveyed by the Clerk to the claimant and Mr Baldwin in their Private Session room. The claimant understood that accepting the offer of \$30,000 would require him to end the Claim against the respondents.
- 135 There were other terms discussed by the respondents with the Clerk, including the claimant's termination being by way of resignation and not to disparage the Shire and its officers. However, I find that these other terms were intended to be incorporated in the Deed.
- 136 Some of these terms were discussed with the claimant in the Private Session room, including the recasting of his termination as a resignation, aspects of the settlement being confidential and the reduction of the agreement to writing.
- 137 Any agreement was to be reduced to writing by way of a Deed which also contained the mechanism for giving effect to the monetary settlement, along with other terms that were generally discussed at the PTC, including the claimant resigning from the Shire and maintaining confidentiality about the Claim.
- 138 The claimant accepted the offer of \$30,000 and he understood that this would bring an end to the Claim. He understood he would sign a Deed.
- 139 The claimant's acceptance of the offer of \$30,000 was verbally conveyed to the respondents and the respondents' lawyers by the Clerk and by Mr Baldwin. Mr Baldwin was authorised to convey the claimant's acceptance of the \$30,000 offer to the respondents and their lawyers and agreed on behalf of the claimant for the respondents' lawyers to prepare the Deed giving effect to the agreement reached.
- 140 The respondents' lawyers prepared the Deed and emailed a copy of the Deed to Mr Baldwin, who in turn, emailed a copy of the Deed to the claimant.
- 141 Mr Baldwin considered that the contents of the Deed reflected the agreement between the claimant and the respondents at the PTC.
- 142 The claimant refused to sign the Deed, he informed the IMC Registry and the respondents' lawyers that he would not settle the Claim for \$30,000 and requested the Claim be relisted for a further PTC or for trial.
- 143 In accordance with reg 22(b) of the Regulations, the Clerk listed the Claim before the Industrial Magistrate for trial.
- 144 The respondents' lawyers hold in their trust account \$30,000 to be paid to the claimant upon the claimant providing his bank account details to them.

Determination

Relevant Legal Principles

- 145 As identified by the respondents in their outline of submissions the question is whether the claimant's acceptance of the respondents' offer of \$30,000 constituted a binding contract between them or whether it was merely an agreement to take part in further negotiations with a view to concluding a binding contract at some point in the future.³⁹
- 146 The relevant principles have been stated in a number of cases. I adopt the stated principles in *Englisch t/as Alpine Property v Sully* [2021] VSC 434, which were restated with approval by the Victorian Court of Appeal in *Sully v Englisch t/as Alpine Property* [2022] VSCA 184; (2022) 406 ALR 456 (*Sully*) at [62] (Walker JA):

Whether an agreement is reached which is intended to be immediately binding falls to be determined objectively, having regard to the presumed or inferred intention of the parties. The parties' objective intention is fact-based and to be determined having regard to all of the surrounding circumstances, including 'by drawing inferences from [the parties'] words and their conduct' and from the terms of the parties' correspondence, such correspondence to be read in the light of the surrounding circumstances and having regard to the commercial context in which they were exchanged. The ultimate

question to be answered is what each party, by its words or conduct, would have led a reasonable person in the position of the other party to believe.

The relevant intention or belief which is the subject of the Court's assessment is that which obtained at the time an alleged agreement was made. The subjective intention or belief of a party is not determinative though it may be relevant.

In certain circumstances, regard may be had to the subsequent conduct of the parties. In *Nurisvan Investment Ltd v Anyoption Holdings Ltd (Nurisvan)*, the Victorian Court of Appeal distinguished between 'cases involving contracts that are said to have come into existence as a result of an exchange of correspondence or other communication between the parties', and cases involving an agreement purported to be contained in a single document, and noted that regard may be had to conduct subsequent to an alleged agreement made in the former kind of case. In *Queensland Phosphate Pty Ltd*, a case involving an exchange of emails said to evidence a binding contract, the Victorian Court of Appeal held that regard may be had to subsequent communications between the parties: '(1) in order to see what was important or essential to the transaction; (2) as admissions; and (3) as probative of the parties' contractual intention'. The parties agreed that this case was one in which the Court could properly have regard to subsequent conduct of the parties for these purposes.

In circumstances such as the present, where the parties agreed that they would prepare a written document setting out terms of agreement, the Court may consider the three categories of contract set out by the High Court in *Masters v Cameron*. These categories describe circumstances in which:

- (a) the parties intend to be bound immediately, though expressing a desire to draw up their agreement in a more formal document at a later stage;
- (b) the parties intend to be bound immediately, but may wish the operation of a particular clause or term to be delayed pending the drawing up of a more formal document; or
- (c) the parties intend to postpone the creation of contractual relations until a formal contract is drawn up and executed.

Since *Masters v Cameron* was decided, Courts have recognised a fourth category — that being where the parties intend to be bound immediately by terms which they have agreed upon, whilst expecting to make a further contract in substitution for the first contract containing, by consent, additional terms.

Negotiations between parties falling within the first, second and fourth categories set out above indicate an immediately binding agreement notwithstanding a commitment to a further, more formal contract. By contrast, negotiations falling within the third category do not reflect an intention to be immediately bound and therefore no contract will be formed until the execution of the further and more formal written agreement.

The categories in *Masters v Cameron* — and the further fourth category — are taxonomic and should not distract from the fundamental inquiry with which the Court is engaged. That inquiry remains whether, in all the circumstances, the parties objectively intended to reach a binding agreement.

For an agreement to be made with immediate binding force, notwithstanding that a written instrument may be executed at a later time, the original oral agreement must be complete, certain and enforceable on its own terms. Relative completeness and certainty of contractual terms may be taken as indicators of the parties' intention to be bound, in addition to fundamental aspects of an agreement without which the Court cannot enforce the agreement. However, and as is recognised in *Masters v Cameron*, parties may in their negotiations leave aspects of an agreement to be decided at a later date while agreeing to be immediately bound in respect of other, concluded terms. In distinguishing the issue of whether the parties intended to reach a concluded agreement and the issue of whether the parties' agreement is enforceable assuming such an intention, the Victorian Court of Appeal in *Nurisvan* adopted the following passage from *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd*:

It is to be noted that the question in a case such as the present is expressed in terms of the intention of the parties to make a concluded bargain: see, eg, *Masters v Cameron* (at 360). That is not the same as, although in a given case it may be closely related to, the question whether the parties have reached agreement upon such terms as are, in the circumstances, legally necessary to constitute a contract. To say that the parties to negotiations have agreed upon sufficient matters to produce the consequence that, perhaps by reference to implied terms or by resort to considerations of reasonableness, a court will treat their consensus as sufficiently comprehensive to be legally binding, is not the same thing as to say that a court will decide that they intended to make a concluded bargain. Nevertheless, in the ordinary case, as a matter of fact and commonsense, other things being equal, the more numerous and significant the areas in respect of which the parties failed to reach agreement, the slower a court will be to conclude that they had the requisite contractual intention.

(citations omitted)

147 To those principles, I would also add further comments of Kirby P in *Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd* [1995] NSWCA 166; (1995) 7 BPR 14,551 at 14,569:

Depending on the size, importance and complexity of the subject matter, the less formal the initial agreement, the less likely it will be that it was intended to be legally binding and enforceable.

148 Referring to this observation, Walker JA in *Sully* at [77] adds:

I accept that the oral nature of the agreement means it was less formal than a written agreement. However, as Kirby P observed, this factor falls to be assessed in light of the size, importance and complexity of the subject matter. In the present case the quantum of the agreement was small and the settlement terms were uncomplicated. Thus, I consider the oral nature of the agreement to be of limited weight.

149 In determining whether parties to an agreement intended to be immediately bound by an agreement it is permissible to have

regard to the parties' conduct and communications after the agreement had been reached.⁴⁰ As observed by Lee J in *Farrell v Super Retail Group Ltd* [2024] FCA 1515 (*Farrell*), at [17]:

[T]he probative value of post-contractual communications lies 'in the light they throw on the proper interpretation of earlier communications alleged to constitute the conduct.'⁴¹

- 150 The principal question is whether a reasonable person observing the PTC would have concluded that, by the end of the PTC, the claimant and the respondents had made a binding agreement. As recently observed by Deputy President Boyce in *Ebbott v Arriba Corporate Pty Ltd* [2025] FWC 1604 at [64]:

Where an offer and acceptance occurs, the task is to inquire as to what the reasonable person would deduce or infer from the objective evidence of the relevant interactions and exchanges between the parties. Such exchanges provide the objective framework of facts within which an agreement or contract came (or did not come) into existence, including the context in which the parties 'presumed' intention in that setting is to be drawn from. As Heydon JA said in *Brambles Holdings Ltd v Bathurst City Council*:

In the light of the above cases, it is relevant to ask: in all the circumstances can an agreement be inferred? Has mutual assent been manifested? What would a reasonable person in the position of the [claimant] and a reasonable person in the position of the [respondent] think as to whether there was a concluded bargain?

(citations omitted)

Application of the Legal Principles to the Facts

- 151 For the following reasons, I find the respondents have discharged their onus in demonstrating the settlement agreement made at the PTC was immediately binding on the parties:

- (a) the parties attended the PTC with a clear understanding that the purpose was to achieve a settlement;
- (b) each party was represented by experienced employment lawyers. The claimant's lawyer was instructed to act on behalf of the claimant at the PTC and there is no credible evidence he acted outside of any instructions;
- (c) the respondents conveyed to the Clerk an offer of \$30,000 to settle the Claim. This offer was conveyed to the claimant and his lawyer, and the claimant accepted the offer of \$30,000 to end the Claim;
- (d) the claimant's acceptance of the respondents' offer was conveyed to the respondents by the Clerk and separately by the claimant's lawyer;
- (e) there was no evidence that the claimant's lawyer did not have the claimant's authority to convey the claimant's acceptance of the respondents' offer to the respondents;
- (f) given the Claim sought the payment of an amount of money, whether by compensation or penalty, and the Claim was resolved by the agreed payment of an amount of money, the most important matter had been addressed;
- (g) notwithstanding the agreement terms had not been reduced to writing, the key oral settlement terms were the payment of an amount of money for the Claim to come to an end, leaving only the machinery for implementation of those terms to be worked out along with some ancillary terms such as the character of the claimant's termination, confidentiality of the settlement and non-disparagement of the Shire;
- (h) in conveying the claimant's acceptance of the respondents' offer to the respondents, there was no evidence or indication that there were further negotiations to be undertaken or that any agreement was 'in principle', or that the Claim remained unresolved in some way. To the contrary, the words said to be used by the Clerk and the claimant's lawyer gave every indication that the Claim was finalised;
- (i) when the claimant's lawyer conveyed the claimant's acceptance of the offer to the respondents in the respondents' Private Session room, it was agreed the respondents' lawyers would prepare a Deed, and the claimant's lawyer understood any Deed would contain 'uncontroversial' terms such as confidentiality, warranties, full and final settlement etc; and
- (j) the Deed was not intended to alter or expand upon what had already been agreed at the PTC.

- 152 That is, on the found facts, at the end of the PTC, the conclusion a reasonable person would reach is that the Claim had been resolved by way of the payment of an amount of money with the cessation of the Claim, and that this was immediately binding on the parties. To the extent there were other matters to attend to, this was to be done 'in writing', or by way of a Deed, but it did not change the finality of the settlement at the PTC.

Other Issues Raised

- 153 I also make some other observations.

- 154 As stated by Walker JA in *Sully* at [87] to [89], while it is 'good' common practice (for what now can be seen as obvious reasons) to reduce an agreement reached at a mediation to writing, where the parties do not so reduce their agreement, this does not necessarily lead to the conclusion that the parties did not intend to be immediately bound. But even if the absence of a written document signed by the parties was *generally* considered to support the idea that the parties do not intend to be immediately bound, it remains necessary to consider the departure from common practice in the *particular case*.

- 155 In this case, the purpose of attending the PTC was to settle the Claim. There was clear language used to convey the offer and acceptance of the offer. The settlement was uncomplicated with the principal issue involving an amount of money to finalise the Claim. The amount of money involved, while not small, was modest. The claimant's lawyer and the respondents' lawyers agreed that the respondents' lawyers would prepare a Deed with the contents of the Deed considered 'uncontroversial'.

- 156 The 'uncontroversial' nature of the contents of the Deed was later reflected in communications from the claimant, where his

complaints were about things purported to have been said by the Clerk and his lawyer and being misled on certain issues. Thereafter, the claimant informs the respondents' lawyers that \$30,000 is, in essence, not a satisfactory amount and that he remains willing to negotiate a settlement *and* sign a deed of settlement, just not for \$30,000.

- 157 The claimant submits that the failure by the respondents to pay him \$30,000 is indicative of: first, the settlement was not intended to be binding, but was to be finalised upon the signing of the Deed; secondly, the Shire not implementing the terms of the settlement; and thirdly, where the Shire had his bank account details, it was unnecessary for this to be a term of the Deed or not to finalise any purported settlement.
- 158 The respondents' answer to this is contained in Mr Sinanovic's email dated 4 July 2024 responding to the claimant's email dated 26 June 2024.⁴²
- 159 The claimant's position in the email dated 26 June 2024 was unequivocal, where he states, 'I have several reasons as to why I won't be signing the deed and agreeing to the \$30,000 settlement sum' and 'I was and still am willing to negotiate a fair and reasonable settlement and sign a deed of settlement but it won't be for \$30,000'. In response, Mr Sinanovic informs the claimant of the respondents' position as to finality of settlement, and states:

We confirm we hold \$30,000 in our trust account to be paid to you pursuant to the agreement reached at the conference.

We would be grateful if you would provide us with your bank account details for the purpose of transferring the settlement funds.

- 160 Thus, in respect of the first and second points raised by the claimant, the respondents' position remained equally as unequivocal and the Shire had, in fact, made arrangements with its lawyers for the payment of the agreed \$30,000 with the money held in trust with its lawyers for that purpose. In respect of the third point raised by the claimant, whether the Shire had the claimant's bank account details is irrelevant. It is hardly surprising that the respondents' lawyers wanted to confirm the claimant's bank account details for the purpose of payment. It was open to the claimant to request the monies be deposited into any bank account he chose. However, by that time, the claimant had already decided to renege on his acceptance of the settlement amount, so providing his bank account details was hardly consistent with this new position.
- 161 In addition, the claimant had also sent an email to the IMC Registry telling the IMC to list the Claim for a further PTC or list a trial, whereupon the IMC Registry informed the claimant the Clerk had now referred the Claim to trial. Thereafter, the parties were informed that the Claim had been listed for a directions hearing before an Industrial Magistrate.
- 162 The claimant further submits that the procedure adopted by the Clerk and the IMC Registry in listing the Claim for a directions hearing for trial supports his contention that the settlement was not intended to be binding. With respect to the claimant, his contention is misplaced. The claimant's email to the Clerk and the IMC Registry was, again, unequivocal; that is, he had no intention of abiding by the settlement arising from the PTC. In accordance with the Regulations, this left the Clerk with limited options. Having regard to the claimant's assertions, it was entirely appropriate for the Claim to be listed before an Industrial Magistrate. The respondents were then required to abide by the Clerk's decision and attend before the Industrial Magistrate and abide by the Court's orders.
- 163 However, the respondents' lawyers in the email to the claimant dated 4 July 2024 preserved the respondents' position to rely upon the agreement at the PTC as a defence to the Claim.⁴³ I also note that at the first directions hearing on 31 July 2024, Mr Sinanovic informed the Industrial Magistrate that the respondents 'reserve [their] rights in relation to [their] position about the pre-trial conference' and indicated it was open to the IMC to have a hearing on 'that issue alone'.
- 164 The claimant emphasised that words used by the respondents in their witness statements indicates the respondents meant for any settlement to be non-binding until the Deed was agreed to and signed. As already stated, care needs to be taken with respect to lay people using words which may have meaning in a legal context where they do not intend to convey that same meaning. For example, in his email to other councillors the day following the PTC, Mr Fletcher refers to the Deed being 'confidential and *binding*' (emphasis added). I do not accept, nor did Mr Fletcher accept, that this meant any settlement was binding upon the Deed being signed or that the settlement at the PTC was conditional on the Deed being signed. His use of the word *binding* in the context of the Deed needs to be seen in the context of the whole email, which also refers to 'the claim was settled', 'the decision encompassed the following...', and '...the [Clerk] worked with both sides to reach the final outcome, as set out above', and '[t]his matter was settled amicably'.⁴⁴
- 165 Similar comments can be said of Mr Fletcher's, Mr Ashe's and Ms Bantock's understanding of their continuing participation in the Claim, given the evidence of the discussion between the parties' lawyers during the Joint Session. From their perspective, the claimant through his lawyer indicated the Claim against Mr Ashe and Ms Bantock would be 'dropped'. Mr Fletcher's evidence is that Mr Sinanovic argued he should also be 'dropped' from the Claim. However, again, as stated, there was no order made at the PTC for the Claim to be dismissed against Mr Ashe, Ms Bantock or Mr Fletcher, and, therefore, it was entirely reasonable for them as named respondents to be a party to a Deed. In addition, they were represented by lawyers, and it was also reasonable for them to rely upon any advice their lawyer may have given them on reducing the settlement to 'something to be signed off on'. Limited weight can attach to the use of isolated words used by lay people in this context.
- 166 I should also note that the same can be said in relation to the claimant's evidence in his witness statement about the content of a conversation in the Private Session room. Leaving aside the scandalous nature of the comment, it is questionable whether a quasi-judicial officer would make such a comment to a party in a settlement conference and for an experienced lawyer not to raise this as an inappropriate comment to make. It would also be surprising for an experienced employment lawyer to mistake the nature of their client's claim, or not to correct a Registrar or clerk of the court if that person was similarly mistaken. Thus, I also place limited weight on some of the claimant's recollection of comments he alleges were made during the Private Session.
- 167 The claimant referred to two decisions in detail: *Mpinda v Fair Work Commission (No 2)* [2024] FCA 692 (*Mpinda*); and *Farrell*.

168 Factually, *Mpinda* is different to this case. In summary, the factual differences in *Mpinda* includes:

- (a) no agreement was made at a conciliation conference, but was later alleged to have been made in written and oral communications between the parties' lawyers;
- (b) the authority of Mr Mpinda's lawyer to make a BSA on Mr Mpinda's behalf was a significant issue in dispute, with Feutrill J finding, at [141], that the lawyer 'was not authorised to put an offer to [the second respondent] that if accepted would form a binding settlement agreement through the agency of [the lawyer]';
- (c) further, his Honour also found, at [141], that the lawyer's 'authority was limited to obtaining agreement "in principle" to a settlement that would involve [the second respondent] providing Mr Mpinda with a reference and payment of \$2,000. Any binding agreement was to be made in a written document that Mr Mpinda could review before signing and final agreement';
- (d) therefore, his Honour found at [142], that the lawyer exceeded his authority as Mr Mpinda's agent;
- (e) in making these findings, Mr Mpinda's lawyer was cross-examined on certain issues, but in the main he and other lawyers were reliant upon the content of the written communications and any file notes made. The content of those communications included the use of words such as 'alternative proposals', and the lawyer 'advised' that Mr Mpinda was 'prepared to settle the matter'; and
- (f) there was no evidence the second respondent took steps to enforce the 'agreement' with Mr Mpinda, including payment of the monies or provision of a reference.

169 In this case:

- (a) an agreement was reached at the PTC, where the purpose of the PTC was to settle the Claim;
- (b) the essential term of the agreement being the payment of an amount of money to 'end' the Claim was agreed, the claimant accepts this occurred and he knew these terms formed the agreement;
- (c) there is no evidence that Mr Baldwin exceeded his authority as the claimant's agent and he was not cross-examined on any aspect of his representation of the claimant or his advice or substance of any advice or the content of any conversation;
- (d) there were no contemporaneous notes of the PTC. The only document that may come close to this was Mr Fletcher's email to the other Shire councillors the morning after the PTC summarising his recollection of the outcome of the PTC;
- (e) there was no reference to any settlement agreement being 'in principle' or any indication by the claimant or his lawyer that any settlement agreement reached at the PTC required further negotiation or was made on a provisional basis or on the basis that a Deed was to be reviewed and signed, only that it was to be prepared by the respondents' lawyers and forwarded to the parties for signing;
- (f) the respondents arranged for the transfer of the settlement amount of \$30,000 to their lawyers' trust account for payment to the claimant upon confirmation of his bank account details; and
- (g) the claimant and the IMC were on notice the respondents reserved their right to argue that the settlement agreed at the PTC was a bar to the Claim.

170 There is no evidence the claimant and the respondents made an agreement to agree in the future or that the parties intended not to make a conclusive agreement unless and until they executed a Deed,⁴⁵ or that any agreement was in some other way provisional. This is not a case where the essential terms were vague, uncertain or incomplete. Mr Baldwin's evidence was that the contents of the Deed were 'uncontroversial', and he was not challenged on this evidence. Further, and consistent with Mr Baldwin's evidence, the claimant did not take issue with the contents of the Deed until he lodged his witness statement on 21 May 2025 for the hearing of the Preliminary Issue. In fact, well prior to that he positively asserted to the respondents' lawyers that he would sign a deed of settlement (not a different deed), just not for \$30,000.

171 The relevance of *Mpinda*, from the claimant's perspective, appears to be Feutrill J's comments as it relates to the proposed deed in paragraphs 155 to 170. However, as already set out, the facts that gave rise to those comments are very different to the facts in determining the Preliminary Issue, something his Honour recognises at, [14], where he states, 'the resolution of the principal issues turn on findings of fact'.

Farrell

172 Similarly, *Farrell* is factually different to this case. *Farrell* involved a series of communications between legal counsel for both parties over a number of days, where proposed terms of an agreement were discussed. Suffice to say, the negotiations involved many disputed terms, involving the retraction of comments made by the claimant, an Australian Securities Exchange announcement and restraints preventing lawyers from acting against the relevant company.

173 The communication purporting to convey acceptance of an offer was in a text message where it was stated, amongst other things, 'our clients have now accepted the offer subject to deed'. The response being, '[w]e will work on the documents now and revert asap.'

174 After this communication there was continuing protracted dispute over the content of the deed, with both parties' lawyers levelling assertions at the other concerning its contents.

175 As observed by his Honour Lee J, '[t]his is not a case at the margins'⁴⁶ or a "run-of-the-mill" dispute'.⁴⁷

176 In summary, his Honour, at [121], observed:

Viewed in the broader context (including the nature of the dispute; the sophistication of all involved; how the parties had

previously turned their mind to the necessity of a formal agreement; and no one ever indicating a departure from this approach), it is difficult to understand why a reasonable person would not have readily understood that the parties and their legal representatives expected that any formal and final resolution was subject to embodiment in a formal deed.

177 Referring to the words 'subject to deed', his Honour stated, at [121] and [122]:

There is no reason why the common understanding which applies to those time-honoured words (being an overriding condition that what has been agreed must be regarded as the basis for a future contract, rather than a contract itself) should be displaced...

[with respect to the words], they were far from superfluous.

178 In oral evidence, the claimant's lawyer in *Farrell* accepted that his client[s] was advised to make the acceptance subject to a deed, and his client[s] accepted that advice. His Honour stated, at [124]:

This is, in substance, the end of the case. A consensus had emerged, but it was subject to finalisation of a mutually agreeable instrument reflecting this consensus, which would then take effect as a concluded bargain. Other issues may be opened up when negotiations were being finalised, notwithstanding that a consensus had emerged on what were perceived to be the 'in-principle' or most significant points that had been discussed.

179 Having regard to the following six principles referred to in *Farrell*, at [15] to [20], and with respect to the claimant, the Claim was 'run-of-the-mill'.

180 First, the Claim concerned the payment of money for alleged conduct by a former employer. It proceeded in the usual course to a PTC before the Clerk. The parties were represented. At the conclusion of the PTC, the claimant confirmed to his lawyer and to the Clerk acceptance of the offer of a payment of an amount of money to end the Claim. This acceptance was conveyed by his lawyer to the respondents and their lawyers, where the respondents' lawyers then said they would prepare the Deed.

181 Secondly, and again with respect to the parties, the Claim did not involve sophisticated entities where the agreement concerned a significant transaction.

182 Thirdly, the claimant's correspondence shortly after the PTC and receipt of the Deed did not refer to important terms and conditions not mentioned during the PTC. The claimant's grievance after the PTC and receipt of the Deed was alleged misinformation given by his lawyer and the Clerk during the Private Session, his purported state of mind, and, following his research, dissatisfaction with the amount agreed at the PTC. As already mentioned, the claimant expressly informed the respondents' lawyers that he would sign a deed of settlement (not a different deed) but not for \$30,000.

183 Fourthly, Mr Baldwin's evidence is the contents of a deed in these matters was 'uncontroversial' and would contain the 'usual terms', where he had participated in many mediations in presumably similar circumstances. There is no evidence that Mr Baldwin indicated to the claimant when he forwarded the Deed from Mr Sinanovic that the claimant should focus on particular parts of the Deed as warranting his attention. According to Mr Baldwin, the Deed reflected what was agreed at the PTC. Nothing in the claimant's subsequent conduct, beyond his refusal to accept the payment of \$30,000 as 'a fair and reasonable settlement', indicated he did not intend to be bound until other issues were resolved in a formal document. To the extent the claimant refers to a letter of resignation, in my view, this was no 'deal breaker'. As suggested in the claimant's email to the IMC Registry on 25 June 2024, his lawyer and the Clerk 'implored' him to recharacterise his termination as a resignation. If he chose not to do so, the only possible disadvantage was his.

