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INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2025 WAIRC 00982

[2025] WASCA 177

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	WA PRISON OFFICERS' UNION OF WORKERS -v- MINISTER FOR CORRECTIVE SERVICES [2025] WASCA 177
CORAM	:	MITCHELL JA SEAWARD J SMITH AUJ
HEARD	:	12 AUGUST 2025
DELIVERED	:	10 DECEMBER 2025
FILE NO/S	:	IAC 1 of 2025
BETWEEN	:	WA PRISON OFFICERS' UNION OF WORKERS Appellant AND MINISTER FOR CORRECTIVE SERVICES Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL COMMISSIONER C TSANG
Citation	:	[2024] WAIRC 01034
File Number	:	FBA 10 OF 2024 & FBA 13 OF 2024

Catchwords:

Industrial relations - Construction of industrial agreement - Whether a prison officer employed as a Principal Officer in the Western Australia prison service was entitled to be paid overtime rates of pay for working on a public holiday - Whether majority of the Full Bench of the Western Australian Industrial Relations Commission erred in its construction of the relevant industrial agreement in finding that the officer was only entitled to ordinary rates of pay for working public holidays

Legislation:

Industrial Relations Act 1979 (WA), s 41, s 83

Minimum Conditions of Employment Act 1993 (WA), s 5, s 30

Public and Bank Holidays Act 1972 (WA), s 7

Result:

Appeal allowed

Decision of Full Bench set aside

Matter remitted to Full Bench to finalise the Appeal on penalty

Category: B

Representation:

Counsel:

Appellant : N D Ellery
Respondent : J M Carroll

Solicitors:

Appellant : Slater & Gordon Lawyers
Respondent : State Solicitor's Office

Case(s) referred to in decision(s):

Black Box Control Pty Ltd v TerraVision Pty Ltd [2016] WASCA 219

Chapmans Ltd v Australian Stock Exchange Ltd (1996) 67 FCR 402

Cockle v Isaksen [1957] HCA 85; (1957) 99 CLR 155

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337

Director General, Department of Education v United Voice WA [2013] WASCA 287; (2014) 94 WAIG 1

Electricity Generation and Retail Corporation trading as Synergy v EIT Kwinana Partner Pty Ltd [2022] WASCA 3

Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd [2019] NSWCA 53

Hancock Prospecting Pty Ltd v Wright Prosecting Pty Ltd [2012] WASCA 216; (2012) 45 WAR 29

Hume Steel Ltd v Attorney-General (Vic) (1927) 39 CLR 455

McCourt v Cranston [2012] WASCA 60

Minister for Corrective Services v Western Australian Prison Officers' Union of Workers [2024] WAIRC 01034

Park v Murray Irrigation Ltd [2018] NSWCA 166

Quasar Resources Pty Ltd v APG Aus No 3 Pty Ltd [2023] WASCA 171

Re Media Entertainment and Arts Alliance; Ex parte The Hoyts Corporation Pty Ltd [1993] HCA 40; (1993) 178 CLR 379

Short v FW Hercus Pty Ltd [1993] FCA 51; (1993) 40 FCR 511

Western Australian Prison Officers' Union of Workers v Minister for Corrective Services [2023] WAIRC 00725

William Sindall plc v Cambridgeshire County Council [1994] 1 WLR 1016

MITCHELL & SEAWARD JJ:

Introduction

1 From 16 November 2020, Maureen Harvey was employed as a 'Principal Officer' in the Prison Service of Western Australia on a full-time basis, working 120 hours per three-week period in accordance with her duty roster. At all material times after 18 December 2020, the conditions of Ms Harvey's employment in that position were governed by the *Department of Justice Prison Officers' Industrial Agreement 2020* (**2020 Agreement**).

2 Ms Harvey was rostered to work, and worked, on the King's Birthday public holiday on Monday 26 September 2022 and was paid her ordinary rate of pay for working that day. A dispute arose between the appellant (**Union**) and the respondent (**Minister**) as to whether Ms Harvey was entitled to be paid overtime rates of pay for working on that public holiday. The Union brought proceedings in the Industrial Magistrates Court alleging contravention of cl 22.1 and cl 33.3 of the 2020 Agreement. Those clauses provided for an Officer who was required to perform 'Overtime' to be paid time and a half for all Overtime hours worked. The magistrate found that the 2020 Agreement required the Minister to pay Ms Harvey Overtime rates of pay for working on 26 September 2022. The court ordered the Minister to pay Ms Harvey the shortfall of $215.51 and a fine of $15,000 for contravention of that requirement.

3 Both the Union and the Minister appealed to the Western Australian Industrial Relations Commission against the orders made by the Industrial Magistrates Court. The Minister contended that the magistrate erred in finding the Minister contravened the 2020 Agreement and in imposing the penalty. The Union contended that the magistrate erred in imposing a manifestly inadequate penalty and in failing to award costs to the Union.

4 A majority of the full bench of the Commission (Commissioners Emmanuel and Tsang, Senior Commissioner Cosentino dissenting) upheld the Minister's appeal and set aside the magistrate's contravention finding. The majority found that, when Ms Harvey worked on 26 September 2022, she was working ordinary hours (as opposed to Overtime) and payment for working those hours was included in her Annualised Salary. The Commission allowed the Minister's appeal and set aside the magistrate's orders. The Union's appeal to the Commission was consequently dismissed.

5 The Union now appeals to this court against the Commission's orders on the ground that the Commission erred in its construction of the 2020 Agreement. In essence, the Union contends that, on the proper construction of the 2020 Agreement, Ms Harvey was working Overtime on 26 September 2022 and was entitled to be paid time and a half of

her Hourly Annualised Rate of Pay. The Union contends that the Commission erred in failing to construe the 2020 Agreement in this manner.

The 2020 Agreement

6 Under cl 19.1 of the 2020 Agreement, the ordinary hours of work for Officers engaged on a full-time basis 'will be 40 hours per week, 80 hours per fortnight or 120 hours per three weeks unless otherwise agreed by the Union and the [Minister].' Clauses 26 - 29 of the 2020 Agreement provide for the posting of a roster for each prison.

7 Under cl 32.1 of the 2020 Agreement:

> The Annualised Salary for each Classification, including annual increments and agreed salary adjustments, is prescribed in Schedule A - Annualised Salaries.

8 Clause 32.4 provided:

> The Annualised Salary for Officers working Monday to Friday incorporates payment for ordinary hours of work and Easter Sunday.

9 The term 'Annualised Salary' was defined by cl 7 in the following terms:

> **Annualised Salary** means the salary rate that applies to each Classification as set out in Schedule A - Annualised Salaries. The Annualised Salary for Officers working shift work shall include the Monday to Friday rate for the Classification and a component in lieu of shift penalty payments, Public Holidays and accrued days off.

10 Schedule A to the 2020 Agreement set out the different classifications of Officer and the Annualised Salary for each classification, as well as the Fortnightly Annualised Rate of Pay and the Hourly Annualised Rate of Pay. The classified positions include 'Principal Officer (Mon - Fri)', 'Principal Officer (Alternate Weekends 10 hour)' and 'Principal Officer (Alternate Weekends 12 hour)'. The rates of pay of Officers classified as 'Principal Officer (Alternate Weekends 10 hour)' are approximately 19% higher than those of Officers classified as 'Principal Officer (Mon - Fri)'. The rates of pay of Officers classified as 'Principal Officer (Alternate Weekends 12 hour)' are approximately 24% higher than those of Officers classified as 'Principal Officer (Mon - Fri)'.

11 Clause 136 of the 2020 Agreement made provision in relation to 10 identified 'Public Holidays',[1] relevantly in the following terms:

> 136.1 For the purposes of this Agreement the following days, or the days observed in lieu shall, be recognised as Public Holidays: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Western Australia Day, Sovereign's Birthday, Christmas Day and Boxing Day.
>
> …
>
> 136.3 Except where specifically provided for in this Agreement payment for work performed on all Public Holidays is included in an Officer's Annualised Salary.
>
> 136.4 Officers who work Monday to Friday and are not required to work Public Holidays will not receive the Public Holiday portion in their Annualised Salary. However, if a Public Holiday falls during such an Officer's annual leave, the Officer will receive a paid day in lieu which will be taken immediately following the annual leave, or at a time mutually acceptable to the [Minister] and the Officer.

12 Overtime and rates of pay for Overtime were provided for in cl 21 and cl 22 of the 2020 Agreement. Subject to a presently immaterial qualification, cl 21.1 required full-time officers 'to work reasonable Overtime in addition to their ordinary hours of work'. Clause 22.1 provided for those Officers to be 'paid at the rate of time and a half the Officer's Hourly Annualised Rate of Pay for all Overtime hours worked'. Subject to a presently immaterial qualification, 'Overtime' for full-time Officers was defined in cl 7 to mean 'all work performed by an Officer at the direction of the [Minister] in excess of the Officer's rostered hours of work'.

Disposition

13 The general principles concerning the construction of industrial agreements were summarised by Buss J in *Director General, Department of Education v United Voice WA*.[2]

14 In our view, the critical issue in the present case is whether Officers classified as 'Principal Officer (Mon - Fri)' are 'Officers who work Monday to Friday and are not required to work Public Holidays' within the meaning of cl 136.4 of the 2020 Agreement. If they are, then cl 136.4 operates as a specific exception to the provision in cl 136.3 that 'payment for work performed on all Public Holidays is included in an Officer's Annualised Salary'. If Officers classified as 'Principal Officer (Mon - Fri)' are not required to work Public Holidays, then Public Holidays will not be part of their 'ordinary hours of work' for the purposes of cl 19.1 and cl 21.1 of the 2020 Agreement. In that event, a requirement to work on a Public Holiday would be a requirement to do work 'in addition to their ordinary hours of work' for the purposes of cl 21.1 of the 2020 Agreement. A requirement to work on a Public Holiday would then be Overtime for which the Officer was entitled to be paid the time and a half rate provided for in cl 22.1 of the 2020 Agreement.

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[1] A 'Public Holiday' is defined in cl 7 of the 2020 Agreement to mean a day specified in cl 136 of that Agreement.

[2] ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2014) 94 WAIG 1 [81] - [83].

15 The difficulty in construing the 2020 Agreement is that its terms are ambiguous as to whether Officers classified as 'Principal Officer (Mon - Fri)' are required to work Public Holidays.

16 We note that the Union seeks to draw support for its argument from the separate classification of various levels of vocational support officers. For example, there is a separate classification of 'Level 2 VSO (Mon - Fri)' and 'Level 2 VSO (Mon - Fri plus Public Holidays)'. This provides some support for the Union's construction, suggesting that classification of a person as working '(Mon - Fri)' does not involve work on Public Holidays. It suggests that a separate classification is provided for an Officer who is required to work Monday to Friday including Public Holidays. However, that support is limited by the distinct character and nature of work performed by vocational support officers, which may explain a different treatment of those positions.

17 The Union also seeks to draw support from the specification in the definition of 'Annualised Salary' that the Annualised Salary of Officers working shift work includes a component for Public Holidays. That is consistent with the Annualised Salary of Officers who are not shift workers not including a component for Public Holidays. If the specified components of shift worker's Annualised Salary were not components of the salary of other full-time workers, that would explain the significant differences (noted at [10] above) in the rates of pay of:

(a) Officers classified as 'Principal Officer (Mon - Fri)', on the one hand; and

(b) shift working Officers classified as 'Principal Officer (Alternate Weekends 10 hour)' and 'Principal Officer (Alternate Weekends 12 hour)', on the other hand.

18 However, the definition of 'Annualised Salary' does not expressly state what are or are not the components of the Annualised Salary of Officers who are not shift workers. While the definition is consistent with the Union's argument, we would not draw a negative implication that the specified components of the Annualised Salary of shift workers were not components of the Annualised Salary of other workers merely from the terms of this definition.

19 In our view, the ambiguity as to the operation of the 2020 Agreement is resolved by reading that agreement in the context of the series of predecessor industrial agreements between the Union and the Minister. Those agreements were in broadly similar format and defined the conditions of employment in periods before the 2020 Agreement was made. They all made provision for the Annualised Salary of Officers employed in the classification 'Principal Officer' and provided for percentage or fixed sum increases of the Annualised Salary at different points in time.

20 The *Department of Corrective Services Prison Officers' Enterprise Agreement 2010* (**2010 Agreement**) provided for the classifications 'Principal Officer (Mon - Fri)' and 'Principal Officer (Mon - Fri plus Public Holidays)'. The Annualised Salary for Officers classified as 'Principal Officer (Mon - Fri plus Public Holidays)' was about 3.8% higher than those classified 'Principal Officer (Mon - Fri)'. It is clear at this time that a 'Principal Officer (Mon - Fri)' was not paid to work on Public Holidays and was not required to work on Public Holidays as part of his or her ordinary hours of work.

21 In the *Department of Corrective Services Prison Officers' Enterprise Agreement 2013* (**2013 Agreement**) there was no classification of 'Principal Officer (Mon - Fri plus Public Holidays)'. The 2013 Agreement provided for a 4.25% increase in Officers' Annualised Salary for the first pay period after 1 June 2013. In the case of a 'Principal Officer (Mon - Fri)', the 4.25% increase was applied to the Annualised Salary provided for an Officer of that classification in the 2010 Agreement. In the absence of clear language, a reasonable person would not have understood the 2013 Agreement to require an Officer classified as a 'Principal Officer (Mon - Fri)' to work additional days without providing for any compensation for that increased demand on the Officer's time. The strong expectation would be that, if Officers classified as 'Principal Officer (Mon - Fri)' under the 2013 Agreement were required to work on Public Holidays as part of their ordinary hours of work, then the rates of pay under the 2010 Agreement for Officers classified as 'Principal Officer (Mon - Fri plus Public Holidays)' would have been carried forward with an increase by the percentage applied to all classifications in the 2013 Agreement. Having regard to the context in which it was made, the 2013 Agreement provided for a 'Principal Officer (Mon - Fri)' to work on weekdays other than Public Holidays and to be paid at the lower rate provided for that classification in the 2010 Agreement (subject to a percentage increase) for those working hours.

22 The classification structures for Principal Officers were maintained in the *Department of Corrective Services Prison Officers' Enterprise Agreement 2016* (**2016 Agreement**), and the *Department of Justice Prison Officers Industrial Agreement 2018* (**2018 Agreement**) with percentage increases applied to the Annualised Salary. The 2018 Agreement was superseded by the 2020 Agreement, which also maintained the classification structure.

23 Understood in the context of the earlier industrial agreements, it appears that the Annualised Salary of an Officer classified as 'Principal Officer (Mon - Fri)' provided for in the 2020 Agreement does not include any component for working on Public Holidays. The Annualised Salary of an Officer classified as 'Principal Officer (Mon - Fri)' in the 2020 Agreement has been arrived at by applying a series of percentage or fixed sum increases to the Annualised Salary for the classification of Principal Officers in the 2010 Agreement which did not include any component for working Public Holidays. The parties have not pointed to anything in the history of the agreements to indicate that the Union agreed for persons working as a 'Principal Officer (Mon - Fri)' to accept significantly longer working hours for no additional remuneration beyond the periodic increases that were applied across the board.

24 During the hearing of the appeal, the court raised with counsel the impact of cl 79.3 of the 2020 Agreement, which provided (subject to presently immaterial exceptions):

> An Officer … who is rostered to work 11 Sundays or Public Holidays (not including Overtime) shall receive an additional one weeks' paid annual leave for every Leave Year of continuous service while so rostered which shall accrue pro rata on a weekly basis.

The court raised the question of whether this provision, the substance of which was introduced in the 2013 Agreement, might have been objectively intended to provide compensation for a new requirement in that agreement for Officers to work on Public Holidays as part of their ordinary hours of work. In supplementary submissions, both parties accepted that the clause did not have this effect and that its requirements would not be satisfied by an Officer working only the 10 Public Holidays identified in the relevant agreements. We accept those supplementary submissions.

25 In the above context, in our view Officers classified as 'Principal Officer (Mon - Fri)' are 'Officers who work Monday to Friday and are not required to work Public Holidays' within the meaning of cl 136.4 of the 2020 Agreement. Payment for work performed on Public Holidays is not included in their Annualised Salary. Those Officers were not required to work Public Holidays as part of their 'ordinary hours of work' for the purposes of cl 19.1 and cl 21.1 of the 2020 Agreement.

26 Therefore, when Ms Harvey was rostered to work on the King's Birthday public holiday on 26 September 2022, she was required to do work 'in addition to [her] ordinary hours of work' for the purposes of cl 21.1 of the 2020 Agreement. She was entitled to be paid the time and a half rate provided for in cl 22.1 of the 2020 Agreement for doing that work. The majority of the full bench of the Commission erred in failing to construe the 2020 Agreement in that manner.

27 In seeking to resist this construction, counsel for the Minister emphasised the context that prisons are required to continuously operate, and that their efficient operation depends on minimum staffing levels being met, including on Public Holidays. Counsel submitted that, if Officers are not required to work Public Holidays as part of their ordinary hours of work, then the Minister could only require them to work overtime which is reasonable. While this aspect of the context is relevant, it does not compel a construction contrary to that which we have reached. On any view, prisons will be required to be staffed at many times which are not part of the ordinary hours of work of a 'Principal Officer (Mon - Fri)'. There is no evidence that the prison rosters could not be adequately managed unless Officers classified as 'Principal Officer (Mon - Fri)' were required to work on Public Holidays as part of their ordinary hours of work. Further, considerations as to efficient prison management do not justify reading the 2020 Agreement as requiring Officers to work on Public Holidays when their Annualised Salary does not include any component for working on those days.

28 Counsel for the Minister also points to the different way that part-time Officers are paid for Overtime. Under cl 22.2 of the 2020 Agreement, part-time Officers are paid at the Officer's Hourly Annualised Rate of Pay for work performed in excess of the Officer's ordinary hours of work up to a maximum of 40 hours per week. Counsel submits that there is no apparent justification for that disparity in treatment of full-time and part-time Officers who both work what would otherwise be their ordinary hours of work, but for the Public Holiday. However, that disparity is simply the product of the provision in cl 22 of the 2020 Agreement for full-time Officers to be paid at time and a half for Overtime while part-time Officers are only paid the ordinary rate.

29 Counsel for the Minister referred to the fact that Ms Harvey had been rostered to work on 26 September 2022 as part of her usual 120 hour per three-week cycle. He relied on the fact that the definition of 'Overtime' refers to work performed in excess of the Officer's *rostered* hours of work. However, counsel ultimately (and correctly) accepted that an Officer's rostered hours provided for in the 2020 Agreement were to be their ordinary working hours.[3] The fact that Ms Harvey was, as a matter of fact, 'rostered' to work on 26 September 2022 does not answer the question as to whether that work was Overtime, which turns on whether Public Holidays formed part of her ordinary hours of work. For the reasons explained above, Ms Harvey was not required to work Public Holidays as part of her ordinary hours of work. Her work on 26 September 2022 was Overtime despite the requirement to work that day appearing on the posted roster.

Orders

30 For the above reasons, we would allow the appeal, set aside the orders made by the Commission and remit the matter to the full bench of the Commission to deal with unresolved questions about penalty.

SMITH AUJ:

Introduction

31 The Union filed a claim pursuant to s 83 of the *Industrial Relations Act 1979* (WA) in the Industrial Magistrates Court of Western Australia alleging that the Minister contravened cl 21.1 of the 2020 Agreement, by failing to pay Ms Harvey overtime rates for work performed on a Public Holiday on 26 September 2022.

32 The relevant facts are not substantially in dispute. Pursuant to the terms of her contract of employment, and the 2020 Agreement, Ms Harvey was paid an Annualised Salary, as a Principal Officer rostered to work regular 8 hour shifts from Monday to Friday each week at Karnet Prison.

33 The circumstances which led to the claim were that on the 2022 King's Birthday Public Holiday[4] which fell on Monday, 26 September 2022, Ms Harvey worked one of her regular 8 hour rostered shifts and was paid ordinary time without payment of any overtime or penalty rates. The Union claims the work performed on that day was work performed as overtime. The Minister claims that payment for work on Public Holidays was included in Ms Harvey's all up Annualised Salary which she received for working ordinary hours of work.

The decision of the Industrial Magistrate at first instance

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[3] Appeal ts 137 - 138, 141.

[4] Formally known as 'Celebration Day' for the anniversary of the reigning Sovereign (*Minimum Conditions of Employment Act 1993* (WA) sch 1).

34 The clause of the 2020 Agreement that is the subject of the enforcement claim by the Union is cl 21.1 which provides when definition (c) of 'Overtime' in cl 7 is read in:[5]

> Subject to clause 23 - Minimum Time off Duty when Overtime is Worked, all Officers, other than those employed on a part time basis or
>
> undertaking ELTP, are required to work reasonable Overtime [*all work performed by an Officer at the direction of the Employer in excess of the Officer's rostered hours of work*] in addition to their ordinary hours of work.

35 At first instance, the Industrial Magistrate identified the elements that the Union was required to prove to make out the contravention of cl 21.1. These were, first, Ms Harvey worked on the Public Holiday on 26 September 2022, second, the work performed by her on that day was in excess of her rostered hours of work, and third, the Department had directed her to work on that Public Holiday.[6]

36 The Industrial Magistrate:

(a) found that there was sufficient ambiguity in the terms of the 2020 Agreement (in particular the meaning of cl 136.3 and cl 136.4) to warrant a consideration of the surrounding circumstances and the context in which the terms of that agreement were negotiated which context could be drawn from a series of industrial instruments that preceded and were in force from 2010 until the making of the 2020 Agreement;[7]

(b) it was necessary to construe the terms of each of those preceding industrial agreements and after doing so found that:

(i) from this history none of the prior industrial agreements reviewed for context contained a term giving clear expression to the requirement for an Officer classified as a Principal Officer (Monday to Friday) to work on Public Holidays;[8]

(ii) if the parties had intended a Principal Officer (Monday to Friday) to work on Public Holidays, the parties would have included an express term to this effect;[9]

(iii) prior to the 2013 Agreement, there were separate classifications for 'Principal Officer Monday to Friday' and 'Principal Officer Monday to Friday plus Public Holidays', the latter having a higher annual salary. The 2013 Agreement and subsequent agreements provided for a 'Principal Officer Monday to Friday' classification;[10]

(iv) prior to the 2013 Agreement, the Prison Officers' Award applied in conjunction with the relevant agreement. Clause 26.1 of the Prison Officers' Award provides '[a]ll Officers will be paid an Annualised Salary which will include a component in lieu of shift penalty payments, accrued days off, public holidays and overtime';[11]

(v) The 2013 Agreement was a stand-alone agreement which excluded the operation of the Prison Officers' Award. In relation to annualised salaries, it provided:[12]

> 31.1 The annualised rate of pay for Officers working Monday to Friday shall include *only* wages for ordinary hours of work.
>
> 31.2 The annualised rate of pay for Officers working shiftwork shall include the Monday to Friday rate for the Classification and a component in lieu of shift penalty payments, Public Holidays and Accrued Days Off.

(vi) the 2013 Agreement no longer had a 'Principal Officer Monday-Friday plus Public Holidays' classification. It did have 'Principal Officer Monday-Friday Shiftwork' classifications;[13]

(vii) from this history, his Honour concluded an Officer classified as a 'Principal Officer Monday-Friday' was entitled to paid days off for Public Holidays under the 2013 Agreement, consistent with how that same classification was treated under the 2010 Agreement.[14] The Industrial Magistrate reached this conclusion for three reasons:[15]

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[5] The relevant definition is shown in italics.

[6] ***Western Australian Prison Officers' Union of Workers v Minister for Corrective Services*** [2023] WAIRC 00725 [10] (primary reasons).

[7] Primary reasons [85] - [92].

[8] Primary reasons [166].

[9] Primary reasons [166].

[10] Primary reasons [98] - [99], [117], [155].

[11] Primary reasons [96] - [97].

[12] My emphasis.

[13] Primary reasons [117].

[14] Primary reasons [125].

[15] Primary reasons [120] - [123].

> First, if the parties had intended to stipulate that principal officers were required to work on public holidays for which they would receive no additional payment, the 2013 Agreement and the successor agreements would have included express provisions to this effect.
>
> Secondly, such a construction, particularly in the absence of an express provision which clarifies that principal officers working Monday to Friday are required to work on public holidays as part of their roster hours for which they would receive no additional payment, is inconsistent with cl 31.1 of the 2013 Agreement.
>
> Thirdly, if principal officers were required to work on public holidays, it would follow that the annualised salaries carried over from the 2010 Agreement, to which the wage increases under the 2013 Agreement and the successor agreements were applied, would be the annualised salary rates for the Principal Officer (Monday to Friday plus Public Holidays).
>
> However, this is not what happened. The rates from the 2010 Agreement for the Principal Officer (Monday to Friday) classifications, to which the wage increases were applied in the 2013 Agreement, were the Monday to Friday rates, which did not include a 'portion' for working on public holidays.

(c) after considering the history of the applicability of the terms of the Prison Officers' Award and prior industrial agreements made since 2010 the Industrial Magistrate:

(i) found that whilst cl 32.4 of the 2020 Agreement was similar to cl 31.1 of the 2013 Agreement, the only substantial difference was the omission of the word 'only' from cl 32.4 of the 2020 Agreement which reads '[t]he Annualised Salary for Officers working Monday to Friday *incorporates payment for ordinary* hours of work and Easter Sunday' whereas the former cl 31.1 was in substantially in the same terms other than that clause contained the words 'include only' after the word 'shall';[16]

(ii) observed that cl 31.1 of the 2013 Agreement was replicated in the same terms in the 2016 Agreement and the 2018 Agreement;

(iii) found that despite the omission of the word 'only' in cl 32.4 of the 2020 Agreement the clause should be interpreted the same way as it appears in the equivalent provisions of the 2013, 2016 and 2018 Agreements;[17]

(iv) found that an Officer who is only paid an Annualised Salary for working ordinary hours, does not receive the portion in their Annualised Salary that is referred to in cl 136.3 of the 2020 Agreement for working Public Holidays;[18]

(v) concluded that as Principal Officers (Monday to Friday) are not paid for working on Public Holidays, it follows these days would fall outside their rostered hours. For this reason, Public Holidays do not form a part of the rostered hours for Principal Officers on Monday to Friday classifications. As a result, the work Principal Officers (Monday to Friday) perform on Public Holidays would fall within the definition of 'Overtime' under cl 7 of the 2020 Agreement. That is, work performed on Public Holidays would be 'in excess of the officer's rostered hours of work'.[19]

37 As consequence of these findings, the Industrial Magistrate made orders that: (a) the contravention of cl 21.1 of the 2020 Agreement was proved; (b) the Minister pay the Union a fine fixed in the sum of $15,000; and (c) the Minister pay Ms Harvey the sum of $215.51.