184 Fifthly, there is no evidence, nor was the claimant's lawyer cross-examined, that he conveyed to the respondents or their lawyers the claimant's acceptance of the offer was 'subject to a deed', or conditional on a deed being reviewed, signed, approved or executed, or the agreement being 'in-principle'.

185 Sixthly, there were no further negotiations between the parties post-PTC. The Deed was sent to the respondents by their lawyers for approval. Then, it was sent to Mr Baldwin who forwarded it to the claimant. Mr Baldwin said in evidence the Deed accorded with the agreement reached at the PTC. It was 'uncontroversial'. The only evidence otherwise is the claimant's now purported disgruntlement with the contents, but even this did not reflect the claimant's state of mind proximate to its receipt. The inclusion of the words on the Deed 'Without Prejudice until Executed' did not add or detract from any of this.

Outcome

186 The Preliminary Issue should be answered as follows:

(a) *On 20 June 2024 at a pre-trial conference, did the parties reach a BSA with immediate effect?*

Yes.

(b) *If a BSA with immediate effect was reached, what were the terms of the BSA?*

The respondents' pay to the claimant \$30,000 and the claimant to discontinue (or end) the Claim.

(c) *If a BSA with immediate effect was reached, was it enforceable or void?*

The BSA continues to be enforceable.

(d) *What is the effect of the determinations or outcomes of the issues in (a), (b) and (c) above on the claimant's claim?*

The claimant is precluded from prosecuting the Claim.

187 I will hear from the parties in relation to final or consequential orders to be made.

D. SCADDAN

INDUSTRIAL MAGISTRATE

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- ¹ Regulation 17 of the Regulations.
- ² Regulation 7(1)(j) of the Regulations empowers the IMC to give judgment against a claim after a decision is made on a separate trial of a preliminary issue.
- ³ Exhibit 1 – Witness Statement of Sean Fletcher dated 15 May 2025 at [13]; Exhibit 3 – Witness Statement of Pauline Bantock dated 23 May 2025 at [5]; Exhibit 4 – Witness Statement of Colin Ashe dated 15 May 2025 at [7].
- ⁴ Exhibit 1 at [15].
- ⁵ Exhibit 4 at [11].
- ⁶ Exhibit 1 at [25].
- ⁷ Exhibit 1 at [27].
- ⁸ Exhibit 1 at [29].
- ⁹ Exhibit 1 at [30] to [31].
- ¹⁰ Exhibit 1 at [32].
- ¹¹ Exhibit 2 – Unredacted Annexure 1 to the Witness Statement of Sean Fletcher dated 15 May 2025 being an email dated 21 June 2024.
- ¹² Exhibit 3 at [8].
- ¹³ Exhibit 3 at [9].
- ¹⁴ Exhibit 3 at [10].
- ¹⁵ Exhibit 3 at [11].
- ¹⁶ Exhibit 4 at [16].
- ¹⁷ Exhibit 4 at [17].
- ¹⁸ Exhibit 4 at [18].
- ¹⁹ Exhibit 4 at [19].
- ²⁰ Exhibit 4 at [20].
- ²¹ Exhibit 1 at annexure 2, Exhibit 3 at annexure 1, Exhibit 4 at annexure 1.
- ²² Exhibit 5 – Witness Statement of Maurice Walsh dated 21 May 2025.
- ²³ Exhibit 5 at [17].
- ²⁴ Exhibit 5 at [18] to [20].
- ²⁵ Exhibit 5 at [22].
- ²⁶ Exhibit 5 at [23].
- ²⁷ Exhibit 5 at [24] to [26].
- ²⁸ Exhibit 5 at [27].
- ²⁹ Exhibit 5 at [29].
- ³⁰ Exhibit 5 at [30] to [40].
- ³¹ Exhibit 5 at Annexure 4, page 80 to 81.
- ³² Exhibit 5 at Annexure 4, pages 78 to 79.
- ³³ Exhibit 5 at Annexure 4, pages 77 to 78.
- ³⁴ Exhibit 5 at Annexure 5, pages 82 to 83.
- ³⁵ Exhibit 5 at page 84.
- ³⁶ Exhibit 6 – Email sent by Mr Sinanovic dated 4 July 2024 in response to Dr Walsh at page 1.
- ³⁷ Exhibit 5, annexure 4 at page 78.
- ³⁸ Exhibit 6 at page 2 to 3.
- ³⁹ *Nurisvan Investment Ltd v Anyoption Holdings Ltd* [2017] VSCA 141 at [100].
- ⁴⁰ *Sully v English t/as Alpine Property* [2022] VSCA 184; (2022) 406 ALR 456 (*Sully*) at [90].
- ⁴¹ Discussing his own comments in *Cardtronics Australasia Pty Ltd v FX Investments Australia Pty Ltd* [2020] FCA 218 at [95] (other citation omitted).
- ⁴² Exhibit 6.
- ⁴³ See also *Sully* at [101], where a similar procedure was discussed by the Victorian Court of Appeal and given limited weight in consideration of whether a binding agreement existed.
- ⁴⁴ Exhibit 2.
- ⁴⁵ That is, this is not the third category of case referred to in *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353.

⁴⁶ *Farrell v Super Retail Group Ltd* [2024] FCA 1515 (*Farrell*) at [116].

⁴⁷ *Farrell* at [119].

2025 WAIRC 00451

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2025 WAIRC 00451
CORAM : INDUSTRIAL MAGISTRATE T. KUCERA
HEARD : MONDAY, 7 APRIL 2025
DELIVERED : TUESDAY, 29 JULY 2025
FILE NO. : M 147 OF 2022
BETWEEN : JILLIAN DIXON, DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY

CLAIMANT

AND
 KAHRAMAN KARAKUYU

FIRST RESPONDENT

AND
 DONE KARAKUYU

SECOND RESPONDENT

CatchWords : **INDUSTRIAL LAW** — pecuniary penalties for numerous award breaches and records contraventions — where respondents failed to keep employment records — s 49D, s 83, s 83E of the *Industrial Relations Act 1979* (WA) — application of principles to determine an appropriate penalty — whether any need for specific deterrence — effect of admissions when determining penalty — effect on penalty where no corrective action taken

Legislation : *Industrial Relations Act 1979* (WA)
Industrial Magistrates Court (General Jurisdiction) Regulations 2005 (WA)

Instrument : *Restaurant, Tearoom and Catering Workers' Award*

Cases referred to in reasons: : *Dixon, Department of Mines, Industry Regulation and Safety v Karakuyu* [2025] WAIRC 00039
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; (2017) 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 762; (1991) ATPR 41-076
Callan v Smith [2021] WAIRC 00216; (2021) 101 WAIG 1155
Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown [2017] FCA 1301; (2017) 275 IR 148
Australian Competition and Consumer Commission v Employsure Pty Ltd [2023] FCAFC 5; (2023) 407 ALR 302; (2023) 164 ACSR 103
Fair Work Ombudsman v Han Investments Pty Ltd [2017] FCA 623
Gardos v Baker [2024] WAIRC 128; (2024) 104 WAIG 344
Fair Work Ombudsman v Conn [2010] FMCA 828
Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) (No 4) [2024] FCA 341
Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2) [2018] FCA 480
Ponzio v B&P Caelli Constructions Pty Ltd [2007] FCAFC 65; (2007) 158 FCR 543
Royer v The State of Western Australia [2009] WASCA 139

Result : Pecuniary penalty to be paid

Representation:

- Claimant : Mr J. Carroll (of counsel) and with him, Ms I. Inkster (of counsel) as instructed by the States Solicitor's Office.
- Respondents : No appearance

REASONS FOR DECISION

- 1 In the decision to follow, I provide my reasons for imposing what I regard is an appropriate penalty for a case in which an employer has failed to keep employment records and significantly underpaid one of its employees.

Background

- 2 The precursor to these reasons, was the decision I issued on 28 January 2025 in *Dixon, Department of Mines, Industry Regulation and Safety v Karakuyu* [2025] WAIRC 00039 (**liability decision**).
- 3 The proceedings to which the liability decision relates (**proceedings**), were commenced by Jillian Dixon (**claimant**), who is an industrial inspector from the Department of Mines, Industry Regulation and Safety (**DMIRS**) under Part III Division 2 of the *Industrial Relations Act 1979* (WA) (**IR Act**).
- 4 The proceedings were brought against Kahraman Karakuyu (**first respondent**) and Done Karakuyu (**second respondent**), who collectively, I will refer to as the respondents.
- 5 The respondents were the proprietors of Newroz Kebab & Turkish Bakery in East Perth (**Newroz**), which is both a dine-in and takeaway food outlet. The respondents operated Newroz as a partnership.
- 6 In the liability decision, I held that the respondents employed Mr Sahin Zeyrek (**Mr Zeyrek**) to work at Newroz as a cook and to serve customers. Mr Zeyrek worked up to 64.5 hours, 6 days per week. For his work, Mr Zeyrek was paid flat hourly rate of \$20 per hour for each hour worked. He was paid weekly and in cash.
- 7 In respect of Mr Zeyrek's employment, I made findings in the liability decision that the respondents had engaged in two types of conduct while he worked at Newroz.
- 8 The first was in respect of the respondent's failure to keep employment records in accordance with the requirements of s 49D(2) of the IR Act.
- 9 The second involved numerous breaches of the *Restaurant, Tearoom and Catering Workers' Award* (**award**).
- 10 In the liability decision, I held the claimant had proved the respondents:
- i. contravened the requirements under s 49D(2) to keep employment records on 738 separate occasions between 19 December 2016 and 31 December 2018 (**records contraventions**); and
 - ii. during the same period, breached the award 392 times (**award breaches**) which resulted in Mr Zeyrek being underpaid, in respect of which I ordered the respondents to pay the sum of \$102,483.74 (**underpayment amount**).

The proceedings following the liability decision

- 11 After the liability decision issued, I made an order requiring the respondents to pay the underpayment amount to the claimant (**payment order**). The payment order was effective from the same day the liability decision issued.
- 12 In addition to the payment order, the claimant sought pecuniary penalties for the records contraventions and the award breaches and an order for pre-judgment interest under regulation 12(4) of the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (WA) in the amount of \$37,382.70 (**pre-judgment interest**).
- 13 The claimant also sought an order for the payment of her disbursements fixed in the sum of \$6,708.22 under s 83C and s 83F of the IR Act (**claimant's disbursements**).
- 14 I directed the parties to each file outlines of submissions on whether a penalty should be imposed and if so, the quantum of the penalty to be paid.
- 15 I also directed the parties to file submissions on the orders the claimant said I should make requiring the respondents to pay pre-judgment interest and for the claimant's disbursements.

Penalty Hearing

- 16 After the parties filed their outlines of submissions, on 7 April 2025, I convened a hearing to hear from the parties on penalty and the further orders that were being sought by the claimant (**penalty hearing**).
- 17 Both parties (as directed) filed outlines of submissions before the penalty hearing. Helpfully, the respondents in their outline of submissions neither consented to nor opposed the Court making orders that required the respondents to pay the claimant's disbursements or pre-judgment interest.
- 18 On the day of the penalty hearing no one appeared for the respondents. Mr Carroll (of counsel) appeared together with the claimant.
- 19 Noting the position adopted by the respondents in their submissions, I determined that it was appropriate to make orders for the payment of the claimant's disbursements and pre-judgment interest.

Principles to determine an appropriate penalty

- 20 The approach to be followed by the Court when determining an appropriate pecuniary or civil penalty was comprehensively considered 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.¹
 - ii. Civil penalties are imposed primarily if not solely for the purposes of deterrence.²
 - 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.³
 - 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.⁴
 - v. For general deterrence, it is important to send a message that the relevant contraventions are serious and not acceptable.⁵
 - vi. An appropriate penalty must strike a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case.⁶
 - vii. Both the circumstances of the contravener as well as the conduct involved in the contravention may be considered, as both may bear on the need for deterrence.⁷
 - 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.⁸
 - 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.⁹
 - 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.¹⁰
 - 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’.¹¹
- 21 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 762; (1991) ATPR 41-076 at [42] (*CSR*).
- 22 *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*.¹²
- 23 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.
- 24 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.¹³
- 25 In matters involving multiple award breaches and/or contraventions civil penalty provisions, Bromwich J in *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301; (2017) 275 IR 148 at [36] described a five-step process to determine an appropriate penalty.
- It involves:
- (1) identifying the individual contraventions noting that each breach of a term of an award and each breach of an obligation is a separate contravention;
 - (2) considering whether each contravention should be penalised independently or whether ‘some degree of aggregation’ is required arising out of a course of conduct;
 - (3) considering whether there should be further adjustment to ensure that, to the extent of any overlap, no double penalty is imposed, and that the penalty is appropriate;

- (4) considering the appropriate penalty in respect of each final group of contraventions taken in isolation; and
 - (5) assessing whether the overall penalty is appropriate.
- 26 The last consideration is commonly referred to as ‘the totality principle’ by which a court is required to carry out a final check of the proposed penalties to ensure that the aggregate sum does not exceed that which is proper for the entire contravening conduct.¹⁴
- 27 Although the Full Bench in *Callan v Smith* did not expressly refer to this five step process, they did apply the principles to be followed within this process.
- 28 Having set out the methodology to be applied to determine an appropriate penalty, I will now provide a summary of the parties’ submissions on this matter.

Claimant’s submissions

- 29 The claimant submitted the present case is one in which the respondents have engaged in ‘wage theft’, which involves the systematic and deliberate underpayment of a vulnerable worker in the hospitality industry.
- 30 It was submitted the respondents had adopted practices to prevent the detection of the wage theft. This included the failure to maintain the requisite employment records and utilising the Newroz accountant to prepare false tax returns for a vulnerable worker.
- 31 The claimant contended the underpayment amount and the timeframe over which the conduct occurred, were significant. It was submitted the facts and circumstances of the case are demonstrative of knowing and intentional non-compliance.
- 32 The claimant argued the respondent’s conduct should be viewed as a serious example of systemic wage theft and a disregard for the regulatory regime in which the respondents’ business operated. It was submitted the nature and circumstances of the wrongdoing warrant the imposition of a penalty at the higher end of the scale.
- 33 On the issue of specific deterrence, the claimant submitted the respondents’ conduct in response to the proceedings did not demonstrate contrition. It was submitted that because the respondents are still involved in the Newroz business, specific deterrence is a significant factor that I should have regard to when determining penalty.
- 34 The claimant argued that general deterrence in the present case is a factor that weighs heavily in favour of a substantial penalty being imposed. The claimant submitted the respondents’ conduct significantly undermines the effectiveness and purpose of the system of fair wages provided under the IR Act and the award.
- 35 Noting the number of contraventions, the objective seriousness of these contraventions and the need for general deterrence, particularly in response to the reported prevalence of wage theft in the hospitality industry, it was submitted a penalty in the upper range is appropriate.

Respondent’s submissions

- 36 In the outline of submissions the respondents’ counsel filed, it was submitted that Newroz in the main, operated as family business, with most of the work performed by members of the respondents’ immediate and extended family.
- 37 The respondents submitted they were not involved managerially, in the day-to-day operations of Newroz, but accept they bore the ultimate responsibility for the way in which the people they appointed to manage Newroz, conducted their business affairs.
- 38 While it was conceded the first respondent had some involvement in the business, it was submitted the second respondent was not directly involved in running Newroz. The respondents maintained that their son Hasan Karakuyu (**Hasan**) ran the business day-to-day.
- 39 The respondents submitted that because Newroz was operated as a family business, there was informality in the way the respondents dealt with people who were employees. There was a failure to focus on their compliance obligations and a willingness to conduct their business with agreements that had an insufficient regard for their compliance obligations.
- 40 The respondents submitted that most of the staff who worked at Newroz (including Mr Zeyrek) were treated as though they were members of their extended family. The respondents dispute that any contraventions they committed were intentional or deliberate.
- 41 Rather, the respondents submitted the award breaches and the records contraventions, were the result of carelessness or ignorance. The respondents submitted that they believed they were treating Mr Zeyrek fairly and lawfully.
- 42 Regarding the size of the business, the respondents submitted that Newroz was a small business. It was submitted the respondents did not have access to competent or professional advice, whether internally or externally and that this negatively impacted on the respondents’ capacity to appreciate the nature and complexity of their compliance obligations.
- 43 The respondents submitted there was no need for the Court to impose a penalty for specific deterrence. It was contended that this is because the respondents no longer operate a business or employ anyone.
- 44 Counsel for the respondents submitted that there is no need for the Court to impose a penalty that will deter them from engaging in further contraventions because there will be no scope or opportunity for the respondents to reoffend.
- 45 The respondents did not take issue with the claimant’s submission on the need for the Court to impose a penalty for the purpose of general deterrence.

Consideration

- 46 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.
- 47 In determining an appropriate disposition, I have considered the parties’ submissions alongside the various findings that I made

in the liability decision.

Records contraventions

48 As a starting point, the requirement for employers to keep accurate employment records under industrial and employment statutes is principally about protecting employees by ensuring they receive their correct entitlements.

49 There is no doubt that proving the number of hours an employee has worked and whether they have been correctly paid under an award or an industrial instrument, is made more difficult, whether for employees, unions or regulators alike, in circumstances where an employer fails to comply with the requirement to keep accurate employment records.

50 This observation was made clear by Barker J when commenting upon equivalent employment records provisions that are contained in the *Fair Work Act 2009* (Cth) (**FW Act**) that were contravened by a hospitality industry employer in *Fair Work Ombudsman v Han Investments Pty Ltd* [2017] FCA 623 [113] - [114]:

This is an area of employment regulation where, unless record keeping obligations are met, the ability of a regulator, and indeed individual employees, to identify an employer's breach of employment obligations is made difficult, if not on occasions impossible – as indeed this case emphasises.

The record keeping obligations are directed at ensuring the creation and retention of records as a critical tool in the assessment of compliance with workplace laws. Unless an employer complies with the law, and makes and keeps employment records, an effective safety net for employees is difficult to maintain. The result is that employees are far more vulnerable to exploitation. The job of the [Fair Work] Ombudsman, as regulator, in detecting and protecting employees' workplace entitlements is reduced in effectiveness.

51 While the law imposes the obligation on employers to keep employment records, there is little doubt the maintenance of such records serves their interests as well. Without accurate employment records, the ability of an employer in an underpayment of wages dispute to demonstrate an employee did not work the hours an employee said they did will, (as in this case) be diminished.

52 Whether the failure to keep time and wages records is the result of poor business practices or an intentional contravention, the result will be the same. The capacity of both parties in an employment relationship to demonstrate an employer's compliance with minimum employment standards will be significantly hampered by an employer's failure to keep and maintain accurate employment records.

53 For this reason, there is a strong public interest imperative in ensuring that employers comply with the records keeping requirements under the IR Act.

The nature and number of records contraventions

54 In this matter, the respondents admitted to having committed 738 records contraventions in the period 19 December 2016 - 31 December 2018 (**contravention period**).

55 This admission was made in the Statement of Agreed Facts the parties filed before a five-day hearing on liability, that was held in April 2024 (**liability hearing**).

56 A description of the records contraventions is provided in the table below.

Paragraph of s 49D(2)	Obligation	When does contravention occur?	No. of contraventions in relation to Mr Zeyrek – (19.12.2016 to 31.12.2018)
(a)	Employee's name and DOB if under 21 years	When the employee's name (and if applicable age) is not recorded	1
(b)	Industrial instrument that applies (the award)	When an applicable industrial instrument is not recorded	1
(c)	Date on which the employee commenced employment	When the employee's commencement date is not recorded	1
(d)	For each day: (i) the time at which the employee started and finished work; (ii) the periods for which the employee was paid; and (iii) details of work breaks including meal breaks.	At least on the day that the employee works and the prescribed details are not recorded	627 The number of days worked by Mr Zeyrek between 19.12.2016 to 31.12.2018.
(e)	For each pay period: (i) the employee's designation; (ii) the gross and net amounts paid to the employee under the industrial instrument; and	Each pay period that the prescribed details are not recorded.	106 The number of full pay periods for Mr Zeyrek between 19.12.2016 to 31.12.2018.

	(iii) all deductions and the reasons for them.		
(f)	All leave taken by the employee, whether paid, partly paid or unpaid.	Each time a period of leave is taken by the employee and the details are not recorded.	2 In accordance with Mr Zeyrek's evidence that he took one period of unpaid parental leave, and one period of unpaid leave when the business shutdown for renovations.
		Total number of contraventions	738

The circumstances in which the records contraventions were committed

- 57 I described the circumstances in which the records contraventions were discovered in [97] - [136] and [139] - [160] of the liability decision. These paragraphs provide a summary of the evidence regarding the records contraventions, from both the claimant and Brian Ravenscroft, who is also employed by DMIRS as an Industrial Inspector.
- 58 The respondents provided two excuses as to why they could not produce employment records for the contravention period and why the records they did produce, were inaccurate.
- 59 Firstly, the respondents claimed they had lost some of their employment records when the Newroz business premises was renovated in 2017 (**lost records excuse**).
- 60 For the period after the renovation, the respondents claimed that the responsibility to keep and maintain employment records was delegated to Hasan (**delegation excuse**). By raising this excuse, the respondents attempted to argue they should not be held responsible for something that was done on Hasan's watch.
- 61 As the liability decision reveals, this is not a matter where the respondents were immediately forthcoming when they were initially approached by industrial inspectors from DMIRS to provide copies of their employment records for inspection.
- 62 On the contrary, this is a case in which the respondents, when asked to produce their employment records were evasive and sought to mislead DMIRS inspectors. The first instance in which the respondents acted dishonestly in this regard was in the provision of an inaccurate time and wages book for inspection.
- 63 The second was in respect of the business records the respondents provided via their accountants, in response to Notices to Produce, the claimant and DMIRS inspectors issued under s 98(3)(e) of the IR Act (**Notices to Produce**). I concluded the business records the accountants produced were unreliable.
- 64 In addition, counsel for the respondents properly made the concession that even if the respondents had been able to provide the claimant with employment records, which they claimed were lost during the renovation, it is likely these records would have been deficient.
- 65 The respondents' concession they did not keep employment records for Mr Zeyrek, in the form required under s 49D of the IR Act, was not made until after the proceedings were commenced.
- 66 By this stage, DMIRS inspectors (which included the claimant) had to waste their time wading through the inaccurate records the respondents did provide, which were not produced without some delay.
- 67 The level of resources the claimant and other DMIRS inspectors were required to commit, both for an investigation into the award breaches and the proceedings, is a point to which I will return when dealing with the extent to which the respondents cooperated with enforcement authorities.

Award contraventions

- 68 In the liability decision I noted that pecuniary penalties could only be imposed for award breaches that occurred during the contravention period; a total of 392 across 106 weekly pay periods.
- 69 The clauses of the award that were breached, the number of contraventions the respondents committed and the amounts by which Mr Zeyrek was underpaid are set out in the table below (**award breaches table**):

Award clause	Number of contraventions	Resulting underpayment
Clause 9(2) – additional rates for ordinary hours (payment of additional rates where ordinary hours are performed on Saturdays and Sundays)	54	\$8,461.50
Clause 10(2) – overtime (payment at overtime rates for overtime worked Mondays-Fridays and on Saturdays and Sundays)	106	\$47,205.24
Clause 13(1)(b) – meal breaks (payment of the loading that applies where a meal break is not provided)	106	\$2,086.71
Clause 17(1)(a) – public holidays	2	\$189.11 and \$198.17

(observing Christmas Day in 2016 and Christmas Day in 2017 as holidays without deduction of pay)		
Clause 17(2)(a) – public holidays (payment at the rate of double time and half for work performed on public holidays)	16	\$5,937.47
Clause 18(6) – annual leave (payment of annual leave and leave loading upon termination)	1	\$19,423.74
Clause 21(1) – wages (minimum fortnightly wage payable for a full-time Level 2 employee)	1	\$397.62
Clause 26(2) – uniforms and laundering (payment of a fortnightly laundry allowance)	53	\$381.60
Clause 27(1) – protective clothing (payment of an allowance where rubber gloves are not provided, when performing particular cleaning tasks and using cleaning agents)	53	\$206.70
Total:	392	\$84,487.86

70 The award breaches table shows the bulk of the contraventions were in respect of the respondents' failure to pay the correct penalty rates that applied for work at night and on weekends.

Underpayment amount

71 One of the consequences for the respondents, arising from their failure to keep employment records that I addressed in the liability decision, was the extension of the six-year limitation period that would ordinarily apply to an action to recover any amounts by which an employee was underpaid, under s 82A of the IR Act (**limitation period**).

72 In the liability decision, I determined that because of the respondents' failure to provide employment records in response to the Notices to Produce, it was appropriate to extend the limitation period under s 83A(2) of the IR Act, to six years from the date immediately following, the day on which the respondents were required to provide employment records, in accordance with the Notices to Produce.

73 As a result of this finding, the period in which the claimant was allowed to pursue an underpayment of wages claim on Mr Zeyrek's behalf, was extended from 27 April 2016 to 31 December 2018 (**claim period**), which is approximately 6 months longer than the contravention period. This allowed the claimant to pursue the respondents for the underpayment of wages that resulted from the 513 award breaches that occurred during the claim period.