The decision of the majority of the Full Bench

38 On appeal, for reasons given by the majority, the Full Bench upheld the appeal and quashed the orders made by the Industrial Magistrate.[20]

39 In their joint reasons for decision of the majority, Emmanuel and Tsang CC, found that when Ms Harvey worked the 8 hour shift on the Public Holiday on 26 September 2022, she was working both her ordinary hours and rostered hours of work, and consequently she was not directed to work in excess of her rostered hours of work.[21]

40 As to the issue regarding Ms Harvey's entitlement to a paid day off on 26 September 2022, the majority found the Industrial Magistrate had erred in law in finding ambiguity arose in the 2020 Agreement warranting recourse to surrounding circumstances.[22]

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[16] Primary reasons [159] - [160]; see [36(b)(v)] of these reasons for the text of cl 31.1.

[17] Primary reasons [173].

[18] Primary reasons [175].

[19] Primary reasons [176] - [177].

[20] ***Minister for Corrective Services v Western Australian Prison Officers' Union of Workers*** [2024] WAIRC 01034 (FBA reasons).

[21] FBA reasons [232] and [234].

[22] FBA reasons [202] and [218].

41 The Commissioners went on to find:

(a) the Annualised Salary compensates an Officer in Ms Harvey's position for work performed on the King's Birthday Public Holiday. In particular, cl 136.3 states that payment for their work on this Public Holiday 'is **included** in their Annualised Salary "***except*** where specifically provided for in this Agreement"';[23]

(b) in cl 136.3 of the 2020 Agreement, the word 'specifically' is an adverb modifying the word 'provided'. A matter is 'provided for in' an industrial agreement via a provision of the agreement, and a provision of the agreement is a provision in the agreement. Nevertheless, cl 136.3 explicitly states that the provision must be in the 2020 Agreement: 'except where specifically provided for in this Agreement'. The meaning of specifically provided for in this context means expressly provided for in the 2020 Agreement';[24]

(c) when regard is had to the Macquarie Dictionary meaning of the word 'specific', Ms Harvey would only be entitled to payment in addition to her Annualised Salary for the work performed on 26 September 2022 if there was a specific provision in the 2020 Agreement that provided for this;[25]

(d) there is no specific provision in the 2020 Agreement that provides for payment for the work performed on this Public Holiday *to not be* included in her Annualised Salary;[26]

(e) similarly, there is no specific provision in the 2020 Agreement that provides for Ms Harvey to receive overtime pay for the work performed on this Public Holiday;[27]

(f) there is no specific provision in the 2020 Agreement that provides for an Officer in Ms Harvey's position to be absent from work on Public Holidays or be paid penalty rates for work performed on Public Holidays;[28] and

(g) the following matters support the proposition that when Ms Harvey worked on 26 September 2022, payment of the hours worked by her was included in her Annualised Salary:

(i) it was conceded by the Union that on the Public Holiday she worked her ordinary hours of work;[29]

(ii) by cl 19.1 and cl 19.6, as a full-time employee, Ms Harvey's ordinary hours of work are 40 hours a week worked in shifts of 8 hours;[30]

(iii) by cl 7 the definition of 'Annualised Salary' Ms Harvey was not working shift work, meaning only the first sentence of that definition applied to her and the rate applicable to her classification as a Principal Officer as set out in Schedule A - Annualised Salaries support this position, which do not provide for a classification of 'Mon-Fri plus Public Holidays';[31]

(iv) cl 136.4 only applies to Officers 'who work Monday to Friday and who are not required to work Public Holidays', meaning they will not receive the Public Holiday portion in their Annualised Salary, which means that cl 136.4 does not apply to Ms Harvey;[32]

(v) as an Officer working Monday to Friday, Ms Harvey's Annualised Salary by the operation of cl 32.4 'incorporates payment for ordinary hours of work and Easter Sunday'. Clause 136.1 does not include Easter Sunday. Therefore, it would be consistent to read the reference to 'ordinary hours of work' in cl 32.4 as including the Public Holidays listed in cl 136.1.[33]

Principles - The proper approach to construction of a registered industrial agreement

42 The starting point in considering the principles applicable to the proper construction of industrial agreement is the nature of an industrial agreement is that it is made as an agreement 'with respect to any industrial matter or for the prevention or resolution under this Act of any related disputes, disagreements, or questions may be made between an organisation or association of employees and any employer or organisation or association of employers'.[34] Once agreed between the parties an application is made to register the agreement as an industrial agreement, which when registered is subject to and pursuant to the terms of the *Industrial Relations Act 1979* (WA).[35]

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[23] FBA reasons [209].

[24] FBA reasons [210].

[25] FBA reasons [212].

[26] FBA reasons [213].

[27] FBA reasons [214].

[28] FBA reasons [215]; as to the finding there is no specific provision that provides for an Officer in Ms Harvey's position to be absent from work on Public Holidays, Senior Commissioner Cosentino made the same observation in [63].

[29] FBA reasons [220].

[30] FBA reasons [221(a) and (b)].

[31] FBA reasons [221(c) and (d).

[32] FBA reasons [221(f)].

[33] FBA reasons [221(h)].

[34] *Industrial Relations Act 1979* (WA), s 41(1).

[35] *Industrial Relations Act 1979* (WA), div 2B.

43 The effect of registration is that the terms extend to and bind all employees who are employed in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies; and any employer or union who is a party to the agreement.[36] Once registered an industrial agreement becomes a statutory instrument, which is enforceable under s 83 of the *Industrial Relations Act*.[37]

44 The second point is that it is to be borne in mind that when construing an industrial agreement these agreements are not usually drafted by a skilled legal draftsperson and are often expressed in terms which lack precision.

45 In this context Buss J in ***Director General, Department of Education v United Voice WA*** stated the following principles as to the proper approach to the construction of an industrial agreement:[38]

> The construction of an industrial agreement involves ascertaining what a reasonable person would have understood the parties to the agreement to mean. The language of the agreement should be understood in the light of its industrial context and purpose. See ***Amcor Ltd v Construction, Forestry, Mining and Energy Union*** [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ & McHugh J).
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> In ***Kucks v CSR Ltd*** (1996) 66 IR 182, Madgwick J observed:
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> > 'It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention *in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon*. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. *And meanings which avoid inconvenience or injustice may reasonably be strained for*. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand (184). (emphasis added)'
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> See also ***City of Wanneroo v Holmes*** (1989) 30 IR 362, 378 - 379 (French J); ***Amcor*** [96] (Kirby J), [129] - [130] (Callinan J).
>
> The words of a clause in a written agreement are to be given the most appropriate meaning which they can legitimately bear. A court must have regard to all of the provisions of the agreement with a view to achieving harmony among them. See ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** [1973] HCA 36; (1973) 129 CLR 99, 109 - 110 (Gibbs J). These propositions are applicable to instruments generally, subject to any particular rules of construction which have been developed in relation to a particular kind of provision or instrument.

46 Although industrial agreements are not in essence commercial agreements, it is important as with the construction of all instruments that are in part contractual in nature as they are made by agreement between parties that:[39]

(a) the role of the court or tribunal in construing such an instrument is to give effect to the common intention of the parties. The common intention of the parties is to be ascertained objectively;

(b) the task involves a determination of the meaning of the words of the instrument by reference to its *text, context and purpose*. The starting point for the proper construction of a clause is the language used in the clause. That is why, if the words used are unambiguous (that is, one open to only one meaning) the court must give effect to them; and

(c) *the instrument must be read as a whole*. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed to have some operation.

47 Further, it is meaningless to refer to the ordinary meaning of words in the abstract. Words must be construed within the context of the terms of the contract.[40]

48 As to whether it can be found that there is ambiguity in the text and if so, as to how that ambiguity is resolved, Mason J in ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** referred to what is known as the 'true rule' that:[41]

> [E]vidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.

49 Subsequently, McLure P in ***Hancock Prospecting Pty Ltd v Wright Prosecting Pty Ltd*** explained the effect of the 'true rule' as follows:[42]

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[36] *Industrial Relations Act 1979* (WA), s 41(4).

[37] *Industrial Relations Act 1979* (WA), s 83.

[38] ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2014) 94 WAIG 1 [81] - [83].

[39] See ***Electricity Generation and Retail Corporation trading as Synergy v EIT Kwinana Partner Pty Ltd*** [2022] WASCA 3 [230], [232] - [234].

[40] ***Quasar Resources Pty Ltd v APG Aus No 3 Pty Ltd*** [2023] WASCA 171 [74] - [75] (Beech & Vaughan JJA).

[41] ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** (1982) 149 CLR 337, 352.

> The practical limitation flowing from the ***Codelfa*** true rule is that surrounding circumstances cannot be relied on to give rise to an ambiguity that does not otherwise emerge from a consideration of the text of the document as a whole, including whatever can be gleaned from that source as to the purpose or object of the contract.
>
> The word 'ambiguous', when juxtaposed by Mason J with the expression 'or susceptible of more than one meaning', means any situation in which the scope or applicability of a contract is doubtful: ***Bowtell v Goldsbrough, Mort & Co Ltd*** (1905) 3 CLR 444, 456 - 457. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity.

50 As McLure P made clear in ***Hancock Prospecting Pty Ltd v Wright Prosecting Pty Ltd*** in the passage above ambiguity can arise where contractual language is susceptible of more than one meaning in the sense of uncertainty where words are doubtful or lacking in clarity,[43] and where there is doubt about the scope or the application of the terms of the instrument to the facts that render the instrument in some sense ambiguous that is revealed by a consideration of context.

51 In addition, instruments are to be usually read in the ordinary way a document is read, that is from the beginning onwards.[44]

52 Also of importance, as the Court of Appeal stated in ***Black Box Control Pty Ltd v TerraVision Pty Ltd***, there are important limits on the extent to which evidence of admissible surrounding circumstances can influence the proper construction of an instrument. Reliance on surrounding circumstances must be tempered by loyalty to the text of the instrument, whereby reference to background facts are not a licence to ignore or rewrite the text.[45]

53 Where there is an apparent inconsistency between two clauses in the agreement, where possible, the conflict should be resolved on the basis that one provision qualifies the other and, as a result, both provisions are given meaning and effect.[46] However, it is a well-accepted rule of construction that specific provisions prevail over inconsistent general provisions concerning the same subject matter.[47] Consequently, where there are general provisions and specific provisions, both are given effect, the specific provisions being applicable to the circumstances which fall within them.[48] As Hoffmann LJ observed in ***William Sindall plc v Cambridgeshire County Council***, that it is 'particularly apposite if the effect of general words would otherwise be to nullify what the parties have contemplated as an important element in the transaction'.[49]

54 It is also relevant to observe in this appeal that definitions do not have substantive effect and must not be construed in isolation from the operative provisions. Consequently, where an agreement uses definitions, ordinarily the words of the definition are to be read into the operative text.[50] This necessarily is a consequence of the principle of construing a word or words in the context of the subject matter in which it is used and its location in the operative text.

55 Although in some cases it may be relevant where ambiguity is raised to have regard to preceding instruments as evidence of surrounding circumstances, in the absence of implied or express incorporation of any provision of a preceding instrument it is not permissible to construe an instrument by regard to the construction of a provision or provisions in a preceding instrument that are different. Although where ambiguity is raised recourse may be had to the history of a particular clause of an instrument, the use to which that history can put to use is not unlimited.

56 In ***Short v FW Hercus Pty Ltd***, Burchett J observed:[51]

> Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form, only a kind of wilful judicial blindness could lead the court to deny itself the light of that history, and to prefer to peer unaided at some obscurity in the language. 'Sometimes', McHugh J said in ***Saraswati v The Queen*** (1991) 172 CLR 1 at 21, the purpose of legislation 'can be discerned only by reference to the history of the legislation and the state of the law when it was enacted'. Awards must be in the same position.

57 However, as to the use of the history, his Honour relevantly said:[52]

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[42] ***Hancock Prospecting Pty Ltd v Wright Prosecting Pty Ltd*** [2012] WASCA 216; (2012) 45 WAR 29 [76] - [77].

[43] See ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** (1982) 149 CLR 337, 350 (Mason J).

[44] ***McCourt v Cranston*** [2012] WASCA 60 [71] (Murphy JA).

[45] ***Black Box Control Pty Ltd v TerraVision Pty Ltd*** [2016] WASCA 219 [42(7)].

[46] ***Re Media Entertainment and Arts Alliance; Ex parte The Hoyts Corporation Pty Ltd*** [1993] HCA 40; (1993) 178 CLR 379, 386 - 387.

[47] ***Hume Steel Ltd v Attorney-General (Vic)*** (1927) 39 CLR 455, 465 - 466 (Higgins J) (Gavan Duffy J agreeing); see also ***Chapmans Ltd v Australian Stock Exchange Ltd*** (1996) 67 FCR 402, 411 (Lockhart & Hill JJ); ***Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd*** [2019] NSWCA 53 [52] (Leeming JA) citing ***Park v Murray Irrigation Ltd*** [2018] NSWCA 166 [79] (Sackville AJA).

[48] ***Chapmans Ltd v Australian Stock Exchange Ltd*** (1996) 67 FCR 402, 411 (Lockhart & Hill JJ).

[49] ***William Sindall plc v Cambridgeshire County Council*** [1994] 1 WLR 1016, 1024.

[50] ***Black Box Control Pty Ltd v TerraVision Pty Ltd*** [2016] WASCA 219 [42(11)].

[51] ***Short v FW Hercus Pty Ltd*** [1993] FCA 51; (1993) 40 FCR 511, 518.

[52] ***Short v FW Hercus Pty Ltd*** [1993] FCA 51; (1993) 40 FCR 511, 517 - 518.

> [I]f, for example, an expression was first created by a particularly respected draftsman for the purpose of stating the substance of a suggested term of an award, was then adopted in a number of subsequent clauses of awards dealing with the same general subject, and finally was adopted as a clause dealing with that same general subject in the award to be construed, the circumstances of the origin and use of the clause are plainly relevant to an understanding of what is likely to have been intended by its use. It is in those circumstances that the author of the award has inserted this particular clause into it, and they may fairly be regarded as having shaped his decision to do so.
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> …
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> The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed. In literature, Milton and Joyce could not be read in ignorance of the source of their language, nor should a legal document, including an award, be so read.

58 Consequently, it is permissible to have regard to prior instruments for context, as the original meaning of a particular clause. However, if the words used in their context are different to the words used in the instrument to be construed, or clauses in a different form have been omitted, or a prior instrument when read as a whole provides a different scheme then the use to which the history of a similar clause or words in a prior instrument may be put to use is likely to be limited.

59 In contrast, where an instrument is part of an interconnected series of agreements those agreements can be construed as a whole.[53] This principle has no application in this matter as the 2020 Agreement replaced all preceding Industrial Agreements, and the Prison Officers' Award. Clause 6 of the 2020 Agreement provides:

> 6.1 This Agreement cancels and replaces the Department of Justice Prison Officers' Industrial Agreement 2018.
>
> 6.2 This Agreement is a comprehensive Agreement consolidating all relevant Award terms and is intended to replace in full the Prison Officers' Award. Notwithstanding this intention, if there is any inconsistency between this Agreement and the Prison Officers' Award, the terms of this Agreement will prevail.
>
> 6.3 This Agreement replaces all other registered industrial agreements and unregistered agreements between the parties on matters contained in this Agreement.
>
> 6.4 This Agreement will be read in conjunction with the relevant legislation and associated regulations.

Did the Full Bench err in its construction of the 2020 Agreement?

60 The issue for determination by the Industrial Magistrate, and in this appeal, is whether work carried out by a Principal Officer Monday to Friday, on a weekday that is a Public Holiday attracts the operation of cl 21.1, on grounds that such work is performed in addition to their ordinary hours of work.

61 Before considering the reasons of the majority it is necessary to have regard to the minimum statutory framework governing entitlements to Public Holidays in div 5 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act), in force at the time of the alleged breach in 2022, which were by operation of law implied into the 2020 Agreement, as a minimum condition of leave.

62 Section 5(1) of the MCE Act provides that the minimum conditions of employment[54] extend to and bind all employees and employers and cannot be displaced by an industrial instrument or contract of employment. Section 5(2) contemplates that an industrial instrument may provide for more favourable conditions, than the minimum conditions.

63 A Public Holiday is defined in s 3(1) of the MCE Act to mean a day mentioned in Schedule 1 that is a Public Holiday. Schedule 1 of the MCE Act lists 11 Public Holidays, namely New Year's Day, Australia Day, Labour Day, Good Friday, *Easter Sunday*, Easter Monday, Anzac Day, Western Australia Day, Celebration Day for the anniversary of the birthday of the reigning Sovereign (the day appointed by proclamation published in the Gazette under the *Public and Bank Holidays Act 1972* (WA)), Christmas Day and Boxing Day. In addition, Schedule 1 includes any special day appointed by proclamation under the *Public and Bank Holidays Act 1972* s 7 to be a Public Holiday.

64 At the time of the alleged breach of the 2020 Agreement, s 30 of the MCE Act provided that an employee, other than a casual employee, who in any area of the State is not required to work on a day solely because that day is a Public Holiday in that area, is entitled to be paid as if he or she were required to work on that day.

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[53] ***Hancock Prospecting Pty Ltd v Wright Prosecting Pty Ltd*** [2012] WASCA 216; (2012) 45 WAR 29 [81] (McLure P).

[54] By operation of (c) of the definition of the meaning of 'minimum conditions of employment' in s 3(1) of the *Minimum Conditions of Employment Act 1993* (WA) as it applied in 2022 were minimum conditions of employment.

65 At first instance, and before the Full Bench, there was a dispute between the parties in respect of the interpretation of cl 136.3 and cl 136.4 of the 2020 Agreement which dealt with payment for work on Public Holidays by Officers who are paid an Annualised Salary. These clauses provided:

> 136.3 Except where specifically provided for in this Agreement payment for work performed on all Public Holidays is included in an Officer's Annualised Salary.
>
> 136.4 Officers who work Monday to Friday and are not required to work Public Holidays will not receive the Public Holiday portion in their Annualised Salary. However, if a Public Holiday falls during such an Officer's annual leave, the Officer will receive a paid day in lieu which will be taken immediately following the annual leave, or at a time mutually acceptable to the Employer and the Officer.

66 The Industrial Magistrate found that ambiguity arose in the construction of cl 136.3 and cl 136.4 of the 2020 Agreement, in that there was ambiguity in the meaning of *'except where specifically provided for in this Agreement*' in cl 136.3 and ambiguity in the words *'Monday to Friday and are not required to work Public Holidays*' in cl 136.4.

67 On appeal, the majority of the Full Bench found that there was no ambiguity in these terms of the 2020 Agreement. The majority also found that cl 136.4 had no application to payment for work performed by Ms Harvey. The majority found the text of cl 136.4 was unambiguously clear and found it applied only to Officers who were *not* required to work Public Holidays.

68 For the reasons that follow the approach of the majority was erroneous. The Commissioners narrowly construed the provisions of the 2020 Agreement without regard to the nature of a 'Public Holiday' and context of the various conditions that attach to the Public Holiday provisions of the 2020 Agreement, including the components of Annualised Salary payable to a Principal Officer in the position of Ms Harvey. Nor did they construe those provisions as a whole.

69 In her minority reasons, Senior Commissioner Cosentino also did not find there was ambiguity in cl 136.3 and cl 136.4 but instead found there was ambiguity in the words 'rostered hours of work' in the definition of 'overtime'.[55] However, the approach taken by the Senior Commissioner informing this opinion was also erroneous.

70 First, the task of construction in the way approached by the Senior Commissioner was to construe the words 'rostered hours or work' in the absence in the context in which they appeared in cl 21.1. Clause 21.1, when the definition of 'Overtime' in cl 7(c) is read in, provided:[56]

> Subject to clause 23 - Minimum Time off Duty when Overtime [*all work performed by an Officer at the direction of the Employer in excess of the Officer's rostered hours of work*] is Worked, all Officers, other than those employed on a part time basis or undertaking ELTP, are required to work reasonable Overtime in addition to their ordinary hours of work.

71 Second, no ambiguity could be found to arise in cl 21.1 itself, when the definition is read in. In the context in which they appear in that clause the words 'rostered hours of work' are used to refer to the posted work cycle of planned work.

72 The Industrial Magistrate found that Ms Harvey was engaged 120 ordinary hours worked over a three-week roster Monday to Friday, and on 26 September 2022 she was directed to work one fifth of her weekly hours of 40 hours a week on an 8 hour shift.

73 Ambiguity does arise when cl 21.1, cl 32.4, cl 136.3 and cl 136.4 of the 2020 Agreement are read together in the context of the critical issue whether the work performed by Ms Harvey on Monday, 26 September 2022 was work performed in addition to, or in excess of, her rostered hours of work. This ambiguity arises because it is not clear whether Principal Officers Monday to Friday are *required to work* Public Holidays that fall on a weekday or whether such work falls outside of 'ordinary hours'.

74 This ambiguity arises despite the fact that cl 19.1 and cl 19.3 prescribed 'ordinary hours' for Monday to Friday Officers engaged on a full-time basis to be 40 hours a week worked in 8 hour shifts (on Monday to Friday).

75 This ambiguity also arises from the inherent nature of the bundle of rights and obligations comprising the observance of Public Holidays. Except in particular workplaces such as in this matter, workplaces are closed on a Public Holiday and employees do not work all of their ordinary hours of work in that week if that Public Holiday falls on an ordinary workday. However, they are paid as if they had worked all their ordinary hours. This is reflected in s 30 of the MCE Act as it applied in 2022, which implied into the 2020 Agreement that an Officer who was *not required to* work on a day solely because that day was a Public Holiday and instead that Officer was entitled to be absent from work on that day and to be paid as if that Officer was required to work on that day.

76 Put another way, these provisions of the 2020 Agreement raise an ambiguity in the context whether hours worked by a Principal Officer Monday to Friday on a Public Holiday that falls on a weekday (which by operation of s 30 of the MCE Act if such an Officer is *not required* to work on that day it is a paid day) and if that day is worked is that work 'in addition to their ordinary hours of work' within the meaning of cl 21.1 of the 2020 Agreement so as to deem that work to be overtime.

77 A further ambiguity also arises in this context when construing cl 136.4 in so far as this provision provides that 'Officers who work Monday to Friday and *who are not required to work Public Holidays* will not receive the Public

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[55] FBA reasons [73].

[56] The relevant part of definition is shown in italics.

Holiday portion in their Annualised Salary', together with cl 136.3 which provides '[e]xcept where specifically provided for in this Agreement *payment for work performed on Public Holidays is included in an Officer's Annualised Salary*.' This raises the question whether there is a distinction in these provisions between *being required to work* Public Holidays if an Officer's annualised salary includes a component of payment for such work and *not being required to work* Public Holidays if there is no such component.

78 Put another way, are Public Holidays that fall within Monday to Friday of a week to be treated as 'ordinary hours of work' when a Principal Officer Monday to Friday is absent on that day on the basis that they are *not required to work* on these days because they receive no remuneration for working on those Public Holidays?

79 The answer to these questions raises a further ambiguity because it is not entirely clear from the rates specified in Schedule A for Principal Officers (Monday to Friday) that the Officers' Annualised Salary in the 2020 Agreement provided any component or compensation for being directed to work on a Public Holiday.

80 It is notorious that the nature of an annualised rate of pay is that it is an all-up rate of pay that incorporates payment for all hours worked, except where the terms of an applicable industrial instrument provide for an additional payment for particular work patterns and other allowances. It is well accepted, by what might be characterised as a norm or custom that is usually applied by the operation of employment and industrial instruments, that employees who are required to or are directed to work on a Public Holiday receive compensation in the form of either an additional day of leave or a penalty loading in addition to their normal pay.

81 Consequently, the components of an annualised salary in an industry that operates 24 hours a day 7 days a week are usually inextricably linked to required work patterns such as rostered ordinary hours, and whether particular classifications of employees are shift workers, or are required routinely to work weekends and/or Public Holidays.

82 The provisions of the 2020 Agreement that applied to Officers who worked Monday to Friday, were as follows:

(1) Clause 32.4 when the definition of 'Annualised Salary' in cl 7 that applied to Officers who were not shift workers is read in provided:[57]

> The Annualised Salary [*the salary rate that applies to each Classification as set out in Schedule A - Annualised Salaries.*] for Officers working Monday to Friday incorporates payment for ordinary hours of work and Easter Sunday.

This provision made clear that although an Officer who was classified Monday to Friday, that Officer would not be rostered to work on a Sunday, yet they received an additional payment for the Easter Sunday Public Holiday.

(2) The rate of salary applicable for the classification for Principal Officers in Schedule A distinguished the rate payable to Principal Officers Monday to Friday on 8 hour weekday shifts from Principal Officers who are shift workers and who work alternative weekends on 10 or 12 hour shifts. Shift workers suffer the disability of working irregular hours or longer shifts, and for this disability they usually receive some form of additional remuneration. This differential was reflected in the following Annualised Salaries each of the three classifications of Principal Officers in Schedule A. Notably, the Principal Officers who were required to work alternative weekends on 10 or 12 hour shifts received a higher rate of pay than Principal Officers who were to work Monday to Friday:

	Rate of Pay on and from 11 June 2020			Rate of Pay on and from 11 June 2021		
	Annualised Salary ($)	Fortnightly Annualised Rate of Pay ($)	Hourly Annualised Rate of Pay ($)	Annualised Salary ($)	Fortnightly Annualised Rate of Pay ($)	Hourly Annualised Rate of Pay ($)
Principal Officer (Mon-Fri)						
1st Year	109,296	4,190.26	52.37	110,300	4,228.75	52.85
2nd Year	111,421	4,271.73	53.39	112,425	4,310.22	53.87
Thereafter	113,588	4,354.81	54.43	114,592	4,393.30	54.91
Principal Officer (Alternate Weekends 10 Hour)						
1st Year	130,504	5,003.34	62.54	131,702	5,049.27	63.11
2nd Year	133,041	5,100.61	63.75	134,240	5,146.58	64.33
Thereafter	135,629	5,199.83	64.99	136,827	5,245.76	65.57
Principal Officer (Alternate Weekends 12 Hour)						
1st Year	135,975	5,213.09	65.16	137,224	5,260.98	65.76
2nd Year	138,619	5,314.46	66.43	139,868	5,362.35	67.02
Thereafter	141,315	5,417.82	67.72	142,564	5,465.71	68.32

[57] The relevant part of the definition is shown in italics.