74 Notwithstanding this finding, the claimant by virtue of s 82A of the IR Act is only permitted to seek pecuniary penalties for the award breaches that occurred within the usual six-year limitation period. In the present case this means pecuniary penalties may only be imposed for the 392 award breaches that occurred during the contravention period.

75 The difference between the underpayment amount that I ordered the respondents to pay and the underpayment that occurred during claim period, was an amount of \$17,995.88. The total amount by which the claimant was underpaid during the contravention period was the sum of \$84,487.86.

76 The average weekly underpayment during the contravention period was an amount of \$613.81 per week (**average weekly underpayment**). I calculated the average weekly underpayment by adding the totals for the breaches that occurred the most frequently together and dividing the total by the 106 pay periods that occurred with the contravention period.

77 I did not include the award breach for the non-payment of annual leave and leave loading on termination when calculating the average weekly underpayment. In my view the exclusion of this amount from the calculation, represents a more accurate week to week average by which the applicant was underpaid.

78 The amounts by which Mr Zeyrek was underpaid, whether viewed as a total sum or week to week, were significant.

The size of the respondents' business

79 It is worth acknowledging, the records contraventions and the award breaches were committed in the context of a small family business, which the respondents started in or around 2001, following their arrival in Australia.¹⁵

80 Newroz has, for some time, provided the respondents, their children and members of the extended Karakuyu family, with the means to make a living. I do not doubt that the entire Karakuyu family has worked hard and for long hours in the business.

81 As Newroz grew, the respondents had to employ additional staff, including some from outside the Karakuyu family, providing them with the opportunity for employment or a stepping stone to move on to other things.

82 Despite acknowledging the respondents' conduct was committed in the context of small family business, I do not accept that it provides a cover for non-compliance with the requirement to keep employment records or permits a level of informality the Court should condone.

- 83 In *Gardos v Baker* [2024] WAIRC 128; (2024) 104 WAIG 344 at [85] I noted that while some latitude may, in appropriate circumstances, be given to small business owners by way of mitigation, it should not be viewed as an automatic discounting factor on penalty.
- 84 Also relevant is *Fair Work Ombudsman v Conn* [2010] FMCA 828 at [66] in which Burnett FM held that the size and financial resources of a business should not impact upon an employers' obligations to comply with workplace employment laws and the mere fact a business may be small, should not absolve an employer of their obligation to comply with the law in relation to the employment of its employees.
- 85 Noting the length of time the respondents and members of their family were involved in the Newroz business, I am not prepared to accept the records contraventions and award breaches were the result of ignorance or carelessness.
- 86 I also do not accept the respondents did not have access to competent or professional advice. When confronted with the Notices to Produce, the respondents were very quick to involve their accountants.

The circumstances in which the award breaches were committed

- 87 It is apposite to describe the circumstances in which the award breaches in this matter were committed as falling under the definition of 'wage theft'.
- 88 The term 'wage theft' was considered and defined by the report Tony Beech, the former Chief Commissioner of the Western Australian Industrial Relations Commission, prepared in relation to the Department of Mines, Industry Regulation and Safety, *Inquiry into Wage Theft in Western Australia*, Report (2019) (**Wage Theft Inquiry Report**).
- 89 For the inquiry, 'wage theft' was defined as:
[T]he systematic and deliberate underpayment of wages and entitlements to a worker.¹⁶
- 90 At page 7 of the Wage Theft Inquiry Report, Mr Beech made the following observation:
The reasons why systematic and deliberate underpayment of wages and entitlements is occurring include the lack of detection and enforcement of non-compliance, the intention of some employers to maximise financial return, the vulnerability of some workers, and a lack of knowledge of employment conditions by both workers and employers.
Systematic and deliberate underpayment makes it harder for workers to meet day-to-day living expenses, and can affect the individual's health, and have consequences for the worker's family. The unfair cost advantage achieved by underpaying businesses can undermine those businesses which are compliant, and this has consequences for the viability of the compliant business, its employees, and in a wider sense for the economy. As a community, we are the poorer because of businesses which systematically and deliberately underpay their employees.
- 91 In [692] – [697] of the liability decision, I set out some of the critical features of the context in which the respondents committed the award breaches. The circumstances I described, very much align with those under consideration in the Wage Theft Inquiry Report.

Vulnerable employee

- 92 It is of significance I concluded that even though Mr Zeyrek was at one time close to the Karkuyu family, he was nevertheless a vulnerable worker, in an unequal bargaining position, that was open to abuse.
- 93 I do not consider the respondents employed Mr Zeyrek solely for benevolent purposes. He was employed because the business wanted staff so Newroz would be open during its advertised opening and closing times.
- 94 It is my view that Mr Zeyrek was trapped in a situation of the respondents' making, which commenced in or around 2013, approximately six months after Mr Zeyrek immigrated to Australia from Türkiye.¹⁷
- 95 Mr Zeyrek who had limited English and was on a refugee protection visa, was offered work by the first respondent on flat hourly rate of \$20 per hour, for which he was paid cash in hand. During his employment with the respondents, Mr Zeyrek paid very little tax and likely under-declared his earnings to both Centrelink and the Australian Taxation Office (ATO).
- 96 While the respondents may have suggested to Mr Zeyrek that his 'cash in hand' employment arrangements were of benefit to him, they were unlawful. His employment arrangements also trapped Mr Zeyrek in a relationship in which he was very much dependent upon the respondents.
- 97 Mr Zeyrek's employment with the respondents lasted for close to 8 years, throughout which he was paid below the award and in cash. The longer the arrangement went on, the greater the level of underpayment and the extent of the deception.
- 98 When faced with an investigation by DMIRS and the proceedings that followed, the respondents, relying upon the absence of employment records, called upon members of their immediate and extended family, to give evidence disputing that Mr Zeyrek worked the hours he said he did.
- 99 Although I reached the conclusion in the liability decision, that much of the evidence the respondents' witnesses gave if not dishonest, was at the very least unreliable, the lengths the claimant had to go through to prove the award breaches, underline the extent to which Mr Zeyrek's relationship with the respondents was compromised.

The nature and extent of any loss sustained because of the records contraventions

- 100 In the preceding [50], I touched on the practical difficulty a failure to keep employment records presents in promoting compliance.
- 101 It follows that the loss resulting from the records contraventions in the present case, mostly arises in the time and public resources that were outlaid on the investigation of Mr Zeyrek's underpayment of wages claim and in the proceedings that followed.

102 While the claimant did not place a price tag on the amount of time and resources DMIRS spent on reviewing the inaccurate records the respondents provided before the proceedings were commenced, it is reasonable to conclude the public has been put to considerable expense, with both the proceedings and the DMIRS investigation that preceded them.

The nature and extent of any loss sustained because of the award breaches

103 The more tangible and quantifiable loss in this matter is in respect of the award breaches, specifically, the significant amount by which Mr Zyrek was underpaid. As I have indicated, Mr Zeyrek was underpaid by a substantial amount.

104 Mr Zeyrek was deprived of this money in circumstances where he had a wife, a young family and he was the sole breadwinner. During the liability hearing, the Court heard evidence of some of the social and financial impacts the award breaches had on Mr Zeyrek.

105 I do not doubt that Mr Zeyrek's employment arrangements contributed to the deterioration of his marital relationship. He also had difficulties securing finance to purchase a car and was unable to obtain a home loan. During the liability hearing, Mr Zeyrek's wife gave evidence the couple were unable to take any holidays together and as a family.

106 The payment of \$20 per hour cash in hand, for each hour worked, was not sufficient to discharge the respondents' obligations under the award, particularly in respect of the requirements for work at night, on weekends, public holidays and at overtime rates.

107 In this matter, there is no guarantee Mr Zeyrek will receive the money that he was underpaid. As I indicated at [728] of the liability decision, Mr Zeyrek has acknowledged that he may be required to make a repayment to Centrelink.

108 It is clear from the liability decision that taxation was not correctly remitted to the ATO and that Superannuation Contributions were not paid on Mr Zeyrek's behalf. While these matters are not within my direct remit, they are nevertheless a function of the respondents' conduct, which included the award breaches.

109 Having regard to the matters I have outlined at [103] - [108] above, it is reasonable to infer that the losses to the public purse and to Mr Zeyrek personally, as a result of the award breaches, are more extensive than just the underpayment amounts, the cost of the proceedings and the resources that were used to investigate the award breaches.

Whether or not the records contraventions were deliberate

110 It is my view the records contraventions were deliberate. This is a matter where the respondents had decided to adopt a business practice of not keeping employment records and paying their employees in cash.

111 In the liability decision, I reached the conclusion the respondents' failure to keep employment records was an entrenched business practice, that likely commenced when the business was established.

112 It is regrettable that as Newroz grew and other family members became involved in the business, the respondents' employment record keeping practices did not evolve to the standard required under the IR Act.

113 As I indicated earlier in [98], I am of the view the respondents attempted to use the absence of employment records to assist them in their defence of the proceedings.

114 My finding in this regard is very much shaped by the way in which the respondents responded to the Notices to Produce and the way in which the respondents defended the proceedings.

115 Having raised the lost records and delegation excuses, (both of which I rejected in the liability decision) there are two points that are relevant to deciding whether the contraventions were deliberate. First, in raising these excuses, it cannot be said the respondents were unaware of the requirement to keep employment records.

116 Second and more important, the respondents, even with the involvement of Hasan in a management role, were still responsible for ensuring they took reasonable steps to keep and maintain employment records.

117 In the liability decision I indicated that I was not prepared to accept the respondents had discharged their responsibility to keep employment records with the level of diligence required.

118 It is on this basis that I accept the records contraventions (if not intentional) were at the very least, committed with a wilful disregard for the regulatory scheme in which the business operated.

Whether or not the award breaches were deliberate

119 In view of the findings I made in the liability decision, there is no doubt the award breaches, like the records contraventions (if not intentional) were similarly, committed with a wilful disregard for the terms of the award.

120 As a result, I concluded that in the same way the respondents had failed to keep employment records, it was not huge leap to find it they had engaged in the award breaches.¹⁸

121 I accept the claimant's submission that the circumstances of this case, can be fairly described as 'wage theft'. For the respondents, this removes any suggestion the award breaches were the result of carelessness or ignorance.

122 The extent of the underpayment which I have described in the preceding [75] - [78] when viewed in context, is also at a level to support a finding the respondents have engaged in wage theft.

123 Noting the description of 'wage theft' that I referred to in the preceding [87] - [89], I also accept that this is a case in which the respondents may be fairly described as having engaged in the systematic and deliberate underpayment of a vulnerable worker.

124 I accept the claimant's submission that practices were in place to help prevent the detection of the award breaches, which included the failure to keep employment records and using the Newroz accountants to prepare false or misleading tax returns.

Involvement of senior management

125 In the context of a family business that is operated as a partnership, it is reasonable to regard the partners who own it, as the

most senior figures with the business.

- 126 While I acknowledged in the liability decision that the first respondent's interaction with the claimant and other DMIRS staff, suggested he retained a greater level of authority within the business than what the respondents said he did, with the rejection of the delegation excuse, I regard the respondents as jointly responsible for both the records contraventions and the award breaches.
- 127 I do not accept that because the second respondent as a silent partner, had little to do with the day-to-day operations of Newroz and left decisions that affected her interests in her husband's hands, that she should face a separate or diminished penalty for the records contraventions and the award breaches.
- 128 In the same way the second respondent stood to benefit in equal measure from her ownership stake as a partner in the Newroz business, I consider that it is only appropriate that she be held jointly liable for any penalties for conduct that first respondent conducted (whether lawful or otherwise) on the partnership's behalf.

Similar conduct

- 129 There is no evidence the respondents, whether individually or collectively, have previously contravened a civil penalty provision of the IR Act or breached the terms of an award.
- 130 Despite this, it is my view that when weighed against the other factors I am required to have regard to when determining penalty, the fact the respondents have escaped prior scrutiny is more a matter of luck than something of benefit to them in mitigation.
- 131 In addition, while a lack of prior contraventions might be viewed as evidence of good character, as Katzmann J held in *Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) (No 4)* [2024] FCA 341 at [54] such evidence has no role to play in the fixing of civil penalties unless it suggests that the prospect of future contraventions is unlikely.
- 132 The matter of whether there is a potential for further contraventions is a matter to which I will return when dealing with whether the respondents have taken corrective action and the issue of specific deterrence.

Cooperation with enforcement authorities

- 133 In the present case, the assessment of whether the respondents cooperated with enforcement authorities, needs to be viewed in two stages.
- 134 The first involves an assessment of the extent to which the respondents cooperated with DMIRS in their response to the DMIRS investigation. On this, it cannot be said, having regard to the circumstances in which the records contraventions were committed, (which I described in the preceding [57] - [67]) that the respondents cooperated with enforcement authorities, before the proceedings were commenced.
- 135 The second stage of this assessment goes to the way in which the respondents conducted themselves after the proceedings were commenced. On this, I accept that the proceedings in so far as they related to the records contraventions, were not contested.
- 136 I also accept the respondents made a series of concessions, in a Statement of Agreed Facts, and during the proceedings in relation to the award breaches.
- 137 The matters the respondents conceded on the award breaches variously included the following:
- i. that the respondents employed Mr Zeyrek;
 - ii. if the award applied, that Mr Zeyrek was employed in a 'Level 2' classification; and
 - iii. the respondents did not take issue with the claimant's underpayment calculations.
- 138 Notwithstanding the concessions referred to, the way in which the respondents defended the remainder of the proceedings in respect of the award breaches, was in no way cooperative and largely negated the mitigatory benefit flowing from their admissions.
- 139 In denying the award applied to Mr Zeyrek's employment and by disputing the number of hours Mr Zeyrek said he worked, the claimant was forced to incur costs and utilise public resources in the prosecution of her claim against the respondents.
- 140 I have also had regard to the following:
- i. The respondents were not successful in their attempts contradict Mr Zeyrek and his wife's evidence regarding Mr Zeyrek's employment at Newroz.
 - ii. The number of witnesses the respondents called in their attempt to impugn Mr Zeyrek's evidence on the number of hours he said he worked, increased the length and the complexity of the proceedings.
 - iii. I consistently doubted the reliability of the evidence from the respondents' witnesses.
- 141 I accept the respondents' decision to defend the proceedings is not an aggravating factor when determining an appropriate penalty.
- 142 However, by contesting the proceedings, the respondents are unable to claim anything in mitigation that would otherwise have been available if they had admitted the award breaches before the liability hearing.

Whether the respondents have exhibited contrition

- 143 In their submissions on penalty, the respondents' said they regret their failure to conduct their affairs in a compliant way.
- 144 Despite this, the respondents also said that up to and including the liability hearing, they were convinced they had done the right thing by Mr Zeyrek and believed he was attempting to take money from them that he had not earned. In this regard, it was submitted the respondents were not contrite about the underpayments.

145 Noting my observations regarding the respondents' response to the proceedings that I touched on in the preceding [136] - [142], I am not persuaded the respondents, even at this stage, are genuinely apologetic or remorseful for their conduct.

146 I am more inclined to the view the respondents have not properly expressed or demonstrated contrition for either the records contraventions or the award breaches.

Corrective action – underpayment amount

147 In this matter, there are two forms of corrective action that I regard as relevant to the assessment of an appropriate penalty. The first is whether the respondents have made any attempts to rectify the underpayment.

148 The second is whether the respondents have implemented a system to keep and maintain employment records.

149 During the penalty hearing, the claimant's counsel advised the respondents had agreed to a 'time to pay arrangement' (**time to pay arrangement**) and that the respondents had paid their first instalment of \$25,000.

150 As recently as Friday 27 June 2025, the Court's registry staff wrote to the parties and requested an update on whether the respondents had made any further payments under the time to pay arrangement.

151 On Monday 30 June 2025, the claimant's counsel provided information on the time to pay arrangement and advised that the respondents had been making payments in accordance with the plan.

152 Under the time to pay arrangement the respondents have agreed that they will pay the claimant a total amount of \$139,866.44 comprised of the underpayment amount and the pre-judgment interest.

153 As at, 30 June 2025, the total amount the respondents have paid under the time to pay arrangement is the sum of \$41,359.20. Commencing on and from 15 July 2025, the respondents have agreed that they will continue to pay \$4,000 monthly instalments until the total amount owing under the time to pay arrangement is paid in full.

No evidence of corrective action – employment records

154 In relation to the implementation of a system to keep and maintain employment records, I am mindful there was a change in the ownership of the Newroz business.

155 Counsel for the respondents suggested in his submissions, that for this reason, corrective action involving the implementation of a system to keep and maintain employment records cannot be taken. It was submitted that this is because the respondents no longer operate a business and do not employ anyone.

156 Although I appreciate that with the change in ownership, the respondents may technically be correct in saying the requirements under the IR Act to keep employment records no longer apply to them, there is in my view still scope for the respondents to be involved in similar contravening conduct.

157 During the penalty hearing counsel for the claimant provided a company search from the Australian Securities and Investments Commission, which I accepted into evidence and marked as Exhibit A1.

158 Exhibit A1 reveals the respondents continue to be involved as directors in Karakuyu Pty Ltd (**company**), which now owns Newroz, to which the provisions of the FW Act apply.

159 While Newroz may no longer be owned by the respondents, evidence of the company's compliance with the equivalent employment records provisions of the FW Act, would have gone some way to persuading me the respondents had gained some insight into their wrongdoing. It may have also convinced me there was a reduced risk of them reoffending.

160 In the absence of such evidence, there is still a risk, while the respondents remain involved in the company as directors, that they may engage in further contravening conduct.

Specific deterrence

161 In view of the matters I noted in [156] - [160], I consider there is still a need to invoke the principle of specific deterrence in this case.

162 As indicated, I have not been provided with any evidence that demonstrates the respondents have taken sufficient steps to ensure records contraventions, of the type at issue in this matter, will not be repeated.

163 I am concerned that if a penalty with deterrent effect is not imposed, even after the Court has issued orders to recover the underpayment amount and to pay pre-judgment interest, that the respondents in their capacity as directors of the company, may again decide to 'take the odds'.¹⁹

164 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 both a deterrent to discourage the respondents from 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.

General deterrence

165 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 respondents from engaging in further contravening conduct, but others who may be contemplating taking a similar path.

166 To deter others, who may be in the same or similar position the respondents were in, the penalty imposed cannot be so low that it will be viewed by the respondents or others as an acceptable cost of doing business.²⁰ It should also be of a kind that it would likely act as a deterrent in preventing similar contraventions by like-minded persons or organisations.²¹

167 It is of concern that the conduct under consideration in this case has occurred in the hospitality and takeaway food sector, which is regrettably renown for a high incidence of wage theft.²²

168 When invoking the principle of general deterrence, I must have regard to Hasan's and the other members of the Karakuyu

family's involvement in the records contraventions and award breaches.

- 169 Having regard to the evidence members of the Karakuyu family gave during the liability hearing, I am concerned there is still the potential for them to be involved in future contraventions of workplace relations laws of a similar kind at issue in this case.
- 170 In other words, while a penalty needs to be imposed that sends a strong message to employers who are contemplating or may be engaged in wage theft elsewhere, one that is sufficient to discourage other members of the Karakuyu family who are still involved in Newroz, from repeating the respondents' conduct, is just as important.

Comparison with *Callan v Smith*

- 171 I have had regard to the approach that was taken by the Full Bench in *Callan v Smith* when determining an appropriate penalty, including the quantum of the fine for each award breach, when viewed individually and the total pecuniary penalty that was imposed.
- 172 I have considered the following:
- i. The quantum of the underpayment amount in this case when compared with the underpayment amount at issue in *Callan v Smith* is almost three times higher.
 - ii. The respondent in *Callan v Smith* committed 282 award breaches over two-year period, which is well below the number of award breaches, the respondents committed in this case.
 - iii. When compared with the award breaches at issue in *Callan v Smith*, the contravening conduct at issue in this matter is objectively, far more serious.
- 173 I have also noted the respondent in *Callan v Smith* admitted to all the award breaches he was alleged to have committed, before enforcement proceedings were commenced and that liability in the case did not have to be decided after a five-day contested hearing.
- 174 While the Full Bench decided that a total penalty (following adjustments) of \$22,704 was an appropriate disposition for the award breaches at issue in *Callan v Smith*, noting the number and the objective seriousness of the records contraventions and the award breaches in this matter, I do not consider that a global fine close to this amount, would be a just outcome.

Course of Conduct

- 175 There is little doubt the records contraventions and the award breaches were committed as single and continuing courses of conduct. It is my view the respondents formed a view about how they were going to run their business, which included not keeping employment records or paying in line with the award.
- 176 In *Callan v Smith*, the Full Bench acknowledged the 'course of conduct' or 'one transaction' principles have a role to play in determining penalty.²³
- 177 The Full Bench, following the decision of Owen JA in *Royer v The State of Western Australia* [2009] WASCA 139 observed that if the particular circumstances call for application of the 'one transaction principle' (because there is a sufficient legal and factual interrelationship between the offences), then it is to be applied at the second stage of sentencing, that is after the penalty or sentence for the individual offences or contraventions has been assessed.²⁴
- 178 Importantly, the 'one transaction principle' does not operate to enable a sentencing court to effectively treat multiple offences as one offence which is to be penalised.²⁵

Penalty to be imposed for the records contraventions

- 179 For each records contravention that was committed, the maximum civil penalty per contravention under s 83E(1)(a) of the IR Act, that applied during the contravention period, was a fine of \$5,000.
- 180 Applying the principles in *Callan v Smith*, the theoretical maximum aggregate penalty for all the records contraventions that were committed during the contravention period is very large.
- 181 By way of example, if I was to take the view that a penalty at the lower end of the range (10% - 25%) for each records contravention was justified, it would result in an individual fine of \$500 per contravention.
- 182 However, noting the records contraventions were deliberate, committed over an extended timeframe and there is no evidence the respondents have taken any corrective action, the more appropriate penalty would be a \$1,500 fine for each contravention.
- 183 The penalties per contravention when added together would result in a theoretical aggregate penalty of \$1,107,000. While I regard each separate records contravention in this matter as important as the other, this is not a case where a total aggregate fine in this amount would be a just and proportionate response.
- 184 In this case, the biggest problem with the respondents' conduct for compliance purposes, is that DMIRS was unable to check if Mr Zeyrek, from week to week, was paid correctly, in accordance with the award, for the hours he worked at Newroz.
- 185 For each weekly pay period, there were close to six records contraventions committed each week for 106 weeks. The most prevalent are those that relate to the respondents' failure to keep a record of:
- i. Mr Zeyrek's start and finish times on each day Mr Zeyrek worked during the contravention period (627 contraventions of s 49D(2)(d) of the IR Act); and
 - ii. what Mr Zeyrek was paid for each pay period (106 contraventions of s 49D(2)(e) of the IR Act).
- 186 Having regard to the 'one transaction principle' it would seem sensible to group the records contraventions together and to set a theoretical maximum penalty by reference to the pattern of conduct that was committed week to week, 106 times.
- 187 Grouping all the records contraventions together in this way, will ensure there is no double penalty and the aggregate fine to be imposed, would in the circumstances, despite the seriousness of the contraventions, be neither crushing nor oppressive.

- 188 It is on this basis I would impose a fine of \$1,500 for each one of the 106 pay periods that fell during the contravention period. This would equate to a theoretical aggregate penalty of \$159,000.
- 189 It is appropriate to reduce the theoretical aggregate penalty for the records contravention by 20% because the respondents admitted the records contraventions. I accept these admissions to a certain extent, reduced the duration and complexity of the proceedings.
- 190 In *Callan v Smith*, the Full Bench noted that reductions for early admissions do not merely act as a reward to an individual respondent, but as an encouragement to other contravening parties to admit contraventions at an early stage. The 20% adjustment I have applied for the respondents' admissions to the records contraventions is consistent with the reduction that was applied by the Full Bench in *Callan v Smith*.
- 191 Having made this adjustment to the theoretical aggregate penalty, I also consider it appropriate to apply the totality principle to ensure the global fine to be imposed for the records contraventions is not so high as to be oppressive.
- 192 Noting the Full Bench in *Callan v Smith* applied a further 40% reduction on penalty to give effect to the totality principle, in my view an equivalent percentage should also be applied to the theoretical aggregate penalty in this matter, which would result in a total fine for the records contraventions being fixed in the sum of \$76,320.

Penalty to be imposed for the award breaches

- 193 The maximum potential pecuniary penalty that applied under s 83(4) of the IR Act on the date for each of the award breaches that were committed was a \$2,000 fine. Applying the principles in *Callan v Smith*, it follows that the theoretical maximum penalty for the award breaches committed during the contravention period when viewed cumulatively, was a global penalty of \$784,000.
- 194 The award breaches the respondents have committed are serious and for which, the Court should impose stiff penalties. The award breaches, like the records contraventions were intentional and committed over an extended timeframe.
- 195 In the circumstances I consider it appropriate that a fine of \$300 per award breach be imposed, which would result in an overall theoretical aggregate penalty of \$117,600.
- 196 Although I accept the award breaches, like the records contraventions, were committed as part of single, continuous course of conduct, the amounts by which Mr Zeyrek was underpaid (whether viewed weekly or cumulatively) are such that I do not consider it is appropriate to reduce the theoretical maximum penalty by grouping the award breaches together in the same way I did for the records contraventions.
- 197 In other words, I regard this as the type of matter in which the Court should be reluctant to exercise its discretion to discount the penalty by reference to the one transaction principle, whether individually or globally, theoretical or otherwise.
- 198 While the respondents have not demonstrated contrition and there is little that can be argued in mitigation regarding their cooperation with enforcement authorities, I am prepared to apply a discount on the penalty for the effort the respondents have made to date, towards rectifying the amount by which Mr Zeyrek was underpaid.
- 199 To this end I consider that it is appropriate to apply a 20% discount to the theoretical aggregate penalty for the award contraventions.
- 200 Like the adjustment to the theoretical aggregate penalty for the 'totality principle' that I considered was appropriate for the records contraventions, I also consider that an equivalent reduction should be applied to the theoretical aggregate penalty for the award contraventions.
- 201 To this end, I will apply a 40% adjustment to ensure the total penalty to be imposed for the award contraventions, when viewed as a whole, is just, appropriate and is a proportionate response to the conduct the respondents have engaged in.
- 202 Accordingly, it is my view that a total penalty for the award breaches should be fixed in the sum of \$56,448.