83 The starting point in considering whether the Annualised Salary paid to Ms Harvey in accordance with cl 32.4 and Schedule A contained an additional component for work performed on a Public Holiday that falls on a weekday is to first consider the effect of cl 136.3.

84 Clause 136.3 when the definition of 'Officer' in cl 7 is read in provided:[58]

> Except where specifically provided for in this Agreement payment for work performed on all Public Holidays is included in an Officer's [who is an '*employee employed in a Classification contained in Schedule A - Annualised Salaries ...*'] Annualised Salary.

85 In ***Cockle v Isaksen***, Dixon CJ, McTiernan and Kitto JJ said of the character of the word 'except':[59]

> An exception assumes a general rule or proposition and specifies a particular case or description of case which would be subsumed under the rule or proposition but which, because it possesses special features or characteristics, is to be excluded from the application of the rule or proposition. It is not a conception that can be defined in the abstract with exactness or applied with precision; it must depend very much upon context.

86 The words *'Except where specifically provided for in this Agreement*' in cl 136.3 when read in context, raise a general rule that all the annualised salaries in Schedule A contain a component of payment for work performed on all Public Holidays, whereby this general rule will not apply if there is another specific provision in the 2020 Agreement which provides otherwise.

87 The word 'specifically' when used in this context is clearly an express reference to another clause that has specific operation to the circumstances prescribed in that specific provision, rather than a clause that has general application in the 2020 Agreement (namely cl 136.3).

88 There are two clear specific express exceptions to the application of cl 136.3.

89 The first is cl 32.5. It applies expressly to Officers who are *shift workers*. It is a specific provision in that it applies only to shift workers and not to Officers generally. It does not apply to Principal Officers in the position of Ms Harvey (who by being required by their classification to work 8 hour shifts Monday to Friday are not shift workers). Clause 32.5 itemises the individual components of the Annualised Salary for Officers who work shift work as follows:

> The Annualised Salary' for Officers working shift work incorporates the Monday to Friday rate (including Easter Sunday) for the Classification and a component in lieu of shift penalty payments, Public Holidays and Accrued Days Off. Where a total rate is used, individual component parts of penalties, allowances, and base rates should be identified.

90 Clause 32.5 would apply to Principal Officers classified in Schedule A as Principal Officer (Alternative Weekends 10 Hour) and Principal Officer (alternative Weekends 12 Hour) as working weekends on 10 or 12 hours would necessarily involve shift work. In the absence of an Annualised Salary Officers in these classifications would be paid shift penalty payments. There is a mention in this clause of a component for Public Holidays as it is necessary to specify other components that are not paid to Monday to Friday Officers such as shift penalty payments. In addition, cl 32.5 is also repetitive in part in that it repeats the second sentence of the definition of 'Annualised Salary' in cl 7 of the 2020 Agreement which states that:

> The Annualised Salary for Officers working shift work shall include the Monday to Friday rate for the Classification and a component in lieu of shift penalty payments, Public Holidays and accrued days off.

91 Because cl 32.5 expressly makes mention of the components of the Annualised Salary including a component in lieu of Public Holidays, this provision applies to Officers who are shift workers and cl 136.3 does not apply to these Officers, in that it repeats this component together with other components of the applicable Annualised Salary.

92 Second, there are other Officers who receive specific rates of pay which distinguish those Vocational Support Officers (VSOs) who are rostered to work ordinary hours on Monday to Friday and those who are rostered to work ordinary hours on Monday to Friday and Public Holidays in the Annualised Salary classifications in Schedule A (Levels 2, 3 and 4 VSOs (Monday to Friday plus Public Holidays)). Those in the former category of various levels of VSO classifications receive a lower Annualised Salary than those in the equivalent classifications in the latter classifications of VSOs. The VSO classifications do not include any classification of Principal Officer.

93 The third possible exception to cl 136.3 is the specific provision cl 32.4 which applied to Officers who work Monday to Friday, and as such prima facie applied to Principal Officers in the position of Ms Harvey.

94 It is noted that cl 32.4 is silent as to when a Public Holiday falls on a weekday does work on that day comprises 'ordinary hours of work'.

95 One construction of cl 32.4 is that the components of the remuneration of Officers who worked Monday to Friday each week was for ordinary hours worked and one Public Holiday only, namely Easter Sunday, but no other Public Holiday, that otherwise falls within ordinary hours.

96 Easter Sunday was not listed in cl 136.1 as a day recognised as a Public Holiday for the purposes of the 2020 Agreement. However, as referred to in [63], it is a day specified as a Public Holiday in Schedule 1 of the MCE Act, and was a minimum leave condition implied into the 2020 Agreement.

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[58] The relevant part of the defined term is shown in italics.

[59] ***Cockle v Isaksen*** [1957] HCA 85; (1957) 99 CLR 155, 165.

97 However, it is not clear whether by the receipt of a component of pay for 'ordinary hours' a Monday to Friday Officer is paid for the disability for work on a Public Holiday that falls within what constitutes 'ordinary hours of work'. If these Officers do not receive a component for that disability in their Annualised Salary, are the hours worked on that day 'additional hours', rather than 'ordinary hours' within the meaning of cl 21.1?

98 In light of questions that arise in the construction of cl 32.4, cl 136.3 and cl 136.4 in this context, regard can be had to the history of prior instruments which specified the components of annualised salaries paid to Officers who were rostered to work and classified as Monday to Friday Officers.

99 The search to give the words used in these provisions of the 2020 Agreement their proper meaning should not be at large but instead chiefly confined to the history of the provisions of the 2010 and 2013 Agreements which contained a separate classification of Principal Officers Monday to Friday plus Public Holidays. It is to be noted that the relevant provisions of the 2013 Agreement were in substance repeated in the 2016 and 2018 Agreements.

100 The 2013 Agreement effected a substantial change from the relevant provisions of the 2010 Agreement which contained separate classifications for Principal Officers Monday to Friday who were, and who were not, required to work Public Holidays.

101 Turning first to the relevant differences between the 2013 Agreement and the 2020 Agreement, there were two differences between cl 32.4 of the 2020 Agreement and cl 31.1 of the 2013 Agreement. One was the addition of the word 'only' in cl 31.1. The other was the addition in cl 32.4 of the 2020 Agreement of the words 'Easter Sunday'. It is notable that there is no mention of any rights and obligations in respect of work on Easter Sunday in the 2013, 2016 and the 2018 Agreements. The parties are unable to explain why Principal Officers Monday to Friday receive a component of payment for Easter Sunday.

102 Leaving that issue aside, it is relevant that cl 132.3 of the 2013 and the 2016 Agreements were in identical terms to cl 136.3 of the 2020 Agreement. By the words '[t]he annualised rate of pay for Officers working Monday to Friday shall include *only* wages for ordinary hours of work'[60] in cl 31.1 when properly construed clearly created an exception to cl 132.3 so that Principal Officers in the position of Ms Harvey would not receive a component of compensation for working Public Holidays in their annualised remuneration.

103 It is also noted that cl 78.3 of the 2013 Agreement also created an additional one weeks paid annual leave for work performed on Public Holidays that was not work performed as overtime, which provision was substantially in identical terms to cl 79.3 of the 2020 Agreement. Clause 78.3 of the 2013 Agreement provided:

> An Officer, other than an Officer engaged on a part time or casual basis or undertaking ELTP, who is Rostered to work 11 Sundays or Public Holidays (not including Overtime) shall receive an additional one (1) week's paid Shift Annual Leave for every Leave Year of continuous service while so Rostered which shall accrue pro rata on a weekly basis.

104 These provisions of the 2013 Agreement were repeated in the 2016 and 2018 Agreements.

105 When regard is had to this history, the question is whether the absence of the word 'only' in cl 32.4 and the addition of the component of an allowance for Easter Sunday to the component of ordinary hours salary in cl 32.4 of the 2020 Agreement had the effect that it cannot be construed as a specific exception to the clause of general application in cl 136.3, and the consequence is that the annualised salary for Principal Officers Monday to Friday contains a component for working Public Holidays as 'ordinary hours'.

106 When regard is had to the rates of pay for Annualised Salaries for Principal Officers provided for in the 2010 Agreement when compared to the subsequent agreements the omission of the word 'only' cannot be found to be material, and cl 32.4 cannot be found to have this effect.

107 The Industrial Magistrate found that the wage increases effected from the 2010 Agreement to the 2020 Agreement provided evidence to support an inference that the Annualised Salaries in Schedule A for Principal Officer (Monday to Friday) in the 2020 Agreement did not include a component for working on Public Holidays. The Industrial Magistrate drew this inference on the basis that Schedule A of the 2010 Agreement contained a classification for annualised salary rates for Principal Officer (Monday to Friday plus Public Holidays) which rate increases were not applied to the Principal Officer (Monday to Friday) classifications in successive agreements.[61] His Honour also went on to find that the change in salaries between the 2018 and the 2020 Agreements was as a result of the application of the $1,000 per annum general wage increases and the addition of a paid day for Easter Sunday, to the annualised salary rates from the previous agreements.[62]

108 When the Annualised Salary rates for Principal Officers in the 2010 and 2013 Agreements are compared it is clear that the Industrial Magistrate's finding is correct.

109 This is evident from the rate of pay specified in the 2010 and 2013 Agreements. The 2010 Agreement provided that after a second year of work in the classification of Principal Officer Monday to Friday was to be paid $94,375 as an Annualised Salary, whereas a Principal Officer in the classification of Monday to Friday plus Public Holidays at the same level of service was to be paid $97,994 as an Annualised Salary.

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[60] My emphasis.

[61] Primary reasons [122] - [124].

[62] Primary reasons [165].

110 In the 2013 Agreement there was only one classification of a Principal Officer Monday to Friday. In that agreement, after two years of service and applying a 4.25% salary increase from the 2010 Agreement rates of pay the Annualised Salary for this classification was an amount of $98,386. Plainly a pay increase of 4.25% was not applied to the rates of pay for the 2010 Agreement classification of Principal Officer Monday to Friday plus Public Holidays, as the rate referred to above in the 2013 Agreement would have been $4,000 to $5,000 higher.

111 Consequently, the Industrial Magistrate was correct to find that the wage increases that became operative from the 2010 Agreement to the 2020 Agreement for the classification of Principal Officer Monday to Friday did not include a component for payment for working Public Holidays other than payment for one Public Holiday, namely Easter Sunday.

112 From the history of the removal of the classification of a Principal Officer Monday to Friday plus Public Holidays, and the fact the classification that continued of a Principal Officer Monday to Friday from the 2013 Agreement to the 2020 Agreement did not include a component of payment for working Public Holidays other than Easter Sunday, an inference can be drawn that the Annualised Salaries for this classification of Officers created a specific exception to cl 136.3 of the 2020 Agreement.

113 What also emerges from these convoluted provisions of the 2020 Agreement is that there is an inherent distinction between *being required to work* Public Holidays and *being directed to work* on a Public Holiday.

114 The parties do not take issue with the fact that all prison officers can be given a reasonable *direction to work* on Public Holidays. A direction in this context contemplates a specific *direction to work* Public Holidays or a particular Public Holiday whereas the concept of being *required to work* on Public Holidays contemplates that there will be a requirement either within the express terms of the 2020 Agreement or in an Officer's contract of employment. A *direction to work* Public Holidays was pursuant to the terms of the 2020 Agreement different to being *required to work* Public Holidays.

115 The question is whether when Ms Harvey was given a direction to work an 8 hour shift on the King's Birthday holiday on Monday, 26 September 2022, was that direction to carry out work in excess of her rostered hours and as such in addition to her ordinary hours of work.

116 When it is accepted that the Annualised Salaries in the 2020 Agreement for the classifications held by Ms Harvey did not include payment for working Public Holidays other than Easter Sunday, it necessarily follows that there was no requirement for her to work Public Holidays and the general provision in cl 136.3 did not apply to Officers in the position of Ms Harvey. Instead cl 136.4 applied to these Officers in that they were Officers who were *not required* to work Public Holidays as part of their ordinary hours of work as they had no entitlement to a Public Holiday portion in their Annualised Salary.

117 In circumstances where the Annualised Salary for a Principal Officer Monday to Friday did not contain a component of being paid for Public Holidays but only for ordinary hours plus Easter Sunday, then it follows that work on a Public Holiday that falls on a weekday must necessarily be work in addition to ordinary hours. This is because in the absence of any separate component for remuneration for work on these days it cannot be found that these Officers were *required to work* on Public Holidays as part of their ordinary hours pursuant to the terms of the 2020 Agreement. This construction is consistent with the implied condition of leave in the then operative s 30 of the MCE Act.

118 The consequence of this construction is that whilst the 2020 Agreement was in force, a Principal Officer Monday to Friday was entitled to be absent on all Public Holidays that fall on a Monday to Friday, and it must necessarily follow that they were entitled to be paid for that absence on the basis that they are to be paid for ordinary hours worked on that day. That does not mean that for operational reasons they could not have been reasonably directed to work on a Public Holiday that falls on a weekday.

119 The parties agree Principal Officers who are classified Monday to Friday can be directed to work Public Holidays. The consequence of when they are so directed and work on a Public Holiday, providing that direction is reasonable, that work when performed invokes the obligation of the subject of the claim in cl 21.1 which is a direction to work reasonable overtime and such work attracts overtime rates of pay.

120 For these reasons, the appeal should be allowed, the orders of the Full Bench should be set aside, and the matter should be remitted to the Full Bench to finalise the appeal on penalty.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

KP

Associate to the Hon Justice Mitchell

10 DECEMBER 2025

2025 WAIRC 00978

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	WEDNESDAY, 10 DECEMBER 2025
FILE NO/S	IAC 1 OF 2025
CITATION NO.	2025 WAIRC 00978

Result	Appeal upheld
Representation	
Appellant	Mr N D Ellery of counsel (instructed by Slater & Gordon)
Respondent	Mr R J Andretich of counsel (instructed by the State Solicitor's Office)

Order

1. The appeal is upheld.
2. The decision of the Full Bench of the Western Australian Industrial Relations Commission in FBA 10 of 2024, made on 13 December 2024, is set aside.
3. The matter is remitted to the Full Bench of the Western Australian Industrial Relations Commission to determine the question of penalty.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2025 WAIRC 00958

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	TUESDAY, 2 DECEMBER 2025
FILE NO/S	IAC 1 OF 2025
CITATION NO.	2025 WAIRC 00958

Result	Order issued

Order

1. Until judgment is delivered in this matter only the following persons (authorised persons) may view the advance reasons in this matter or be informed of any information from those advance reasons:
   (a) each party who is an individual;
   (b) where any party is not an individual:
      (i) one representative of that party who is authorised to represent the party or to instruct its legal advisers (if any) with respect to the orders properly made at judgment delivery; and
      (ii) any legal practitioner who is employed by the party to provide the party with legal advice generally, even if that legal practitioner is not representing the party in the matter; and

(c) if any party is legally represented, the party's legal advisers including barristers or counsel.

2. Until judgment is delivered in this matter:

(a) a person who has a copy of the advance reasons or any information from those reasons is personally responsible to take all reasonable steps to maintain the confidentiality of those reasons except as otherwise provided in this order;

(b) an authorised person may only provide a copy of the advance reasons, or disclose information from the advance reasons, to an authorised person; and

(c) any authorised person who provides a copy of the advance reasons, or discloses information from the advance reasons, to any other authorised person is personally responsible to take all necessary steps to ensure that the advance reasons remain confidential in the hands of any and all of those to whom they provide the advance reasons, including but not limited to providing a copy of these confidentiality orders.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

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

2025 WAIRC 00928

APPLICATION PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

RESPONDENT

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

FIRST INTERVENOR

WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

SECOND INTERVENOR

FILE NO/S CICS 5 OF 2023

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

APPLICANT

-v-

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

RESPONDENT

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

FIRST INTERVENOR

WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

SECOND INTERVENOR

FILE NO/S CICS 8 OF 2023

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

APPLICANT

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

RESPONDENT

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

FIRST INTERVENOR

WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

SECOND INTERVENOR

FILE NO/S CICS 9 OF 2023

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

DATE	WEDNESDAY, 12 NOVEMBER 2025
FILE NO/S	CICS 5 OF 2023, CICS 8 OF 2023, CICS 9 OF 2023
CITATION NO.	2025 WAIRC 00928

Result	Order issued
Representation	
Applicant	Mr J Blackburn SC of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Respondent	Mr O Fagir of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
First Intervenor	Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)
Second Intervenor	Mr N Ellery of counsel on behalf of the Western Australian Local Government Association

Order

HAVING heard Mr J Blackburn SC of counsel on behalf of the WASU, Mr O Fagir of counsel on behalf of the CFMEUW, Mr K Trainer on behalf of the LGRCEU, and Mr N Ellery of counsel on behalf of the WALGA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

(1) THAT this order applies to pages 436 to 469 of exhibit CFMEU 43 in these proceedings.

(2) THAT subject to any further order, the evidence subject of this order:

(a) Is to be kept confidential and may not be published or disclosed to any person other than the legal representatives of the parties and intervenors in these proceedings; and

(b) May not be used for any purpose other than the conduct of these proceedings.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.] By the Commission in Court Session.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2025 WAIRC 00943

ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VIX TECHNOLOGY (AUST) PTY LTD
	APPLICANT
	-v-
	ELECTRICAL TRADES UNION WA, AMPAC DEVELOPMENTS PTY LTD, J.R.L COMPONENT SALES PTY LTD, HINCO ENGINEERING, OMNITRONICS PTY LTD, HUPHIM PTY LTD, IBES AUSTRALIA, AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WA BRANCH
	RESPONDENTS
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 25 NOVEMBER 2025
FILE NO/S	APPL 54 OF 2025
CITATION NO.	2025 WAIRC 00943

Result	Award varied
Representation	On the papers

Order

WHEREAS Vix Technology (AUST) Pty Ltd (trading as Vix Technology) (**Vix Technology**) applied on 8 October 2025 to vary the *Electronics Industry Award No. A 22 of 1985* (**The Award)** pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS the application set out the grounds upon which it is made, indicating the application is to remove the applicant as a party to the Award;

AND WHEREAS the named respondents to the application were each duly served except J.R.L Component Sales Pty Ltd;

AND WHEREAS service was unable to be effected as J.RL. Component Sales Pty Ltd was deregistered on 28 September 2023 and as the corporation has been deregistered the Registry was unable to determine the principal place of business, principal office or registered office;

AND WHEREAS no response to the application was received within the time specified and the application is unopposed;

AND WHEREAS as Vix Technology is a party bound by the Award it has standing to bring the application under s 40(2) of the IR Act;

AND WHEREAS as the application is not made within the term specified in clause 4 of the Award, s 40(3) of the IR Act is inapplicable and no barrier to the amendments sought;

AND BEING satisfied that:

(a) the amendment proposed does not effect any substantive change to the scope of the Award or its area of operation;
(b) the application is not made within a term specified in the Award; and
(c) the requirements for varying the Award are met;

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

THAT the *Electronics Industry Award No. A 22 of 1985* be varied to remove Vix Technology (AUST) Pty Ltd (trading as Vix Technology) from the First Schedule – Schedule of Respondents and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

2025 WAIRC 00938

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, WESTERN AUSTRALIA BRANCH
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 25 NOVEMBER 2025
FILE NO/S	APPL 51 OF 2025
CITATION NO.	2025 WAIRC 00938

Result	Award Varied
Representation	On the papers

Order

WHEREAS this is an application filed by the Public Transport Authority of Western Australia (**PTA**) on 7 October 2025 to vary the *Public Transport Authority (Transwa) Award 2006* (**Award**) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS the application sets out the grounds upon which it is made, indicating the application is made to increase allowances in the Award effected by the 2025 State Wage Case decisions and Consumer Price Index (CPI);

AND WHEREAS the proposed key amendments sought by the present application were set out in an attachment, supported by a second attachment showing the calculations underpinning the amendments sought;

AND WHEREAS the named respondent to the PTA's application was duly served;

AND WHEREAS no response to the application was received within the time specified and the application is unopposed;

AND WHEREAS the parties have agreed by consent to this matter being determined on the papers;

AND WHEREAS as the PTA is a party bound by the Award it has standing to bring the application under s 40(2) of the IR Act;

AND WHEREAS as the application is not made within the term specified in clause 4 of the Award, s 40(3) of the IR Act is inapplicable and no barrier to the amendments sought;

AND WHEREAS the Award does not specify a method for adjusting allowances which is at odds with the methods involved in this application. The adjustments sought are consistent with the wage fixing principles set out in the 2025 State Wage Case;

AND BEING satisfied that:

(a) The amendments proposed do not change the scope of the Award or its area of operation;

(b) The application is not made within the term specific in the Award; and

(c) The requirements for varying the Award under s 40 of the Act have been met;

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

THAT the *Public Transport Authority (Transwa) Award 2006* be varied in accordance with the following Schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

SCHEDULE

1. Clause 5.1 – Shift Work:

A. Delete subclause 5.1.1 of this clause and insert the following in lieu thereof:

5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hours, an employee will be paid an allowance of $3.55 an hour on all time paid at ordinary rate.

B. Delete subclause 5.1.2 of this clause and insert the following in lieu thereof:

5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of $4.09 an hour on all time paid at ordinary rate.

C. Delete subclause 5.1.3 of this clause and insert the following in lieu thereof:

5.1.3 On an early morning shift, which commences at or between 0400 ad 0530, an employee will be paid an allowance of $3.55 an hour on all time paid at ordinary rate.

2. Delete subclause 5.1.4 of this clause and insert the following in lieu thereof:

5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of $4.09 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

3. Clause 5.2 – Temporary Transfer Allowance: Delete paragraph (b) of subclause 5.2.1 of this clause and insert the following in lieu thereof:

(b) When the period of relief is for one week or less the allowance of $9.75 per shift shall be paid in recognition of the disruption to the employee's normal roster.

4. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of $5.88 per hour for all time on call.

5. Clause 5.5 – Away from Home and Meal Allowance: Delete subclause 5.5.2 of this clause and insert the following in lieu thereof:

5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of $38.85 for each 8 hour period and, where less than 8 hours is worked, at the rate of $9.65 for each 2 hour period or part thereof worked.

2025 WAIRC 00940

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, WESTERN AUSTRALIA BRANCH
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 25 NOVEMBER 2025
FILE NO/S	APPL 52 OF 2025
CITATION NO.	2025 WAIRC 00940
Result	Award Varied
Representation	On the papers

Order

WHEREAS this is an application filed by the Public Transport Authority of Western Australia (**PTA**) on 7 October 2025 to vary the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* (**Award**) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS the application sets out the grounds upon which it is made, indicating the application is made to increase allowances in the Award effected by the 2025 State Wage Case decisions and Consumer Price Index;

AND WHEREAS the proposed key amendments sought by the present application were set out in an attachment, supported by a second attachment showing the calculations underpinning the amendments sought;

AND WHEREAS the named respondent to the PTA's application was duly served;

AND WHEREAS no response to the application was received within the time specified and the application is unopposed;

AND WHEREAS the parties have agreed by consent to this matter being determined on the papers;

AND WHEREAS as the PTA is a party bound by the Award it has standing to bring the application under s 40(2) of the IR Act;

AND WHEREAS as the application is not made within the term specified in clause 4 of the Award, s 40(3) of the IR Act is inapplicable and no barrier to the amendments sought;

AND WHEREAS the Award does not specify a method for adjusting allowances which is at odds with the methods involved in the application. The adjustments sought are consistent with the wage fixing principles set out in the 2025 State Wage Case;

AND BEING satisfied that:

(a) The amendments proposed do not change the scope of the Award or its area of operation;

(b) The application is not made within the term specified in the Award; and

(c) The requirements for varying the Award under s 40 of the Act have been met;

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

THAT the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* be varied in accordance with the following Schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

SCHEDULE

1. Clause 3.3 – Meal and Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:

(b) The employer shall provide such employee a meal allowance of $16.15 to cover the cost associated with the purchase of foods associated with the taking of a second crib.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

2. Clause 4.3 – Suburban Electric Railcar Allowance: Delete paragraph (a) (1), (2) and (3) of subclause 4.3.1 of this clause and insert the following in lieu thereof:

4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	$53.10
(2)	Thereafter	$53.50
(3)	Special Case	$54.40

3. Clause 5.1 – Shift Work: Delete paragraphs (a), (b), (c) and (d) of subclause 5.1.1 of this clause and insert the following in lieu thereof:

(a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $3.65 an hour on all time paid at ordinary rate.

(b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of $4.23 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of $3.65 an hour on all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance, an employee will be paid an allowance of $4.23 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

4. Clause 5.2 – Temporary Transfer Allowance: Delete paragraph (b) of subclause 5.2.1 of this clause and insert the following in lieu thereof:

(b) When the period of relief is for one week or less the allowance of $9.45 per shift shall be paid in recognition of the disruption to the employee's normal roster.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 and insert the following in lieu thereof:

5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of $5.42 per hour for all time on call.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2025 WAIRC 00942

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, WESTERN AUSTRALIA BRANCH, ELECTRICAL TRADES UNION OF WA, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	RESPONDENTS
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 25 NOVEMBER 2025
FILE NO/S	APPL 53 OF 2025
CITATION NO.	2025 WAIRC 00942

Result	Award Varied
Representation	On the papers

Order

WHEREAS this is an application filed by the Public Transport Authority of Western Australia (**PTA**) on 7 October 2025 to vary the *Railway Employees' Award No. 18 of 1969* (**Award**) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS the application sets out the grounds upon which it is made, indicating the application is made to increase allowances in the Award effected by the 2025 State Wage Case decisions and Consumer Price Index;

AND WHEREAS the proposed key amendments sought by the present application were set out in an attachment, supported by a second attachment showing the calculations underpinning the amendments sought;

AND WHEREAS the named respondents to the PTA's application were each duly served;

AND WHEREAS no response to the application was received within the time specified and the application is unopposed;

AND WHEREAS the parties have agreed by consent to this matter being determined on the papers;

AND WHEREAS as the PTA is a party bound by the Award it has standing to bring the application under s 40(2) of the IR Act;

AND WHEREAS as the application is not made within the term specified in clause 4 of the Award, s 40(3) of the IR Act is inapplicable and no barrier to the amendments sought;

AND WHEREAS the Award does not specify a method for adjusting allowances which is at odds with the methods involved in the application. The adjustments sought are consistent with the wage fixing principles set out in the 2025 State Wage Case;

AND BEING satisfied that:

(a) The amendments proposed do not change the scope of the Award or its area of operation;

(b) The application is not made within the term specified in the Award; and

(c) The requirements for varying the Award under s 40 of the Act have been met;

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

THAT the *Railway Employees' Award No. 18 of 1969* be varied in accordance with the following Schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - Experience Allowance

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - $ 8.10

After 24 months service with the employer - $ 17.60

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees' Award No. 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete paragraph (a) of subclause 4.4.1 of this clause and insert the following in lieu thereof:

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of $21.40 per week to such tradesperson/apprentice.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees' Award No. 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 Leading Hands:

A. Delete paragraph (a) of this clause and insert the following in lieu thereof:

(a) Class 3

When in charge of not less than three and not more than ten others, paid $39.90 extra per week

B. Delete paragraph (b) of this clause and insert the following in lieu thereof:

(b) Class 2

When in charge of more than 10 but few than twenty others, paid $59.80 extra per week

C. Delete paragraph (c) of this clause and insert the following in lieu thereof:

(c) Class 1

When in charge of more than twenty others, paid $77.30 extra per week

4. Clause 4.6 – Electrical Licence Allowance: Delete this clause and insert the following in lieu thereof:

4.6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $28.20 per week.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees' Award No. 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.1 – On Call Allowance: Delete subclause 5.1.2 of this clause and insert the following in lieu thereof:

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorised officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call Allowance of $5.89 per hour.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees' Award No. 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. Clause 5.3 – After Hours Contact: Meals and Expenses: Delete paragraph (a) of subclause 5.3.1 of this clause and insert the following in lieu thereof:

(a) An employee who having responded to a call is unable to return to the employee's home during a recognised meal period for a meal shall be supplied with a meal or be paid a meal allowance of $14.00 as provided under this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) – Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

7. Clause 5.4 – Away from Home Allowances:

A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:

5.4.2 Where subclause 5.4.1 applies, the employee shall be paid an allowance of $64.10 per day except when the accommodation includes dining facilities and meals, in which case an allowance of $48.15 per day shall be paid.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees' Award No. 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:

5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of $16.90 per day.

8. Clause 5.6 – Travelling Time – Traffic: Delete subclause 5.6.3 of this clause and insert the following in lieu thereof:

5.6.3 When the period of relief is for one week or less an allowance of $9.75 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in subclause 5.6.2

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees' Award No. 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

9. Clause 5.7.1 – Refreshment Allowance: Delete subclause 5.7.1 of this clause and insert the following in lieu thereof:

5.7.1 Refreshment Allowance

An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of $7.05 where:

(a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and

(b) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) – Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

10. Clause 5.7.2 – Meal Allowance: Delete subclause 5.7.2 of this clause and insert the following in lieu thereof:

5.7.2 Meal Allowance

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid $14.00 in lieu where:

(a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or

(b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) – Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

11. Clause 5.8 – Shifts and/or Night Work Allowance – (Six – Day Shift Work): Delete paragraphs (a), (b), (c), (d) and (e) of subclause 5.8.1 of this clause and insert the following in lieu thereof:

(a) On afternoon shift, which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of $3.55 an hour on all time paid at the ordinary rate.

(b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of $4.09 an hour on all time paid at ordinary rate.

(c) On early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of $3.55 an hour for all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance an employee will be paid an allowance of $4.09 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) The provision of subparagraphs (a) to (d) of this clause will not apply to employees continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of $4.23 per hour.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees' Award No. 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

INDUSTRIAL MAGISTRATE—Claims before—

2025 WAIRC 00924

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00924
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 8 OCTOBER 2025
DELIVERED	**:**	WEDNESDAY, 12 NOVEMBER 2025
FILE NO.	**:**	M 94 OF 2024
BETWEEN	**:**	CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION
		CLAIMANT
		AND
		OSM AUSTRALIA PTY LTD
		RESPONDENT
CatchWords	**:**	INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth) – Contravention of an enterprise agreement – failure to offer permanent employment within the timeframe provided
Legislation	**:**	*Fair Work Act 2009* (Cth)
Instrument	**:**	*OSM Australia Pty Ltd and MUA Offshore Oil and Gas Enterprise Agreement 2023*
Cases referred to in reasons:	**:**	***Construction, Forestry and Maritime Employees Union v OSM Australia Pty Ltd*** [2025] WAIRC 00349
		Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2) [2018] FCA 480
		Construction, Forestry, Maritime, Mining and Energy Union v OSM Australia Pty Ltd [2022] WAIRC 00713; (2022) 102 WAIG 1298
		The Australian Workers' Union v OSM Australia Pty Ltd [2024] WAIRC 00853; (2024) 104 WAIG 2172
		Australian Building and Construction Commissioner v Pattinson [2022] HCA 13; (2022) 274 CLR 450
		Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2) [2018] FCA 1211; (2018) 70 AILR 102-975
		Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2025] FCA 208
		Australian Building and Construction Commissioner v Powell (No 2) [2019] FCA 972
		Auimatagi v Australian Building and Construction Commissioner [2018] FCAFC 191
Result	**:**	Penalty imposed
Representation:		
Claimant	:	Ms S. Sayed (of counsel)
Respondent	:	Mr S. Rogers (of counsel)

REASONS FOR DECISION (PENALTY)

1 On 13 June 2025, the Industrial Magistrates Court of Western Australia (**the Court**) published reasons for decision in respect of the preferred construction of cl 12.5(a) and cl 12.5(b) of the *OSM Australia Pty Ltd and MUA Offshore Oil and Gas Enterprise Agreement 2023* (**OSM Agreement**) (**Liability Decision**).[1]

2 In the Liability Decision, the Court found that OSM Australia Pty Ltd (**OSM**) breached cl 12.5(a) of the OSM Agreement by failing to provide five casual employees with offers to convert to permanent employment within four weeks of registration of the OSM Agreement, and, therefore, contravened s 50 of the *Fair Work Act 2009* (Cth) (**FWA**).

3 However, the Court found OSM called for expressions of interest within the timeframe provided for in cl 12.5(a) of the OSM Agreement, and the Court was not satisfied that the Construction, Forestry and Maritime Employees Union (**CFMEU**) proved OSM contravened cl 12.5(b) of the OSM Agreement.

4 This is the decision with respect to the appropriate penalty, if any, to be imposed for OSM's contravention of s 50 of the FWA.

Evidence

Claimant

5 The claimant relied upon a witness statement of George Gakis (**Mr Gakis**) signed on 5 September 2025 with two attachments.[2] Mr Gakis was a witness in the Liability Decision.

6 Mr Gakis states he was copied into an email dated 4 April 2025[3] from the claimant to Warren Harrower (**Mr Harrower**), one of OSM's witnesses in the Liability Decision. In the email, the claimant asked, 'could you advise whether OSM is admitting the breach and agrees to a penalty to be assigned by the Court?'[4]

7 Mr Gakis states Mr Harrower replied, 'OSM does not concede that it breached the terms of the Agreement'.[5]

8 Mr Gakis also attaches to his witness statement the 'latest' General Purpose Financial Statement for OSM filed at ASIC, which he says demonstrates OSM's net profit after income tax expense for the financial year ending 31 December 2023 was $2,430,174.[6]

OSM

9 OSM relied upon a witness statement of Ilana Jewson (**Ms Jewson**) dated 21 August 2025.[7] Ms Jewson was also a witness in the Liability Decision.

10 Ms Jewson's evidence expands on her evidence in the Liability Decision, at [44] to [47], by including the duty period and off-duty period for each affected employee:

At relevant times:

(a) Jeffrey Badger was engaged aboard the Siem Aquamarine. The swing immediately before he commenced permanent employment was as follows:

(1) Duty Period – 14 February 2024 to 12 March 2024;

(2) Off-Duty Period – 13 March 2024 to 8 April 2024;

(3) Permanency commencement: 9 April 2024.

(b) Richard Badger was engaged aboard the Siem Thiima. The swing immediately before he commenced permanent employment was as follows:

(1) Duty Period – 30 December 2023 to 23 January 2024;

(2) Off-Duty Period – 24 January 2024 to 27 February 2024;

(3) Permanency commencement: 28 February 2024.

(c) Matthew Duguid was engaged aboard the Siem Aquamarine. The swing immediately before he commenced permanent employment was as follows:

(1) Duty Period – 10 January 2024 to 13 February 2024;

(2) Off-Duty Period – 14 February 2024 to 13 March 2024;

(3) Permanency commencement: 14 March 2024.

(d) Mitch Keighram was engaged aboard the Siem Aquamarine. The swing immediately before he commenced permanent employment was as follows:

(1) Duty Period – 10 January 2024 to 13 February 2024;

(2) Off-Duty Period – 14 February 2024 to 13 March 2024;

(3) Permanency commencement: 14 March 2024.[8]

Submissions

11 Both parties refer to the law in respect of the determination of an appropriate pecuniary penalty for contraventions of the FWA. I do not intend to recite the parties' reference to the applicable law. Schedule I to these reasons sets out a summary of those principles.

Claimant

12 In summary, the claimant submits that:

(a) there is no basis for the respondent to assert the parties were in dispute or that the CFMEU did not raise the issue of timeliness at any time prior to the proceedings;

(b) the contravention arose out of the conduct of senior management, where the claimant says Mr Harrower and Ms Jewson were involved in the 'current matter';

(c) OSM demonstrates no remorse or contrition, and cannot rely on there being no purported loss suffered by an employee;

(d) OSM failed to accept liability, at least with respect to cl 12.5(a) of the OSM Agreement, to avoid the need for a hearing, albeit OSM assisted in the preparation of a statement of agreed facts;

(e) OSM has a corporate culture of breaching enterprise agreements and, therefore, must have a heightened awareness of the risk it took from an erroneous construction where it has previously been found to have contravened s 50 of the FWA;

(f) Mr Gakis proposed a 'simpler process' in his email of 20 December 2023, and OSM did not cooperate and engaged in careless conduct;

(g) any penalty must be fixed at a meaningful level, which is not seen as the cost of doing business and deter others from 'cutting corners'; and

(h) OSM has sufficient profits to pay a significant penalty.

Respondent

13 In summary, OSM submits no penalty should be imposed and if a penalty is imposed, it should be at the lower end.

14 OSM supports its principal submission as follows:

(a) OSM's position was made known to the claimant during the agreement making process, the circumstances of which are referred to in the Liability Decision;

(b) OSM did not 'set out' to contravene the OSM Agreement, and fulfilled the obligation to make five casual employees permanent, albeit the offer to do so fell outside of the timeframe provided in cl 12.5(a) of the OSM Agreement;

(c) there is no evidence of any ill intent on the part of OSM or that it flagrantly disregarded its obligations under the OSM Agreement;

(d) OSM refers to ***Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)*** [2018] FCA 480 (***Hail Creek***) in support of the imposition of no penalty or, alternatively, a penalty at the lower end of the scale;

(e) there is no evidence of any loss or damage resulting from the contravention and the five employees did not suffer any disadvantage as a result of the delay in making the offers of permanent employment;

(f) OSM had, so far as it was able, 'remedied' the contravention before this claim was commenced;

(g) while OSM has prior contraventions, the nature and circumstances of those contraventions do not serve to aggravate or increase what may be an appropriate penalty in this case;

(h) the contravention arose from the same decision-making process in respect of each employee, namely OSM erroneously forming the view that it was only required to call for expressions of interest by 19 January 2024 (or within four weeks of the registration of the OSM Agreement);

(i) while OSM it is not financially impecunious, that it would face difficulties in paying any penalty ordered, this also should not serve to aggravate or increase what may be an appropriate penalty in this case;

(j) the Liability Decision found the contravention arose as a result of an honestly, but erroneously, held view about the timing of the obligation under cl 12.5(a) of the OSM Agreement, and there is no evidence to demonstrate the contravention was a deliberate act designed to defeat the objects of the FWA;

(k) there is no evidence of the involvement of senior management;

(l) ultimately, OSM complied with the obligation to make five casual employees permanent and did so prior to the proceedings being commenced;

(m) OSM's decision to defend the claim was an improper act, when it was partially successful; and

(n) the primary objective of deterrence is not necessarily met where OSM rectified its error before the claim was commenced, there is no evidence of malicious intent or reckless disregard for industrial laws, and there is no evidence of a course of conduct that establishes OSM considers contraventions and penalties an acceptable cost of doing business.

The Nature, Extent and Circumstances of the Conduct

15 The Liability Decision made findings of fact and made reference to the evidence the Court accepted.

16 This included accepting Mr Harrower's evidence concerning the nature of the conversations between him and Mr Gakis about the way in which cl 12.5(a) and cl 12.5(b) of the OSM Agreement was to be implemented.[9]

17 Even though the Court accepted Mr Harrower's evidence, ultimately the Court did not accept OSM's suggested construction of cl 12.5(a) of the OSM Agreement for other reasons.

18 However, Mr Harrower's evidence is relevant to the circumstances in which the contravening conduct occurred. That is, OSM did comply, in part, with cl 12.5(a) of the OSM Agreement but considered it had a common understanding with the claimant's representative of the difficulties in making offers of permanent employment by 19 January 2024.

19 By calling for expressions of interest within time, it is apparent that OSM was not trying to escape its overall obligation to make five casual employees permanent. As observed in the Liability Decision, given the lack of clarity surrounding the process associated with assessing and offering permanent employment, it was open to OSM to determine the process and the period in which it left open the call for expressions of interest. In leaving open the time for employees to submit an expression of interest until 15 January 2024, OSM put itself under pressure to comply with the end date of 19 January 2024 to make offers of permanent employment, albeit this gave employees the best opportunity to ensure they submitted their expressions of interest.

20 OSM did make the offers of permanent employment to the five successful applicants between 19 and 29 February 2024, and all successful applicants commenced immediately following their relevant off-duty period (or in one case after returning from parental leave).

21 The contravening conduct was not widespread and was confined to the five successful applicants under a particular term of the OSM Agreement, and, unless such a term is replicated in a future enterprise agreement, is highly unlikely to occur again.

Course of Conduct

22 There does not appear to be any dispute between the parties that the contravention forms one breach of cl 12.5(a) of the OSM Agreement notwithstanding five employees were affected and is, therefore, one contravention of s 50 of the FWA. That is, OSM's failure to make offers of permanent employment to convert five casual employees to permanent employees arose from its failure to do so within the timeframe provided in cl 12.5(a).

Deliberate Conduct

23 There is no evidence OSM engaged in deliberate conduct to circumvent industrial laws or deprive the affected workers of an offer for permanent employment. If that was the case, OSM would not call for expressions of interest and take steps to ensure that employees had a fair opportunity to submit their expressions of interest. OSM understood it was obliged to give five casual employees permanent employment, but they did not account for required the time frame to make the offers by 19 January 2024.

24 Unlike in ***Hail Creek*** there is no evidence OSM should have been on notice or have had a heightened awareness of the risk it took from an erroneous construction because it had previously been found to have contravened the same term of the OSM Agreement and had pecuniary penalties imposed: ***Hail Creek*** at [18].

25 There is no evidence that some other dispute resolution process had been invoked and there was an attempt to resolve the parties' competing interpretation of cl 12.5(a) of the OSM Agreement. In that sense, OSM cannot have been said to have 'taken the odds' that its conduct if not would, then might, contravene s 50 of the FWA.

26 In those circumstances, I am not satisfied that OSM engaged in any deliberate conduct, and consequently it did not deliberately contravene s 50 of the FWA.

Similar Previous Conduct

27 OSM has been found to have contravened s 50 of the FWA on two previous occasions.[10]

28 On the first occasion, the claimant conceded that OSM's contravention was the result of an inadvertent error on the part of an inexperienced payroll employee, which was not brought to OSM's attention until the claimant lodged the claim in the Court. Upon the claim being lodged, OSM immediately rectified the error by making out-of-cycle payments to the employees. A penalty of $1 was imposed on 12 October 2022.

29 On the second occasion, OSM's contravention was in relation to over cycle payments for four employees. The parties were in prior dispute about the interpretation of the relevant term of the enterprise agreement and following the commencement of proceedings, the respondent admitted the contravention and rectified the contravention by paying the relevant amounts to the four employees. A combined penalty of $1,700 was imposed on 27 September 2024.

30 There are some similarities between the circumstances of this claim and OSM's second contravention occasion. However, there are notable differences, namely in relation to this claim there was no history of any prior dispute between the parties and OSM had remedied their contravention before the commencement of proceedings. That is, OSM proceeded on the basis that their interpretation of the timing in cl 12.5(a) of the OSM Agreement was correct and had completed in the process of offering permanent employment before the issue was raised by the claimant by the lodgement of these proceedings.

Applicable Maxima

31 The maximum penalty with respect to a contravention of s 50 of the FWA by OSM is 300 penalty units, given the respondent is a body corporate. The penalty unit value at the time of the contravention was $313. Therefore, the theoretical maximum is $93,900.

Size of the Respondent and Involvement of Senior Management

32 OSM accepts that it is not financially impecunious or that it would face difficulties in paying any penalty ordered.

33 Noting the circumstances of the contravention, OSM's size and financial status, in my view, is a neutral factor in assessing the appropriate penalty to be imposed.

34 The claimant asserts Mr Harrower and Ms Jewson constitute the involvement of senior managers in the contravention. Mr Harrower's evidence in the Liability Decision is that he is OSM's Employee Relations Manager and was involved in the negotiation of the OSM Agreement with the claimant. He details his understanding of cl 12.5 of the OSM Agreement as a result.[11] Ms Jewson's evidence in the Liability Decision is that she is OSM's Employee Operations Manager responsible for the management of OSM's crewing operations team, dealing with union officials and day-to-day management of employees on vessels.[12]

35 Beyond their job title including the word 'Manager', the scope of their duties within OSM is unclear or unknown. Ms Jewson's duties appear limited to the 'on the ground' running of an aspect of the business and unrelated to higher levels of running the overall business. The Court's knowledge of Mr Harrower's involvement in the running of the business is his involvement in negotiating an enterprise agreement. This is not sufficient for the court to find on the balance of probabilities that senior management was involved in the contravention, notwithstanding the claimant's assertion to the contrary.

Cooperation, Contrition and Corrective Action

36 OSM cooperated in the legal proceedings. The parties prepared a statement of agreed facts.

37 Unlike in ***Hail Creek***, and as stated above, there is no evidence OSM elected to take the risk its conduct would contravene s 50 of the FWA and could have mitigated the risk by seeking some other form of dispute resolution. There were competing constructions of cl 12.5(a) and cl 12.5(b) of the OSM Agreement and nothing before the Court suggests OSM was on notice of the issue prior to the proceedings being commenced in July 2024. Notably, OSM had remedied the contravening conduct prior to the institution of the proceedings with all five casual employees commencing permanent employment February, March and April 2024.

38 While the claimant cannot be criticised for commencing the proceedings, nor can OSM be criticised for defending a reasonable argument in response, particularly where OSM was, in part, successful in defending the claim and had partially complied with cl 12.5(a) of the OSM Agreement.

39 I do not accept, nor was it accepted in the Liability Decision, that the email from Mr Gakis raised an issue with respect to the timing of the offers of permanent employment. As stated in the Liability Decision, at [20], '[o]n 20 December 2023, Mr Gakis emailed [Ms Jewson], Employee Operations Manager for the respondent, raising the members' concerns about the application *process*.' (emphasis added) Ms Jewson stated in her evidence that Mr Gakis did not raise any concern with the timing of offers.[13]

40 The claimant seeks to rely upon an email from the claimant's legal representative to Mr Harrower copied to Mr Gakis dated 4 April 2025, where the legal representative asks if OSM will admit the breach and agree to a penalty. The claimant suggests that Mr Harrower's reply in not admitting the breach is evidence of either its lack of contrition or its unreasonableness in continuing to litigate the proceedings. This cannot be accepted. This email was sent approximately three weeks prior to the hearing on 30 April 2025 when each parties' position was well settled. As it transpires, OSM was partially successful in defending the proceedings and it cannot be said its defence of the claim was unreasonable.

41 In these circumstances, it is difficult to see what relevance contrition has, particularly where the contravening conduct was addressed well before the proceedings commenced. Further, the contravening conduct is unlikely to be repeated given it involved the interpretation of a particular term of the OSM Agreement, which the Court considered suffered from drafting deficiencies.[14]

Loss of Damage Suffered

42 There is no evidence that the affected workers suffered loss or damage, or prejudice. This is properly described as a neutral factor in determining the appropriate penalty to be imposed.

Deterrence

43 The claimant calls for a significant penalty.

44 OSM says, consistent with comments made by the High Court in ***Australian Building and Construction Commissioner v Pattinson*** [2022] HCA 13; (2022) 274 CLR 450 (***Pattinson***) at [55], the conduct the subject of the contravention does not bear a reasonable relationship to the maximum penalty where the conduct arose out of the respondent's genuine belief about its construction of cl 12.5(a) of the OSM Agreement, the contravention was not deliberate.

45 In ***Pattinson***, at [71], the majority judgment concluded that a court's 'real task under s 546' is 'fixing the penalty which it considers fairly and reasonably to be appropriate to protect the public interest from future contraventions of the [FWA]' where, at [58], 'the maximum penalty is intended by the [FWA] to be imposed in respect of a contravention warranting the strongest deterrence within the prescribed cap'. To that end, both the circumstances of the contravention(s) and the respondent's circumstances may be relevant to the assessment as to whether the maximum level of deterrence is required.

46 In ***Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2)*** [2018] FCA 1211; (2018) 70 AILR 102-975 (also referred to in ***Pattinson*** at [26]), Tracey J stated at [20]:

> [T]he maximum penalty may be appropriate for a person who has repeatedly contravened the same or similar legislative provisions despite having been penalised regularly over a period of time for such misconduct. The gravity of the offending, in such cases, is to be assessed by reference to the nature and the quality of the recidivism rather than by comparison of individual instances of offending: see ***Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)*** [2015] FCA 1462 at [8] (Jessup J). Relevant matters will include the number of contraventions which have occurred over a period, whether the ongoing misconduct is the result of conscious decisions, whether the repeated contravenor has treated the payment of penalties as a cost of doing business and whether any attempt has been made to comply with the law as declared by the Court.

The Respondent's Circumstances

47 Unlike in ***Pattinson***, there was no discernible policy by OSM to not convert five casual employees to permanent employment.

48 Further, this was not a case of carelessness or negligence by OSM. The best description is that OSM was misguided in its application of cl 12.5(a) of the OSM Agreement.

The Circumstances of the Contraventions

49 There is overlap between the circumstances of the contraventions and OSM's circumstances.

50 That is, there is no evidence the contravention was an industrial strategy pursued without regard for the law.

51 The consequence of considering the above factors is that I am not satisfied in relation to the contravention that a significant penalty 'is reasonably necessary to deter further contraventions of a like kind.'[15]

Determination

52 In this case, specific deterrence has less, but not no, role to play with respect to OSM's contravention. That is, the contravention arose out of a dispute about the interpretation and application of a term of an enterprise agreement, which had already been implemented by OSM by the time the proceedings commenced. The likelihood of a similar contravention occurring in the future is minimal. To the extent that OSM has previously contravened s 50 of the FWA, such contraventions resulted in a nominal penalty of $1 and a very modest penalty of $1,700.

53 This leaves the issue of general deterrence.

54 Comments made by Feutrill J, at [94], in ***CFMEU v Qube Ports Pty Ltd*** [2025] FCA 208 have some relevance:

> Contraventions are not only the consequence of intentional or deliberate conduct but carelessness, oversight and inadvertence. Part of deterrence involves encouraging employers to implement and maintain systems, policies, procedures and a culture aimed at preventing careless, unintentional or ignorant contraventions of the Act. Therefore, the size and spread of an employer's operation is not a reason for diminishing corporate responsibility for historical contraventions as these may be indicative of systemic or underlying failings in corporate systems, policies, procedures and culture and, therefore, of an ongoing and enhanced risk of future contraventions.

55 However, while his Honour's comments may have been directed to specific deterrence, the tenure of these comments is applicable to any employer so as to ensure compliance with industrial laws.

56 Guidance may also be derived from Bromberg J in ***Australian Building and Construction Commissioner v Powell (No 2)*** [2019] FCA 972 at [28] to [30], referring to ***Auimatagi v Australian Building and Construction Commissioner*** [2018] FCAFC 191 (at [176]):

> It is a fundamental principle, at the core of the judicial power to impose a penalty, that the imposition is for the contravention in question. Prior contraventions, even so many and often so serious as the Union may have engaged in in the past, is a factor which may be taken into account in determining the appropriate quantum for the contravention; it cannot be taken to lead to a penalty that is disproportionate to the gravity of the instant contravention. The maximum is for the worst category of cases.

57 Further, his Honour stated, at [30]:

> The well settled principles most recently expressed in *Parker* call for a structured approach to the imposition of a penalty on a contravener with a history of contraventions, the object of which is to ensure that the contravener does not 'suffer the fact of being sanctioned anew for past contraventions' (at [341]). *First*, the Court must identify the applicable range of penalties for that contravention without regard to the contravener's prior history of contraventions. *Having done that*, the Court should then take into account that history in assessing where, within the applicable range, the penalty should fall. (original emphasis)

58 His Honour later agreed with the applicant's contention and stated, at [34] and [35]:

> [T]here is no general principle that, if a person contravenes a civil penalty provision on a genuine but mistaken view on an arguable question of law, there should be no penalty. Whether or not a penalty should be imposed will always depend on all of the circumstances considered principally by reference to the need for specific and general deterrence.
>
> It is well settled and not in contest that an honest and reasonable belief may be a relevant mitigating or ameliorating factor in determining whether or not a penalty is to be imposed and, if so, the extent of the penalty imposed. (citations omitted)

59 I am not satisfied that this is an occasion where imposing no penalty is appropriate. However, I am satisfied that given all of the factors referred to above, this is a contravention for which a penalty at the lower end of the scale is appropriate.

Penalty to be Imposed

60 Taking all of these factors in to account, the appropriate penalty aimed to secure compliance by deterring repeat contraventions, if not of this type, then of future different contraventions, is $2,000.

61 I do not consider any further reduction to be warranted to account for an imbalance between oppression and deterrence.

62 I note OSM's submission that any pecuniary penalty should be paid to the Commonwealth, and not the claimant.[16] I do not consider that there is anything before the Court which suggests it should be awarded other than to the successful initiating party. Accordingly, the payment of the pecuniary penalty should be paid to the claimant.

Conclusion

63 Pursuant to s 546(1) of the FWA, where the Court is satisfied that the respondent has contravened a civil penalty provision, the respondent is to pay a pecuniary penalty in the amount of $2,000.