Conclusion

- 203 For the reasons set out in the preceding paragraphs, I have concluded that the circumstances of this case, warrant the imposition of a substantial pecuniary penalty.
- 204 Accordingly, it is in my view appropriate, the respondents be ordered to pay the following:
- i. a total penalty of \$76,320 for the records contraventions; and
 - ii. a total penalty of \$56,448 for the award contraventions.
- 205 As it was the claimant who brought the proceedings, it is also appropriate that I make an order under s 83F of the IR Act requiring the respondents pay these penalties to the claimant.

T. KUCERA

INDUSTRIAL MAGISTRATE

¹ *Pattinson* at [9].

² *Pattinson* at [9] and [15].

³ *Pattinson* at [15] citing *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at 506 [55].

⁴ *Pattinson* at [9].

- ⁵ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68; 271 IR 321, at [98].
- ⁶ *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].
- ⁷ *Pattinson* at [55].
- ⁸ *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].
- ⁹ *Pattinson* at [55].
- ¹⁰ *Pattinson* at [53].
- ¹¹ *Pattinson* at [17] citing *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at 265 [62].
- ¹² *Pattinson* at [54].
- ¹³ *Callan v Smith* at [91].
- ¹⁴ *Australian Competition and Consumer Commission v Employpure Pty Ltd* [2023] FCAFC 5; (2023) 407 ALR 302; (2023) 164 ACSR 103 at [52] per Rares, Stewart and Abraham JJ.
- ¹⁵ Evidence of Kahraman Karakuyu – liability decision at [338]
- ¹⁶ Wage Theft Inquiry Report at page 21.
- ¹⁷ Liability decision at [187].
- ¹⁸ Liability decision at [739].
- ¹⁹ *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)* [2018] FCA 480 at [17].
- ²⁰ *Pattinson* at [98].
- ²¹ *Ponzio v B&P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543 at [93].
- ²² Wage Theft Inquiry Report at pages 7 - 8; also see *Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) (No 4)* [2024] FCA 341 at [38] - [39].
- ²³ *Callan v Smith* [58].
- ²⁴ *Callan v Smith* [60].
- ²⁵ *Callan v Smith* [60].

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2025 WAIRC 00417

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GARRY RONALD FORMICA

APPLICANT

-v-

BARRY IRWIN

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

FRIDAY, 11 JULY 2025

FILE NO.

U 58 OF 2024

CITATION NO.

2025 WAIRC 00417

Result	Order Issued
Representation	
Applicant	Mr Garry Formica
Respondent	Mr Barry Irwin

Order

WHEREAS on 13 June 2024, the applicant filed a *Form 2 – Unfair Dismissal Application*, and on 23 July 2024, the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application*;

AND WHEREAS by Notices of Hearing issued on 14 November 2024 the matter was set down for hearing on 26 March 2025, and by Directions ([2024] WAIRC 01036) issued on 12 December 2024, the hearing set down on 26 March 2025 was vacated;

AND WHEREAS on 2 July 2025, the applicant advised the Commission that he did not wish to continue with the matter (**Application for leave to discontinue the matter**);

AND WHEREAS on 3 July 2025, the Commission wrote to the respondent and requested his response to the Application for leave to discontinue the matter, and informed the respondent that if he did not respond by 4:00pm on Friday, 11 July 2025, the Commission will issue an Order discontinuing the matter with leave;

AND WHEREAS by 4:00pm on 11 July 2025, no response was received from the respondent;

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

THAT application U 58 of 2024 is discontinued with leave.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00682

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 00682
CORAM : COMMISSIONER T B WALKINGTON
HEARD : TUESDAY, 1 OCTOBER 2024, MONDAY, 30 SEPTEMBER 2024
DELIVERED : MONDAY, 11 AUGUST 2025
FILE NO. : B 67 OF 2023
BETWEEN : JESSICA MCCARTHY
 Applicant
 AND
 MY FOODIE BOX LIMITED
 Respondent

CatchWords : Industrial Law (WA) - Contractual benefits claim - Entitlements under contract of employment - Contractual Interpretation - Whether applicant's employment contract was varied - Contractual variation found - Reasonable additional hours - Payment of additional hours - Payment of time off in lieu - Unjust enrichment - Quantum meruit - Payment for balance of remaining notice period - Application dismissed in part

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Act 1979 (WA)

Result : Order for Balance of Notice Period Remaining
 Application Dismissed

Representation:

Applicant : Ms J McCarthy
Respondent : Ms M Hughes and Mr B Hughes

Case(s) referred to in reasons:

Benge & Anor v Bluescope Steel (AIS) Pty Ltd (No.2) [2020] FCCA 515
B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Cantor Fitzgerald International v Callaghan & Ors (1999) 2 All ER 411
Dorsch v HEAD Oceania Pty Ltd [2024] FCA 162
GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd (2003) 128 FCR 1
HotCopper Australia Ltd v Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704

Levi Rohan v S&DH Enterprises PTY LTD [2023] WAIRC 00076; (2023) 103 WAIG 174

Roude v Helwani [2020] NSWCA 310

Simone Jade Stewart v Next Residential [2016] WAIRC 00756; (2016) 96 WAIG 1354

Wegener v The Trustee for Cottesloe Hotel Trust & the Trustee for Richmond Equity Fund [2022] WAIRC 00156; (2022) 102 WAIG 280

Reasons for Decision

- 1 On 21 November 2023, Ms Jessica McCarthy (**the applicant**) filed a claim to the Western Australian Industrial Relations Commission (**the Commission**) for contractual benefits against My Foodie Box Limited (**the respondent**), seeking orders for:
 - 1) \$12,307.44 payment in compensation for hours worked, when she says her contract was unilaterally reduced from full time to four days per week (**full-time pay**).
 - 2) A payment of amount between \$3,441.22 to \$6,396.63 in compensation for unpaid overtime and time off in lieu (**TOIL**).
 - 3) A payment of \$6,153.72 being two-weeks' salary for the notice period the applicant claims she is entitled to (**notice period**).
 - 4) An unspecified amount for a redundancy payment based on full-time employment, not the reduced four-day work week (**redundancy**).
 - 5) A payment of \$2,469.58 being for annual leave entitlements based on full-time employment. (**annual leave**).
- 2 The respondent opposes the applicant's claim and contends that they have paid the applicant all entitlements due under the contract of employment. The respondent says that the applicant agreed to reduce her working hours to part time and a four-day working week.
- 3 The respondent contends that the notice period and redundancy payment meet the National Employment Standard requirements and complied with the terms of the contract of employment.
- 4 In addition, the applicant claims an unspecified amount for hours worked beyond her contracted hours because she says the respondent was unjustly enriched. The applicant seeks an order calculated on the basis of quantum meruit.

Questions to decide

- 5 In claims made under s 29(1)(d) of the *Industrial Relations Act 1979* for a benefit under a contract of employment, the applicant must be able to demonstrate the fact of a contractual term and the fact that the contractual benefit has been denied. That is, as set out in *HotCopper Australia Ltd v Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704 (*HotCopper*), the onus is on the applicant to establish an entitlement to a benefit and the applicant must establish that:
 - 1) the applicant must be an 'employee' as defined under s 7 of the *Industrial Relations Act 1979*,
 - 2) the benefit claimed must be a contractual benefit,
 - 3) the benefit must not be one under an award or order of the Commission, and
 - 4) the benefit must have been denied.
- 6 In relation to the applicant's claims for payment of full-time pay, redundancy and annual leave benefits, they claim have been denied because the respondent's calculations are based on part-time hours and not full-time hours, I must decide whether there was a contractual variation made between the parties to reduce the applicant's hours of work.
- 7 In relation to the applicant's claim for TOIL, the question is whether the terms of the contract provided an entitlement to the TOIL and payment for TOIL not taken and, if so, whether the applicant has satisfied the requirements for payment under the terms of the contract of employment for payment of any entitlements.
- 8 In addition, I must decide whether the Commission has the power to make an order calculated on the basis of quantum meruit for the work performed by the applicant.

Was the Employment Contract for Part-Time or Full-Time Hours of Work?

- 9 A variation of a contract is a change to the terms and obligations under the contract. A variation must be agreed between the parties and there must be consideration. The terms of the variation must be certain, complete and there must be an intention to vary the contract.
- 10 The applicant asserts that she is entitled to a payment calculated at full-time hours per week. The claim is for payment of \$12,307.44 being for 7.6 hours per week for a period of 20 weeks during which she was paid for 30.4 hours per week and not for 38 hours per week.
- 11 The respondent opposes the claim and says that at the relevant time, the applicant's contract of employment was for part-time hours being four days per week. The respondent says the applicant agreed to reduce her hours and remained on four days per week until her employment was terminated.
- 12 The respondent contends that the applicant also claims an overtime payment for those same hours and that this is effectively double dipping. The respondent's evidence is that most of the applicant's A payment requests including work undertaken on Friday's were paid. The respondent says the requests for payment for time in lieu were made at the time of the termination of the applicant's employment. The respondent declined to pay an equivalent amount for only two of the periods of time in lieu requested by the applicant.
- 13 The applicant submits that the respondent unilaterally varied her contract of employment by reducing her hours from full time

to part time, a reduction of 7.6 hours per week. The applicant says that her contract of employment states that any variation to its terms must be agreed in writing. The applicant asserts that she did not agree in writing to reduce her hours of work and therefore, the variation to her working hours was not a valid variation to her contract of employment.

14 Both parties referred the Commission to a contract of employment for the role of Director of Product Development and Customer Experience dated 9 October 2021 (**Employment Contract**).

15 The Employment Contract states that the position is full time:

Dear Jess

It is with great pleasure That My Foodie Box Pty Ltd trading as My Foodie Box (“The Employer”) offers you the position of Director of Product Development and Customer Experience on a full-time basis.

I am delighted to confirm the following details:

1 Position

- 1.1 You will be appointed to the position of Director of Product Development and Customer Experience, reporting directly to the Managing Director or any other person directed by the Employer from time to time. The Employer may unilaterally change your title, duties, responsibilities, function, role accountability or reporting relationship at any time
- 1.2 Your employment will commence on Monday 6 December 2021 and your employment will continue unless terminated in accordance with the terms of this letter of appointment.
- 1.3 Your employment will be full time.
- 1.4 In addition to the hours set out above, you may also be required to work reasonable additional hours.
- 1.5 The duties of this position are set out in the attached position description. You will be required to perform these duties, and any other duties the employer may assign to you, having regard to your skills, training and experience.

16 The Employment Contract neither specifies the number of hours for ‘full time’ nor any number of hours to be regarded as ‘reasonable additional hours’.

17 Both parties agree that on 14 November 2022, the applicant and the Chief Executive Officer of the respondent met to discuss the need to reduce business expenditure. At this meeting, the applicant was requested to reduce her hours of work. The respondent says that the applicant agreed to reduce her working hours to four days a week and that her working days were Monday to Thursday. In cross-examination, the applicant confirmed that she had agreed to the reduction in her working hours to four days a week at that meeting.

18 Subsequently, the respondent emailed the applicant on 16 November 2022 (Exhibit R2):

Variation to Existing Employment Contract

Dear Jess

As a result of our discussions on 14th November 2022, the following change to your Individual Employment Agreement has been agreed:

- Existing clause from individual Employment Agreement dated 9th October 2021:

1.3. Your employment will be full-time.

Newly agreed clause:

1.3. Your employment will be part time (30.4 hours per week).

The agreed change detailed above will take effect from 14/11/22 and remain in effect until a mutually agreed date when the individual employment agreement will revert back to the existing clause from the temporary clause.

If you have any queries regarding the variation please contact Mai Hughes at mai@myfoodibox.com.au.

Otherwise, please add your signature below and return to Mai at mai@myfoodiebox.com.au as confirmation of your understanding and agreement to the variation to your individual Employment Agreement.

You can use an electronic signature or reply electronically with your agreement if you don’t have an electronic signature.

Yours sincerely

Mai Hughes

My Foodie Box

CEO & Co-Founder

Employee Acknowledgement

Name:

Signature: Date:

In signing this acknowledgement, I confirm that I have read and fully understand the variation to my individual employment agreement in detailed in this letter and declare that it accurately reflects the variation agreed.

- 19 The applicant says that she did not receive this email and neither signed nor returned a signed copy of the email to the respondent. Neither party produced a signed copy of this email. The respondent submitted a copy of the email that confirmed it had been sent to the applicant through a digital mobile application utilised by the respondent to communicate with their employees.
- 20 The respondent submits that the applicant's agreement to reduce hours is reflected by the applicant's response to a request made by email on 28 November 2022 from the Executive Assistant (Exhibit R3):
- Hi Team
- Can you please reply to this email and let me know your working days moving forward? This is so that it can be easier for Mandy moving forward to do payroll.
- Please let me know asap, and any issues just let me know.
- 21 On the same day, the applicant responded by reply email with 'Mon to Thursday' (Exhibit R3). The applicant says her response reflects that she needed to respond within a pay cycle, even though she did not consider the Employment Contract had been varied because it had not been formalised and agreed in writing.
- 22 On 5 December 2022, the respondent made an offer to the applicant for appointment to the position of Chief Marketing Officer and Head of Product Development (Exhibit R5):
- Hi Jess
- As discussed, please see attached your Letter of Offer for the position of CMO and Head of PD. We want to restructure the team at MBX as we have identified a gap and therefore some missing opportunities in Marketing. Your experience and skillset are not only an asset to the company, it also matches perfectly with the current needs of the business.
- As always, I wanted to show my appreciation and recognition of your dedication, hard work, loyalty and commitment to My Foodie Box. I think with Sarah moving to lead the ops side of the business, you two will make a killer team.
- Please see attached:
- Your letter of offer
 - Job Guidelines
 - What I am proposing for the new teams structure
- Please let me know your thoughts.
- We would be moving you back to full time effective immediately
- Thank you
- Mai
- Mai Hughes Co-founder and CEO
- 23 The respondent offered the applicant a return to full-time hours with the change in position. The applicant acknowledged under cross-examination that she declined the respondent's proposal she return to full-time hours.
- 24 The respondent submits that the applicant requested she remain part time until she returned from leave as she wanted additional time to organise her wedding.
- 25 The applicant agrees that she requested that consideration of the new position be deferred until after her return from leave.
- 26 However, despite this, the applicant says she continued to work full time on Mondays through to Fridays each week and she was working from home on Fridays.
- 27 There is no evidence before me that the applicant declined to agree to a change to the Employment Contract to reduce her hours of work and salary commensurately. There is no evidence before me that during the applicant's employment, she protested the change in her hours. However, more than mere acceptance is required to show agreement to vary a contract of employment: *Benge & Anor v Bluescope Steel (AIS) Pty Ltd (No.2)* [2020] FCCA 515 (*Benge*).
- 28 I find that the applicant understood that the Employment Contract had been varied to a working week of four days because the evidence is that the applicant agreed to this change at the meeting on 14 November 2022.
- 29 In addition, the applicant made claims for time in lieu for hours worked on Fridays during the relevant period. I find the applicant must have considered she had worked additional hours beyond that of her agreed working hours being Monday to Thursday. I find that the applicant agreed for her salary to be reduced because the evidence is that when requested to confirm her hours for payroll purposes, she responded that her working hours were four days per week being Monday to Thursday.
- 30 Furthermore, the applicant declined the respondent's proposal to return to full-time hours which clearly shows the applicant was working less than full-time hours.
- 31 The applicant refers to *Wegener v The Trustee for Cottesloe Hotel Trust & the Trustee for Richmond Equity Fund* [2022] WAIRC 00156; (2022) 102 WAIG 280 (*Wegener*) as authority for finding that there was not a contractual variation effected. The facts differ in *Wegener* from those in this matter. Critical to the finding in *Wegener* is that the employee did not agree to a variation in his contract to reduce his hours of work and he specifically protested the proposal to reduce his hours of work on several occasions. In this matter, there is no evidence before me that the applicant declined in agreeing to a reduction in her hours of work. On the contrary, the evidence is that the applicant did agree to the change.
- 32 The applicant submits that *Benge* is authority for her contention that the respondent was not able to unilaterally change the terms of her contract of employment. The facts in *Benge* are that, unlike in this matter, the employees clearly objected to the

changes in the terms of their contracts of employment as implemented by their employer. At no time did the employees agree to the changes. In this matter, the applicant concedes she did agree to the changes in her hours of work and salary.

- 33 I find there was a variation to the Employment Contract made orally. The variation was certain, complete and there was consideration as the change affected both parties' obligations.

Was the Variation Required to be in Writing?

- 34 The applicant argues that despite her oral agreement to reduce her hours of work, she is entitled to payment at the full-time rate because any reduction in hours from that set out in her contract of employment required a variation to be in writing, and this had not occurred.

- 35 The applicant refers the Commission to clause 27.1 of the Employment Contract:

27.1 This letter of appointment may only be varied by written agreement between parties except as otherwise provided for in this letter.

- 36 The requirement for a variation to be in writing was considered by the Federal Court of Australia in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 (*GEC Marconi*):

217 (2) The principal cases in this country dealing with non-compliance with contractually imposed written modification clauses are those dealing with claims to be paid for extra work or services rendered under contracts which require written orders or written agreements for such works or services: *Liebe v Molloy* (1906) 4 CLR 347; see generally, *Halsbury's Laws of Australia*, vol 3(2), 65-1145. The conclusions to be drawn from the cases in this category are that (i) notwithstanding the writing requirement, it is open to the parties by express oral agreement or by contract implied from conduct to impose further or different rights and obligations on each other from those contained in the original contract: *Liebe v Molloy* at 353-355; *Commonwealth v Crothall Hospital Services (Aust) Ltd* (1981) 54 FLR 439 at 448; or (ii) that one party may so induce or encourage the other's assumption on which it relies that the relevant formal requirements need not be complied with, as to be estopped from later setting up those requirements: *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251. The relevant principle, for present purposes, was stated concisely by Ellicott J in the *Crothall Hospital* case in the following terms (at 449):

It is open to the parties to a written contract to vary it. This may be done in writing or, except where the contract is required by law to be evidenced in writing, by oral agreement. The agreement to vary may be express or implied from conduct.

(Emphasis added.) The common, often fatal, difficulty experienced by a party in seeking to make out a contract to vary has been the evidentiary one of proof of the contract itself: see *Liebe v Molloy*, above; *Trimis v Mina*, above at [64].

218 (3) For an alleged subsequent variation to be contractually effective notwithstanding non-compliance with the written modification requirement, it must itself otherwise satisfy the requirements of a valid contract, that is, "the terms of the arrangement must be certain, and ... there must generally be real consideration for the agreement": *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105; and see below, "Formation of a contract of variation".

- 37 In *Benge*, the Federal Circuit Court of Australia (FCCA) citing the English Court of Appeal in *Cantor Fitzgerald International v Callaghan & Ors* (1999) 2 All ER 411, found that remuneration provided for in employment contracts is a fundamental term and a reduction in remuneration constituted a breach or repudiation of contract. In the matter before them, the FCCA found that the employees did not affirm or consent to any contract of employment that varied the terms, and their continued employment entitled them to the benefit that the employer had purported to remove. A reduction in remuneration requires affirmation and something more in law than acquiescence.

- 38 The evidence in this matter, unlike in *Benge*, shows the applicant agreed to the respondent's proposed change in her hours of work and a corresponding decrease in remuneration on 14 November 2022. This was a variation of the Employment Contract agreed orally. That is, there was something more than acquiescence from the applicant. The applicant agreed to the change.

- 39 I note that the letter of variation to the existing contract confirming the discussion was settled by the respondent on 16 November 2022 and the respondent's evidence is that it was sent to the applicant using a digital mobile application. The applicant says she did not receive this letter, and I cannot find on the evidence before me that the applicant did receive the letter. However, as set out in *GEC Marconi* above, this written confirmation or agreement is not required to effect a variation to the Employment Contract.

- 40 In addition, the applicant did not merely acquiesce to a decision or direction of the respondent. The evidence is that the applicant expressly agreed and confirmed the change on several occasions.

- 41 Applying *GEC Marconi* I find that, despite clause 27.1 of the Employment Contract, a variation did not require that the change be in writing if both the applicant and respondent agreed to the change and intended for the change to be contractual.

- 42 I find the Employment Contract was varied and consequently, the applicant's hours of work were reduced to 30.4 hours per week and her salary was reduced commensurately. The applicant's claim for payment equivalent to 7.6 hours per week for 20 weeks between 14 November 2022 and 4 April 2023 is dismissed.

Payment for Additional Hours

- 43 The applicant claims payment for 80.5 hours of overtime or additional hours worked that had been 'logged' with the respondent and payment for 117 hours of overtime or additional hours worked but not 'logged' with the respondent.

44 In relation to working additional hours, the Employment Contract expressly provides for several relevant terms:

Clause 5. Remuneration

Clause 5.3 Your base salary will be deposited on a fortnightly basis, in arrears, into your nominated bank account. Your base salary covers all and any overtime, penalty rates or allowances you may be otherwise entitled to under any industrial instrument.

Clause 6 Working Hours

Clause 6.1 My Foodie Box is a seven day a week business and you may be required to work during any of these operating hours.

Clause 6.2 Your remuneration package includes payment for all hours you work for My Foodie Box. You agree to work at the times reasonably necessary for the requirements of your role, which may vary from time-to-time. As you agree to work the hours reasonably necessary to meet business requirements, rather than only specified hours, you agree to your hours of work being averaged over each 12-month period.

45 The Employment Contract clearly expresses that the working hours may vary and there may be a requirement to work on any day of the week. Clause 6.2 expressly states that the remuneration package, being the salary, is payment for all hours worked. Clause 5.3 expressly states that the base salary includes payment for any overtime, penalty rates or allowances under an industrial instrument.

46 The evidence shows that there was a practice of submitting a request for TOIL and/or unpaid overtime. The respondent submitted an extract from their 'Policies and Guidelines' document that sets out how overtime and additional hours are to be treated:

D. Overtime and additional hours

Overtime is work which is performed at the direction of the manager and which is in excess of your contracted hours of work. If you cannot for some reason work reasonable additional or overtime hours you must notify your Manager as soon as practicable with the reasons as to why. To comply with record keeping and overtime compensation requirements, we need a smooth procedure. This is the procedure that My Foodie Box follows:

1. Team members and their managers should always agree on the hours of overtime needed. Overtime should not exceed any legal limits and employees shouldn't end up working excessive hours. Team members and their managers should also agree on the type of compensation they get (time-in-lieu or additional paid working hours),
3. Team members and managers accurately record overtime.
4. Finance calculates overtime pay according to legal pay rates
5. Team members receive their overtime compensation in the next scheduled pay period if it has been agreed that team members receive additional pay for their overtime. Should team members select to receive time-in-lieu for their overtime, the latter should be taken within 3 months of accruing the time-in-lieu.

47 For a practice or policy to be a denied contractual benefit, I must find that the practice or policy is imported or incorporated into a contract of employment. The Employment Contract refers to the policies of the respondent:

4. Terms and conditions of employment

- 4.1 My Foodie Box Policies and Procedures manual and the National Employment Standards combine to form your minimum conditions of employment.
- 4.2 Upon commencement you will be provided with a copy of My Foodie Box Policies & Procedures manual.
- 4.3 An overview of the National Employment Standards of the Fair Work Act 2009 is contained in our policies and procedures.

23. Policies and Procedures

- 23.1. In addition to the terms and conditions contained in this letter of appointment, there are other policies and procedures that apply to your employment. These policies and procedures are formulated by My Foodie Box for the efficient and fair administration of employment and other business matters. You must follow My Foodie Box's policies and procedures (as amended from time to time).
- 23.2. You are required to be familiar with the content of all such policies, and to comply with their terms at all times. Any failure to do so may result in disciplinary action up to and including termination of employment. If you are uncertain of where these policies are located or what obligations they impose, you have an express obligation to raise this with your manager. Your manager will then provide you with, or direct you to, the required information.
- 23.3. To the extent that the policies describe benefits and entitlements for the Employee or impose any obligations on the Employer, these are discretionary in nature and are not intended to be contractual. The terms and conditions of your employment that are intended to be contractual are set out in this contract.
- 23.4. My Foodie Box may unilaterally introduce, vary, remove or replace policies at any time during the course of your employment.

- 48 Clause 23.3 makes clear that any benefit or entitlement contained in a policy but not in the Employment Contract, is not a contractual term.
- 49 Given an implied term cannot be inconsistent with an express term, I cannot find the practice and/or policy concerning overtime and additional hours is implied into the contract as set out in *B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 [283].
- 50 I find the compensation arrangements for working additional hours or overtime are not terms of the applicant's contract of employment.
- 51 As set out in *HotCopper*, a claimed benefit or entitlement **must be for a benefit under the contract of employment**. As the claim for overtime and additional hours are not claims under a contractual term, this element of the applicant's claim must fail.

Notice Payment

- 52 The applicant claims payment equivalent to two-weeks' salary for notice of termination of employment. The applicant contends that the respondent provided only two-weeks' notice when the respondent terminated her employment, whereas the terms of the Employment Contract entitle her to four-weeks' notice.
- 53 The respondent contends that the notice period of two weeks has been paid in accordance with the requirements of the *Fair Work Act 2009* (Cth) (**FW Act**). The respondent submits that it used the Fair Work Pay and Conditions Calculator Tool to calculate the termination payment.
- 54 The contractual entitlements and obligations between the parties concerning termination of employment and notice is found in clause 15 of the Employment Contract:

15. Termination of Employment

15.1. You will be engaged on a fortnightly basis terminable by the following table:

Employees Continuous Service	Period of Notice
Less than 1 year	2 weeks
1 and less than 3 years	4 weeks*
3 and less than 5 years	5 weeks*
5 years and over	8 weeks*

*If you are over 45 years of age and have had at least 2 years continuous service, you will receive one (1) extra week notice.

- 55 The applicant worked for the respondent for a period of more than one year and less than three years. In these circumstances, the Employment Contract clearly provides for four-weeks' payment on notice of termination.
- 56 Section 117 of the FW Act provides for the minimum notice that must be paid on termination. Employers and employees are free to agree on entitlements that are more beneficial to the employee and are above the statutory minimum.
- 57 In this matter, the applicant and the respondent agreed to a greater period of notice, being four weeks as reflected in clause 15 of the Employment Contract.
- 58 The applicant has already received two-weeks' salary by way of notice paid in her final pay. Therefore, the denied benefit is the balance of the four weeks specified in the Employment Contract and is two-weeks' pay.
- 59 I find that the benefit owed to the applicant is two weeks' pay calculated on the four days per week, I will order the respondent pay the applicant the equivalent of two weeks' pay being a payment of \$6,153.72 gross.

Redundancy Payment

- 60 On 21 March 2023, the applicant was made redundant and paid out entitlements based on a contract of employment of four days per week.
- 61 The applicant claims that the respondent failed to pay the required redundancy payment. The application did not specify an amount nor the basis of the claim. However, the applicant's claim is set out in an email to the respondent on 3 April 2023 when she emailed the respondent. With respect to the redundancy calculation rate, the email stated:

4 weeks redundancy pay.

This amount is correct, however, as discussed with you at the time you based this calculation on the 4 days a week that the business requested, in an effort to save costs. As we have discussed, I was consistently completing more than a FTE week due to the business requirements which I completed in good faith with the assumption that the business would track and compensate, also no contract was ever provided to me to formalise the 4 days a week as such my original contract of FT is currently still active and is what the calculation for my entitlements payouts should be calculated on.

- 62 I have understood the claim to be one for a payment for the equivalent of the difference between that calculated for five days per week and not four days per week. This claim I understand to be founded on the assertion that the Employment Contract was not validly varied.
- 63 The Employment Contract provides the following provision in respect of redundancy:

16. Redundancy

16.1. My Foodie Box will adhere to the National Employment Standards (as amended) at the time a redundancy is necessary.

- 64 Further, the Employment Contract refers to the National Employment Standards at Clause 4:
4. Terms and conditions of employment
 - 4.1 My Foodie Box Policies and Procedures manual and the National Employment Standards combine to form your minimum conditions of employment.
- 65 Clause 4 of the Employment Contract merely states that the respondent will adhere to the National Employment Standards. This express term does not import the National Employment Standard provisions into the contract. Further, the express term merely notes that the respondent will comply with the National Employment Standards and that these will be the minimum.
- 66 This Commission lacks the necessary jurisdiction to enforce compliance with the National Employment Standards.
- 67 I have found that the Employment Contract was validly varied to reduce the applicant's hours to four days per week.
- 68 The issues raised by the applicant related to her claim for working hours necessary to meet business requirements are addressed later in this decision.
- 69 The respondent has not denied the applicant a contractual benefit concerning redundancy and I will dismiss this element of the applicant's claim.

Unjust Enrichment and Quantum Meruit

- 70 The applicant argues that she is entitled to be paid for the work performed. The applicant says she had understood that a reduction in working hours would have afforded her the opportunity to be able to attend to personal matters on Fridays, the day she was not rostered to work.
- 71 The applicant's evidence is that several employees were terminated at the time the applicant was requested to reduce her hours. Other employees were also asked to reduce their working hours. The applicant says the work previously undertaken by these employees was distributed amongst remaining employees including herself. The applicant submits that her workload was not reduced and therefore she continued to work on Fridays, weekends and other days outside of business hours.
- 72 The applicant contends that the demands of the business operations frequently required her to work an additional 12 to 16 hours per week and submits that this situation was contrary to the initial agreement where overtime was expected to be minimal and reasonable.
- 73 The applicant submitted various email exchanges with other staff and the Chief Executive Officer to evidence that she had continued to work on Fridays and at other times.
- 74 The applicant says that some business processes required to her to work outside of her rostered hours and that her employer had knowledge or ought to have known of the hours the applicant was working and the hours required to complete the work.
- 75 The applicant claims that she worked beyond her contractual terms without receiving adequate compensation and refers to clause 6.2 of the Employment Contract. That is, the averaging of hours worked over a 12-month period. The applicant says that this is unlawful because the FW Act only permits hours to be averaged over a maximum period of 26 weeks.
- 76 On 27 March 2023, the applicant submitted a written request for payment of 80.5 hours previously submitted to the respondent as logged hours (Exhibit A19). On 3 April 2023, the applicant submitted a further written request for payment of an additional 65.2 hours worked for early starts undertaking 'reconciliation' and 'covering CS' (Exhibit A25). The letter dated 3 April 2023 also includes a statement 'Based on this completed 117 hrs of additional hours' and a summary of the components of the claim for payment of additional hours '3 weeks TOIL (based on 5 days)' (Exhibit A25). It is not clear how the additional hours were calculated.
- 77 The respondent's evidence is that some projects and business processes were ceased at the time of the reduction in staff employed and some remaining staff reduced their hours of work. The respondent says that the applicant was not directed to perform tasks outside of her hours of work. Further, the respondent says that the applicant worked on non-working days when she was not required and that this was a choice she made.
- 78 The respondent's uncontested evidence is that the applicant was paid for \$3,076.92 for 38 additional hours worked on 5 April 2023.
- 79 The Employment Contract at clause 6.2 provides for hours to be averaged over a 12-month period:

6.2 Your remuneration package includes payment for all hours you work for My Foodie Box. You agree to work at the times reasonably necessary for the requirements of your role, which may vary from time to time. As you agree to work the hours reasonably necessary to meet business requirements, rather than only certain specified hours, you agree to your hours of work being averaged over each 12 month period.

- 80 The parties agree that the applicant was not covered by an award. Therefore, s 64 of the FW Act applies:

64 Averaging of hours of work for award/agreement free employees

- (1) An employer and an award/agreement free employee may agree in writing to an averaging arrangement under which hours of work over a specified period of not more than 26 weeks are averaged. The average weekly hours over the specified period must not exceed:
 - (a) for a full-time employee—38 hours; or
 - (b) for an employee who is not a full-time employee – the lesser of:
 - (i) 38 hours; and
 - (ii) the employee's ordinary hours of work in a week.
- (2) The agreed averaging arrangement may provide for average weekly hours that exceed the hours

referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

- 81 In *Dorsch v HEAD Oceania Pty Ltd* [2024] FCA 162 at [336], the Federal Court of Australia considered the factors that may be utilised to decide whether hours of work are reasonable:

... [A]n employee may establish that he or she was *required* to work a certain number of hours if he or she gives evidence of the work he or she was directed by her employer to complete a task and the impossibility of completing it other than beyond ordinary working hours. However, whether there was such a requirement may depend upon other factors including, without being exhaustive, the employee's seniority and level of autonomy within the enterprise to set his or her own working hours and the terms of contract, relevant industrial instrument and any workplace guideline. ...

- 82 Although, clause 6.2 of the Employment Contract is not compliant with s 64(1) of the FW Act, the applicant's submissions do not address what this means for the terms of the Employment Contract. Even if I concluded that this clause was voided, being contrary to the FW Act, this does not trigger payments of overtime or TOIL.
- 83 The terms of the Employment Contract must contain a provision for payment of TOIL or overtime for the Commission to issue an order under s 29(1)(d).
- 84 Clause 6.2 of the Employment Contract provides for the applicant to undertake additional hours that are reasonable for the applicant's role and reasonably necessary to meet business requirements. There is insufficient evidence before me to make a finding that any hours worked are additional to those reasonably necessary for the requirements of the applicant's role, nor reasonably necessary to meet business requirements. There is insufficient evidence before me that enables the Commission to assess whether any additional hours worked were reasonable or not.
- 85 The applicant contends the respondent was unjustly enriched by her continued performance of her duties and taking up additional duties as a consequence of the reductions in staffing. The applicant submits that that the Commission ought to apply the principles of unjust enrichment and quantum meruit and refers to *Roude v Helwani* [2020] NSWCA 310 (*Roude*) in support of her claim.
- 86 *Roude* is a decision of the New South Wales Supreme Court concerning a builder's claim for payment on a quantum meruit basis and whether the builder was required to lead evidence of the market rate for the work performed or whether the invoices submitted were sufficient. 'Quantum meruit' essentially means what is the reasonable value of services.
- 87 Importantly in *Roude*, there was no written contract between the parties. In this matter, the applicant's contract of employment is written and for the claim to succeed, it is necessary to find a contractual term either expressly provided, or a term that is implied into the contract.
- 88 In *Levi Rohan v S&DH Enterprises PTY LTD* [2023] WAIRC 00076; (2023) 103 WAIG 174 (*Rohan*), the Full Bench considered the issue of a claim for unpaid reasonable remuneration in an application for a benefit under a contract pursuant to s 29(1)(d) of the *Industrial Relations Act 1979* (WA). The Full Bench concluded that the Commission may apply quantum meruit to calculate the value of a remedy in circumstances where there is a benefit under a contractual term which has been denied:

[70] Despite the breadth of the meaning of 'benefit', which both the Full Bench and the Industrial Appeal Court have consistently adopted, and which includes in its ordinary meaning 'anything that is for the good of a person or thing', it is the case that a claim for a denied contractual benefit advanced under s 29(1)(b)(ii) must involve a benefit to which an employee is 'entitled' 'under' a contract of employment. To be 'entitled', in a contractual sense, to a benefit, means having a legal claim of right, in terms of enforceable legal rights and obligations: *Perth Finishing College v Watts* (1989) 69 WAIG 2307 per Sharkey P at 2313, citing *Leontiaides v F. T. Manfield Pty Ltd* [1980] FCA 49; (1980) FLR 193; *Industrial Relations Bureau v Hassan* (1982) 2 IR 151 and *Poulos v Waltons Stores (Interstate) Ltd* [1986] FCA 159; (1986) 10 FCR 429. For a benefit as claimed, as an entitlement, to be advanced, it must be 'under' a contract of employment, in the sense that it must arise 'by virtue of', or 'pursuant to' (in the sense that the benefit is in accordance with or consequent and conformable to) the relevant contract: *Perth Finishing College* at 2315.

[74] It is difficult to see how a *claim* under s 29(1)(b)(ii), for a 'reasonable sum' or for 'reasonable remuneration', however it may be expressed, not anchored in a term of a contract of employment, and which now, as accepted on the leading authorities, has no connection with a contract as a quasi-contractual or implied contractual right, but which is a remedy at law more generally based on principles of unjust enrichment, and which relies for its possible success as in this case, on the impugning of a contract of employment or a part of it, could satisfy the statutory criteria under s 29(1)(b)(ii). Rather, it seems that the appellant's claim at first instance in this respect was one involving stepping outside of the contract of employment and not attempting to enforce it, in the sense discussed in the cases above, but attempting to strike down its terms, to then provide a foundation for the relief he then claimed, as a consequence. This does not sit comfortably with the statutory scheme for the bringing of such claims under s 29(1)(b)(ii) of the *Act* (See also *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 per Kenneth Martin J at [117] to [122], in a different statutory context).

[75] The situation may be different, for example, in a case where an employee brings a claim for a denied contractual benefit under s 29(1)(b)(ii), which is anchored in a term of the contract, which contract is either extant or no longer on foot. The employer disputes the claim on the ground that the relevant contractual provision is, on some basis, unenforceable, despite having received the benefit of the employee's labour and skill during the period of the employment under the contract. It may be the case that in those circumstances, if the Commission found the relevant contract term to be unenforceable, it would be empowered, as a matter of equity and good conscience under s 26(1)(a) of the *Act*, and applying unjust enrichment principles, to grant a remedy, as part of

enquiring into and dealing with the industrial matter under s 23(1) of the *Act*.

- [76] The bringing of *claims* to recover contractual benefits is one thing. How the Commission deals with such claims under s 23(1), in terms of a *remedy*, having regard to the objects of the *Act* in s 6 and the terms of s 26(1)(a) and 26(2), would appear to be another matter. We apprehend that the decisions of the Court in *HotCopper* and *Matthews* in particular, are concerned principally with how the scope of the Commission's statutory powers to 'enquire into and deal with' such industrial matters, may be applied, in the granting of a remedy. How the Commission, once a claim to recover an alleged denied contractual benefit is validly made, then determines the claim, is a matter for the Commission according to the facts and circumstances of the case, and opens the possibility of alternative remedies, where the claimed denied contractual benefit cannot be awarded in specie. This may involve the recovery of a debt, an award of damages in lieu of the benefit denied, or an award of a sum calculated on a quantum meruit. This is as long as the Commission, in granting a remedy, does no more than resolve the industrial controversy before it: *Welsh* (1982) 62 WAIG 2708 per O'Dea P at 2709.
- 89 Applying *Rohan*, the question to be first decided is whether the applicant's contract of employment provided for payment of additional hours worked.
- 90 The applicant agrees that her contract of employment provides for an 'all-inclusive salary' which compensates her for all hours worked.
- 91 The applicant's email to the respondent dated 3 April 2023 refers to the applicant's assumption that the respondent would track all hours worked by the applicant and pay her for these hours (Exhibit A25).
- 92 Restitution claims for overtime and unjust enrichment are discussed in Irving M, *The Contract of Employment* (2nd Ed, 2019) 6.31:
- ...It is suggested that in any claim based on unjust enrichment for time worked the key issue is – what is the quantity of service required to earn the remuneration under the contract? It is suggested that the following taxonomy of possibilities may be apposite. First, when a contract specifies that the contractual rate covers all hours worked then no restitutionary claim arises, as the contract regulates the remuneration for 'overtime' hours. This contractual intent can be exhibited in various ways. One is to specify the remuneration is an 'all in rate' or includes an amount for any overtime. Another is a clause that stipulates the employee is dedicating all of his or her working time to the employer under the contract. Or possibly a clause that states 'reasonable hours of overtime will be worked' implicitly in exchange for the stated remuneration. Clauses of these types impliedly specify the employee is being paid the set remuneration for all of the service, not just for 38 hours per week.
- 93 The applicant's assumption that the hours worked which were more than her agreed hours per week would be recompensed is not sufficient. This assumption was not founded on a term of the contract of employment agreed with the respondent.
- 94 The applicant has not met the first condition required to sustain a claim for compensation, that is a contractual term which has been denied, and the Commission lacks the necessary jurisdiction to make the order sought. As considered in *Rohan*, the applicant needs to point to a term of the Employment Contract to first establish a claim for payment of TOIL or hours in excess of those that are reasonable. Once this has been established, the Commission may apply quantum meruit to calculate the value of any payment owed to the applicant. The issues decided in *Roude* do not assist the applicant where the benefit under a term of the contract has not been established.
- 95 The applicant submits *Simone Jade Stewart v Next Residential* [2016] WAIRC 00756; (2016) 96 WAIG 1354 (*Next Residential*) in support of her contention that the salary clause fails to specify the entitlements which were offset. I understand that the applicant argues the contract is uncertain regarding the salary clause or the terms concerning hours of work.
- 96 In *Next Residential*, the applicant argues that the court ruled a broad undefined all-inclusive salary clause, was insufficient if it did not clearly outline how the employee's entitlements were being accounted for. This matter concerns the question of whether the clause in the contract of employment ousted the employee's entitlements under an award.
- 97 The Honourable Industrial Magistrate G. Cicchini found at [19]:
- The requirement for specificity is crucial because a worker must be able to compare his or her annual salary to award entitlements so that the no disadvantage test can be properly considered.
- 98 *Next Residential* is not relevant to the considerations of the Commission in this matter. The applicant's claim is not that the respondent offset an entitlement for overtime or additional hours arising under an award or another industrial instrument. The question to be decided in this matter does not entail the offset of one entitlement against another. The terms of the applicant's contract of employment are that the applicant agreed to work additional hours for an 'all-inclusive' salary.
- 99 The terms of the Employment Contract are clear and the remuneration is a salary paid fortnightly for all hours worked. The applicant's contract of employment provides for a rate that covers all hours worked and is similar to the type of contractual term referred to in [92] above. The Employment Contract regulates the remuneration for any additional or 'overtime' hours worked. The contractual term is not uncertain.
- 100 Given the absence of a contractual term that entitles the applicant to payment, in addition to her salary, for all the hours worked, the applicant's claim for a payment calculated on the basis of quantum meruit cannot succeed. I will dismiss this element of the claim.

Conclusion

- 101 For reasons set out above I will order the respondent pay the applicant two-weeks salary being \$6,153.72 gross.

2025 WAIRC 00696

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JESSICA MCCARTHY

APPLICANT

-v-

MY FOODIE BOX LIMITED

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 13 AUGUST 2025

FILE NO/S

B 67 OF 2023

CITATION NO.

2025 WAIRC 00696

Result Order for Balance of Notice Period Remaining
Application Dismissed

Representation**Applicant**

Ms J McCarthy

Respondent

Ms M Hughes & Mr B Hughes

Order

HAVING HEARD from Ms McCarthy on her own behalf and Ms Hughes and Mr Hughes on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT the respondent pay the applicant two-weeks salary being \$6,153.72 gross within 7 days of the date of this order.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2025 WAIRC 00691

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JOSHUA PETER LODGE

APPLICANT

-v-

RED DUST HOLDINGS

RESPONDENT**CORAM**

COMMISSIONER T KUCERA

DATE

MONDAY, 4 AUGUST 2025

FILE NO/S

U 56 OF 2025

CITATION NO.

2025 WAIRC 00691

Result Application dismissed

Representation**Applicant**

Joshua Peter Lodge

Respondent

Red Dust Enterprises Pty Ltd

Order

WHEREAS the applicant on 8 May 2025 filed a *Form 2 – Unfair Dismissal Application* pursuant to s 29(1) (a) of the *Industrial Relations Act 1979* (**application**);

AND WHEREAS the respondent on 16 June 2025 filed a *Form 2A – Employer Response to Unfair Dismissal Application* in which it objected to the application on the ground that it was a national system employer (**jurisdictional objection**);

AND WHEREAS the Commission on 3 July 2025 convened a conciliation conference, to hear from the parties on the jurisdictional objection (**conference**);

AND WHEREAS the Commissioner noted the Commission had sent the applicant a Notice of Listing to his home and email addresses;

AND WHEREAS the Commissioner had noted the applicant did not answer his telephone when called and it appears the applicant did not attempt to contact the Commission to request his unfair dismissal claim be moved to a different date or to advise whether he intended on proceeding with the application;

AND WHEREAS On 3 July 2025, the applicant did not appear at the Commission for the conference and was not contactable by telephone;

AND WHEREAS representatives for the Red Dust Enterprises Pty Ltd (**respondent**) appeared at the conference by ZOOM;

AND WHEREAS because of the applicant's failure to appear at the Commission, the Commissioner was unable to deal with the application whether by conciliation or otherwise;

AND WHEREAS it appears the respondent is a 'national system employer' and the applicant has likely filed his unfair dismissal claim in the wrong jurisdiction;

AND WHEREAS the Commissioner has determined the appropriate course would be for the applicant to request his unfair dismissal claim be listed for a 'Show Cause Hearing', at which time the applicant would be given an opportunity to explain why the Commission should continue to deal with his unfair dismissal claim (**Show Cause Hearing**);

AND WHEREAS the Commissioner advised the applicant in writing that if he did not request a Show Cause Hearing by **Wednesday, 23 July 2025**, his unfair dismissal claim would be dismissed;

AND WHEREAS the Commission has heard nothing further from the applicant in relation to the application;

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

THAT the application be dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2025 WAIRC 00693

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MARK CROWLEY

APPLICANT

-v-

RESOURCES DEVELOPMENT GROUP/ CENTRALS

RESPONDENT

CORAM COMMISSIONER T KUCERA

DATE WEDNESDAY, 13 AUGUST 2025

FILE NO/S U 123 OF 2024

CITATION NO. 2025 WAIRC 00693

Result Application dismissed

Representation

Applicant Mr M Crowley

Respondent Mr A Ellison

Order

WHEREAS the applicant on 20 November 2024 filed a *Form 2 – Unfair Dismissal Application* pursuant to s 29(1) (a) of the *Industrial Relations Act 1979* (**application**);

AND WHEREAS the respondent on 18 December 2024 filed a *Form 2A – Employer Response to Unfair Dismissal Application* in which it objected to the application on the ground that it was a national system employer (**jurisdictional objection**);

AND WHEREAS it appeared the respondent was a 'national system employer' and the applicant had likely filed his unfair dismissal claim in the wrong jurisdiction;

AND WHEREAS the Commissioner has given the applicant an opportunity to seek legal advice in relation to the jurisdictional objection and to advise whether he intended to proceed with or discontinue the application;

AND WHEREAS the Commission has heard nothing further from the applicant in relation to the application;

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

THAT the application be dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

STOP BULLYING/SEXUAL HARASSMENT—

2025 WAIRC 00445

STOP BULLYING AND SEXUAL HARASSMENT ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KERRY LOUISE FERGUSON

APPLICANT

-v-

SHIRE OF MT MARSHALL, AARON WOOTON

RESPONDENT

CORAM COMMISSIONER T KUCERA

DATE FRIDAY, 25 JULY 2025

FILE NO/S S 7 OF 2024

CITATION NO. 2025 WAIRC 00445

Result	Application dismissed
Representation	(On the papers)
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the applicant on 10 October 2024, made an application pursuant to s 51BM of the *Industrial Relations Act 1979* (**application**);

AND WHEREAS the Commission on 31 October 2024, and 19 December 2024 held a series of conciliation conferences in relation to the application;

AND WHEREAS the Commission was advised of the applicant's passing on 24 February 2025;

AND WHEREAS on 31 March 2025 the Commission wrote to the applicant's next of kins to advise that due to the applicant's passing, the proceedings the subject of the application have abated, with the result that the application will be dismissed (**proposed order**);

AND WHEREAS the Commission in the same correspondence, gave the applicant's next of kins until 28 April 2025 to seek legal advice in relation to and/or an opportunity to be heard and/or to object to the proposed order;

AND WHEREAS the applicant's next of kins did not object to the making of the proposed order by 28 April 2025 and the Commission has not since this date, received any further correspondence from the applicant's next of kins in relation to the proposed order;

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

THAT the application be dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

UNIONS—Matters dealt with under Section 66

2025 WAIRC 00438

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 00438
CORAM : CHIEF COMMISSIONER S J KENNER
HEARD ON THE PAPERS : WRITTEN SUBMISSIONS AND AFFIDAVIT FILED 23 JULY 2025
DELIVERED : THURSDAY, 24 JULY 2025
FILE NO. : PRES 1 OF 2022
BETWEEN : GREGORY BUSSON
 Applicant
 AND
 THE COAL MINERS' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA
 Respondent

Catchwords : Industrial Law (WA) - Application under s 66 - Interim Delegate Board previously established - Rule alteration application made - Resolution required to authorise application - Further Aggregate meeting held - Quorum requirements not met - Waiver granted

Legislation : *Industrial Relations Act 1979* (WA) s 66, s 66(2), s 26(1)(a), s 26(1)(c)

Result : Order issued

Representation:

Counsel:

Applicant : Ms A McNamara of counsel
Respondent : Ms A McNamara of counsel

Solicitors:

Applicant : Slater and Gordon Lawyers
Respondent : Slater and Gordon Lawyers

Case(s) referred to in reasons:

Busson v The Coal Miners Industrial Union of Workers of Western Australia: [2022] WAIRC 00170; (2022) 102 WAIG 307 [2022] WAIRC 00178; (2022) 102 WAIG 309

Reasons for Decision

Application and evidence in support

- 1 As a result of proceedings before me under s 66 of the *Industrial Relations Act 1979* (WA) I made orders on 4 May 2022, establishing an Interim Delegate Board of the respondent to enable it to continue to operate while amendments to the respondent's Rules were being progressed: *Busson v The Coal Miners Industrial Union of Workers of Western Australia*: [2022] WAIRC 00170; (2022) 102 WAIG 307; [2022] WAIRC 00178; (2022) 102 WAIG 309. Further orders have subsequently been made, extending the operation and effect of the Interim Delegate Board, with my most recent order dated 12 June 2025, extending its operation to 30 September 2025: [2025] WAIRC 00350.
- 2 On 21 February 2025, an Aggregate Meeting of the respondent's members was convened by the Secretary of the respondent, Mr Busson. At the meeting, a majority of members present passed a resolution in support of the proposed alterations to the Rules. Subsequently, on 21 March 2025, the respondent made an application to the Commission (APPL 15 of 2025), to alter its Rules in accordance with the resolution passed. However, in determining the matter, the Registrar informed the respondent that a further resolution of members of the respondent was required, to authorise the application to the Commission.
- 3 As a result, a further Aggregate Meeting of members of the respondent was held on 16 June 2025. Arising from that meeting, the members present granted authority to the Interim Delegate Board to take all necessary steps to make an application to the Commission for the alteration of the Rules. Under r 10 of the respondent's Rules, a quorum for an Aggregate Meeting is 50 per cent of the respondent's membership plus one. As at the date of the meeting, the respondent's membership was 221. In accordance with an affidavit sworn by the Secretary of the respondent Mr Busson on 23 July 2025, Mr Busson stated that 93 members attended the Aggregate Meeting and the following resolution was passed:

The members present at the Coal Miners' Industrial Union of Workers of Western Australia Special AGM held on Monday 16th June 2025 hereby approve the rule amendments that the members were previously given notice of; and the

members present authorise the Interim Delegate Board to take all necessary steps to make an application to the Western Australian Industrial Relations Commission and to have the proposed rule amendments registered.