64 Pursuant to s 546(3)(b) of the FWA, the pecuniary penalty is to be paid to the claimant.

D. SCADDAN

INDUSTRIAL MAGISTRATE

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

Pecuniary Penalty Orders

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

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

Date of Contravening Conduct	Penalty Unit
January to February 2024	$ 313

[3] The purpose served by penalties was described by Katzmann J in ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 (***Grouped Property Services***) at [388] in the following terms (omitting citations):

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

[4] In ***Pattinson*** [42], the plurality confirmed that civil penalties 'are not retributive, but rather are protective of the public interest in that they aim to secure compliance by deterring repeat contraventions'. However, 'insistence upon the deterrent quality of a penalty should be balanced by insistence that it "not be so high as to be oppressive"': [40], citing ***NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*** [1996] FCA 1134; (1996) 71 FCR 285.

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

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

(b) The circumstances in which that conduct took place.

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

(d) Whether there had been similar previous conduct by the respondent.

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

(f) The size of the business enterprise involved.

(g) Whether or not the breaches were deliberate.

(h) Whether senior management was involved in the breaches.

(i) Whether the party committing the breach had exhibited contrition.

(j) Whether the party committing the breach had taken corrective action.

(k) Whether the party committing the breach had cooperated with the enforcement authorities.

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

(m) The need for specific and general deterrence.

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

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

[8] 'Multiple contraventions' may occur because the contravening conduct done by an employer:

(a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;

(b) was done once only or was repeated; and

(c) was done with respect to a single employee or was done with respect to multiple employees.

[9] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions by an employer are taken be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a 'course of conduct', the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: ***Rocky Holdings***; ***Fair Work Ombudsman v South Jin Pty Ltd (No 2)*** [2016] FCA 832 [22] (White J) The section does *not* apply to cases where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): ***Grouped Property Services*** [411] (Katzmann J).

[10] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. ***Australian Ophthalmic Supplies*** [47] - [52].

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

Payment of penalty

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

(a) the Commonwealth; or

(b) a particular organisation; or

(c) a particular person.

[12] In ***Milardovic v Vemco Services Pty Ltd (No 2)*** [2016] FCA 244 [40] - [44], Mortimer J, in light of ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4; (2016) 239 FCR 336, summarised the law: (omitting citations)

> [T]he power conveyed by s 546(3) is *ordinarily to be exercised by awarding any penalty to the successful applicant*. … [T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons … in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the Gibbs [***Gibbs v The Mayor, Councillors and Citizens of City of Altona*** [1992] FCA 553; 37 FCR 216] … exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted. (original emphasis)

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[1] ***CFMEU v OSM Australia Pty Ltd*** [2025] WAIRC 349 (Liability Decision).

[2] Exhibit 1 – Witness Statement of George Gakis signed on 5 September 2025 with two attachments.

[3] Exhibit 1 at GG2-01.

[4] Exhibit 1 at paragraph 5.

[5] Exhibit 1 at paragraph 5.

[6] Exhibit 1 at GG2-02.

[7] Exhibit 2 – Witness Statement of Ilana Jewson signed on 21 August 2025.

[8] Exhibit 2 at [5].

[9] Liability Decision at [28] to [30] and [50].

[10] See ***Construction, Forestry, Maritime, Mining and Energy Union v OSM Australia Pty Ltd*** [2022] WAIRC 713; (2022) 102 WAIG 1298 and ***The Australian Workers' Union v OSM Australia Pty Ltd*** [2024] WAIRC 853; (2024) 104 WAIG 2172.

[11] Liability Decision at [23] to [30].

[12] Liability Decision at [34].

[13] Liability Decision at [39].

[14] See Liability Decision at [95].

[15] ***Pattinson*** at [61].

[16] ts 11.

2025 WAIRC 00933

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00933
CORAM	**:**	INDUSTRIAL MAGISTRATE B. COLEMAN
HEARD	**:**	FRIDAY, 19 SEPTEMBER 2025
DELIVERED	**:**	FRIDAY, 21 NOVEMBER 2025
FILE NO.	**:**	M 8 OF 2025
BETWEEN	**:**	JILLIAN DIXON, DEPARTMENT OF ENERGY, MINES, INDUSTRY REGULATION AND SAFETY **CLAIMANT** AND RICHARD SAY LY **FIRST RESPONDENT** SIU MEN LY **SECOND RESPONDENT** INTHARAT CHUEN-AROM **THIRD RESPONDENT** MOING DEING WOUNG **FOURTH RESPONDENT** JENNESSA OENG **FIFTH RESPONDENT**

CatchWords	:	INDUSTRIAL LAW – Assessment of appropriate civil penalties for the enforcement of an entitlement provision – multiple contraventions of an Award – multiple contraventions of a civil penalty provision – declaration sought that the respondents engaged in 'wage theft' – whether declaration is appropriate in the particular circumstances – penalties determined
Legislation	:	*Industrial Relations Act 1979* (WA)
		Minimum Conditions of Employment Act 1993 (WA)
Instrument	:	*Restaurant, Tearoom and Catering Workers' Award* (WA)
Cases referred to in reasons:	:	***Australian Building and Construction Commissioner v Pattinson*** [2022] HCA 13; (2022) 274 CLR 450
		Commissioner of Taxation v Arnold (No 2) [2015] FCA 34; (2015) 324 ALR 59
		Callan v Smith [2021] WAIRC 00216; (2021) 101 WAIG 1155
		Kelly v Fitzpatrick [2007] FCA 1080; (2007) 166 IR 14
		Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
		Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) (No 4) [2024] FCA 341
		Markarian v The Queen [2005] HCA 25, (2005) 228 CLR 357
		Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 113; (2017) 254 FCR 68
		Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The BKH Contractors Case) (No 2) [2018] FCA 1563
		Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560
		Fair Work Ombudsman v NSH North Pty Ltd trading t/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
		Construction Forestry Mining and Energy Union v Cahill [2010] FCAFC 39; (2010) 194 IR 461
		Jillian Dixion, Department of Mines, Industry Regulations and Safety v Karakuyu [2025] WAIRC 00451; (2025) 105 WAIG 2074
Result	:	Penalty issued; no formal declarations made
Representation:		
Claimant	:	Ms H. Kerr (of counsel) and with her, Ms S. Parekh (of counsel)
Respondents	:	Mr A. Mason (of counsel)

REASONS FOR DECISION

Background

1 The claimant, Ms Jillian Dixon (**Ms Dixon**), an industrial inspector with the Department of Energy, Mines, Industry Regulation and Safety (**the Department**), commenced proceedings against the five respondents on 21 January 2025, seeking enforcement of entitlement provisions pursuant to the *Restaurant, Tearoom and Catering Workers' Award* (**the Award**).

2 The respondents wholly admitted the claim and the Industrial Magistrates Court of Western Australia (**Court**) made orders on 30 April 2025 that the respondents pay $100,603.13 in outstanding Award entitlements. On 16 May 2025 the Court further ordered the payment of pre-judgment interest in the amount of $19,952.07.

3 By her claim, the industrial inspector has also sought payment of civil penalties relating to the contraventions admitted by the respondents.

4 The power of the Court to order such penalties is set out in s 83(4) of the *Industrial Relations Act 1979* (WA) (**Act**).

The Contraventions

5 By an unincorporated partnership, the five respondents owned and operated the food business trading as 'Ocean Keys Hi Thai' in Clarkson (**the business**), located in the Ocean Keys Shopping Centre food court.

6 The business commenced trading in May 2016 and ceased trading on 31 January 2022.

7 The day-to-day running of the business was carried on by the manager, Mr Chy Veng Chao (**Mr Chao**). The fourth respondent, Ms Moing Deing Woung (**Ms Woung**), assisted in managing the business. The first respondent, Mr Richard Ly (**Mr Ly**), undertook the bookkeeping and business administration needs for the business. The second, third and fifth respondents were not involved in running the business.

8 Ms Kwanchanok Holland (**Ms Holland**) was employed from 29 November 2018 to 30 December 2021 and Ms Trang Nguyen (**Ms Nguyen**) from 10 April 2019 until about 11 January 2022 (together, **the employees**). Both were casual employees, as defined in clause 11(1) of the Award. Each performed the duties of a Food and Beverage Attendant Grade 2, as defined in clause 6(4) of the Award.

9 The respondents paid the employees weekly in accordance with clause 20 of the Award. The employees were initially paid in cash, but from May 2020 they began receiving electronic funds transfers (EFT) under the Australian government JobKeeper Payment scheme, and thereafter generally received a combination of cash and EFT payments.

10 Ms Holland worked on any day of the week and though her hours of work varied, she usually worked 35 to 40 hours a week. Her length of shifts varied from 4 hours up to 10.5 hours. Ms Nguyen worked on any day of the week and while her hours also varied, she usually worked at least four days a week, averaging 29 hours per week, with each shift often being six to seven hours.

11 The employees were not usually provided with a meal break during their employment. If they took a break, it was usually about 15 minutes and they were required to remain at the business and serve customers as required.

12 The respondents paid the employees a flat rate of pay for all hours worked, including on weekends and public holidays.

13 The respondents paid Ms Holland the following hourly rates of gross pay during the period of her employment:

a. $13 on and from 22 January 2019;

b. $14 on and from 4 February 2019;

c. $15 on and from 10 March 2019;

d. $16 on and from 29 December 2019;

e. $18 on and from 4 January 2021.

14 The respondents paid Ms Nguyen the following hourly rates of gross pay during her employment:

a. $13 on and from 10 April 2019;

b. $15 on and from 13 October 2019;

c. $16 on and from 29 December 2019;

d. $18 on and from 2 May 2021.

15 When Ms Nguyen commenced employment, the respondents deducted $200 from her first pay, contrary to section 17C(1) of the *Minimum Conditions of Employment Act 1993* (WA).

16 The respondents contravened the following clauses of the Award in relation to the employees' employment:

a. The respondents contravened clauses 11(3) and (4) of the Award by not paying the employees the correct hourly rate of pay (and any applicable loading) for a casual employee.

b. The respondents contravened clause 13(1)(b) of the Award by not paying the Employees an additional 50% of their ordinary hourly rate where they were not provided with a meal break.

17 The respondents contravened clauses 11(3) and (4) of the Award with respect to Ms Holland on 138 occasions, resulting in an underpayment of $47,991.09. The respondents contravened clause 13(1)(b) of the Award on 137 occasions, resulting in an underpayment of $13,701.58.

18 In December 2021, the respondents back paid Ms Holland $500.64 following a proactive audit conducted on the business by industrial inspectors.

19 In total, the respondents contravened the Award on 275 occasions, resulting in an underpayment of $61,692.67 gross to Ms Holland. After backpay, as of 19 June 2025, the respondents owed Ms Holland $61,192.03 gross.

20 The respondents contravened clauses 11(3) and (4) of the Award with respect to Ms Nguyen on 110 occasions, resulting in an underpayment of $35,014.13. The respondents contravened clause 13(1)(b) of the Award on 100 occasions, resulting in an underpayment of $4,618.12.

21 In December 2021, the respondents back paid Ms Nguyen $221.16 following a proactive audit conducted on the Business by industrial inspectors.

22 In total, the respondents contravened the Award on 210 occasions, resulting in an underpayment of $39,632.26 gross to Ms Nguyen. After backpay, as of 19 June 2025, the respondents owed Ms Nguyen $39,411.10 gross.

23 The respondents were required to maintain records in relation to the employees' employment in accordance with section 49D(2) of the Act[1] and clause 32 of the Award.

24 The respondents failed to maintain the required records during the employees' employment on 832 occasions for Ms Holland and 646 occasions for Ms Nguyen, including failing to record:

a. the date on which the employees commenced employment;

b. the employees' designation under the Award;

c. the time at which the employees started and finished work each day;

d. the periods for which the employees were paid;

e. details of work breaks including meal breaks;

f. the gross and net amounts paid to the employees for each pay period; and

g. all deductions and the reasons for such deductions.

The Penalty Hearing

25 The respondents accept that a penalty is appropriate in the circumstances and they do not resile from the fact that the penalty is likely to be substantial.

26 The claimant urges the Court to make specific declarations with respect to the respondents and their conduct.

27 The parties attended a hearing on 19 September 2025 to determine the penalty for the admitted contraventions.

28 Each of the parties filed written submissions, supplemented by oral submissions at the hearing.

29 The claimant relied upon the translated affidavit of the employee Ms Holland and the amended affidavit of the industrial inspector Ms Dixon.

30 The respondents relied upon the signed witness statement of the first respondent, Mr Ly.

31 Viva voce evidence was also led from Ms Holland and Mr Ly at the hearing.

Principles relevant to determine the appropriate penalty

32 The procedure of the Court relevant to penalties is contained in the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA). Notably, regulation 35(4) states that the Court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.

33 The Act allows the Court to order a penalty paid either directly to a person directly affected by the conduct to which the contravention relates, to the claimant, or the treasurer.[2]

34 The principles relevant to determination of a civil penalty are well-settled.

35 The High Court in ***Australian Building and Construction Commissioner v Pattinson*** [2022] HCA 13; (2022) 274 CLR 450 (***Pattinson)*** reiterated that 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 contravener and by others who might be tempted to contravene a statute.[3]

36 Therefore, I must decide the appropriate penalty such that it does not exceed what is reasonably necessary to achieve deterrence by the respondents, and other employers, within their industry.

37 Regard must be had to the individual circumstances of the case and should not be determined by any comparison with another case.

38 The appellate courts have adopted a non-exhaustive range of considerations to which regard may be had in determining whether conduct calls for the imposition of a penalty and, if it does, the amount of that penalty.[4]

Consideration of Penalty

Is a declaration of 'wage theft' appropriate?

39 The claimant urges the Court to make a finding that the respondents engaged in systematic and deliberate underpayment of vulnerable workers, describing the actions of the respondents as 'wage theft'. The respondents argue that to make such a finding would be erroneous and unnecessary.

40 The claimant did not plead deliberate contraventions as part of its case: there was certainly the option to do so, since the penalty provisions in the Act allow for a higher penalty when the claimant establishes that the contravention is a serious contravention.[5]

41 A contravention can be found to be serious where the claimant establishes that the person either knowingly committed the contravention, or the person was reckless as to whether the contravention would occur.[6]

42 In such circumstances, the Court has the capacity to award a penalty that is ten times higher than the usual penalty.[7]

43 Where the evidence establishes that there has been deliberate and systematic non-compliance with the workplace obligations, it is entirely relevant to the assessment of penalty.

44 In Western Australia, there is no universal acceptance of the term 'wage theft'. In his report *Inquiry into Wage Theft in Western Australia*, Report (2019), the former Chief Commissioner of the Western Australian Industrial Relations Commission Mr Tony Beech observed:

> From the submissions made to the Inquiry, and from research done in the course of the Inquiry, I can confidently say that even though there is not a universal acceptance of the term 'wage theft' to describe underpayment of wages and entitlements, there is an almost unanimous view across all of the submissions received that the systematic and deliberate underpayment of wages and entitlements to a worker is to be condemned.[8]

45 Mr Beech drew a distinction between deliberate non-compliance and mistakes or oversights:

> I recognise that the consequence for a worker is the same whether the underpayment was intentional or unintentional. However, it is important to draw a clear distinction between an employer's deliberate and systematic non-compliance with the workplace obligations towards its workers on the one hand, and genuine mistakes and oversights which are likely to be corrected upon their discovery on the other, because the responses to, or sanctions arising from, the underpayment will differ according to the circumstances.[9]

46 The Industrial Magistrates Court is not a Court of pleadings, however, in practice, the parties have a duty to comply with procedural fairness. Should the claimant invite the Court to make specific findings of fact that demonstrate deliberateness and/or recklessness on the part of the employer, in fairness to the respondents, it is appropriate that those propositions form part of the originating claim.

47 In circumstances where the respondents have accepted responsibility at the outset by wholly conceding the claim,[10] it is unfair to then later seek that the Court make specific findings regarding deliberateness and wage theft when such propositions did not form part of the originating claim.

48 I do accept, however, that I can consider the entirety of the evidence that has been presented when forming a view about the overall running of the business, the vulnerability of the employees, the length of time of the contraventions and the resulting impact upon the employees when determining the appropriate penalty.

The nature and extent of the conduct and the circumstances in which it occurred

49 The respondents operated the business from about 30 May 2016 until 31 January 2022. During that time, the respondents contravened the Award on 485 occasions and contravened the records requirements of the Act pursuant to s 49D(2) on 1478 occasions.

50 The respondents paid a flat rate of pay per hour to each employee, irrespective of when they worked, including on weekends and public holidays. In doing so, they failed to pay each employee the appropriate amount of pay on weekdays and the appropriate amount of pay, including loadings, on weekends.

51 They also failed to provide the employees with payslips and failed to maintain a record of hours worked and wages paid.

52 The evidence establishes that Mr Chao and Ms Woung are husband and wife and both were involved in the day-to-day running of the business. Ms Woung informed the industrial inspector that she was involved in assigning the hours of work to the employees, that she ordered stock and worked in the store on the weekends. She claimed that the business kept weekly timetables that recorded the actual hours worked by the employees and she asserted that the employees signed the timesheets at the end of each week.[11] She said that she disposed of the timetables at the end of the business lease.[12] I do not accept this proposition. Based upon the evidence before the Court, including the sworn evidence of the employee, Ms Holland, I am satisfied that the business never in fact kept any employee timesheets, rosters or employment-related records at all. Instead, Mr Chao conveyed the roster to the employees via text message, collected the information from the employees about the hours they had actually worked via text message, conveyed that information to Ms Woung and then Ms Woung conveyed the total amount of hours worked to Mr Ly on a weekly basis.[13]

53 I am also satisfied on the evidence that Ms Woung was involved in the day-to-day running of the business with her husband Mr Chao rather than only ordering stock from time to time. By her own admission when interviewed by the industrial inspectors, she employed each of the two employees.[14] I am satisfied on the evidence that she knew the hours that they worked, including their weekend shifts, since she was responsible for conveying that information to Mr Ly.[15] When she informed industrial inspectors that the employees did not work on weekends she was being untruthful.[16] The assertion that she 'threw out' the employment records at the end of the lease was also false.[17]

54 However, I am not satisfied that Ms Woung was aware that the two employees were being underpaid. Rather, she was ignorant of the fact that she (as a partner in a business) was required to comply with the relevant Award and the records requirements. I am satisfied that she had some involvement with the employees' rate of pay, in that Mr Chao would ask her to speak with Mr Ly about any increases,[18] however, I am not satisfied that Ms Woung was aware that the business was not paying the correct rate to the employees.

55 The evidence reveals that Mr Chao, as the manager of the business, was entirely aware of the amount of hours worked by each employee, since he was the primary contact for disseminating the roster and collecting the hours worked from the employees at the end of each week.[19] He was also the primary person that Ms Holland spoke to about her rate of pay. I am satisfied on Ms Holland's evidence that Mr Chao knew that the employees were not being paid according to the Award by reference to his words, '[w]e pay Asia way, not white way.'[20] I am also satisfied that Mr Chao, as the manager of the business, deliberately exploited Ms Holland as a temporary visa holder, by threatening to report her and have her kicked out of the country when she questioned him about her rate of pay.[21]

56 The evidence also establishes that as the manager of the business, Mr Chao never generated or kept any of the required records during the employees' employment. When the investigation into the business commenced, I am satisfied on the evidence that Mr Chao pressured Ms Holland to sign an undated timesheet and then caused a false timesheet to be presented.[22] I will not speculate on his motivation for doing so, suffice to say, it was in his own interests to conceal the manner in which he had been operating the business.

57 I am also satisfied, by her own admissions to the industrial inspectors, that Ms Woung was involved in the creation of the false timesheet, however, I cannot be satisfied that she understood why it had been created or why she was required to fill in parts of the document.[23]

58 I am satisfied on the evidence of Mr Ly that when the Department commenced its investigation into the business, he enquired with Mr Chao and Ms Woung regarding the provision to the Department of the relevant business records: this resulted in him being emailed the false timesheets by Mr Chao.[24] Having had the benefit of assessing Mr Ly's credibility at the penalty hearing when he was called to give evidence, I am also satisfied that at the time he forwarded those timesheets to the Department, he was not aware that they were false.[25]

59 A careful examination of the documentary evidence reveals that the payslips provided to Ms Holland in October and November 2021 did not match the hours that she had recorded as having worked at the business. It is important to note that around this time, the Department had served a formal Notice to Produce employment records upon Ms Woung and had formally requested documentation related to the employees.[26] It appears that the payslips provided to Ms Holland in October and November were an attempt to comply with the requirement to provide records.

60 Mr Ly's evidence was that he informed Ms Woung that she needed to keep the business records and he later discovered that she had destroyed them at the end of the lease.[27] He instructed his accountant to generate payslips initially upon the request of the Department and then later began generating them himself via the MYOB program.[28]

61 I am satisfied that the payslips given to Ms Holland just prior to the end of her employment were an inaccurate record of her hours worked. I am also satisfied that the payslips provided to the Department were completely inaccurate. I am not persuaded on the evidence that the payslips were deliberately generated by Mr Ly as part of a course of conduct. Rather, having assessed

his evidence on affirmation, I conclude that the payslips provided to the Department were an attempt by the business (with the assistance of Mr Ly's accountant) to reconstruct the employment records to comply with the formal request.

62 Mr Ly made no real inquiry as to whether the payslips or other documents sent to the Department were accurate – he should have done so. To send inaccurate business records to the investigator rather than to admit that no documents existed was a serious error of judgment, however, having assessed the whole of the evidence, it falls short in this case of establishing a course of conduct.

63 Having conducted a careful and considered assessment of the documentary evidence, along with an assessment of each of the witnesses at the penalty hearing, I am not satisfied that there was a systematic and deliberate scheme by the partners in the business to falsify records.

64 Further, the evidence does not satisfy me to the requisite standard that the partners of the business were consciously aware that Mr Chao was exploiting the employees and contravening the Award.

65 Although Ms Woung (as the fourth respondent) was involved in the day-to-day operation of the business, I am not satisfied that she was aware of her obligations under the regulatory regime and it appears that she allowed her husband to run the business in whatever manner he saw fit.

66 I am also not satisfied on the evidence that Mr Ly was aware the employees were being paid the incorrect rate of pay and that they were not being adequately compensated for the hours that they worked on the weekends. Information was conveyed to him weekly from the manager and he relied upon that information to generate the wages and later, the associated payslips. It was impossible for him to pay the applicable rates (including loadings) without being provided the particulars of the days and hours of the week that the employees worked and whether meal breaks were taken.

67 It is clear, however, that Ms Woung and Mr Ly never made any effort to verify whether the information that they were being provided was accurate. The system utilised by the respondents was utterly lacking and put simply, unacceptable. By relying upon inaccurate information, the employees were underpaid for several years and the partnership financially benefited from those underpayments.

68 As a partner in the business and being the person responsible for generating the wages, it was incumbent upon Mr Ly to ensure that the regulatory regime was complied with at all times and to ensure that the employees were adequately compensated.

69 It was also incumbent upon the partners to ensure that the manager they engaged was managing the business effectively and complying with the law. Ms Woung should have taken a more active role in protecting the employees due to her involvement in the day-to-day operations of the business. A partnership cannot escape penalty (or expect a reduction in the penalty) because they are ignorant of the way their business is being managed.

70 The manner in which the business was conducted, predominantly the lack of supervision of the manager of the business, along with the lack of record-keeping and the disjointed system by which the employees were paid their wages was entirely deficient, resulting in immense inconsistencies and colossal underpayments that spanned several years.

71 The extent of the underpayments was difficult to ascertain, since the Department was required to rely upon the information that the employees kept when investigating the underpayments and the records contraventions.

72 Given these factors, the penalty for each breach of the Award and the records contraventions lies in the mid to high range.

The nature and extent of any loss or damage sustained

73 The underpayments of $61,192.03 and $39,411.10 are significant. The underpayments spanned several years and were numerous, including underpayments for hourly base rates, failure to pay loading and failure to compensate for lack of meal breaks.

74 Given the lack of employment records, the Department was unable to determine the full extent of the contraventions for Ms Nguyen.

75 The failure to maintain the necessary records required the employees to undertake their own record-keeping and placed the onus upon each of them to ensure that they were paid. They did not have the requisite knowledge or experience to understand that they were being exploited by Mr Chao.

76 If the partners in the business had taken a more proactive role in overseeing their manager and took the time to invest in knowledge to ensure compliance with the regulatory system, then the underpayments could have been prevented.

77 The impact upon Ms Holland was acute. It is clear from her evidence that the underpayment of her wages and the manner in which Mr Chao managed the business caused her both financial and emotional distress.

78 There is no available evidence regarding the impact upon Ms Nguyen, though I consider that the total amount of her underpayment must have had a significant impact upon her and may have caused her financial distress.

79 This consideration indicates a penalty in the mid to high range.

Similar previous conduct

80 The respondents have not previously been found to have engaged in any breaches of the Award or any civil contraventions of this type, though the lack of previous contraventions has no role to play in the assessment of civil penalties, unless it supports the view that future contraventions are unlikely.[29]

The size of the business

81 There is no substantive information of the size of the business during the relevant period. The business no longer operates, having concluded operations when the commercial lease ended.[30]

82 When in operation, the business employed both Ms Holland and Ms Nguyen to work at the store. Mr Chao worked at the premises as manager and Ms Woung also worked there.

83 The business activity statements submitted to the Australian Taxation Office reveal that the business generated sales in the following amounts:[31]

a. July to September 2019: $133,460;
b. October to December 2019: $144,427;
c. January to March 2020: $92,576;
d. April to June 2020: $106,980;
e. July to September 2020: $150,231;
f. October to December 2020: $152,707;
g. January to March 2021: $138,372;
h. April to June 2021: $136,150;
i. July to September 2021: $149,794;
j. October to December 2021: $170,085; and
k. January to March 2022: $31,334.

84 The activity statements reveal that the total sales generated by the business spanning almost three years was $1,406,116. This is not an insignificant amount for a retail food business in a shopping centre, though in fairness to the respondents, the activity statements may not necessarily reflect the actual profit generated by the business.

85 The business cannot be characterised as a large-scale operation, though it appears that while the business was running, it was successful and would have generated profits to the respondents.

86 The multitude of breaches of the Award and the amount of records contraventions resulted in significant loss to the employees and the failure to pay wages in accordance with the Award would have resulted in a higher profit share to the partnership.