- 4 Mr Busson further stated in his affidavit that although the quorum requirement for the Aggregate Meeting was not met, he decided to continue with the meeting given the numbers attending was close to the quorum requirement. Mr Busson also noted that he received 30 to 38 apologies from members who were unable to attend the meeting. Mr Busson stated that it is often difficult for members to attend meetings, given their various shift work patterns.
- 5 Mr Busson's evidence was that another reason he decided to proceed with the Aggregate Meeting, despite the quorum requirement not having been met, was the fact that a high number of members did in fact attend. He also referred to the resolution passed at the Aggregate Meeting on 21 February 2025, attended by 116 members, which passed a resolution that the proposed Rules amendments proceed. Mr Busson's evidence was that this demonstrated the members' support for the alterations to the Rules.
- 6 The applicant now seeks an order under s 66 of the *Act* in the following terms:
1. The Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders that the quorate requirements in Rule 10 of the Coal Miners' Industrial Union of Workers of Western Australia's Union Rules, be waived in respect of the Aggregate Meeting held on 16 June 2025 in relation to the following motion:

The members present at the Coal Miners' Industrial Union of Workers of Western Australia Special AGM held on Monday 16th June 2025 hereby approve the rule amendments that the members were previously given notice of; and the members present authorise the Interim Delegate Board to take all necessary steps to make an application to the Western Australian Industrial Relations Commission and to have the proposed rule amendments registered.
- 7 In written submissions in support of the orders sought, the applicant contended that in light of the affidavit of Mr Busson, and the recent history of the matter, then it was reasonable in the circumstances, to seek a waiver of the quorum requirements of r 10, in order that the clear wishes of the membership of the respondent to have the Rules altered, can be given effect. It was further submitted that under s 66 of the *Act*, the Chief Commissioner has the jurisdiction and power to make the order sought.

Consideration

- 8 The powers of the Chief Commissioner under s 66(2) of the *Act* are very broad. They enable me to 'make such order or give such directions relating to the rules of the organisation, their observance or non-observance or the manner of their observance, either generally or in the particular case, as the Chief Commissioner considers to be appropriate...'. In my view, the order sought by the applicant is within my powers under s 66(2). Having regard to the evidence of Mr Busson and the recent history of the matter, and the submissions in support, in my opinion it would be appropriate and consistent with ss 26(1)(a) and (c) of the *Act*, for an order to be made waiving the quorum requirement of r 10 of the respondent's Rules for the Aggregate Meeting held on 16 June 2025. This will enable effect to be given to what is the clear will of the membership of the respondent, that the alterations to the Rules be submitted to the Registrar for her approval.
- 9 Accordingly minutes of proposed order now issue.

2025 WAIRC 00446

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GREGORY BUSSON

APPLICANT

-v-

THE COAL MINERS' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA

RESPONDENT

CORAM

CHIEF COMMISSIONER S J KENNER

DATE

FRIDAY, 25 JULY 2025

FILE NO/S

PRES 1 OF 2022

CITATION NO.

2025 WAIRC 00446

Result Order issued

Representation

Applicant Ms A McNamara of counsel

Respondent Ms A McNamara of counsel

Order

This matter having come on for hearing before me on the papers and having heard Ms A McNamara of counsel on behalf of the applicant and the respondent and reasons for decision having been delivered on 24 July 2025, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT in relation to the Aggregate Meeting of members of the respondent held on 16 June 2025 the quorum requirement in rule 10 of the respondent's Rules be and is hereby waived.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

CORRECTIONS—

2025 WAIRC 00415

DEPARTMENT OF EDUCATION (SCHOOL SUPPORT OFFICERS) CSA AGREEMENT 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

APPLICANT

-v-

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT**CORAM**

COMMISSIONER C TSANG

DATE

FRIDAY, 11 JULY 2025

FILE NO.

AG 27 OF 2025

CITATION NO.

2025 WAIRC 00415

Result	Correcting Order issued
Representation	On the papers
Applicant	Mr S Dane
Respondent	Ms S Zuvelek

Correcting Order

WHEREAS the *Department of Education (Schools Support Officers) CSA Agreement 2024 (Agreement)* was registered by the Commission's order [2025] WAIRC 00371 on 19 June 2025;

AND WHEREAS on 7 July 2025, the parties identified the unintentional omission of *Schedule 3 – Remote and Isolated Locations* from the Agreement and requested the Commission to issue an order correcting the Agreement to include the Schedule 3 that was attached to the agreement made between the parties and filed in the Commission on 4 April 2025 (**Schedule 3**);

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

THAT the *Department of Education (Schools Support Officers) CSA Agreement 2024* be corrected by inserting Schedule 3.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2025 WAIRC 00453

OVIS COMMUNITY SERVICES ENTERPRISE AGREEMENT 2025WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PAT THOMAS HOUSE INC.**PARTIES****APPLICANT**

-v-

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES
UNION OF EMPLOYEES**RESPONDENT****CORAM** COMMISSIONER C TSANG
DATE TUESDAY, 29 JULY 2025
FILE NO. AG 25 OF 2025
CITATION NO. 2025 WAIRC 00453

Result Direction issued
Representation
Applicant Mr S Farrell
Respondent Mr P Cecchini

Direction

WHEREAS at a Directions Hearing on 25 June 2025, the Commission issued Directions ([2025] WAIRC 00382) programming 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**) for determination as a preliminary issue;

AND WHEREAS on 23 July 2025, the applicant filed a *Form 1A – Application* requesting an extension of time to comply with Direction 2 of the Directions issued on 25 June 2025 and proposed a corresponding extension of time for the respondent to comply with Direction 3 of the Directions issued on 25 June 2025;

AND WHEREAS on 29 July 2025, the respondent advised that it consents to the Directions being amended as sought by the applicant;

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

THAT the time for compliance with Directions 2 and 3 of the Directions issued on 25 June 2025 be extended as follows:

1. THAT the applicant file **by Friday, 29 August 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.
2. THAT the respondent file **by Friday, 12 September 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.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00462

APPLICATION FOR AN ENTERPRISE ORDER PURSUANT TO SECTION 42IWESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS**PARTIES****APPLICANT**

-v-

CITY OF CANNING, WESTERN AUSTRALIAN MUNICIPAL, CLERICAL AND SERVICES
UNION (WASU), THE LOCAL GOVERNMENT RACING AND CEMETERIES EMPLOYEES
UNION (LGRCEU)**RESPONDENTS****CORAM** SENIOR COMMISSIONER R COSENTINO
DATE FRIDAY, 1 AUGUST 2025
FILE NO/S APPL 33 OF 2025
CITATION NO. 2025 WAIRC 00462

Result	Interlocutory application granted
Representation	
Applicant	Mr O Fagir of Counsel with Mr Thomas Meagher on behalf of the CFMEUW
Second Respondent	Mr C Beetham of Counsel on behalf of the City of Canning
Third Respondent	Mr C Fogliani of Counsel on behalf of WASU
Fourth Respondent	Mr K Trainer for LGCREU

Order

THE Commission, pursuant to the powers conferred under s 27(1) of the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the proceedings be adjourned pending the determination of AG 9 of 2025.
2. THAT there be liberty to apply.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2025 WAIRC 00460

DISPUTE RE INJURY OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
WESTERN AUSTRALIAN POLICE UNION OF WORKERS

PARTIES**APPLICANT**

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 1 AUGUST 2025
FILE NO. C 15 OF 2025
CITATION NO. 2025 WAIRC 00460

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

Direction

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

1. THAT the question of whether the Commission has the necessary jurisdiction to conciliate and arbitrate this application be determined as a preliminary matter;
2. THAT the respondent's Form 1A Application filed on 26 May 2025 and served on 27 May 2025 be the respondent's submissions;
3. THAT the applicant file and serve any written outline of submissions by no later than 18 September 2025;
4. THAT the respondent file and serve any written outline of submissions in reply by no later than 2 October 2025;
5. THAT the hearing be conducted on the papers unless one or both parties request a hearing within 7 days of the respondent's submissions in reply having been filed and served; and
6. THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2025 WAIRC 00434

**APPEAL AGAINST A DECISION OF THE COMMISSION
IN MATTER NUMBER U 73 OF 2024 GIVEN ON 19 MAY 2025**
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

AJAH ABUY

APPELLANT

-v-

TOWN OF PORT HEDLAND

RESPONDENT**CORAM**

FULL BENCH

CHIEF COMMISSIONER S J KENNER

COMMISSIONER T B WALKINGTON

COMMISSIONER T KUCERA

DATE

WEDNESDAY, 23 JULY 2025

FILE NO/S

FBA 6 OF 2025

CITATION NO.

2025 WAIRC 00434

Result Order issued**Representation****Appellant** Not Applicable**Respondent** Not Applicable*Order*

The Full Bench, having regard to the application by the appellant to extend the time for service of the appeal book in the herein appeal, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the time for service of the appeal book in the herein appeal be and is hereby extended to 25 June 2025.

By the Full Bench
(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2025 WAIRC 00690

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 10 OF 2024

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPELLANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT**CORAM**

MITCHELL J

SEAWARD J

SMITH J

DATE

TUESDAY, 12 AUGUST 2025

FILE NO/S

IAC 1 OF 2025

CITATION NO.

2025 WAIRC 00690

Result Order Issued**Representation****Appellant** Mr N D Ellery as instructed by Slater and Gordon**Respondent** Mr J M Carroll as instructed by the State Solicitor's Office

Order

1. By 4 pm on 22 August 2025 the respondent may file and serve supplementary written submissions in relation to the operation of clause 79.3 of the 2020 Industrial Agreement.
2. By 4 pm on 29 August 2025 the appellant may file and serve supplementary written submissions in relation to the operation of clause 79.3 of the 2020 Industrial Agreement.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.**2025 WAIRC 00683****APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 10 OF 2024**

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPELLANT**-v-**

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT**CORAM**

MITCHELL J

DATE

MONDAY, 11 AUGUST 2025

FILE NO/S

IAC 1 OF 2025

CITATION NO.

2025 WAIRC 00683

Result

Programming Order Issued

Order

1. The appellant be granted leave to file a substituted List of Legal Authorities by 11 August 2025.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.**2025 WAIRC 00449****APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 27 DECEMBER 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JEAN-PIERRE CLEMENT

APPLICANT**-v-**

DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION

RESPONDENT**CORAM**

COMMISSIONER C TSANG

DATE

MONDAY, 28 JULY 2025

FILE NO.

PSAB 3 OF 2025

CITATION NO.

2025 WAIRC 00449

Result

Direction issued

Representation**Applicant**

Mr J P Clement (on his own behalf)

Respondent

Mr M McIlwaine (of counsel)

Direction

HAVING heard from Mr J P Clement on his own behalf and Mr M McIlwaine (of counsel) on behalf of the respondent, the Public Service Appeal Board pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the Directions issued on 17 June 2025 ([2025] WAIRC 00366) 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 Monday, 7 July 2025**.
7. THAT the respondent file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Monday, 4 August 2025**.
8. THAT the parties notify the Chambers of the Chair **by Monday, 11 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 Monday, 11 August 2025**.
10. THAT the respondent file an outline of legal submissions **by Monday, 1 September 2025**.
11. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00416

APPEAL AGAINST THE DECISION TO DISMISS GIVEN ON 21 NOVEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GORDON MILLER

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 11 JULY 2025

FILE NO.

PSAB 31 OF 2024

CITATION NO.

2025 WAIRC 00416

Result

Direction issued

Representation

Applicant

Mr J Tebbutt

Respondent

Mr J Carroll (of counsel)

Direction

HAVING heard from Mr J Tebbutt on behalf of the appellant and Mr J Carroll 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 appellant file an outline of written submissions by 15 August 2025;
2. THAT the respondent file an outline of written submissions by 29 August 2025; and
3. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00458

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 29 NOVEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HARSHA RANASINGHE ARACHCHILLAGE

APPELLANT

-v-

THE BOARD OF HEALTH SUPPORT SERVICES

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRPERSON
MR B HAWKINS - BOARD MEMBER
MR P HESLEWOOD - BOARD MEMBER**DATE**

WEDNESDAY, 30 JULY 2025

FILE NO

PSAB 32 OF 2024

CITATION NO.

2025 WAIRC 00458

Result	Order issued
Representation	
Appellant	Ms T Rajapaksa (as agent)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Ms T Rajapaksa (as agent) on behalf of the appellant, and Mr J Carroll (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT subject to any further order of the Public Service Appeal Board (**Board**), Agreed Documents 1.4, 1.5, 1.6, 1.7, 1.8, and 4.8 (**Relevant Agreed Documents**), and any other document filed in application PSAB 32 of 2024, which refers to information in the Relevant Agreed Documents (together the **Relevant Documents**), are not to be provided to any person other than:
 - (a) the Commissioner and members constituting the Board hearing the appeal;
 - (b) the Registrar and Deputy Registrar of the Commission, or any of the Registrar's staff;
 - (c) an Associate or Chambers Support Officer of the presiding Commissioner;
 - (d) any witness giving evidence in the proceeding;
 - (e) the appellant and his representative;
 - (f) the respondent, its representative, and any employee of the respondent within Workforce and Organisational Development;
2. THAT unless they have access to the Relevant Documents by reason other than their involvement in these proceedings, the persons referred to in order 1(d) and 1(e) may only use, and make copies of, the Relevant Documents, for the purposes of these proceedings;
3. THAT the appellant's and respondent's representatives are to make each person referred to in order 1(d) to 1(e) above aware of the existence and effect of orders 1 and 2 above which can be achieved by providing those persons with a copy of these orders; and
4. THAT the parties have liberty to apply on short notice.

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00457

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 29 NOVEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HARSHA RANASINGHE ARACHCHILLAGE

APPELLANT

-v-

HEALTH SUPPORT SERVICES

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRPERSON
MR B HAWKINS - BOARD MEMBER
MR P HESLEWOOD - BOARD MEMBER**DATE**

WEDNESDAY, 30 JULY 2025

FILE NO

PSAB 32 OF 2024

CITATION NO.

2025 WAIRC 00457

Result Order issued**Representation****Appellant** Ms T Rajapaksa (as agent)**Respondent** Mr J Carroll (of counsel)*Order*HAVING heard from Ms T Rajapaksa (as agent) on behalf of the appellant and Mr J Carroll (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the *Industrial Relations Act 1979* (WA), orders –

THAT the name of the respondent be amended to ‘The Board of Health Support Services’.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2025 WAIRC 00697

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 13 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STEPHEN BRUCE BURNS

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR M FINNEGAN – BOARD MEMBER
MS E HAMILTON – BOARD MEMBER**DATE**

WEDNESDAY, 13 AUGUST 2025

FILE NO.

PSAB 34 OF 2024

CITATION NO.

2025 WAIRC 00697

Result Order issued**Representation****Appellant** Mr J Tebbutt**Respondent** Mr J Carroll (of counsel)

Order

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

1. Subject to any further order of the Public Service Appeal Board (**Board**), Respondent's Documents 14, 15, and 16.1 to 16.18, and the documents contained in the Appellant's Further Bundle of Documents (**Relevant Documents**), and any other document filed in the proceeding which refers to information in the Relevant Documents (together the **Confidential Documents**), are not to be provided to any person other than:
 - (a) the Commissioner and members constituting the Board hearing the appeal;
 - (b) the Registrar and Deputy Registrar of the Commission, or any of the Registrar's staff;
 - (c) an Associate or Chambers Support Officer of the presiding Commissioner;
 - (d) any witness giving evidence in the proceeding;
 - (e) the appellant and his representatives; and
 - (f) the respondent, his representative, and any employee of the respondent within Professional Standards and Conduct Division.
2. Unless they have access to the Confidential Documents by reason other than their involvement in these proceedings, the persons referred to in Order 1(d) and 1(e) above may only use, and make copies of, the Confidential Documents, for the purposes of these proceedings.
3. The appellant's and respondent's representatives are to make each person referred to in Order 1(d) and 1(e) above aware of the existence and effect of Orders 1 and 2 above which can be achieved by providing those persons with a copy of these Orders.
4. The parties have liberty to apply on short notice.

(Sgd.) C TSANG,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00464

DISPUTE RE APPLICATION OF R. 8 OF THE POLICE (MEDICAL RETIREMENT) REGULATIONS 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

APPLICANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE TUESDAY, 5 AUGUST 2025

FILE NO. PSACR 2 OF 2025

CITATION NO. 2025 WAIRC 00464

Result	Direction issued
Representation	(on the papers)
Applicant	Mr J Brinkman
Respondent	Mr J Carroll (of counsel)

Direction

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

1. THAT the parties file any statement of agreed facts and bundle of agreed documents by no later than 4:00 P.M. on 29 August 2025;
2. THAT the applicant file:
 - (a) any outlines of witness evidence and any documents which are not agreed documents; and
 - (b) an outline of written submissions and list of authorities, upon which it intends to rely by no later than 4:00 P.M on 26 September 2025;

3. THAT the respondent file:
 - (a) any outlines of witness evidence and any documents which are not agreed documents; and
 - (b) an outline of written submissions and list of authorities,
 upon which it intends to rely by 4:00 P.M. on 24 October 2025;
4. THAT the applicant is to file any outlines of witness evidence and any documents upon which it intends to rely upon in reply by no later than 4.00 P.M. on 31 October 2025;
5. THAT the matter is to be listed for a hearing of up to two days on a date to be fixed not before 6 November 2025;
6. THAT discovery be informal, and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2025 WAIRC 00426

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PRECIOUS CHINAEMEREM AMUTA

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE FRIDAY, 18 JULY 2025
FILE NO. U 58 OF 2025
CITATION NO. 2025 WAIRC 00426

Result Order issued
Representation
Applicant Mr P C Amuta
Respondent Mr M McIlwaine (of counsel)

Order

HAVING heard from Mr P C Amuta on his own behalf 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), hereby orders –

THAT the name of the respondent ‘Department of Communities’ be deleted and substituted with ‘Director General, Department of Communities’.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00461

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-

WORKSAFE COMMISSIONER

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 1 AUGUST 2025
FILE NO/S WHST 5 OF 2025
CITATION NO. 2025 WAIRC 00461

Result	Programming orders issued
Representation	
Applicant	On his own behalf
Respondent	Mr J Gallo (of counsel)

Programming orders

HAVING heard from the applicant on his own behalf and Mr J Gallo (of counsel) on behalf of the respondent, the Work Health and Safety Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) and the *Work Health and Safety Act 2020* (WA), orders –

1. THAT by 4pm on Monday, 18 August 2025, the respondent file her application to dismiss application WHST 5 of 2025 (**Dismissal Application**), any material on which she seeks to rely, and written submissions in support of the Dismissal Application;
2. THAT by 4pm on Monday, 1 September 2025, the applicant file his response to the Dismissal Application, any material on which he seeks to rely, and written submissions opposing the Dismissal Application;
3. THAT by 4pm on Monday, 8 September 2025, the respondent file any written submissions in reply; and
4. THAT application WHST 5 of 2025 be listed for a short hearing on a date to be fixed not before Monday, 22 September 2025.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Workers' Union (Western Australian Public Sector) General Agreement 2024 - The AG 43/2025	29/07/2025	Department of Primary Industries and Regional Development, Department of Biodiversity Conservation and Attractions, Department of Education, Western Australian Meat Industry Authority & Other	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Commissioner T Kucera	Agreement registered
City of Bayswater Outside Agreement 2025 AG 49/2025	23/07/2025	City of Bayswater	Local Government, Racing and Cemeteries Employees Union, Australian Services Union Western Australian Branch	Senior Commissioner R Cosentino	Agreement Registered
City of Mandurah Industrial Agreement 2024 AG 50/2025	21/07/2025	City of Mandurah	Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Local Government, Racing and Cemeteries Employees Union (WA) & Others	Senior Commissioner R Cosentino	Agreement Registered
City of Melville Outside Workforce Industrial Agreement 2025 AG 55/2025	28/07/2025	City of Melville	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU), Local Government Racing and Cemeteries Employees Union (LGRCEU WA)	Senior Commissioner R Cosentino	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Subiaco Operational Staff Industrial Agreement 2025 AG 54/2025	23/07/2025	City of Subiaco	Local Government Racing Cemeteries Employees Union, Western Australian Municipal, Clerical and Services Union	Senior Commissioner R Cosentino	Agreement Registered
City of Wanneroo Salaried Officers Industrial Agreement 2025 AG 51/2025	15/07/2025	City of Wanneroo	Western Australian Municipal, Administrative, Clerical, and Services Union of Employees	Senior Commissioner R Cosentino	Agreement Registered
Department of Justice (Jury Officers) CSA Agreement 2024 AG 52/2025	21/07/2025	Department of Justice	Civil Service Association of Western Australia Incorporated.	Commissioner T Emmanuel	Agreement registered
Governor's Establishment Staff General Agreement 2024 AG 46/2025	07/08/2025	Governor's Establishment	United Workers Union, Community and Public Sector Union / Civil Service Association	Commissioner T Kucera	Agreement registered
Public Transport Authority/ARTBIU (Transperth Train Operations Railcar Drivers) Industrial Agreement 2025 AG 53/2025	18/07/2025	Public Transport Authority of Western Australia	Australian Rail, Tram and Bus Industry Union of Employees, Western Australia Branch	Commissioner T Kucera	Agreement registered

NOTICES—Appointments—

2025 WAIRC 00454

Industrial Relations Act 1979

I, the undersigned, the HONOURABLE PETER DAMIEN QUINLAN, Chief Justice of Western Australia, in exercise of the powers conferred on me by s 85(3) of the *Industrial Relations Act 1979 (WA)*, DO HEREBY NOMINATE THE HONOURABLE JENNIFER SMITH, an auxiliary Judge of the Supreme Court of Western Australia, to be a Member of the Western Australian Industrial Appeal Court from 29 July 2025.

As witness my hand this 29th day of July 2025



Chief Justice of Western Australia

2025 WAIRC 00455

Industrial Relations Act 1979

I, the undersigned, the HONOURABLE PETER DAMIEN QUINLAN, Chief Justice of Western Australia, in exercise of the powers conferred on me by s 85(3) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE JOSHUA THOMSON, a Judge of the Supreme Court of Western Australia, to be the Presiding Judge of the Western Australian Industrial Appeal Court from 29 July 2025.

As witness my hand this 29th day of July 2025



Chief Justice of Western Australia

PUBLIC SERVICE APPEAL BOARD—

2025 WAIRC 00442

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 02 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2025 WAIRC 00442
CORAM	:	COMMISSIONER T KUCERA – CHAIRPERSON MR B HAWKINS – BOARD MEMBER MR A SALTER – BOARD MEMBER
HEARD	:	WEDNESDAY, 28 MAY 2025
DELIVERED	:	FRIDAY, 25 JULY 2025
FILE NO.	:	PSAB 30 OF 2024
BETWEEN	:	ADRIAN MITCHELL Applicant AND PUBLIC SECTOR COMMISSION Respondent

CatchWords	:	Industrial Law (WA) - Public Sector Appeal Board - Appeal against decision to dismiss under s 78 of the Public Sector Management Act 1994 - Appellant convicted of a serious offence - Whether the conviction for a serious offence was related to the requirements of the appellant's role - Dismissal not harsh, unfair, or disproportionate - Appeal dismissed
Legislation	:	<i>Industrial Relations Act 1979</i>
Result	:	Appeal dismissed
Representation:		
Applicant	:	In person
Respondent	:	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Brianna Conti-Nibali v Main Roads [2024] WAIRC 00120

Civil Service Association of Western Australia Inc v Director General of Department for Community Development [2002] WASCA 241

Deborah Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728; (2017) 97 WAIG 1525

Gaudet v Commissioner Ian Johnson Department of Corrective Services [2013] WAIRC 00032

Picks v WA Country Health Service Board [2020] WAIRC 00806

Rose v Telstra [1998] AIRC 1592

Safeta Kos v Director General, Department of Transport [2023] WAIRC 00298

Sanja Spasojevic v Speaker of the Legislative Assembly [2021] WAIRC 00641

Scott v Consolidated Paper Industries (WA) Pty Ltd (1998) 78 WAIG 4940

Selvahandran v Peteron Plastics Pty Ltd (1995) 62 IR 371

Williams v Commissioner of Police, Western Australia [2018] WAIRC 00720

Reasons for Decision

- 1 This is the unanimous decision of the Public Service Appeal Board (**Board**).
- 2 The case involves an appeal by Adrian Mitchell (**appellant**) of a decision by the Public Sector Commissioner (**respondent**), that resulted in the termination of his employment.
- 3 The appellant, who was employed by the Public Sector Commission (**PSC**) as a Senior Consultant, was dismissed from his employment on 2 December 2024 (**dismissal**), after he was convicted by a jury in the District Court, for the offence of ‘aggravated common assault’ contrary to s 313(1)(a) of the *Criminal Code Act Compilation Act 1913* (**offence**).
- 4 The offence was committed in August 2020, against the appellant’s former wife, in the family home. The circumstances of aggravation included that the assault involved a non-fatal strangulation, and the couple’s children were present.
- 5 Upon his conviction for the offence, the appellant was sentenced to a suspended term of 12 months’ imprisonment.
- 6 Following this, the PSC commenced disciplinary action under the *Public Sector Management Act 1994* (**PSM Act**) which culminated in the appellant’s dismissal.
- 7 On 3 December 2024, the day after he was dismissed, the appellant filed an appeal against his dismissal under s 78 of the PSM Act (**appeal**).
- 8 By way of relief, the appellant sought orders that he be reinstated to his former position or to a different public sector role. He also asked the Board to exercise its discretion to impose alternative sanctions under s 80A of the PSM Act.
- 9 In the reasons to follow, the Board explains why it has decided that it is not appropriate to adjust the respondent’s decision and why her decision to dismiss the appellant must stand.