Totality and Course of Conduct

87 Section 83(4) of the Act prescribes the maximum penalty that is to be applied to any 'single' contravention of a civil penalty provision. Where multiple contraventions occur, there is a need to consider whether it is appropriate to reduce the penalty for individual contraventions and make an adjustment by way of a reduction for each contravention.[32]

88 The maximum penalty serves as a benchmark or a yardstick,[33] and it is also necessary to identify any separate contraventions to arrive ultimately at the appropriate penalty.[34] The totality of the penalty must be reassessed considering the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty.[35]

89 When assessing whether the breaches arose as part of one course of conduct, the object is to avoid 'double punishment'.[36]

90 The 1,963 breaches can properly be grouped into two groups being:

a. the 485 underpayment contraventions; and
b. the 1,478 records contraventions.

91 The contraventions arose essentially out of the same course of conduct, in that the respondents failed to pay the two employees their correct wages as required by the Award and failed to keep the required employment records.

92 Consequently, this should result in an adjustment when aggregating the individually assessed penalties.

Deliberateness of the Contraventions

93 It is clear that Mr Chao as the manager of the business was knowingly complicit in the underpayment of the two employees and also knowingly failed to maintain accurate records to ensure compliance with the regulatory regime. Later, during the Department's investigation, Mr Chao forwarded false documentation to Mr Ly which the partnership relied upon.

94 There is a lack of sufficient evidence to support the proposition that the respondents, as a partnership, were aware of the actions of Mr Chao and knowingly engaged in deliberate and systematic non-compliance with their workplace obligations towards their employees.

95 The failure to ensure the adequate supervision of Mr Chao as the manager of the business, along with the lack of knowledge of the regulatory regime and rates pursuant to the relevant Award, resulted in multiple contraventions but that failure does not fall within the parameters of this consideration.

Cooperation with enforcement authorities

96 Upon commencement of the investigation, the partnership cooperated with the Department's industrial inspectors. To the extent that there were any records relevant to the operation of the business and the employment of the workers, those records were provided. Ms Woung consented to participate in an electronic record of interview during the course of the investigation.

97 Upon commencement of the proceedings, the respondents admitted the claim and made a series of concessions by way of the filed Statement of Agreed Facts.

98 The respondents are entitled to a reduction in penalty for cooperation.

Specific and general deterrence

99 The respondents operated the business for several years in the hospitality sector, which has been identified as particularly susceptible to exploitation of employees. Often the industry attracts young, low paid and vulnerable workers.[37]

100 Both Ms Nguyen and Ms Holland fell within the category of 'vulnerable worker'. Ms Nguyen was only 19 years of age when she commenced working at the business and the claimant submitted that she had limited experience in the hospitality industry.[38] Ms Holland was new to Australia, was initially working on a temporary visa and had only worked for about a week at another Thai restaurant prior to commencing her employment with the business.[39] English is her second language: it is clear from her evidence that she did not understand her entitlements and was extremely susceptible to exploitation.

101 The first and second respondents, Mr Ly and his wife Siu Men Ly, are currently involved in the day-to-day operation of six businesses within the hospitality sector. There are thirteen other businesses operating in the sector but they are not involved in the day-to-day running of those businesses.[40]

102 A further five businesses which they had been involved in had ceased trading by the date of the penalty hearing.[41]

103 The fourth respondent Ms Woung is named as an entity for three businesses that are currently trading in the sector.[42]

104 The fifth respondent Jennessa Oeng is named as an entity for one business that is currently trading in the sector.[43]

105 The Act requires employers to comply with the relevant award, to keep accurate records and to make those available to employees by way of timesheets or other daily records to ensure that employees are paid their correct entitlements.

106 The failure to provide payslips or records makes it difficult, and sometimes impossible, for an employee to determine whether an employer has complied with their obligations.

107 Specific and general deterrence are paramount considerations, since although the respondents did not deliberately engage in the underpayment of each of their employees, they failed to adequately supervise a manager who did. In addition, the complete lack of any employment records ensured that such underpayments continued for around three years: a considerable length of time that ultimately impacted each of the employees substantially. The five respondents benefited financially by way of profit share in circumstances where there is evidence to suggest the business was very profitable.

108 The penalty must operate as a specific deterrent to the respondents, and also to other employers operating within the hospitality industry, to send the message that tacit involvement in a business does not abrogate an employer of their responsibility to ensure the adequate renumeration of the employees of their business.

109 These considerations lie in the high range.

Corrective action, contrition, and cooperation

110 The respondents admitted the contraventions and consented to the Court making orders to rectify the underpayments.

111 The respondents entered into a payment plan with the Department to repay $10,000 monthly until July 2026 and have not defaulted on any of the payments. As at the date of the penalty hearing, the respondents had repaid a total of $20,000.

112 The respondents are entitled to a reduction in penalty for their contrition.

113 Since the Department's investigation, Mr Ly has migrated all of his current businesses that he manages to MYOB, and '[p]ayroll and payslips' are issued to employees on a weekly pay cycle.[44]

114 He has undertaken to educate the managers of his other businesses regarding compliance with the regulatory regime and has taken a more 'hands on' approach to the management of his businesses by attending each business at least once a month to engage directly with employees and managers.[45]

115 Having carefully considered the conduct of Mr Ly subsequent to the Department's investigation, along with the steps he has taken to ensure compliance with the regulatory regime, given the amount of businesses he and his wife are involved in, there is still a danger that further contraventions may arise, since no information has been provided about the specific systems that have been put in place to ensure adequate supervision of the various managers of each of the six businesses they are directly involved in.

116 Further, Mr Ly and his wife have no direct involvement with the 13 other businesses operating within the sector. In the absence of any evidence related to those businesses, there is no guarantee that those businesses have systems in place to adequately manage the requirements under the regulatory regime.

117 Similarly, the respondents Ms Woung and Ms Oeng have not provided any information to the Court with respect to regulatory compliance for the businesses that they continue to be involved with.

118 In such circumstances, although a reduction of the penalty for corrective action undertaken by Mr Ly is appropriate, it should not be a substantial reduction.

Financial position of the respondents

119 The financial position of a person against whom an order is made may be relevant, and of course it is in this case, because the five respondents are jointly and severally liable for the penalty, having operated a partnership at the time of the contraventions.

120 The respondents assert that they do not have the means to readily pay a significant penalty.[46] There is no information before the Court to determine the various financial positions of the respondents, though they accept, and do not resile from, the requirement to pay a substantial penalty.[47]

121 As noted in the ***Commissioner of Taxation v Arnold (No 2)*** [2015] FCA 34; (2015) 324 ALR 59 at [200] - [204], in most cases, this factor will not carry great weight in the assessment of penalty.

Assessment of Penalty

The Award contraventions

122 The respondents have admitted 1963 contraventions which can be categorised into two groups:

a. 485 underpayment contraventions; and

b. 1478 records contraventions.

123 At the time of the contraventions, the maximum penalties were:

a. $2000 for each breach of the Award;[48] and

b. $5000 for each breach of a civil penalty.[49]

124 Therefore, the total maximum penalty for breaching the Award is $970,000. The total maximum penalty for the records contraventions is $7,390,000.

125 The underpayment contraventions involved the breach of three provisions of the Award for each employee:

Award Clause	Nature of Entitlement	Number of Contraventions	Employee
11(3) & 11(4)	Ordinary rate of pay and casual loading	138	Holland
11(3) & 11(4)	Ordinary rate of pay and casual loading	110	Nguyen
13(1)	Payment in lieu of meal break	137	Holland
13(1)	Payment in lieu of meal break	100	Nguyen

126 Applying the reasoning in ***Callan v Smith*** [2021] WAIRC 00216; (2021) 101 WAIG 1155,[50] it is appropriate to apply the 'course of conduct' principles to adjust the individually assessed penalties of clauses 11(3) and 11(4) for each employee, since the failure to pay the ordinary rate of pay, and then the failure to pay the necessary loadings, were the consequence of an overriding approach taken by the respondents to pay flat rates of pay to each employee throughout the course of their employment.

127 I do not consider that it is appropriate to make any further adjustment to the Award breaches in the circumstances. Although the 237 breaches of clause 13(1) could be categorised as breaches of the substantive 'wages' provision at clause 21A, it is imperative that employers ensure that meal breaks are taken. The fact that the Award allows for the provision of 50% of the ordinary hourly rate of pay until such time that the employee is released for a meal demonstrates the importance of such breaks in the hospitality sector. To make a further reduction for the clause 13(1) contraventions would go against the primary objective of promoting the public interest in compliance.

128 The Award contraventions were serious, in that they were committed over an extended period of time, involved two vulnerable employees and arose due to the lack of adequate supervision of the manager.

129 Having carefully considered all relevant factors and focusing on both specific and general deterrence, I consider the appropriate penalty for each contravention to be as follows:

a. for each of the 248 underpayment contraventions relating to Ms Holland, the amount of $500;

b. for each of the 237 underpayment contraventions relating to Ms Nguyen, the amount of $500.

130 This equates to an aggregate penalty of $242,500.

The Records Contraventions

131 The records conventions involved the breach of three provisions of the Act for each employee:

Section	Obligation	Number of Contraventions	Employee
49D(2)(c)	Record date of commencement	1	Holland
49D(2)(c)	Record date of commencement	1	Nguyen
49D(2)(d)	Record start and finish times, record pay period, record work breaks	707	Holland
49D(2)(d)	Record start and finish times, record pay period, record work breaks	527	Nguyen
49D(2)(e)	Record employee's designation, gross and net payments and tax withheld, record any deductions and the reason	124	Holland
49D(2)(e)	Record employee's designation, gross and net payments and tax withheld, record any deductions and the reason	118	Nguyen

132 The breaches of the three separate provisions of s 49D(2) can be categorised as one course of conduct for each employee, since they all arose as a consequence of the complete failure by the business to maintain any employment records.

133 It is appropriate to adjust the individually assessed penalties for the records contraventions for each employee to group the records contraventions into contraventions for each pay period as follows: [51]

a. 124 contraventions for the employee Ms Holland;

b. 118 contraventions for the employee Ms Nguyen.

134 The records contraventions were very serious, in that the failure to keep accurate employment records facilitated the underpayments and hindered the Department in its ability to ascertain the full extent of the loss to the employee Ms Nguyen.

135 Having carefully considered all relevant factors and focusing on both specific and general deterrence, I consider the appropriate penalty for each records contravention to be as follows:

a. for each of the 124 records contraventions relating to Ms Holland, the amount of $2,000, and

b. for each of the 118 records contraventions relating to Ms Nguyen, the amount of $2,000.

136 This equates to an aggregate penalty of $484,000.

137 I am satisfied that the separate contraventions related to underpayment and the failure to keep records can be considered as a single course of conduct. The question is whether an adjustment must be made so that if there is an overlap between the contraventions, a double penalty is not imposed.[52]

138 Having reviewed the facts of the claim, it is appropriate to make an adjustment which calls for a reduction of 50% on each of the underpayment contraventions to $250 and each of the records contraventions to $500, adjusting the aggregate penalty for the underpayment contraventions to $121,250 and the aggregate penalty for the records contraventions to $242,000.

139 It is appropriate to apply a further discount to each aggregate penalty in the amount of 20% because the respondents admitted the contraventions at the commencement of the proceedings and negated the need for a trial.

140 Finally, the totality principle must be considered to ensure that the multiple penalties are just, appropriate and proportionate to the whole of the conduct. To impose a wholly separate penalty for each employee would fall outside the scope of this principle.[53] There will be a further reduction of the total aggregate penalties in the amount of 20%.

141 The respondents will be required to pay:

a. a total penalty of $72,750 for the underpayment contraventions;

b. a total penalty of $145,200 for the records contraventions; and

c. $640.75 for disbursements.

142 It is appropriate that the penalties be paid to the claimant.

B. COLEMAN

INDUSTRIAL MAGISTRATE

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[1] The section has since been amended by the *Industrial Relations Legislation Amendment Act 2021* (WA) on 20 June 2022.

[2] Section 83F(2) *Industrial Relations Act 1979* (WA) (***Industrial Relations Act***).

[3] ***Pattinson***, [15].

[4] ***Callan v Smith*** [2021] WAIRC 216; (2021) 101 WAIG 1155 (***Callan v Smith***) at [90] citing the Federal decisions of ***Kelly v Fitzpatrick*** [2007] FCA 1080 and ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7.

[5] See sections 83E(1)(a)(i), 83E(1)(b)(i) and 83EA *Industrial Relations Act*.

[6] Section 83EA(2) *Industrial Relations Act*.

[7] Sections 83E(1)(a)(i) and 83E(1)(b)(i) *Industrial Relations Act*.

[8] *Inquiry into Wage Theft in Western Australia*, Report (2019) (**Wage Theft Inquiry Report**), pp 22 - 23.

[9] Wage Theft Inquiry Report p 22.

[10] In this case, the respondents did not wholly accept the claim by way of the Response filed 24 April 2025, however, the part of the claim that was in dispute was later excised by way of the Amended Particulars of Claim filed with the Court on 20 May 2025.

[11] Exhibit 2 – Witness Statement of Jillian Denise Dixon, JDD14, pp 23 - 24.

[12] Exhibit 2, JDD14, p 24.

[13] Exhibit 1 – Witness Statement of Kwanchanok Holland, [5]. See also ts 20.

[14] Exhibit 2, JDD14, pp 13 - 14.

[15] ts 20.

[16] Exhibit 2, JDD14, pp 34 - 35.

[17] Exhibit 2, JDD14, p 24.

[18] Exhibit 1, [23].

[19] Exhibit 1, [3] - [5].

[20] Exhibit 1, [24].

[21] Exhibit 1, [29].

[22] Exhibit 1, [13], [14] and [18] - [19]; Exhibit 2, JDD15 and JDD16.

[23] Exhibit 2, JDD14, pp 39 - 47 and 53 - 56.

[24] Exhibit 2, JDD15: see specifically the email chain from Richard Ly to Sarah Rutherford dated 3 December 2021 at 11.35 am.

[25] Exhibit 1, KH1 and KH2.

[26] Exhibit 2, [4].

[27] Exhibit 3, [11] and [12].

[28] ts 20.

[29] ***Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) (No 4)*** [2024] FCA 341 per Katzmann J at [54].

[30] Exhibit 2, JDD14, page 37.

[31] JDD6: see specifically the Activity Statements for the relevant periods.

[32] ***Callan v Smith*** at [111].

[33] ***Markarian v The Queen*** [2005] HCA 25, (2005) 228 CLR 357 at [31]; ***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*** [2017] FCAFC 113; (2017) 254 FCR 68 at [82]; ***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The BKH Contractors Case) (No 2)*** [2018] FCA 1563 at [19].

[34] ***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*** [2017] FCAFC 113; (2017) 254 FCR 68 at [108] - [149].

[35] The principles relating to consideration of multiple contraventions of civil penalty provisions is discussed in ***Kelly v Fitzpatrick*** [2007] FCA 1080; (2007) 166 IR 14; ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; (2008) 165 FCR 560; ***Fair Work Ombudsman v NSH North Pty Ltd t/as New Shanghai Charlestown*** [2017] FCA 1301; (2017) 275 IR 148.

[36] ***Australian Competition and Consumer Commission v Employsure Pty Ltd*** [2023] FCAFC 5; (2023) 407 ALR 302 (***ACCC v Employsure Pty Ltd***) at [51]; ***Construction Forestry Mining and Energy Union v Cahill*** [2010] FCAFC 39; (2010) 194 IR 461 (***CFMEU v Cahill***) at [41].

[37] Wage Theft Inquiry Report, pp 89 - 90; ***Jillian Dixion, Department of Mines, Industry Regulations and Safety v Karakuyu*** [2025] WAIRC 00451; (2025) 105 WAIG 2074, [87] - [99] (Kucera IM).

[38] See [33] of the claimant's submissions filed 13 August 2025: there is no independent evidence before the Court related to Ms Nguyen but the respondents did not seek to challenge the claimant's description of Ms Nguyen as a vulnerable worker.

[39] Exhibit 1, [28] - [32].

[40] Exhibit 3, [13] - [16].

[41] Exhibit 3, [13].

[42] Agreed Statement of Facts filed 8 August 2025, Annexure B.

[43] Agreed Statement of Facts, Annexure B.

[44] Exhibit 3, [18].

[45] Exhibit 3, [19] - [20].

[46] Respondent's submissions filed 15 September 2025 at [50].

[47] Counsel for the respondents conceded in oral submissions at the penalty hearing that a significant penalty is appropriate: see ts 5.

[48] Section 83(4)(a)(ii) *Industrial Relations Act*.

[49] Section 83E(1)(a) *Industrial Relations Act.*

[50] ***Callan v Smith***, [94] - [97].

[51] Annexure A of the Agreed Statement of Facts filed 8 August 2025 states that there were 124 pay periods for the employee Holland and 118 pay periods for the employee Nguyen.

[52] ***ACCC v Employsure Pty Ltd***, [51]; ***CFMEU v Cahill***, [41].

[53] ***Callan v Smith***, [112].

2025 WAIRC 00963

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00963
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 1 OCTOBER 2025, THURSDAY, 2 OCTOBER 2025 & FRIDAY, 3 OCTOBER 2025
DELIVERED	**:**	THURSDAY, 4 DECEMBER 2025
FILE NO.	**:**	M 142 OF 2024
BETWEEN	**:**	PATRICIA ANGELICA ROJO DIAZ

CLAIMANT

AND

TOWN OF CAMBRIDGE

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – *Industrial Relations Act 1979* (WA) – Consideration of the relationship of contract for service and contract of service – Whether the claimant's engagement was as an independent contractor or as an employee for the purposes of the *Fair Work Act 2009* (Cth) and the *Industrial Relations Act 1979* (WA)
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA)
Instrument	**:**	*Town of Cambridge Employees' Collective Agreement 2013* *Town of Cambridge Employees' Collective Agreement 2018* *Town of Cambridge Employees' Collective Agreement 2022*
Cases referred to in reasons:	**:**	***Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*** [2022] HCA 1; (2022) 275 CLR 165 ***ZG Operations Australia Pty Ltd v Jamsek*** [2022] HCA 2; (2022) 275 CLR 254 ***EFEX Group Pty Ltd v Bennett*** [2024] FCAFC 35; (2024) 330 IR 171 ***Ma v Yan Massage Wynnum West Pty Ltd*** [2024] FWCFB 419; (2024) 335 IR 57 ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37; (2015) 228 FCR 346 ***Stevens v Brodribb Sawmilling Co Pty Ltd*** [1986] HCA 1; (1986) 160 CLR 16 ***ACE Insurance Ltd v Trifunovski*** [2011] FCA 1204; (2011) 200 FCR 532 ***Abdalla v Viewdaze Pty Ltd*** [2003] AIRC 504; (2003) 122 IR 215 ***Botica v Top Cut TMS Holdings Pty Ltd*** [2020] WAIRC 00061; (2020) 100 WAIG 102
Result	**:**	The claim is dismissed
Representation:		
Claimant	:	In person
Respondent	:	Mr K. Jarrett (of counsel)

REASONS FOR DECISION

Background

1 On 16 October 2024, Ms Patricia Angelica Rojo Diaz (**Ms Diaz**), lodged an originating claim alleging that the Town of Cambridge (**the Town**) failed to comply with the *Town of Cambridge Employees' Collective Agreements 2018 and 2022* (**Cambridge Agreement 2018 and Cambridge Agreement 2022**) and contravened the *Fair Work Act 2009* (Cth) (**FWA**) and the *Industrial Relations Act 1979* (WA) (**IR Act**).

2 Ms Diaz is a fitness instructor who was employed on a casual basis to instruct aqua aerobics classes at Bold Park Aquatic Centre (**Bold Park**), a community facility operated by the Town that provides, amongst other things, aqua aerobics classes attended by members of the public on a fee-paying basis.

3 In or around October or November 2018, the Town decided to change the engagement of aqua aerobics instructors from casual employees to independent contractors. This change of engagement is the principal issue of dispute between Ms Diaz and the Town, where the entitlements claimed, and orders sought, by Ms Diaz are entitlements owed to employees both under the FWA and the IR Act.

4 A complicating factor in the proceedings is that on 1 January 2023, the Town transitioned to the Western Australian industrial relations system.

5 Thus, there are two statutory regimes, the FWA in the federal jurisdiction and the IR Act in the state jurisdiction, to consider in determining the principal issue, from which, and depending on the resolution of the principal issue, different entitlements and orders may result.

6 In relation to the Federal jurisdiction, *if* Ms Diaz proves on the balance of probabilities that, for the purposes of the FWA, she was an employee of the Town from November 2018, then the Town is a *national system employer*, and Ms Diaz is a *national system employee* as those terms are defined under the FWA. *If* Ms Diaz was an employee of the Town, then the Town has obligations under the FWA.

7 Similarly, in the State jurisdiction, *if* Ms Diaz proves on the balance of probabilities that, for the purposes of the IR Act, she was an employee of the Town after 1 January 2023, then the Town has obligations under the IR Act.[1]

8 Schedule I of these reasons outlines the jurisdictions, standard of proof, as well as the practice and procedure of the Industrial Magistrates Court (**IMC**, or **Court**) in the Federal and State jurisdictions.

The Claim

9 In the originating claim, Ms Diaz sought orders outside the jurisdiction of the IMC which was raised with her in directions hearings on 5 and 14 March 2025.

10 Following this, on 4 April 2025, Ms Diaz lodged an amended statement of claim (**the Amended Claim**), whereby she alleges that the Town:

Federal Claim

(1) under the FWA:

(a) contravened s 44 by breaching the National Employment Standards (**NES**);

(b) contravened s 50 by:

(i) failing to pay her the minimum payments as a casual employee under the Cambridge Agreement 2018;

(ii) failing to pay her associated superannuation under the Cambridge Agreement 2018; and

(iii) failing to provide access to or copies of the Cambridge Agreement 2018;

(c) contravened s 125(B) by failing to provide her with a Casual Employment Information Statement;

(d) contravened s 345 by making false statements or misrepresentations;

(e) contravened s 323 by failing to pay in her in full for the performance of work;

(f) contravened s 535 by failing to keep employment records as prescribed;

(g) contravened s 536 by failing to provide pay slips; and

State Claim

(2) contravened the IR Act by:

(a) failing to keep records under s 49D(1);

(b) failing to provide information, superannuation details, termination details under s 49D(2);

(c) failing to provide pay slips under s 49DA;

(d) making false statements under s 97D; and

(e) underpaying wages and superannuation entitlements in breach of the Cambridge Agreement 2022.

11 Ms Diaz seeks the following orders to be made:

(a) declarations of contraventions under s 545 of the FWA;

(b) declarations of contraventions under s 83 and s 83A of the IR Act;

(c) the payment of 'compensation' under s 545(3) of the FWA for the alleged underpayment of wages and superannuation for the period up to 7 March 2023;

(d) the payment of an amount determined under s 83 and s 83A of the IR Act for the alleged underpayment of wages and superannuation for the period 8 March 2023 to 23 August 2024;

(e) pre-judgment interest;

(f) the imposition of a civil pecuniary penalty under s 546(1) of the FWA in relation to each of the Town's contraventions of a civil penalty provision in s 539 of the FWA and the contraventions are serious contraventions; and

(g) the imposition of a civil pecuniary penalty under s 83E and s 83EA of the IR Act.

12 Notwithstanding the prior discussions with Ms Diaz, in the Amended Claim she continued to make a claim under s 345 of the FWA. Pursuant to the table in s 539(2) of the FWA at column 3, a claim made under s 345 of the FWA can be made to the Federal Court or the Federal Circuit and Family Court of Australia. There is no reference to an application of this type being made to an *eligible State or Territory court*, which, defined in s 12 of the FWA includes at paragraph (b): a magistrates court – including a court constituted by an industrial magistrate. Accordingly, the Court has no jurisdiction to hear a claim under s 345 of the FWA and this will not be further considered in this decision. To that end, there are parts of Ms Diaz's evidence which traverses issues related to possible claims of misrepresentation, unfair or unlawful termination or other workplace rights. While this may be important to Ms Diaz, much of the evidence is not relevant to the justiciable aspects of the Amended Claim.

13 To that end, while I will make brief reference to this evidence, the Town objected to its admissibility where it was not relevant to the Amended Claim. Nevertheless, the Town acknowledged that Ms Diaz was self-represented and that the Court was well-placed to determine the appropriate weight to be given to such material.[2]

14 Further, s 125B of the FWA is not a civil remedy provision itemised in the table of s 539(2) of the FWA. Therefore, even if there was an amount owed to Ms Diaz as a result of a failure of the Town to provide her with a copy of the Casual Employment Information Statement, the IMC could not order the payment of an amount where s 545(3)(b) of the FWA also applies. For the same reason, the IMC cannot order a pecuniary penalty to be paid under s 546(1) of the FWA.

15 The Town denies the Amended Claim and asserts Ms Diaz was an independent contractor from November 2018 and so the Cambridge Agreement 2018, Cambridge Agreement 2022, FWA and IR Act provisions do not apply to her.

16 The Town further says:

(a) The Cambridge Agreement 2018 was approved and operated from 9 April 2019 and, therefore, did not cover or apply to Ms Diaz due to her not being employed by the Town after 11 November 2018;

(b) Section 125B of the FWA commenced on 27 March 2021 and does not have retrospective effect where Ms Diaz was employed as a casual employee between October 2017 and November 2018;

(c) The declarations sought by Ms Diaz are not capable of being made by the Court under s 545(3) of the FWA; and

(d) Ms Diaz was not covered by the Cambridge Agreement 2022 as group fitness instructors are not a classification covered by this agreement.

Issues for Determination

17 In addition to the principal legal issue, other legal and factual issues for determination by the Court include:

(a) Was Ms Diaz's casual employment with the Town terminated in or around October 2018?

(b) If Ms Diaz's casual employment with the Town was terminated what was the nature of her engagement from in or around 6 November 2018?

(c) What were the terms of the engagement, if any?

(d) If Ms Diaz's casual employment was the Town was not terminated in or around October 2018, did her employment continue to until August 2024?

18 If Ms Diaz is found to be an independent contractor from in or around 6 November 2018, the Amended Claim fails in its entirety. If Ms Diaz's casual employment is found to have never been terminated or if her engagement is found to be to be a contract of service consistent with being an employee, then the issue of quantum arises. If the issue of quantum is to be considered, the Town says, amongst other things, that the aqua aerobics classes at Bold Park would not have continued where the Town was liable to pay a minimum of two hours for the instruction of a one-hour class.

Evidence

19 Ms Diaz tendered her witness statement dated 13 June 2025 with annexures and she also gave oral evidence.

20 The Town relied upon witness statements of Jasper Silver (**Mr Silver**) dated 11 July 2025 with annexures and Tamara Sanders (**Ms Sanders**), acting Manager, Governance at the Town, dated 11 July 2025 with annexures. Both also gave oral evidence.