Appeals to the Board

- 10 As a starting point, it is worth providing a brief description of the following:
 - a. why the Board has the jurisdiction to hear the appeal,
 - b. some of the powers the Board has in dealing with the appeal; and
 - c. the matters the Board is entitled to consider.
- 11 On this, Part 5 of the PSM Act applies to Public Service Officers and other prescribed employees (**public sector employees**) in relation to any suspected breaches of discipline, including acts of misconduct.
- 12 Under s 80 of the PSM Act, a public sector employee who commits an act of misconduct commits a ‘breach of discipline’ and is liable to face disciplinary action.
- 13 The PSM Act includes in its definition of ‘disciplinary action’ under s 80A ‘a reprimand, fine, transfer, reduction in remuneration or classification and dismissal’ (**disciplinary action**). Section 82A sets out how an employing authority deals with a disciplinary matter.
- 14 In situations where an employing authority decides to take disciplinary action, the affected public sector employee may appeal a decision to take disciplinary action to the Board under s 78 of the PSM Act and s 80I(1)(b) of the *Industrial Relations Act 1979* (**IR Act**).
- 15 The Board as a constituent authority of the Western Australian Industrial Relations Commission (**WAIRC**), exercises jurisdiction under the IR Act when hearing and determining such appeals.
- 16 The Board has a discretion to ‘adjust’ the matters referred to in s 80I(1) of the IR Act, which includes setting aside a decision to dismiss a public sector employee.
- 17 Section 26(1)(a) of the IR Act applies to the exercise of the Board’s jurisdiction. It requires the Board to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms.
- 18 The Board is empowered to review the Department’s decision de novo: see *Deborah Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525 (*Harvey*).
- 19 This means the Board can decide the matter afresh, on the evidence before it, not merely based on whether the Department made the right decision available to it at the time: *Safeta Kos v Director General, Department of Transport* [2023] WAIRC 00298 (*Kos*) at [15].
- 20 When determining matters de novo, the Board makes its own decision as to whether the appellant engaged in the misconduct

alleged: see *Harvey* at [31] and [65]. It also means the Board has much greater scope to substitute its own view for that of the employing authority: *Brianna Conti-Nibali v Main Roads* [2024] WAIRC 00120 at [67].

- 21 An employing authority's decision is not to be totally disregarded by the Board. However, a hearing de novo does not necessarily mean the Board must re-hear every aspect of the allegations afresh: see *Kos* at [17].
- 22 The matters that are to be considered in an appeal to the Board, will largely depend on the circumstances of the particular case: see *Harvey* at [29] – [30] and *Sanja Spasojevic v Speaker of the Legislative Assembly* [2021] WAIRC 00641 at [40] – [44].

Evidence and submissions in the appeal

- 23 Before the appeal was listed for hearing, the Board made the following programming directions:
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 4.00 pm on 31 January 2025.
 3. THAT by 4.00pm on Friday, 14 February 2025 the appellant is to file:
 - a. any witness outlines; and
 - b. any documents which are not agreed documents upon which he intends to rely on.
 4. THAT by 4.00pm on Friday, 28 February 2025 the respondent is to file:
 - a. any witness outlines; 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 4.00 pm on Friday, 14 March 2025.
 6. THAT the respondent is to file an outline of written submissions upon which they intend to rely on by 4.00 pm on Friday, 28 March 2025.
 7. THAT the appeal is to be listed for hearing of up to 1 day not before Thursday, 3 April 2025.
- 24 The parties as directed, filed a Statement of Agreed Facts and a Bundle of Agreed Documents, which included a copy of the transcript from the sentencing hearing in the District Court.
- 25 The appellant, who was self-represented, declined to file any witness outlines or any further documents in support of his appeal. In email correspondence to the Board, the appellant confirmed that he was content for the appeal to be decided on the material contained in the Statement of Agreed Facts and the Bundle of Agreed Documents.
- 26 Although the respondent filed a further bundle of documents to be relied upon in opposition to the appeal (**Respondent's Bundle of Documents**) like the appellant, the respondent did not file any witness outlines. The respondent was similarly content for the appeal to be decided on the material that was filed by agreement between the parties.
- 27 It is reasonable to describe the Respondent's Bundle of Documents, as a series of guidance notes and policy statements, on how employing authorities are to respond to and the supports that are available for public sector staff who are affected by the incidence of domestic violence.
- 28 The appellant and the respondent both filed brief outlines of submissions. In accordance with the programming directions, the Board then convened a half day hearing that was held on Wednesday, 28 May 2025 (**hearing**).

Statement of Agreed Facts and Bundle of Agreed Documents

- 29 Before providing a summary of the parties' submissions and to describe the context in which the respondent made her decision to dismiss the appellant, it is worth setting out those matters the parties were able to agree upon in the Statement of Agreed Facts.
- 30 It is also helpful to extract and include relevant content from the Bundle of Agreed Documents.

The appellant's employment and job description

- 31 The appellant commenced employment with the PSC in December 2010. Prior to his dismissal, he worked as a Level 6.4 Public Service Officer, in the position of Senior Consultant.
- 32 Agreed Document 1 which was attached to the Statement of Agreed Facts, is a copy of the Job Description Form that applied to the appellant's position of Senior Consultant (**job description**).
- 33 A copy of the appellant's job description is extracted below:

Senior Consultant Referrals, Notifications and Assessments (PSC18055)

Division	Integrity and Risk	Effective date	03/12/2018
Classification	Level 6	Agreement	PSGO CSA GA
Location	West Perth	ANZSCO code (HR)	22311

Role of the position

The Senior Consultant Referrals, Notifications and Assessments is responsible for:

- contributing to the management and delivery of referrals, notifications and assessment services to provide high quality, innovative and timely services to the WA public sector
- undertaking an oversight role including investigation and reviews relating to minor misconduct, breach of standards, matters of referral and any other matters allocated by the Commissioner.

Reporting relationship

Principal Consultant Referrals, Notifications and Assessments, Level 7	Other position reporting to this position: <ul style="list-style-type: none"> • Senior Consultant Referrals, Notifications and Assessments, Level 6 x 2 • Assessment Officer, Level 4
Senior Consultant Referrals, Notifications and Assessments, Level 6	
Total number of FTEs managed: Nil	

Responsibilities of the position

- Undertakes reviews and investigations to support the legislative functions of the Commissioner in assessing performance and compliance with the relevant legislation, standards, instructions and ethical codes across the WA public sector.
- Researches and analyses issues relevant to compliance and performance.
- Contributes to the development of policies, systems and frameworks to ensure referrals, notifications and assessment services are provided in the most effective and efficient manner and incorporate innovative approaches.
- Assists key stakeholders to understand their responsibilities and obligations under various Acts including the *Public Sector Management Act 1994*, *Public Interest Disclosure Act 2003*, *Corruption, Crime and Misconduct Act 2003*, *Commissioner's Instructions* and other requirements and subsidiary legislation relevant to the scope of the Division.
- Provides advice, both internally and externally, to address and resolve a broad range of public sector governance, human resource management, and integrity and conduct matters, and clarify directives, policies and procedures.
- Researches and prepares reports, briefing notes, speeches, correspondence and other written material relevant to the outputs of the Division and for a wide audience including Parliament, Ministers and Chief Executive Officers.
- Provides advice to the Commission's Executive, senior management and employees in relation to reviews, investigations and matters relating to performance and compliance and strategic streamlining opportunities.
- Promotes the Commission's and the Division's interests by developing and maintaining positive and effective working relationships with external and internal stakeholders.
- Represents the Commissioner and the Commission's interests at various agency, community and state forums.
- Actively contributes to the efficient operation of the Commission and undertakes other roles and tasks as directed.
- Demonstrates the highest standards of honesty and integrity, and operates within public sector values, code of ethics and conduct, organisational processes, and legislative and policy parameters.

Work related requirements (selection criteria)

The selection panel assesses applications against the work related requirements of the responsibilities of the position. The panel also takes into account the needs of the Commission and availability of suitable applicants.

1. **Role specific requirements**
 - Experience in interpreting legislation, standards and codes and the application of assessments, investigations and reviews in an oversight role
 - Demonstrated ability to enhance service processes and procedures to achieve maximum efficiency
2. **Shapes and manages strategy**
 - Supports shared purpose and direction
 - Thinks strategically
 - Harnesses information and opportunities
 - Shows judgment, intelligence and common sense

3. Achieves results

- Identifies and uses resources wisely
- Applies and builds professional expertise
- Responds positively to change
- Takes responsibility for managing projects to achieve results

4. Builds productive relationships

- Nurtures internal and external relationships
- Listens to, understands and recognises the needs of others
- Values individual differences and diversity
- Shares learning and supports others

The appellant's conviction

- 34 On 4 June 2024, the appellant at the conclusion of a trial by jury that was held in the District Court, was convicted of the offence (**conviction**). Following the trial, the sentencing hearing was deferred to a later date.
- 35 On 20 September 2024, District Court Judge Ritter sentenced the appellant to a term of 12 months' imprisonment suspended for 18 months (**sentence**).
- 36 Agreed Document 2 that was referred to the Bundle of Agreed Documents is a copy of the 31 pages of transcript setting out His Honour Judge Ritter's sentencing decision (**sentencing transcript**).
- 37 When providing his reasons for the sentence the appellant received, Ritter J described the circumstances in which the offence was committed.
- 38 At pages 15 -16 of the sentencing transcript Ritter J stated:

To summarise my findings, therefore, they are:

- (a) on 16 August 2020, you and Ms Mitchell had been to a party;
- (b) you both returned home to 13 Brown Street, Claremont;
- (c) after you came home, you paid a babysitter who left;
- (d) you were at that time quite inebriated;
- (e) an argument broke out between you and Ms Mitchell;
- (f) you then moved to the master bedroom downstairs;
- (g) the argument continued and you pushed Ms Mitchell against the wall where she hit her head. She was pushed by you by your hands on her chest;
- (h) you then grabbed the neck of Ms Mitchell with your hand and pinned Ms Mitchell up against the wall. Ms Mitchell said in her evidence that she was suffocating and choking at that time and you were squeezing her neck;
- (i) Lachlan came to the door, had Ms Mitchell's phone and said, "Dad, I'm going to call the police."
- (j) you then let go of Ms Mitchell, smacked Lachlan on the thigh and said, "You little shit."
- (k) Ms Mitchell then grabbed the telephone, went upstairs and hid in the boys' bedroom;
- (l) Ms Mitchell and the children barricaded the door and waited until they thought you had definitely gone;
- (m) Ms Mitchell said at that time that she felt terrified.

- 39 At page 17 Ritter J noted:

I need to take into account now the objective seriousness of your offending. I take into account specifically the contemporary concern for this type of offending. It is, rightly, described as a scourge on society. There have been very justifiable concerns by governments and the community about the seriousness of this type of offending. It happens far too frequently, and the seriousness of offending of this type is patent.

- 40 Quoting from the decision of *Bropho v Hall* [2015] WASC 50, Ritter J on page 18 of the sentencing transcript stated:

His Honour said that it must be accepted, that:

An offence of this nature generally involves an abuse of trust which one partner places in another, often where the complainant is in a vulnerable position by reason of greater physical strength of the offender. The vulnerability of the complainant is generally increased by the difficulty which she (it is usually a she) may have in extracting herself from the situation.

- 41 On page 19 of the sentencing transcript Ritter J said:

I note also that your offending in this case was the holding of Ms Mitchell's throat and the squeezing of her

neck and applying pressure to that. That offence could be described as one of non-fatal strangulation.

The act of strangulation can pose a real risk of conduct to the life and health of a victim. That was referred to, in particular, in the decision of the Court of Appeal in *MYB v The State of Western Australia* [2024] WASCA 53 at paragraph 64. The court said:

Strangulation, which is commonly reported by women who have experienced domestic violence, can be distinguished from other forms of family and domestic violence on the basis that it often leaves very few marks or signs; even in cases where the strangulation was life-threatening.

The court said:

The fact that this type of offending is more likely to go undetected makes strangulation a particularly dangerous form of domestic violence, and recent studies have consistently shown that it is both a predictive risk factor for future domestic violence and a relatively common cause of domestic violence-related homicide.

42 Further down on page 19 of the sentencing transcript, Ritter J also said:

I look now at the aggravating factors to your offending. Your child, Lachlan, was present, and you hit Lachlan in the aftermath of your offending. Your son witnessed at least part of the assault that represented the assault by you, his father, upon his mother. I regard it as an aggravating factor that your son had to witness this type of unprovoked violence, and that he was hit when he tried to do something about it.

The Sentencing Act, as I have said, provides that in sentencing I need to take into account the vulnerability of the victim. The person you offended against was your wife who you were then living with. It was a gross breach of trust. Rather than being there for the mutual support and protection involved in a marriage you instead, on this occasion, assaulted her in the serious way that I have described.

Disciplinary action – Show cause letter

43 Following his conviction and sentence, the respondent in a letter dated 9 October 2024, informed the appellant that she was considering taking disciplinary action by way of dismissal (**show cause letter**).

44 The show cause letter was referred to the Bundle of Agreed Documents as Agreed Document 3, the contents of which are extracted below:

Dear Adrian

PROPOSED DISCIPLINARY ACTION

I write with reference to your recent conviction by the District Court of aggravated common assault.

I have obtained a copy of your sentencing transcript from the Court (attached). Having reviewed the transcript from his Honour, Judge Ritter's sentencing remarks I am giving consideration to taking disciplinary action in accordance with s.92(1) of the *Public Sector Management Act 1994* (PSM Act).

Specifically, I am considering taking disciplinary action by way of dismissal. My reason for this proposal is my present concern that the nature and objective seriousness of the offence for which you have been convicted renders you unsuitable for employment in an integrity related position in the Public Sector Commission.

In proposing this action, I have given careful consideration to:

- your conviction for aggravated common assault.
- the suspended sentence of 12 months imprisonment you have received in relation to that conviction; and
- the Judge's sentencing remarks.

Prior to taking disciplinary action, in accordance with s.92(2) of the PSM Act, I invite you to make a submission in relation to the action I am considering taking. Your submission should be provided to [REDACTED], Executive Director Integrity and Risk at [REDACTED] by close of business Wednesday 23 October 2024.

In proposing this outcome, I acknowledge it may impact your psychological health. I would encourage you to maintain contact with your own treating medical practitioners and use the Commission's EAP providers if required. Their details are below

- Benestar tel 1300 360 364
- People Sense tel 93889000

Yours sincerely

SHARYN O'NEILL PSM

PUBLIC SECTOR COMMISSIONER

Appellant's response

45 On 5 November 2024 the appellant provided his written response to the show cause letter. This was referred to in the Bundle of Agreed Documents as Agreed Document 4 (**appellant's response**).

46 The appellant's response is a three-page letter, to which he attached copies of his curriculum vitae (CV), a letter from Dr Dylan

Galloghly – Senior Clinical and Forensic Psychologist dated 5 August 2024 (**psychologist’s report**) and some of the character references the appellant provided to Ritter J for the sentencing hearing (**character references**).

- 47 The appellant also included a copy of a letter he provided to Ritter J dated 1 September 2024, in which he stated:

My employment may also be jeopardised by this conviction which is another challenge I must overcome.

The appellant’s dismissal

- 48 After he submitted his response to the show cause letter, the respondent by way of a letter dated 2 December 2024 dismissed the appellant from his employment (**dismissal letter**).
- 49 The dismissal letter was referred to in the Bundle of Agreed Documents as Agreed Document 5, a copy of which is extracted below:

Dear Adrian

NOTICE OF DISMISSAL

I have received your submission in response to the proposed discipline action of dismissal detailed to you in my letter of 9 October 2024.

I have carefully reviewed your submission. I am pleased to hear you are seeking support and assistance from medical professionals and undertaking various volunteering opportunities, which is contributing to your rehabilitation. However, having considered all the factors outlined in your submission, I remain of the view that dismissal is commensurate with the seriousness of the offence of which you have been convicted and is the appropriate sanction in this matter.

While I considered your request for consideration of alternative forms of disciplinary action outlined in section 80A of the *Public Sector Management Act 1992*, I consider that your continued employment in an integrity related agency such as the Public Sector Commission is not tenable. As you will be aware, the highest standards of integrity and public sector values are essential requirements for all positions in the Commission. The nature and seriousness of your offence, as reflected in the suspended sentence you received, are not compatible with these requirements.

Your termination pursuant to section 92(1) of the PSM Act is effective as of today’s date. Arrangements will be made for you to receive a payment in lieu of notice and payments for accrued annual leave and pro rata long service leave.

To support you with your continuing rehabilitation and personal development, I am willing to provide you with 6 sessions of free confidential counselling through one of our Employee Assistance Providers, Telus Health, 1800 835 871 or PeopleSense, 9388 9000.

I understand this is not the outcome you were hoping for, but I do genuinely wish you well for your future endeavours.

- 50 Having now described the factual context in which the dismissal occurred, it is necessary to provide a summary of the parties’ submissions in the appeal.

Appellant’s submissions

- 51 The appellant contended his dismissal was a disproportionate response to his conviction for the offence.
- 52 While the appellant in his submissions acknowledged the fact of his conviction, like he did in his response to the show cause letter, the appellant continued to profess his innocence.
- 53 The appellant submitted his conviction for the offence was not related to the inherent requirements of his job and that it would not preclude him from fulfilling the requirements of his role: (transcript p 4).
- 54 The appellant submitted the penalty of dismissal was excessive, because he had no prior history of workplace conduct that warranted disciplinary action and he was not sentenced to ‘an immediate term of imprisonment.’
- 55 The Board understood the second part of this submission to mean that because the appellant’s term of imprisonment was suspended and he was not required to spend any actual time in prison, the offence was less serious than what was suggested by the respondent in the show cause and dismissal letters.
- 56 The appellant submitted the respondent, in reaching her decision to dismiss him, had failed to properly consider or have regard to, relevant mitigating factors including:
- (i) The appellant’s long and unblemished service within the public sector.
 - (ii) The fact the offence occurred in a personal and domestic setting, unrelated to his employment.
 - (iii) The substantial support the appellant has from colleagues and in professional references, which indicate his capability to continue serving effectively in his role.
- 57 The appellant contended the respondent had failed to consider alternative sanctions. He submitted the respondent, instead of his dismissal, should have explored or implemented lesser disciplinary measures, such as demotion, suspension without pay, training, counselling or a formal warning, which could have been more appropriate and rehabilitative in nature.
- 58 On the issue of procedural fairness, the appellant contended he was not given a fair opportunity to present his case before the decision was made to terminate his employment. The appellant said he was not adequately informed of, the full scope of considerations, the respondent relied upon to make her decision.
- 59 During the hearing and in his outline of submissions, the appellant referred to the decision in *Picks v WA Country Health*

Service Board [2020] WAIRC 806 (Picks).

60 The appellant relied upon *Picks* to suggest that his case was comparable. On this basis, the appellant submitted the Board should also make an order that would allow the appellant to return to his employment with the respondent.

Respondent's submissions

61 The respondent argued the appellant's dismissal was, in all the circumstances, a fair response to the conviction. It was submitted there was no basis for the Board to interfere with the respondent's decision to dismiss the appellant.

62 The respondent submitted that where a public sector employee (as in this case) is covered by Part 5 of the PSM Act and is convicted or found guilty of a 'serious offence,' an employing authority is permitted to take disciplinary action that may result in the employee's dismissal.

63 Referring to the definitions of a 'serious offence' as they appear in ss 80A and s 92 of the PSM Act, the respondent submitted the offence, for which the appellant faced disciplinary action, was serious.

64 The respondent accepted that where an employee is convicted of a 'serious offence,' an employing authority may decide that it does not have to take disciplinary action by way of dismissal.

65 However, it was submitted that as is the case with employment discipline more generally, all the facts and circumstances need to be considered when determining appropriate disciplinary action, following a conviction for a 'serious offence.'

66 Notwithstanding this, the respondent submitted the appellant's dismissal was fair in all the circumstances, taking into account all of the circumstances. These were described at paragraph 21 of the respondent's outline in the following terms:

- (a) The very serious nature of the offending which is set out above. That a term of imprisonment was imposed, which is a sentence of last resort, is itself indicative of the very serious nature of the offending. As the sentencing judge explained, this type of offending is a scourge on society, and this type of offending involving strangulation is particularly serious.
- (b) The nature of the position held by the appellant which is an integrity-based position. Duties of the position include conducting reviews and investigations to support the Public Sector Commissioner's legislative functions in assessing performance and compliance with relevant legislation, standards, instructions and ethical codes across the WA Public Sector.
- (c) The agency in which the appellant was employed is an agency which has a central role in establishing and monitoring ethical standards and integrity within the WA Public Sector. For example, the Public Sector Commissioner's functions include:
 - (i) prevention of, and education in respect of, misconduct: *Corruption Crime and Misconduct Act 2003* (WA) (*CCM Act*), ss 7B(6), 45A;
 - (ii) ensuring that allegations about minor misconduct are dealt with in an appropriate way within the public sector: *CCM Act* s 45B;
 - (iii) setting the minimum standards of conduct and integrity within the public sector and monitoring compliance with those standards: *PSM Act* s 21; and
 - (iv) issuing guidance regarding public sector supports available for staff affected by family and domestic violence: see Respondent's Bundle of Documents.

67 The respondent argued the fact that public service officers can be disciplined or even dismissed for engaging in criminal conduct, with no direct connection to their employment, is indicative of the fact that such officers require a level of integrity and moral fibre, to uphold the values of the public service.

68 It was submitted that serious criminal wrongdoing, even where it may not be directly connected to an employee's employment, can impact upon the officer's continued suitability for employment in the public sector.

69 The respondent submitted that given the functions of the respondent, the respondent and her agency can reasonably be expected to lead by example and to set the standards for the whole of the public sector.

70 It was submitted that in this context, it is reasonable for the respondent, to expect even higher standards of integrity and moral fibre from her employees, than what other public sector agencies may require – including in respect of conduct engaged in outside of work.

71 It was further submitted that the nature of the appellant's particular role within the PSC, was such that the respondent could reasonably expect, higher standards of integrity and moral fibre from the appellant than what might be expected of employees employed in a different agency and who are, not involved in, functions relating to ethics and integrity.

72 The respondent submitted that given the PSC's functions, the appellant's duties when he was employed and the sector leading role the PSC has in matters of integrity, including in respect of family and domestic violence and providing support to employees suffering from such violence, that it was obvious the continued engagement of the appellant following his conviction for such a serious offence could bring the PSC into disrepute and cause reputational damage.

73 The respondent submitted that in the context outlined and in light of the appellant's very serious offending, it was reasonable for her to have formed the view, that disciplinary action by way of dismissal, was justified.

74 In reply to the appellant's submission, that *Picks* provided support for the arguments against his dismissal, the respondent submitted the decision was distinguishable and confined to its own facts.

Consideration

- 75 In deciding whether to adjust a decision to take disciplinary action that results in a public sector employee's dismissal, it is open to the Board to apply the well settled principles the Commission follows in unfair dismissal cases.
- 76 The test as to whether a dismissal is harsh, oppressive or unfair is a broad one of industrial fairness. To this end the Chief Commissioner in *Scott v Consolidated Paper Industries (WA) Pty Ltd* (1998) 78 WAIG 4940 at 4943 relevantly said the following:

The law in this jurisdiction is well settled in relation unfair dismissal. It must be demonstrated that there has been an abuse of the employer's right to dismiss an employee, such that the dismissal is rendered harsh or oppressive: *Miles v The Federated Miscellaneous Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385. It is also established that it is not for the Commission to assume the role of the manager in considering whether the dismissal is or is not unfair. The test is an objective one in accordance with the Commission's duty pursuant to s 26(1)(a) and (c) of the Act. Moreover, contemporary standards of industrial fairness require in my view, that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his or her performance or conduct does not improve as required by the employer. This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated unless they take appropriate remedial steps: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635. It should be emphasised that whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however it may be a most important factor, depending upon the circumstances of the particular case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. It follows however, that a dismissal will not necessarily be unfair in the event of procedural unfairness alone, as all the circumstances need to be considered.

Valid reason

- 77 In applying the test as to whether the exercise of the respondent's right to dismiss the appellant, was unfair, it is relevant for the Board to first consider if there was a 'valid reason' for the appellant's dismissal.
- 78 A valid reason for dismissal, regardless of whether it is in the context of private or public sector or employment, must be 'sound, defensible or well founded' and is not 'capricious, fanciful, spiteful or prejudiced:' *Selvahandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 (*Selvahandran*) at (373).
- 79 In considering whether a reason is valid, it must be remembered that this requirement applies in the practical sphere of the relationship between an employer and an employee, where each has rights and privileges and duties and obligations, conferred, and imposed, on them: *Selvahandran* at (373).
- 80 For this reason, the assessment of whether a valid reason exists, must be applied in a practical and common-sense way, to ensure 'the employer and employee are each treated fairly': *Selvahandran* at (373).
- 81 It is trite that a conviction for a criminal offence (particularly those involving serious unethical actions or offences involving a significant breach of trust) may, following an examination of the circumstances in which the offence was committed, give rise to a valid reason for dismissal: *Williams v Commissioner of Police, Western Australia* [2018] WAIRC 00720 (*Williams*).
- 82 It is accepted that convictions for criminal offences that happen outside of work hours, can give rise to a valid reason for dismissal: *Gaudet v Commissioner Ian Johnson Department of Corrective Services* [2013] WAIRC 00032.
- 83 The approach that was taken by Ross VP in *Rose v Telstra* [1998] AIRC 1592 (*Rose v Telstra*), is relevant to deciding whether an employee's involvement in criminal conduct that occurs outside of working hours, may give rise to a valid reason for dismissal. This involves a consideration of the following:
- i. Whether the conduct has damaged or undermined the employer/employee relationship;
 - ii. The effect of the conduct on an employer's interests and reputation; and
 - iii. Whether the conduct is incompatible with an employee's duty as an employee.
- 84 In context of public sector employment, particularly having regard to the provisions of the PSM Act, this principle is even more clear: *Civil Service Association of Western Australia Inc v Director General of Department for Community Development* [2002] WASCA 241.
- 85 That is because s 92 of the PSM Act expressly provides that an employing authority may take disciplinary action (including dismissal) where a public sector employee is convicted of a 'serious offence.'
- 86 It is worth noting that s 92 of the PSM Act applies, regardless of whether a serious offence is committed at work or outside of working hours.

Serious criminal offence

- 87 There is little doubt the offence the appellant committed is a 'serious offence' within the meaning prescribed in s 80A of the PSM Act.
- 88 The definition of 'serious offence' that appears in s 80A includes an 'offence or an offence of a class' prescribed in s 108, which is the regulation making power under the PSM Act.
- 89 Regulation 15 of the *Public Sector Management (General) Regulations 1994* (WA) includes in its description of 'serious offences:' offences which are punishable on conviction by imprisonment for two years or more.
- 90 The offence of 'Aggravated common assault' under s 313(1)(a) of the *Criminal Code* for which the appellant was convicted, attracts a maximum penalty of 3 years' imprisonment and a fine of \$36,000.
- 91 The Board accepts that because the 'offence' reached the applicable penalty threshold, the respondent was following the

appellant's conviction, within her rights under s 92 of the PSM Act to commence disciplinary action against the appellant.

92 We do not regard the fact the appellant received a suspended sentence, in any way detracts from or diminishes, the seriousness of the offence for which he was convicted.

Effect of the conviction

93 Although the appellant says he did not commit the offence, there is no dispute the appellant was found guilty. As a result, and despite the appellant's submissions about his innocence, the Board is not permitted to look behind the conviction: *Williams* [12]-[16].

94 This means the Board is required to respect the verdict the jury reached in the District Court and is bound by the findings Ritter J made, regarding the circumstances in which the offence was committed and its seriousness.

95 In other words, the Board must proceed on the basis the appellant committed the offence and the conviction stands.

Relevance to the appellant's employment

96 The Board does not accept the appellant's submission that he should not have been dismissed because the offence was not relevant to or unconnected to his employment.

97 On the contrary, we consider that although the offence happened outside of work, there was still a sound and defensible reason for the disciplinary action that followed.

98 We consider that our conclusion on this matter is supported by an analysis of the following:

- i. the nature and functions of the appellant's employing authority, the PSC; and
- ii. what the appellant did for a job.

Nature and function of the PSC

99 Regarding its nature and function; the PSC website states:

The Public Sector Commission is a central agency responsible for setting ethical standards, promoting integrity and helping to prevent misconduct across the WA government sector.

We observe the highest standards of integrity at all times and expect those doing business with us do the same to help us deliver public value.

100 In carrying out this function, the PSC is involved in the following:

- i. prevention of, and education in respect of misconduct;
- ii. ensuring that allegations about minor misconduct are dealt with in an appropriate way within the public sector;
- iii. setting the minimum standards of conduct and integrity within the public sector and monitoring compliance with those standards; and
- iv. issuing guidance regarding public sector supports available for staff affected by family and domestic violence.

101 The functions described, must be viewed alongside the provisions in the PSM Act, by which public service employees may be disciplined or dismissed for engaging in criminal behaviour, even where such conduct has no direct connection to their employment.

102 In our view, there is little scope to argue the PSC is anything other than an 'integrity-based' employing authority. It follows that we accept it is reasonable for the respondent to expect a higher standard of integrity and conduct from her employees, which extends to their conduct outside of work.

The appellant's job

103 The Board has, following an analysis of the appellant's job description that we earlier extracted at paragraph 32, reached the conclusion the appellant was employed in an 'integrity-based role.'

104 Relevantly, the appellant's stated responsibilities included the following:

- Assists key stakeholders to understand their responsibilities and obligations under various Acts including the Public Sector Management Act 1994, Public Interest Disclosure Act 2003, Corruption, Crime and Misconduct Act 2003, Commissioner's Instructions and other requirements and subsidiary legislation relevant to the scope of the Division.
- ...
- Provides advice to the Commission's Executive, senior management and employees in relation to reviews, investigations and matters relating to performance and compliance and strategic streamlining opportunities.
- ...
- Demonstrates the highest standards of honesty and integrity, and operates within public sector values, code of ethics and conduct, organisational processes, and legislative and policy parameters.

105 In addition, we have also reviewed the description of the employment history that is contained in the appellant's CV and considered the nature of the work that he said he was involved in at the PSC.

106 From our analysis of the appellant's CV, it cannot be said he was involved in low level administrative or inconsequential work at the PSC, for which a higher standard of behaviour might not have been as crucial to determining whether the appellant's offending conduct should give rise to a valid reason for his dismissal.

107 Rather we consider the appellant was involved in work for which it was critical for him to have conducted himself with a high level of integrity.

108 Furthermore, the appellant, in his 1 September 2024 letter to Ritter J, acknowledged the seriousness of the offence and that because of his conviction, his employment was in jeopardy.

Integrity offence

109 In sentencing, Ritter J noted that an essential feature of the offence the appellant committed was that it involved a serious breach of trust.

110 In our view, this categorisation of the offence by Ritter J is significant. It means the respondent was entitled to consider the appellant's conviction for a domestic violence offence in the same light as or equivalent to, other offences involving a serious breaches of trust.

111 While convictions for integrity offences in the past may have been seen as only involving acts of fraud or dishonesty, due to the shift in judicial thought and community sentiment, (which Ritter J referred to in his sentencing remarks), it is reasonable for domestic violence offences to be viewed in a similar light.

112 Put simply, we accept that in context of an employee, who works for a public sector employer, in an integrity-based role, the appellant's conviction for a serious offence that occurs outside of work, that involves domestic violence, could give rise to a valid reason for dismissal.

113 It is on this basis, the Board considers that it was not unreasonable for the respondent to have viewed the appellant's conviction for the offence, as incompatible with the continuation of his employment.

Other grounds

114 In applying the test to determine if the appellant's dismissal was unfair, the Board, notwithstanding its finding there was a valid reason for his termination, is required to consider if it was harsh or oppressive.

115 The matters to be considered include whether the penalty of dismissal was in all the circumstances overly harsh, whether the appellant was afforded procedural fairness and if there were alternative disciplinary outcomes that could have been imposed instead.

Procedural fairness

116 The Board does not accept the appellant's submission that he was not given a fair opportunity to present his case before the decision was made to terminate his employment.

117 It is our view the appellant was given an opportunity, (as required by s 92(2) of the PSM Act) to respond to the show cause letter, which not only made clear the respondent was proposing to terminate his services, but the reason why.

118 It is our view the 14-day timeframe within which the appellant was expected to provide a response to the show clause letter, was in the circumstances of this matter, reasonable, particularly where the appellant was not at work and suspended on full pay: see appellant's response at page 2.

119 The appellant's response was not light on detail. He laid out the arguments as to why he believed the respondent should take a different view of his conduct and the disciplinary action that should follow.

120 The fact the appellant was able to provide a fulsome response to the show cause letter is suggestive of him being afforded a reasonable opportunity to be heard.

Relevant considerations

121 The Board does not accept the respondent failed to properly consider or have regard to, relevant mitigating factors.

122 We have noted the respondent in the dismissal letter indicated that she had carefully reviewed the appellant's response, which included his reference to:

- i. his previous service within the public sector;
- ii. the fact the offence occurred in a personal and domestic setting, which the appellant submitted was unrelated to his employment; and
- iii. the character references from his friends and colleagues.

123 Ultimately, the respondent reached a different view about these matters. That she concluded the appellant's dismissal was commensurate with the seriousness of the offence and it was the appropriate sanction, does not mean she did not consider the appellant's arguments.

Board's consideration of the appellant's response and submissions

124 We have reviewed the same materials the respondent considered before making her decision to dismiss the appellant and which the appellant referred to in his submissions. On the material before us, we do not consider that the Board should deal with the matter any differently.

125 There is no doubt the appellant has a good employment record. That is to his credit and should help him secure future employment. It is however but one of the factors that need to be weighed against the seriousness of the conduct for which the appellant was dismissed.

126 As we have already explained in the preceding paragraphs [96]-[112] we consider there was a relevant connection between the offence and the appellant's employment.

127 While we have reviewed the psychologist's report and each of the appellant's character references, we do note they were all

prepared for a wholly different purpose, the appellant's sentencing.

128 It is our view the psychologist's report and the character references do not directly address the appellant's suitability to continue in the role he was employed in at the PSC, prior to his dismissal. For this reason, there was a limit on the weight the respondent could attach to this material.

129 In addition, we consider that it was entirely reasonable for the respondent to conclude the seriousness of the offence, when weighed against the appellant's work history, the contents of the psychologist's report and the character references, justified her decision to dismiss the appellant.

Alternative sanctions

130 Noting the serious nature of the offence and the circumstances in which it was committed, the Board accepts that this is not a case in which the respondent ought to have implemented lesser disciplinary measures.

131 It is our view that in the context of his role as a Senior Consultant, the imposition of penalties such as demotion, suspension without pay, training, counselling or a formal warning, while available, would have sent the wrong message to the appellant and other PSC employees, regarding its attitude towards the perpetrators of domestic violence, who are employed in integrity-based roles.

132 There are two reasons for this, both of which are closely related. Firstly, there is little point in imposing lesser disciplinary outcomes that may be 'rehabilitative in nature,' if the employee who committed the offence, is not remorseful for his conduct.

133 During sentencing, Ritter J noted the appellant had not demonstrated remorse: (sentencing transcript p 26). In our view, this is problematic for the respondent because it suggests the appellant has not gained an insight into his offending conduct, in respect of which he is required to lead by example.

134 Second, the continuation of the appellant's employment presents an obvious reputational risk for the PSC, which we accept has the potential to bring the agency's reputation into disrepute.

135 The optics of retaining a senior employee who has been convicted of a serious offence involving domestic violence, for which he is not remorseful, who works at an integrity-based agency, in an integrity-based role, where the PSC is also involved in the development of public sector policy to provide support to employees who are the victims of domestic violence, would be poor.

136 We therefore do not accept the respondent acted harshly or oppressively, by refusing to impose a lesser penalty.

Picks decision

137 The Board has reviewed and considered the *Picks* decision, alongside the circumstances at issue in this appeal.

138 It is our view the appellant's situation is not comparable with the decision in *Picks*. Rather, *Picks* was decided on its own facts and in very different circumstances.

139 The case in *Picks* centred on a security officer who worked for a health service provider. Mr Picks was convicted of an 'assault occasioning bodily harm' following an incident involving a male member of his extended family and in the context of complex cultural tensions.

140 The assault in *Picks* occurred in a bar (a public place) where the first punch was thrown by the complainant. Mr Picks retaliated by punching the complainant. While provocation may well have loomed large as a defence, Mr Pick's pleaded guilty to the assault. He also expressed remorse for his actions.

141 Following his conviction, Mr Pick's was dismissed from his employment. The employing authority's rationale for his dismissal was based upon a concern that Mr Picks' offending behaviour, posed a potential risk to patients, staff or the public. The employing authority was concerned he might react in a similar way to an aggressive situation in the hospital where he worked.

142 At [74] of its decision, the Board in *Picks*, following the principles in *Rose v Telstra*, rejected submissions from the employing authority that Mr Picks' conduct was likely to cause serious damage to the employment relationship, damage the employer's interests or was incompatible with Mr Pick's duty as an employee.

143 After considering the circumstances of his offending, the Board at [75]-[76] also determined there was no reasonable basis to conclude that Mr Picks presented as a risk in the workplace.

144 As indicated, the facts and circumstances in both matters are very different:

- i. the case in *Picks* did not involve an incident of domestic violence or a breach of trust;
- ii. the circumstances of the offending in the present case, when compared with *Picks* are objectively, far more serious;
- iii. the respondent in the present case is not relying upon the risk of a recurrence of similar offending behaviour in the workplace as the reason for the appellant's dismissal;
- iv. the appellant in the present case has not expressed remorse for his offending conduct;
- v. the nature of the employing authority's functions and the employee's role in *Picks* was such that there was no risk of damage to the employer's interests or its reputation because of Mr Pick's conduct.

145 The Board therefore does not accept the appellant's argument that the decision in *Picks* provides a basis to adjust the respondent's decision.

Other matters

146 It is worth highlighting the other measures that were adopted by the respondent in dealing with this matter, which have allowed us to conclude the appellant's dismissal was handled fairly.

147 In this regard, we have noted the following:

- i. After the appellant was charged with the offence, he was suspended on full pay and was not required to attend for work until the matter was determined in the District Court: (Transcript page 3);
- ii. Despite his misconduct, the appellant was paid in lieu of notice, along with any accumulated annual and long service leave entitlements; and
- iii. The respondent offered to fund six sessions with counselling services to assist the appellant with his 'continuing rehabilitation and personal development:' (for ii and iii, see the dismissal letter).

148 By providing these benefits to the appellant, it can hardly be said the respondent has, either in the lead up to or following his dismissal, disregarded his needs or personal circumstances.

Conclusion

149 For all the reasons set out in the preceding paragraphs, we have decided to dismiss the appeal.

150 An order giving effect to this decision will now issue.

2025 WAIRC 00443

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 02 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ADRIAN MITCHELL

APPELLANT

-v-

PUBLIC SECTOR COMMISSION

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T KUCERA - CHAIRPERSON
 MR B HAWKINS - BOARD MEMBER
 MR A SALTER - BOARD MEMBER

DATE

FRIDAY, 25 JULY 2025

FILE NO

PSAB 30 OF 2024

CITATION NO.

2025 WAIRC 00443

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Mr A Mitchell on his on behalf, 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 –

THAT appeal PSAB 30/2024 is dismissed.

(Sgd.) T KUCERA,
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

WORK HEALTH AND SAFETY ACT—Matters dealt with

2025 WAIRC 00441

APPLICATION FOR EXTERNAL REVIEW - S229 - WHS ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	BORVEK PTY LTD	APPLICANT
	-v-	
	WORKSAFE COMMISSIONER	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 25 JULY 2025	
FILE NO/S	WHST 4 OF 2025	
CITATION NO.	2025 WAIRC 00441	

Result	Order issued
Representation	
Applicant	Mr J Broad (as agent)
Respondent	Ms V Burns (of counsel)

Order

WHEREAS this is an application for an external review of a decision;

AND WHEREAS the applicant disputes that the access hatch on the mixing tanks referred to in Improvement Notice 90035724 is used as an access point for workers to enter to clean the tanks;

AND WHEREAS the respondent agrees to resolve the matter as the guarding the subject of Improvement Notice 90035724 has been installed;

AND WHEREAS the applicant and the decision-maker have agreed to resolve the matter on the basis of the amendments to Improvement Notice 90035724 as set out in Annexure A;

AND WHEREAS in accordance with s 229A(6) of the *Work Health and Safety Act 2020* (WA), the Work Health and Safety Tribunal (**Tribunal**) may act under s 229A(5)(a) and vary the decision with the agreement of the applicant and the decision-maker;

AND WHEREAS in the circumstances the Tribunal is satisfied that the following orders should be made;

NOW THEREFORE the Tribunal, pursuant to s 229A(5)(a) and s 229A(6) of the *Work Health and Safety Act 2020* (WA), orders, by consent –

1. The internal review decision of the respondent dated 23 May 2025 is varied to vary the Improvement Notice 90035724 in the manner set out in Annexure A to this order.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.



Department of **Energy, Mines,
Industry Regulation and Safety**



Annexure A

Work Health and Safety Act 2020 (Section 191)

IMPROVEMENT NOTICE

Reference ID: 90035724

Issued To

BORVEK PTY. LTD.

ABLE WESTCHEM

273 COLLIER RD BAYSWATER 6053

jordan@westchem.com.au,
chemist@westchem.com.au

In Relation To

In relation to: Blending vessel guarding

At: 273 COLLIER RD BAYSWATER 6053

On: 22 April 2025

Provision

I believe that you are contravening regulation 208(2) of the *Work Health and Safety Regulations 2022*.

Reason

The reason I believe the provision is being, or has been, contravened is:

On 22 April 2025, I attended 273 Collier Rd, Bayswater. At this location I met with Nushan NAWARATHNA, Operations Manager, who told me that BORVEK PTY. LTD. is the person conducting a business or undertaking (PCBU) which engages workers to carry out work activities as directed or influenced by the PCBU while at the workplace.

The person with management or control of plant must ensure that:

(a) if access to the area of the plant requiring guarding is not necessary during operation, maintenance or cleaning of the plant, the guarding is a permanently fixed physical barrier; or

(b) if access to the area of the plant requiring guarding is necessary during operation, maintenance or cleaning of the plant, the guarding is an interlocked physical barrier that allows access to the area being guarded at times when that area does not present a risk and prevents access to that area at any other time; or



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Work Health and Safety Act 2020 (Section 191) IMPROVEMENT NOTICE

(c) if it is not reasonably practicable to use guarding referred to in paragraph (a) or (b), the guarding used is a physical barrier that can only be altered or removed by the use of tools: or

(d) if it is not reasonably practicable to use guarding referred to in paragraph (a), (b) or (c), the guarding includes a presence sensing safeguarding system that eliminates any risk arising from the area of the plant requiring guarding while a person or any part of a person is in the area being guarded.

During my inspection, I saw mixing tanks, identified as Tanks 1-5, in the small-scale blending area of the warehouse. I saw that the access hatch on top of each mixing tank is unguarded and that the lids are not interlocked. Conversations with management revealed that this hatch is ~~dual purpose, being used both as an access point for workers to enter to clean the tank, and to also~~ add chemicals and powders to the tank during blending, often while the impeller mixing blades are rotating. Performing this task while the access hatch remains unguarded increases the risk of injury should a worker fall into the tank while carrying out their normal work duties.

Further, in the large-scale blending area of the warehouse, I saw that the mixing tank identified as 'Louis', while in operation, had its removable hatch guarding removed, with the guarding located on the gantry adjacent the tank.

This type of hazard poses the following risk to workers' health and safety:

- 1) Impact injuries from falling from height into a mixing tank;
- 2) Entanglement injuries or fatality, i.e., from coming into contact with the moving shaft of the impellor mixing blades;
- 3) Crushing and shearing injuries or sheared body parts, i.e., from coming into contact with the moving impellor mixing blades.

Based on my experience as a WorkSafe Inspector, I believe that it is reasonably practicable for items of plant of this type to be adequately guarded, as you have already done so for other similar items of plant. Failing to have items of plant sufficiently guarded could expose workers to risk of harm or serious or fatal injury.

My discussion with management on 29 April 2025 confirms the breach has not been rectified and is ongoing.

Directions

You are directed to take the following measures:

No directions are provided in relation to this notice.



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Work Health and Safety Act 2020 (Section 191) IMPROVEMENT NOTICE

Recommendations

The following recommendations are provided for your consideration:

Refer to WHSC publication 'Managing risks of plant in the workplace: Code of practice (2024)' for practical guidance, available through the following link:

<https://www.worksafe.wa.gov.au/publications/managing-risks-plant-workplace-code-practice>

Due Date

You are required to remedy the contravention or likely contravention by no later than:

Due Date: 30 January 2026 Due Time: 5:00PM

Issued By

Inspector: Joseph BREHENY

Issuing Details

Issued Date: 29 April 2025



Department of Energy, Mines,
Industry Regulation and Safety



Work Health and Safety Act 2020 (Section 191) IMPROVEMENT NOTICE

Information

Provisions from the *Work Health and Safety Act 2020* include:

Failure to comply

Failure to comply with this notice within the specified period may constitute an offence, which may attract a fine of \$55,000 for an individual or \$285,000 for a body corporate. Refer section 193(1).

Display of notice

This notice, or a copy of it, must be displayed in a prominent place at or near the workplace affected by the notice. Failure to display the notice is an offence that may attract a fine. Refer section 210.

Issue of notice

Section 191 provides an inspector with the power to issue an improvement notice.

Contents of notice

The contents of an improvement notice are specified in section 192.

Directions

An improvement notice may include directions. Refer section 192(2).

Recommendations

An improvement notice may include recommendations. Refer section 205(1)

Compliance

The person to whom an improvement notice is issued must, as soon as is reasonably practicable after complying with the notice, notify the regulator of that compliance. Refer section 193(2).

Extension of time

If the time specified for compliance with this notice has not expired, you may request a review and the regulator may extend the time for compliance. Refer section 194.

Review

An eligible person may apply for a review of the decision to issue the improvement notice. Refer section 223.

Application for internal review

An application for internal review of a reviewable decision may be made within the period specified for compliance with the notice or 14 days, whichever is the lesser. Refer section 224.



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Work Health and Safety Act 2020 (Section 191)

IMPROVEMENT NOTICE

Identification

You may request the inspector issuing the notice to provide identification. Refer section 157(2).

Further information

The full *Work Health and Safety Act 2020* is available at www.legislation.wa.gov.au

Further information regarding improvement notices, reviewable decisions and review processes is available on the department's website www.dmirs.wa.gov.au

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2025 WAIRC 00456

**DISPUTE RE ALLEGED CONTRAVENTION OF THE OWNERS-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-

KHALISTAN TRANSPORT PTY LTD

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE WEDNESDAY, 30 JULY 2025
FILE NO/S RFT 3 OF 2025
CITATION NO. 2025 WAIRC 00456

Result Order issued

Representation

Applicant Transport Workers' Union of Australia, Industrial Union of Workers WA Branch

Respondent No Appearance

Order

WHEREAS the applicant on 16 May 2025, filed a *Form 7 – Referral to the Road Freight Transport Industry Tribunal* under the *Owner-Drivers (Contracts and Disputes) Act 2007 (OD Act)* and the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 (application)*;

AND WHEREAS the relief sought by the application was payment for work performed under the terms of an owner-driver contract, between the applicant and the respondent in the amount of \$14,844.50 (inclusive of GST) (**payment for the work performed**);

AND WHEREAS respondent failed to file a *Form 4 Response* to the application within the time prescribed by *the Industrial Relations Commission Regulations 2005*;

AND WHEREAS the Tribunal on 2 July 2025 issued a *Form 17 Notice of Hearing* listing the application for a 'Show Cause Hearing' to be held on Wednesday 30 July 2025 (**show cause hearing**);

AND WHEREAS the applicant appeared at the show cause hearing but there was no appearance by the respondent;

AND WHEREAS the Tribunal, during the show cause hearing heard evidence from David Sinagra on the following matters;

- i. the terms of the owner-driver contract between the applicant and the respondent;
- ii. the nature of the work the applicant performed for the respondent under the terms of the owner driver contract;
- iii. the steps the applicant had taken to date recover the payment for the work performed;

AND WHEREAS the Tribunal is satisfied that payment for the work performed remains outstanding and that it is appropriate to make a default determination under section 38B(2) of the OD Act;

NOW THEREFORE, the Tribunal, pursuant to the powers vested in it under the OD Act and the *Industrial Relations Act 1979* hereby ORDERS—

1. THAT the respondent pay the applicant the sum of \$14,844.50.
2. THAT the hearing of the application in relation to the balance of the relief sought by the applicant is adjourned to a date to be fixed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.