21 Mr Silver has held a number of roles with the Town since around 1989 and has held the role of Coordinator or acting Manager – People and Culture since approximately 2021. In those roles he has communicated and met with Ms Diaz. Mr Silver explained the organisational structure of the Town.[3]

22 Ms Sanders commenced working at Bold Park in 2018 as a senior administrative officer. Her substantive role is Centre Manager at Bold Park, which she has held since 2021.[4] Ms Sanders's interactions with Ms Diaz increased when Ms Sanders commenced as Centre Manager.[5]

23 There are many facts which are not in dispute between the parties. Alternatively, there is uncontroverted evidence, I consider to be reliable, and it is unnecessary to traverse that evidence in detail. Where possible I will discuss the evidence based on the issues raised rather than merely recite the witness evidence.

24 Overall, the witnesses, including Ms Diaz, generally gave their evidence truthfully. However, some witness evidence was inconsistent with the documents tendered and not entirely reliable. Where conflicts arose between witness accounts, I have given greater weight to evidence supported by contemporaneous records, as a more reliable basis for determining the facts.

Undisputed Facts

25 The following facts are taken from the Town's amended response lodged on 9 May 2025:

> The Town is a local government established under the provisions of the *Local Government Act 1995* (WA).
>
> Until 31 December 2022, the Town was a *national systems employer* covered by the [FWA].
>
> On 1 January 2023, the Town transitioned to the Western Australian industrial relations system.[6]

26 Ms Diaz is a fitness instructor who owns and operates a business, Latin Moves & Fitness Australian Business Number (**ABN**) 87 556 453 762 (**LMF**), which was registered with the Australian Business Register on 18 May 2010.

27 Between 10 October 2017 and approximately 8 November 2018, Ms Diaz was employed as a casual employee to provide aqua aerobic fitness classes at Bold Park (**Engagement Period 1**).

Engagement Period 1

28 While Ms Diaz stated she did not believe she was given a written contract of employment, she was in fact provided with, and employed by, a letter of offer of employment dated 8 November 2017 which she signed and accepted on 9 December 2017 (**November 2017 Contract**).[7]

29 In July 2018, the Town decided to send another letter of offer of employment to Ms Diaz which provided that her employment was also covered by the *Town of Cambridge Employees' Collective Agreement 2013* (**Cambridge Agreement 2013**).[8]

30 For some (unknown) reason this decision did not result in a letter of offer of employment being sent to Ms Diaz until around 8 October 2018 (**October 2018 Contract**).[9] The October 2018 Contract did not change the fundamental terms of her casual employment, save that it included reference to her terms and conditions of employment being in accordance with the *Cambridge Agreement 2013* and including special requirements relating to maintaining her fitness instructor qualifications and uniforms.

31 There is no signed acknowledgement by Ms Diaz of the October 2018 Contract, although in her oral evidence she said she did sign the October 2018 Contract,[10] but it is common ground that she continued to be employed on the same or similar terms to the November 2017 Contract, save for as I have already mentioned.

32 The October 2018 Contract (and similarly provided for in the November 2017 Contract) stated, relevantly, that:

> Your hours of work shall be as determined by the Town from time to time and in accordance with the requirements of the Aquatic Centre. The starting and finishing times are to be discussed with your Supervisor.

> We advise that the Town is under no obligation to provide you with, and does not guarantee, continuing employment with the Town at any time in accordance with the casual nature of your employment. As a causal employee you are employed on an hourly contract and each contract is a distinct and separate contract of employment.
>
> The termination of your employment by either yourself or the Town shall be in accordance with the Agreement.

33 Ms Diaz was paid $50 per hour to instruct aqua aerobic classes, which were either deep water or shallow water classes.

34 Initially, Ms Diaz instructed one aqua aerobics class of about 50 to 60 minutes' duration once a week. At some point, possibly in early 2018, the number of aqua aerobics classes instructed by Ms Diaz increased and, likely in or after June 2018, she was instructing between three and five classes per week, each of about 50 to 60 minutes' duration.[11]

35 I note Ms Diaz states that in 2018 she was teaching four classes per week on Monday, Wednesday, Friday and Saturday.[12] However, pay slips and attendance records provided by the Town do not wholly support this and the number of hours per week she instructed aqua aerobics classes was variable and was between one and five hours per week. My observation from the payslips and attendance records provided by the Town is that it was not until after June 2018 that Ms Diaz more consistently worked three hours per week.[13] Up until that time, she worked one or two hours per week and had weeks where she did not work.

36 During Engagement Period 1, Bold Park: determined the times when the aqua aerobics classes were held; the price members of the public were charged for attending the class; took the payment from class attendees and provided them with a 'pass' to participate in the class; set the maximum number of attendees in any class; and provided equipment, including a microphone and sound system, for the instructors to use to conduct the class.[14]

37 The aqua aerobics instructors, including Ms Diaz, were responsible for collecting the class passes and for conducting the classes consistent with her qualifications. Ms Diaz could devise the program she taught during the class and she chose the music that would best suit her program. At the end of the class, she completed paperwork required by Bold Park, which was an attendance record.[15]

38 In October or November 2018, the Town decided to change the engagement terms of the employed aqua aerobics instructors (**Engagement Period 2**). While this is an issue of factual dispute, there are surrounding facts that are not disputed or are reliable.

Engagement Period 2

39 Following an unsuccessful bargaining period, the Cambridge Agreement 2018 was put to a second vote with the access period commencing on 15 October 2028 and a vote held on 6 and 7 November 2018.[16] The Cambridge Agreement 2018 was approved by the Fair Work Commission on 2 April 2019 with a nominal expiry date of 30 June 2020.[17]

40 Since the expiration of the Cambridge Agreement 2018, two enterprise agreements have been approved by the Western Australian Industrial Relations Commission, including the Cambridge Agreement 2022 and *Town of Cambridge Employees' Collective Agreement 2025*.[18]

41 The following summary of the circumstances surrounding the Town's decision to 'contract out' certain services at Bold Park, including the instruction of the aqua aerobics class, is provided to give context to events at the time. It should not be taken to suggest that Ms Diaz's engagement had, in fact, changed to that of a contractor.

42 The Town's concern, arising from the terms of the proposed Cambridge Agreement 2018, was whether the current provision of aqua aerobics classes would comply with the minimum requirements under the agreement. The Town considered it was cost prohibitive to pay aqua aerobics instructors the proposed minimum where there was one class available for instruction. Given the delay in the bargaining process, rather than again delaying the second vote, the Town decided the two other options were to cease offering aqua aerobics classes or engage the instructors as 'sole traders'.[19]

43 Ultimately, the Town decided to continue offering aqua aerobics classes and proceeded to engage the instructors as 'sole traders'.[20]

44 Between 10 October 2018 and 11 November 2018, Ms Diaz attended a meeting at Bold Park at the Town's insistence along with five or six people from the Town's 'Head Office' and 'management' staff from Bold Park (the **October Meeting**). There was possibly one other instructor in attendance.[21]

45 The Town gave some information to Ms Diaz and any other instructor who attended the October Meeting. Ms Diaz's evidence is that one of the Town's officers told her and others that the Town were no longer employing aqua aerobics instructors as casual employees, and instead they would be engaged as contractors. Ms Diaz further stated that the Town's official said they would be dismissed if they did not agree to the new proposal, and they were required to provide a business name, ABN and a certificate of professional indemnity and public liability insurance.[22] Ms Diaz says she was 'forced' to accept the Town's proposal as she wanted to keep working.

46 It is likely the October Meeting took place between 10 and 23 October 2018, as the Town generated a letter dated 23 October 2018 to the aqua aerobics instructors referring to 'recent discussions regarding changes to employment conditions for causal Fitness Instructors at Bold Park Aquatic'.[23] Further, the instructors were informed that the Town was 'moving away' from employing casual instructors to engaging instructors on a 'private contractor arrangement', and, to that end, to become a 'private contractor', the instructor would need to obtain an ABN and the relevant public liability and professional indemnity insurances. Thereafter, the Town offered 'pay rates' in consideration of the change in arrangements and to cover superannuation benefits on a tiered basis:

- 0-10 class participants - $56.70 per class
- 11-15 class participants - $61.50 per class

- 16 or more class participants - $65.40 per class.[24]

47 Instructors were informed that Bold Park would continue to provide all equipment for the aqua aerobics classes. They were required to confirm in writing that they accepted the 'proposed contractor arrangements' by 29 October 2018.[25]

48 The Town cannot locate a signed copy of this letter and cannot confirm if it was sent to Ms Diaz.[26] Ms Diaz denies receiving a copy of this letter or having seen this letter previously. She did not confirm in writing that she accepted the 'proposed contractor arrangements'.

49 However, Ms Diaz did provide the Town with her ABN and business name, and she has provided certificates of insurance for public liability insurance each year since November 2018.[27]

50 The last pay slip the Town provided to Ms Diaz was for the period 29 October 2018 to 11 November 2018.[28] No pay slips were provided to Ms Diaz after this period.

51 Invoices under cover of LMF commenced being generated from about 6 November 2018.[29] The invoices include reference to the pay rates referred to in the letter from the Town dated 23 October 2018.

Facts in Dispute

Termination of casual employment

52 Ms Diaz states that on or about 11 November 2018, the Town 'stated it terminated my employment and re-engaged me as a "contractor"'. She further states she 'did not get any "official" notification that [her] employment was terminated'.[30] Further, she says that she became aware of her changed status when the Town changed the attendance record to a 'false draft invoice'.[31]

53 In her oral evidence in chief, Ms Diaz clarified that at the October Meeting she and others were told that going forward after the October Meeting, they were not 'going to be employees anymore. We were going to be called under contract, and if we didn't want to accept that, we could leave'.[32]

54 Ms Diaz also stated that she did not understand that casual employees could be terminated at short notice and did not understand the casual employment terms.[33] However, this evidence is difficult to reconcile given Ms Diaz signed the November 2017 Contract and October 2018 Contract setting out the terms of her casual employment.

55 While it cannot be verified that the letter from the Town dated 23 October 2018 was sent to Ms Diaz, the contents of the letter is consistent with Ms Diaz's evidence about what occurred and what was discussed at the October Meeting.

56 Based on Ms Diaz's evidence, consistent with her providing details of her ABN and insurance certificates, the unsigned letter from the Town dated 23 October 2018 and the rendering of invoices under the cover of LMF, I find that at the October Meeting the Town orally terminated the casual employment of the aqua aerobics instructors, including Ms Diaz, for Engagement Period 1. Further, I am satisfied the Town gave the aqua aerobics instructors, including Ms Diaz, a period of time to provide certain information to the Town, whereupon from about 6 November 2018 the casual employment for Engagement Period 1 ceased.

57 The October 2018 Contract provided that any termination of Ms Diaz's casual employment was to occur in accordance with 'the Agreement'. Pursuant to cl 4.3(b) of the Cambridge Agreement 2013:

> The services of a casual employee shall be terminated by two hours [sic] notice given on any day by either side, or by payment, on any day by the [Town], or two hours wages in lieu of notice.

58 The requirement to provide a casual employee with written or 'official' notice of termination of casual employment is not required under the FWA[34], albeit it might be good practice to do so. Further, the Cambridge Agreement 2013 did not require written notice of termination of casual employment.

59 Therefore, it was sufficient, albeit possibly harsh, for the Town to verbally inform the aqua aerobics instructors at the October Meeting that they were no longer casually employed by the Town provided they were given two hours' notice or provided with two hours' wages in lieu of notice. I am satisfied Ms Diaz and the aqua aerobics instructors were provided with more than two hours' notice of the termination of their casual employment.

60 While it might have been preferrable for Ms Diaz to have received a copy of the letter from the Town dated 23 October 2018, it was not necessary for the purposes of terminating her casual employment.

61 Ms Diaz says she regularly requested to be changed 'back to an employee.' According to her evidence one of the times this occurred was on 24 September 2021 when she emailed Mr Silver about bullying at Bold Park, and she requested to be made an employee again because she would get her rights back.[35]

62 In this email, Ms Diaz referred to starting at the Town as an employee and 'the Town' asked the instructors to be a contractor.' She also says 'I really like to work at Bold [P]ark and I would like to keep my job.'[36] The content of the email is relevant because it demonstrates that Ms Diaz understood there had been a change in her engagement. While the parties' description of their status does not conclusively establish the nature of that engagement, it is indicative of Ms Diaz's understanding of the situation, despite her attempts during oral evidence to distance herself from that understanding.

63 Following the receipt of this email, Mr Silver met with Ms Diaz and responded to her in an email dated 4 October 2021.[37] In summary, Mr Silver reiterated the Town's position with respect to its decision to engage aqua aerobics instructors as contractors and not as casual employees. There were other topics of conversation, but this related to Ms Diaz's perception of how others were treating her rather than relating to her engagement by the Town. However, consistent with Ms Sanders's evidence[38] about invoicing, an issue was discussed with Mr Silver about Ms Sanders confirming the number of attendees in Ms Diaz's classes.[39]

Engagement Period 2

64 What happened after 6 November 2018 is where the real controversy between the parties arises. That is, was Ms Diaz's engagement by the Town after 6 November 2018 properly described as a contract for services, whereupon her engagement is one of an independent contractor providing services to the Town, or as a contract of service, whereupon her engagement is one of an employee of the Town.

65 It is common ground that there was no written contract for services or written employment contract between Ms Diaz and the Town for Engagement Period 2.[40]

66 However, there were things the parties agree happened during Engagement Period 2 albeit they disagree on the interpretation of what these things mean. The most contentious factual issue in dispute relates to the rendering of invoices by Ms Diaz and the effect this had for the purposes of taxation.

The Aqua Aerobics Classes

67 In terms of the less or non-contentious factual matters, in Engagement Period 2 Ms Diaz continued to instruct aqua aerobics classes at Bold Park, albeit she says that there was a reduction in the number of classes she instructed from four to two per week.[41] This generally accords with the records referred to by both parties, although Ms Diaz instructed additional classes from time to time to cover the unavailability of other instructors.

68 Bold Park continued to do all things it did in Engagement Period 1, referred to in paragraph [36] above, in Engagement Period 2.[42] That is, Ms Sanders admitted in her oral evidence that Bold Park made all the operational decisions regarding the organisation of and payment for aqua aerobics classes, and the instructors, including Ms Diaz, were responsible for the running of the aqua aerobics class they instructed.[43] Instructors were expected to manage minor class behaviour but otherwise were required to report incidents to Bold Park, who retained responsibility for members of the public using the facility.

69 While the aqua aerobics instructors wore their own clothing, from time to time they may have used clothing supplied by the Town (for example, a warm jacket) but this was rare and instructors could not use any Town clothing usually supplied to staff members.

70 Bold Park determined the rates to be paid to aqua aerobics instructors for each class, which was determined by the number of participants in each class, and Ms Sanders accepted Ms Diaz had no input into the rate amount.[44]

71 These rates are referred to in paragraph [46] above (as provided in the letter from the Town dated 23 October 2018) until about 30 March 2023 when the rate was increased as follows:[45]

> 1 to 10 participants: $57.83
>
> 11 to 15 participants: $[62.27][46]
>
> 16+ participants: $66.71

72 Ms Diaz had no input into the amount of the rate increase, and Ms Sanders refers to the amount as an 'hourly rate' in her evidence although it is referrable to the number of participants in the class.[47]

73 Ms Sanders stated that around 24 September 2021 she had a discussion with Ms Diaz regarding the setting up of equipment before the aqua aerobics classes. In summary, Ms Sanders thought other leisure centres required instructors to set up equipment before the class and did not get paid for the time taken to do so. Ms Diaz challenged this. Ms Sanders accepted she was wrong and that if instructors at other leisure centres set up the equipment for the classes, they were paid for the set-up time. Therefore, Ms Sanders reverted to the original set-up arrangement, whereby the Town staff set up the equipment used in the aqua aerobics classes.[48]

Invoicing

74 In her evidence, Ms Diaz referred to 'false invoices', which was confusing. The reason Ms Diaz referred to the invoices as 'false invoices' was clarified by her in her oral evidence. However, contextually it is helpful to how understand the invoicing process was supposed to work, at least from the Town's perspective.

75 Once the Town decided to move to a different engagement model, it required the aqua aerobics instructors to submit a monthly invoice for the aqua aerobics classes they instructed. The Town provided a blank template invoice, which the instructors were required to fill in and sign. These invoices were then submitted to the Town's finance department for a purchase order to be raised and payment made to the instructor.[49]

76 This process was set up prior to Mr Silver's and Ms Sanders's employment with the Town or involvement with Ms Diaz, but Ms Sanders refers to 'draft invoices' from 3 August 2019 to 28 August 2024 being prepared *for* Ms Diaz.[50]

77 From Ms Sanders's evidence, the 'draft invoices' were partially completed templates prepared by Bold Park staff. This accords with Ms Diaz's evidence where she says 'false draft invoices' were prepared by Bold Park 'Management' to include: an invoice number; her business name; her name, email address and telephone number; ABN details; a creditor account number; the insertion of all the dates it was anticipated she would instruct a class in the month; a class charge table (at the bottom), and the insertion of Goods and Services Tax.[51]

78 In part, the reason Ms Sanders says 'draft invoices' were prepared for Ms Diaz was to do with her 'language difficulties'.[52] Ms Diaz took umbrage at this, because she said she could count equally well in English and in Spanish, and, importantly, from her perspective the process still required her to record the number of attendees in the same way that she did in Engagement Period 1.

79 The other reasons Ms Sanders says 'draft invoices' were prepared by staff at the Town was because Ms Diaz's 'head count' differed from the 'point of sale' records where the number of participants set the rate paid to the instructor. Ms Sanders had a separate staff member check the head count and record it in a log book and, later, on a tablet. Because of this, Ms Sanders said the invoices prepared by Ms Diaz were often inaccurate. Therefore, 'draft invoices' were prepared for Ms Diaz, which appears

were, in part, pre-populated by the Town staff, and any amendments or additional classes were handwritten before the invoice was signed by Ms Diaz then re-typed and sent to finance for a purchase order to be raised.[53]

80 For Ms Diaz, one of the problems with this system was that the 'final invoice' (or the re-typed version) was never provided to her for checking or her approval before a purchase order was raised. Therefore, from her perspective she was not able to challenge the accuracy of the Town's final figures, which appears to be the genesis of the 'false invoice' issue.[54]

81 Ms Diaz says after each class she initialled the signature block column, inserted the number of participants and the relevant payment rate depending on the number of participants.[55]

82 From Ms Diaz's perspective, the process of filling in an attendance record in Engagement Period 1 did not materially change from the introduction of the invoice in Engagement Period 2. That is, from her perspective, the Town provided a copy of an invoice in her name (the 'draft invoice' referred to by Ms Sanders) in an office and at the end of each class she completed the invoice. At the beginning of each month, a new invoice was in the office, and she completed the same at the end of each class.

83 Some of the attendance and timesheets from Engagement Period 1 are typed and others are handwritten and unsigned. They do not record the number of participants in a given aqua aerobics class but record the start and finish times, and the number of classes an instructor, including Ms Diaz, takes. The number of classes is totalled at the end of a fortnightly period. From late July 2018, Ms Diaz signs the fortnightly timesheet. The last timesheet signed by Ms Diaz is dated 6 November 2018. On one or two occasions, the number of participants is recorded on a timesheet but this is the exception rather than the norm.[56]

84 This is markedly different to what is recorded on the invoices in Engagement Period 2. That is, in Engagement Period 2, the day, the number of participants in the class, and the payment amount referrable to the number of participants is recorded on the invoice.

85 The attendance records for Engagement Period 1 are consistent with a timesheet where the number of participants have no bearing on the hourly rate paid, and where the total amount paid is based on this hourly rate for the number of classes taken.

86 Ms Diaz accepted that in Engagement Period 1, the attendance records were recorded fortnightly, and in Engagement Period 2, the invoices were monthly.

87 Ms Diaz did not accept the invoices from Engagement Period 2 were submitted at the end of the month and paid about one week later. However, the Town's records demonstrate that this occurred.

88 In Engagement Period 2, after completing the 'draft invoices' which were submitted to the Town's finance department for the raising of the purchase order, Ms Diaz was given a copy of the purchase order which informed her of how much she had been paid or was to be paid.[57]

89 However, Ms Diaz disputes some of the 'draft invoices' and says that she cannot now verify the figures finally paid by the Town. She is concerned the Town prepared the 'draft invoices', which were not finalised by her, and when she did query amounts shown on purchase orders, where they did not reconcile with details she completed on the 'draft invoices', she says her concerns were dismissed.[58]

90 Ms Diaz provided two copies of invoice 71[59] which highlights both Ms Diaz's and Ms Sanders's evidence. That is, if I understand the situation correctly, the first copy of invoice 71 is the 'draft invoice' pre-prepared by Bold Park staff consistent with Ms Sanders's evidence. The second copy of invoice 71 is the 'draft invoice' completed, and handwritten, by Ms Diaz after each class.

91 For a short period of time around July 2022, Ms Sanders introduced a new system of draw-down purchase orders where a purchase order of $2,000 was raised, and instructor invoices were drawn from the single purchase order until depleted, which was similar to other business areas at Bold Park. This was unsuccessful due to the financing interface so Ms Sanders reverted back to the system of one invoice, one purchase order.[60] This may have added to the confusion for Ms Diaz.

92 At the bottom of each purchase order, reference is made to the purchase order being subject to the 'terms and conditions of the Contract Number stated on the purchase order or, if there is no Contract Number, to the [Town's] Standard Conditions of Contract for Supply of Goods and Services.' According to Mr Silver, the creditor is directed to contact the Town for a copy of the 'General Conditions of Contract for Goods and Services'.[61]

93 Mr Silver was unable to locate a copy of a document entitled 'Standard Conditions of Contract'. Mr Silver also says that to his knowledge no instructor requested a copy of a contract, either specifically or the general contract.[62] Ms Diaz says she was never provided with any document of either type.[63]

94 Ms Diaz also says that the Town's payment rates 'closely resembles' Table 3 in Schedule 1 of the Cambridge Agreement 2018, where the relevant hourly rates are:

Position	Hourly Base Rate	Inclusive of Causal Loading (25%)
Group Fitness Instructor 0 to 10 participants in class	$41.60	$52.00
Group Fitness Instructor 11 to 15 participants in class	$44.80	$56.00
Group Fitness Instructor 16 or more participants in class	$48.00	$60.00

95 The Town's response to this is that the 'contracting arrangement' included a higher per hour tiered rate than that proposed under the proposed Cambridge Agreement 2018,[64] which was later increased in March 2023 as detailed by Ms Sanders.

96 I find that the Town pre-populated the invoices to be rendered by Ms Diaz. This extended to including the classes to be instructed by Ms Diaz, but these were subject to amendment from time to time where Ms Diaz instructed additional classes.

97 However, some of the invoices show that Ms Diaz also filled in invoices by including her signature, the number of participants, the amount charged according to the number of participants and she signed the final amount.[65] These invoices coincide with amounts paid to Ms Diaz by the Town.[66]

98 The Town arranged for the 'draft invoices' (including the ones filled in by Ms Diaz) to be re- typed and sent to the finance department for the raising of a purchase order for payment. The final typed invoices were not shown to Ms Diaz before the raising of a purchase order. However, I cannot find to the requisite standard that any final typed invoice was incorrect or altered from the original 'draft invoice'.

Income Taxation

99 Ms Diaz was cross-examined on LMF and her income tax returns (**ITR**) for the financial years 2018 - 2019 to 2023 - 2024. According to her oral evidence, Ms Diaz prepared the ITRs with substantial assistance from an accountant. She professed to have limited knowledge of their contents, notwithstanding she made declarations as to the truth of the ITR contents before lodgment. This included that she did not know LMF was recording sales income from the Town and local governments and claiming expenses for taxation purposes.

100 Again, Ms Diaz's evidence concerning her complete lack of knowledge or understanding of LMF sales and expenses is difficult to accept when she said she provided information to the accountant. The sales and expenses information came from Ms Diaz, and notably LMF's expenses substantially increased after the 2018 financial year. Contrary to the information on her ITR, Ms Diaz says she derived no benefit as a result of the contractor arrangement with the Town.[67]

Other Work

101 Ms Diaz accepted that she promoted LMF on web-based platforms, such as LinkedIn, where she described herself as 'self-employed'. She also agreed she had used Facebook to market LMF and dance classes. She worked at organisations other than Bold Park.[68]

Other Matters

102 Between 2023 and the time the Town terminated its engagement with Ms Diaz in August 2024, there was a series of communications between Ms Diaz, Ms Sanders, Mr Silver and others. The nature of these communications were in relation to behaviours Ms Diaz says she was subject to by Town staff and class attendees. In my view, the relevance of this goes only to what Ms Diaz describes as a lack of control over the attendees' behaviour.

103 As already stated, Ms Sanders said that the instructors were expected to manage minor behavioural issues within the class, such as excessive talking, with the Town being responsible for other behaviours while attendees were within Bold Park. Ms Diaz admitted that, as a professional instructor, she had full control over the running of the class and was allocated a deep or shallow water class for which she was responsible for running. She was never told how to run the class or asked how she was going to run the class.[69]

104 The other topics raised by Ms Diaz in the communications included being told not to wear a Town issued jacket on a cold day, the cancellation of classes due to the holding of a play at Bold Park and the manner in which a Town staff member spoke to Ms Diaz. In my view, while these topics were of concern to Ms Diaz, they have little, if any, relevance to her engagement by the Town as a contractor or an employee. Further, Ms Diaz has referred to, and copied the content of, emails where their author was not called as a witness for the contents of the emails to be challenged, if the contents were relevant at all.

105 Ms Diaz also raised an issue with respect to invoice 72, where the Town requested confirmation of Ms Diaz's professional qualifications. According to Ms Diaz, she informed the Town that if they wanted to confirm her professional qualifications, they would need to pay for her time in doing so.[70] Ms Diaz states Ms Sanders said she had to prepare an invoice for the time charged and then Ms Sanders refused to accept the invoice for $65.40. Ms Diaz said Ms Sanders sent her an email with 'many of the false draft invoices' and instructed her to use the 'false draft invoice' template and dictated the amount Ms Diaz could charge for doing the extra work. Ms Diaz did not prepare the invoice and said Ms Sanders prepared it from an excel spreadsheet.[71]

106 Ms Sanders explains that in August 2024 Bold Park decided to review and record the qualifications of employees and contractors and move the information to a central repository.[72] Ms Diaz was one of many people asked for this information. The email correspondence between Ms Sanders and Ms Diaz confirms that Ms Diaz requested to be paid for her time in providing her qualifications and Ms Sanders agreeing to pay one hour of her time. The issue came when Ms Diaz submitted an invoice for the maximum chargeable rate of $65.40 (the equivalent of instructing a class of 16 plus participants) and Ms Sanders returning a draft invoice for $57.83 (the equivalent of instructing a class of 0 to 10 participants).[73]

107 An interesting component of the email exchange between Ms Sanders and Ms Diaz is Ms Diaz's acknowledgement of the invoices the Town 'supplied to me for years' and that '$66.71 it us [sic] the right amount'.[74]

108 Further, during all of the intervening time, Ms Diaz continued to instruct aqua aerobics classes at Bold Park and continued to complete invoices, which were paid by the Town.

109 Ms Diaz's engagement by the Town ended on 23 August 2024 with the Town terminating the 'contractual arrangements'.[75]

Employee vs Independent Contractor

110 Engagement Period 2 commenced on or around 6 November 2018. Therefore, the principals in the High Court decisions in ***Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*** [2022] HCA 1; (2022) 275 CLR 165 (***Personnel Contracting***) and ***ZG Operations Australia Pty Ltd v Jamsek*** [2022] HCA 2; (2022) 275 CLR 254 (***Jamsek)*** are appliable to the characterisation of the engagement relationship between Ms Diaz and the Town.

111 While Engagement Period 2 commenced on or around 6 November 2018, from 1 January 2023, the Town transitioned to the State industrial relations system under the IR Act. Accordingly, for the avoidance of doubt, I will also discuss applicable principles under State law.

Contract Terms

112 Notwithstanding there was no written agreement or contract between Ms Diaz and the Town for work undertaken by her, the court is to determine the nature and terms of the contract between the parties to ascertain their contractual rights and obligations.[76]

113 The terms are determined by application of orthodox principles. That is, where the terms are partly in writing and partly oral or wholly oral, the terms may be inferred from all the circumstances, including the parties' conduct and words at the time of contract formation; their conduct over time; their course of dealing; or inferred where necessary for business efficacy.[77]

114 To this end, regard may be had to:

> [C]ircumstances surrounding the making of the contract and events and matters, known to the parties at the time of contracting, which assist in identifying the object or purpose of the contract. The nature of the work contracted for and the arrangements of the supply or provision of any tools or equipment to the putative employee may also be relevant.[78]

115 In addition, recourse may be had to the post-contractual conduct of the parties if it assists in ascertaining the terms of the contract.[79]

116 In this case, having regard to the undisputed and found facts, the ascertainable terms of the contract for the supply of labour (whether to an employer or to a client) included:

(a) Ms Diaz would attend at Bold Park to instruct aqua aerobics classes (deep or shallow) at class times as determined by the Town but agreed to by Ms Diaz;

(b) The classes were 55 to 60 minutes in duration;

(c) She would be paid a rate per class determined by the number of participants (that is, the more participants, the greater the rate of pay);

(d) She would complete and render invoices in a business name with an ABN on a monthly basis;

(e) Bold Park would pay her the invoiced amount; and

(f) Ms Diaz was to provide and maintain certificates of currency for professional and public liability insurance.

Other Matters

117 Once the terms of the contract have been ascertained, the relationship created by the contract is characterised. Two factors will be relevant to this characterisation process:

(a) the extent to which the putative employee has the right to control how, where and when the putative employee performs the work; and

(b) the extent to which the putative employee can be seen to work in his or her own business, as distinct from the business of the putative employer.[80]

118 The way the contractual terms address the mode of remuneration; the provision and maintenance of equipment; the obligation to work; the hours of work; the provision for annual leave; the delegation of work and the right to exercise direction and control may be relevant to whether the relationship is one of employee and employer.[81]

119 The indicia indicating Ms Diaz was an employee of the Town include:

(a) Ms Diaz had a defined role within the Town's business. That is, she attended Bold Park to instruct aqua aerobics classes;

(b) she used equipment supplied by the Town to do this work, including aqua aerobic and sound equipment;

(c) she attended at class times set by the Town at the Town's facility, Bold Park, although she was under no compulsion to do so;

(d) the Town collected payment from the class attendees and was responsible for attendees while they were within Bold Park; and

(e) the Town's staff pre-populated invoices in LMF name with Ms Diaz providing some additional details from time to time.

120 The indicia indicating Ms Diaz was an independent contractor, included that:

(a) she was paid a rate according to the number of participants in the aqua aerobics class, albeit this rate was benchmarked against rates referred to in the Cambridge Agreement 2018;

(b) she provided an ABN and was responsible for taxation and professional and public liability insurance;

(c) the income derived from the Town was recorded as sales to LMF on ITRs;

(d) she claimed work expenses on ITRs consistent with the operation of a business;

(e) she was responsible for the content and running of the aqua aerobics classes she instructed, and was not subject to oversight or performance management in the running of the classes;

(f) she was responsible for finding a replacement instructor if she could not attend to instruct an aqua aerobics class, although Town staff members assisted her to find a replacement instructor from time to time;

(g) however, she was under no obligation to provide evidence of why she could not attend to instruct a class or to obtain permission to take leave;

(h) she could carry out work at any other similar leisure facility either in a personal capacity or on behalf of LMF, and she did not require the Town's permission to do so; and

(i) she was not required, nor was she directed, to attend to any *other* duties that employed staff might be required to attend to, such as the setup, repair or replacement of equipment.

Determination

121 Considering the terms of the contract for the supply of labour (such as they were) and all the surrounding circumstances, I am satisfied and I find the relationship between Ms Diaz and the Town was that of an independent contractor providing services to the Town's business.

122 While the Town determined Ms Diaz's place of work, set the times she could work, the amount she was paid to instruct each aqua aerobics class and provided the equipment for her to do the work, which is ordinarily more consistent with an employer-employee relationship, Ms Diaz retained control over the content of the aqua aerobics classes and whether she attended the classes to do the instruction, consistent with an independent contractor.

123 That is, the nature of the Town's business meant it had control over the services offered at Bold Park, including the availability of the aqua aerobics classes. However, neither the service supplied by Ms Diaz, being the actual instruction of the aqua aerobics classes, or LMF's services to other leisure facilities were subject to the Town's control. The Town had no control over Ms Diaz's or LMF's services to other leisure centres or organisations, and Ms Diaz advertised or marketed these services to the world at large.

124 In being paid according to invoices rendered from which she or LMF was responsible for taxation (including claiming business-related expenses), Ms Diaz was operating her own business. This was the case, notwithstanding, Town staff members pre-populated component parts of the invoices used to raise a purchase order for payment. The details for payment on the monthly invoices were substantially different to the recording of hours worked on the fortnightly attendance sheets.

125 In my view, this is a case where Ms Diaz was not working in the Town's business but working in her own business.[82]

126 While things said or done after a contract is made are not aids to the contract's construction, the messages between Ms Diaz and Mr Silver are consistent with the finding Ms Diaz was an independent contractor and her understanding to that effect. This is also reflected in the conversation by the Town during the October Meeting where the Town informed Ms Diaz, and any other attendees, that if they were to continue working at Bold Park it would be as a contractor.

127 Section 7 of the IR Act defines 'employee' to mean:

(a) a person who is employed by an employer to do work for hire or reward, including as an apprentice; or

(b) a person whose usual status is that of an employee.

128 The IR Act does not define 'independent contractors'.

129 The enactment of s 7A in the IR Act, made in response to the High Court decisions in ***Personnel Contracting*** and ***Jamsek***, commenced on 31 January 2025.[83] It did not have retrospective effect. Section 7A(2) established a statutory test for determining whether a worker is an employee or an independent contractor, by looking at the 'real substance, practical reality and true nature of the relationship'[84] between the parties. However, this determination under s 7A(2) and sub-s (3) requires a consideration of the totality of the relationship, including the terms of the contract governing the relationship and other factors relevant to the totality of the relationship, including how the contract is performed in practice.

130 Section 7A of the IR Act reflects common law principles where the totality of the relationship between the parties was considered and not any single factor.[85]

131 The Full Bench of the Australian Industrial Relations Commission in ***Abdalla v Viewdaze Pty Ltd*** [2003] AIRC 504; (2003) 122 IR 215 identified a number of potentially significant factors when assessing the totality of the relationship between a person who engages another to do work and the person who is engaged to do work. In ***Botica v Top Cut TMS Holdings Pty Ltd*** [2020] WAIRC 00061; (2020) 100 WAIG 102, Industrial Magistrate Flynn (as he was then), at [38], helpfully adapted a list from this and other cases, noting that the list was not exhaustive.

132 Applying, for the sake of completeness and to avoid doubt, the principles applicable to assessing the totality of the relationship between Ms Diaz and the Town from 1 January 2023, I am still satisfied, and I still find the relationship between Ms Diaz and the Town was that of an independent contractor providing services to the Town's business for the reasons given above.

133 Therefore, I find on the balance of probabilities that Ms Diaz was not an employee of the Town during Engagement Period 2. That is, she was not an employee, as defined under the FWA, nor was she an employee under the IR Act, employed by the Town.

Outcome

134 Where I have found Ms Diaz was not an employee as defined by the FWA and not an employee under the IR Act, the result is that she has not succeeded in proving the Amended Claim (both in respect of the Federal and State Claims).

135 In addition, the Amended Claim relied upon the application of the Cambridge Agreement 2018, which could not have applied or covered Ms Diaz's employment prior to 6 November 2018 relevant to any part of the Amended Claim, as its operation commenced on 9 April 2019.

136 The Amended Claim is dismissed.

D. SCADDAN

INDUSTRIAL MAGISTRATE

SCHEDULE I:

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

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA. The IMC, being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': s 12 of the FWA (see definitions of 'eligible State or Territory court' and 'magistrates court'); IR Act s 81, s 81B.

[2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.

[3] The jurisdiction of the IMC under the FWA is primarily defined by three provisions:

(1) Section 539 of the FWA identifies the civil remedy provisions of the FWA which may be the subject of an application to an eligible state or territory court;

(2) Section 545(3) of the FWA describe the criteria for an eligible state or territory court to make an order for an employer to pay an amount to an employee upon the contravention of a civil remedy provision; and

(3) Section 546(1) of the FWA provides for the making of a pecuniary penalty order upon the court being satisfied of a contravention of a civil remedy provision.

[4] Section 539 of the FWA identifies, from among the several civil remedy provisions of the FWA, the particular civil remedy provisions for which application may be made to an eligible state or territory court 'for orders in relation to a contravention of the provision'. The provision also identifies, for each civil remedy provision, the person with standing to make application to the relevant court and, expressed in penalty units, the maximum penalty for a contravention.

[5] The civil penalty provisions identified in s 539 of the FWA include:

- Section 44 – contravening a provision of the NES;
- Section 50 – contravening a term of an enterprise agreement;
- Section 323 – failing to pay in full an amount for the performance of work;
- Section 535 – failing to keep employment records as prescribed; and
- Section 536 – failing to provide pay slips.

[6] Section 545(3) of the FWA provides that an eligible state or territory court 'may order an employer to pay an amount to … an employee … if the court is satisfied' of two criteria. First, the failure to pay the relevant amount must be a contravention of a civil remedy provision. Secondly, the employer must have an obligation, 'under this Act [for example, an NES] or a fair work instrument' (for example, a modern award or an enterprise agreement) to pay the relevant amount.

[7] An 'employer' has the statutory obligations noted above if the employer is a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': s 14 and s 12 of the FWA. The obligation is to an 'employee' who is a 'national system employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': s 13 of the FWA.

Burden and Standard of Proof

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

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

[9] In the context of an allegation of the breach of a civil penalty provision of the Act it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; 60 CLR 336:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences (362).

Practice and Procedure of the Industrial Magistrates Court of Western Australia

[10] Section 551 of the FWA provides that 'a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention'. It has been held that the effect of the provision is that an 'eligible State or Territory court' is required to apply the rules of evidence found in the common law and relevant state legislation when a claim concerns the contravention of a civil remedy provision of the FWA: ***Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd*** [2008] WAIRC 350; (2008) 88 WAIG 626; ***Cuzzin Pty Ltd v Grnja*** [2014] SAIRC 36, [14]. In ***Qube Ports Pty Ltd v Maritime Union of Australia*** [2018] FCAFC 72, [94] - [108] White J (with whom Mortimer and Bromwich JJ agreed) undertook a comprehensive analysis of the issue in the context of contravention proceedings before a state court of South Australia, the former Industrial Relations Court of South Australia (IRCSA). In a schedule to the judgment in ***Stagnitta v***

Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 886; (2018) 98 WAIG 1410, the IMC gave reasons for concluding that the law of evidence applied by a state court of general jurisdiction when exercising jurisdiction in non-criminal matters including the *Evidence Act 1906* (WA), was to be applied by the IMC when determining a claim alleging the contravention of a civil remedy provision of the FWA and seeking the imposition of a penalty.

Jurisdiction, Practice and Procedure of the Industrial Magistrates Court of Western Australia Under the *Industrial Relations Act 1979* (WA)

Jurisdiction

[11] The jurisdiction of the IMC under the IR Act is an instance of the general jurisdiction of the court (s 81A of the IR Act), with the result that the powers, practice and procedure of the IMC when exercising that jurisdiction are to be found in the IR Act and the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (IMC Regulations).

Practice and Procedure of the Industrial Magistrates Court of Western Australia

[12] Notably, reg 35(4) of the IMC Regulations provides the court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.

[13] In ***Sammut v AVM Holdings Pty Ltd [No 2]*** [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation:

> The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40]. (citations omitted)

Burden and Standard of Proof

[14] Subject to s 81CAA of the IR Act, which does not apply in this case, in an application under the IR Act, the claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'.

[15] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

---

[1] A reverse onus on the Town to establish that Ms Diaz was not an employee does not apply because s 81CAA of the IR Act only commenced on 31 January 2025, following the enactment of the *Industrial Relations Legislation Amendment Act 2024* (WA).

[2] By way of example, see Exhibit 1 – Witness Statement of Patricia Angelica Rojo Diaz lodged on 13 June 2025 at [90] to [94] concerning allegations of workplace bullying.

[3] Exhibit 2 – Amended Witness Statement of Jasper Silver dated 14 July 2025 at [7] to [19].

[4] Exhibit 3 – Witness Statement of Tamara Sanders dated 11 July 2025 at [7] to [9].

[5] Exhibit 3 at [37] and [38].

[6] Amended response at paragraphs 1 to 3.

[7] Exhibit 2 at JS5.

[8] Exhibit 2 at [52] and JS6 at page 30.

[9] Exhibit 2 at JS6.

[10] ts 16.

[11] Exhibit 1 at [2].

[12] Exhibit 1 at [2].

[13] Exhibit 2 at JS7 and JS8.

[14] Exhibit 1 at [5] to [6]; see also Exhibit 3 at [17] to [19] and [25] to [27].

[15] Exhibit 1 at [10] to [13]; see also Exhibit 3 at [24].

[16] Exhibit 1 at attachment 5 being a memorandum sent by the Town dated 10 October 2018, also referred to in Exhibit 2 at [39].

[17] Exhibit 2 at [39] and [40]. Mr Silver provides some history to the negotiations of the Cambridge Agreement 2018. However, this history is not strictly relevant to the matters in issue in these proceedings. Suffice to say, the Town wanted to consolidate two or more enterprise agreements and there was a period where negotiations were suspended following a 'no' vote in June 2018.

[18] Exhibit 2 at [41].

[19] Exhibit 2 at [42] to [44].

[20] Exhibit 2 at [45].

[21] Exhibit 1 at [19].

[22] Exhibit 1 at [20].

[23] Exhibit 2 at JS4.

[24] Exhibit 2 at JS4.

[25] Exhibit 2 at JS4.

[26] Exhibit 2 at [47].

[27] Exhibit 1 at [21] and [22] (in part only).

[28] Exhibit 2 at JS8.

[29] Exhibit 2 at JS7, (red) page 523.

[30] Exhibit 1 at [23].

[31] Exhibit 1 at [23].

[32] ts 14

[33] ts 38.

[34] Section 123(1)(c) of the FWA.

[35] Exhibit 1 at [48] and attachment 14.

[36] Exhibit 1 at attachment 14.

[37] Exhibit 1 at attachment 15 and Exhibit 2 at [71], see also JS16.

[38] Discussed at paragraph [77] below.

[39] Exhibit 2 at [68] to [70].

[40] Exhibit 3 at [33].

[41] Exhibit 1 at [25] and ts 15

[42] ts 15.

[43] ts 113 to 114 and 142.

[44] ts 132; see also Exhibit 2 at JS4.

[45] Exhibit 3 at TS3.

[46] Exhibit 3, TS3 contains a typographical error. The correct amount is displayed at TS8 after 1 April 2023.

[47] Exhibit 3 at [36].

[48] Exhibit 3 at [39].

[49] Exhibit 3 at [47] and [48], in part. Examples of the invoices and purchase orders are contained in Exhibit 2 at JS10 and JS11.

[50] Exhibit 3 at [48] and TS8, Invoices 14 to 71.

[51] Exhibit 1 at [32].

[52] Exhibit 3 at [47].

[53] Exhibit 3 at [47] to [49].

[54] Exhibit 1 at [37].

[55] Exhibit 1 at [33].

[56] Exhibit 2 at JS7.

[57] Exhibit 1 at [41].

[58] Exhibit 1 at [41] to [42].

[59] Exhibit 1 at attachment 7, pages 1 and 2.

[60] Exhibit 3 at [35].

[61] Exhibit 2 at [63].

[62] Exhibit 2 at [64] and [65].

[63] Exhibit 1 at [41].

[64] Exhibit 2 at [48].

[65] Exhibit 2 at JS10.

[66] Exhibit 2 at JS9.

[67] ts 67 to 68.

[68] ts 78.

[69] ts 80.

[70] Exhibit 1 at [39].

[71] Exhibit 1 at [39].

[72] Exhibit 3 at [58].

[73] Exhibit 3 at [60] to [62].

[74] Exhibit 3 at TS 11.

[75] Exhibit 3 at TS 18.

[76] ***Personnel Contracting*** at [83] and [177]; ***EFEX Group Pty Ltd v Bennett*** [2024] FCAFC 35; (2024) 330 IR 171 (***EFEX***) at [7] and [52] to [56].

[77] ***EFEX*** at [9].

[78] ***EFEX*** at [11].

[79] ***Personnel Contracting*** at [48] and [83].

[80] ***Personnel Contracting*** at [36] to [39].

[81] ***Ma v Yan Massage Wynnum West Pty Ltd*** [2024] FWCFB 419; (2024) 335 IR 57 at [26].

[82] ***Personnel Contracting*** at [36] to [39].

[83] *Industrial Relations Legislation Amendment Act 2024* (WA). Similar amendments were made to the FWA with effect from 26 August 2024.

[84] Replicating the words in ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37; (2015) 228 FCR 346, 377 to 378 [142].

[85] ***Stevens v Brodribb Sawmilling Co Pty Ltd*** [1986] HCA 1; (1986) 160 CLR 16 at 28 to 29; ***ACE Insurance Ltd v Trifunovski*** [2011] FCA 1204; (2011) 200 FCR 532 at [29], Perram J: 'a number of indicia have accreted over time in the authorities which are thought to throw light to varying degrees on the outcome without being determinative: the terms of the contract; the intention of the parties; whether tax is deducted; whether sub-contracting is permitted; whether uniforms are worn; whether tools are supplied; whether holidays [are] permitted; the extent of control of, or the right to control, the putative employee whether actual or de jure; whether wages are paid or instead whether there exists a commission structure; what is disclosed in the tax returns; whether one party 'represents' the other; for the benefit of whom does the goodwill in the business inure; how 'business-like' is the alleged business of the putative employee – are there systems, manuals and invoices; and so on – the list is neither exhaustive nor short.'

2025 WAIRC 00947

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2025 WAIRC 00947
CORAM	**:**	INDUSTRIAL MAGISTRATE R. COSENTINO
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	FRIDAY, 28 NOVEMBER 2025
FILE NO.	**:**	M 100 OF 2025
BETWEEN	**:**	WESLEY TAYLOR
		CLAIMANT
		AND
		NEPTUNE MARINE AND TOWAGE (ACN: 677 447 371)
		RESPONDENT
CatchWords	**:**	INDUSTRIAL LAW – Fair Work Act 2009 (Cth) - Small Claim - claim for payment of accrued time off in lieu on termination of employment - whether time off in lieu is an 'amount payable' under s 323 of the Fair Work Act 2009 - whether claim discloses a cause of action - cause of action disclosed - matter permitted to proceed - directions issued
Legislation	**:**	*Fair Work Act 2009* (Cth)
Cases referred to in reasons:	**:**	***Coote v Mainline Access Pty Ltd (No 3)*** [2019] FCCA 383; (2019) 344 FLR 1 ***Wilkinson v Wilson Security Pty Ltd (No 3)*** [2024] FCA 705; (2021) 332 IR 387 ***Australian Workers' Union v UGL Resources (Contracting) Pty Ltd*** [2025] FCAFC 107 ***Euro Car Parts Pty Ltd v Cannon*** [2024] FCA 828; (2024) 304 FCR 349 ***Wollermann v Fortrend Securities Pty Ltd*** [2025] FCA 103; (2025) 337 IR 457 ***Fair Work Ombudsman v Woolworths Group Limited*** [2025] FCA 1092
Result	**:**	Directions issued

REASONS FOR DECISION

1 The claimant, Mr Wesley Taylor, was employed by Neptune Marine and Towage Pty Ltd (**NMT**) as a Marine Superintendent until he resigned in July 2025. He commenced this small claim pursuant to s 548 of the *Fair Work Act 2009* (Cth) (**FW Act**)

alleging that NMT contravened s 323(1) of the FW Act 'and general contract law' by failing to pay accrued and unused time off in lieu (**TOIL**) when his employment ended.

2 In his Statement of Claim, Mr Taylor says he was employed by NMT under a written employment contract dated 24 October 2024. He notes that the contract did not incorporate any industrial instrument and made no provision for overtime or time off in lieu of overtime.

3 The contract, which is annexed to the claim, says:

> 13.1 Your hours of work are as outlined in Item 10 of Schedule 1.
>
> 13.2 You may be required to work reasonable additional hours beyond the hours described in Item 10 of Schedule 1 without additional payment or compensation. This may include evening, weekend work and public holidays.
>
> …
>
> 14.2 The annual salary component of the [Total Remuneration Package] is set out at Item 11 of Schedule 1 and has been fixed and incorporates:
>
> (a) the payments that may be due to You under an Industrial Instrument that may apply to Your employment, these payments include minimum rates of pay, all disability-related award allowances; penalty and shift work rates or loadings (including leave loadings), as applicable from time to time;
>
> (b) compensation in respect of time worked regularly outside of ordinary hours of duty, and availability for work outside of ordinary hours, including work on evenings, weekends and public holidays.

4 The Statement of Claim says that although the contract was for a fly-in, fly-out roster of 14 days on, 14 days off (after an initial period of working in the Perth office, Monday - Friday), Mr Taylor worked for 28 consecutive days during February and March 2025, with no rostered days off, in addition to his 14 rostered days on. He says that NMT verbally instructed him to 'accrue this time as TOIL instead of paying overtime or additional wages for these hours.'[1]

5 However, Mr Taylor did not take time off before his employment ended on 10 July 2025. No payment was made at the end of the employment in respect of the 'accrued TOIL.'

6 Mr Taylor says the failure to pay for the overtime, *or* the accrued TOIL, constitutes a failure to pay wages for work performed, and is a breach of s 323(1) of the FW Act, and a breach of his contract.

7 The way that Mr Taylor articulated his claim gave rise to two initial concerns about whether a cause of action was disclosed. First, the Industrial Magistrates Court does not have jurisdiction to decide common law claims of breach of contract, as such. Second, s 323 is confined to 'amounts payable to the employee in relation to the performance of work.'[2] It was not clear that Mr Taylor's claim related to amounts payable in relation to the performance of work, as it appeared to be framed as a claim for compensation for not having taken time off work without loss of pay, as had been agreed.

8 These issues were raised with Mr Taylor at a Directions Hearing on 16 October 2025. Mr Taylor confirmed that his claim is confined to a breach of s 323 of the FW Act, and is not in respect of a safety net contractual entitlement. In respect of the application of s 323 to the claim for TOIL, I ordered that Mr Taylor file written submissions to demonstrate he had an arguable case and that the claim ought not be dismissed summarily.

9 I have now received and considered Mr Taylor's written submissions and NMT's responsive written submissions. I am satisfied that Mr Taylor's claim does disclose a cause of action.

10 Section 323 of the FW Act says:

> **Method and frequency of payment**
>
> (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
>
> (a) in full (except as provided by section 324); and
>
> (b) in money by one, or a combination, of the methods referred to in subsection (2); and
>
> (c) at least monthly.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> Note: Amounts referred to in this subsection include the following if they become payable during a relevant period:
>
> (a) incentive-based payments and bonuses;
>
> (b) loadings;
>
> (c) monetary allowances;
>
> (d) overtime or penalty rates;
>
> (e) leave payments.
>
> (2) The methods are as follows:
>
> (a) cash;
>
> (b) cheque, money order, postal order or similar order, payable to the employee;
>
> (c) the use of an electronic funds transfer system to credit an account held by the employee;
>
> (d) a method authorised under a modern award or an enterprise agreement.

(3) Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.

Note: This subsection is a civil remedy provision (see Part 4-1).

11 Until recently, there has been some doubt whether there is 'settled authority to the effect that an employer contravenes s 323(1) of the FW Act only because an employer, in breach of a term of a contract, fails to pay an employee for work done': ***Coote v Mainline Access Pty Ltd (No 3)*** [2019] FCCA 383; (2019) 344 FLR 1 per Manousaridis J at [56]; see also ***Wilkinson v Wilson Security Pty Ltd (No 3)*** [2024] FCA 705; (2021) 332 IR 387.

12 However, in ***Australian Workers' Union v UGL Resources (Contracting) Pty Ltd*** [2025] FCAFC 107, Raper, Dowling and Longbottom JJ at [82] affirmed the approaches taken in ***Euro Car Parts Pty Ltd v Cannon*** [2024] FCA 828; (2024) 304 FCR 349 at [85] and ***Wollermann v Fortrend Securities Pty Ltd*** [2025] FCA 103; (2025) 337 IR 457 at [11] which interpreted s 323(1) more broadly and determined that it creates an independent obligation to pay amounts due under any instrument, including a contract, in full. At [82] the Full Court said:

> In our view, the approaches in ***Euro Car*** and ***Wollermann*** are correct. The obligation arising under s 323(1) is plain on its words; it is for an employer to pay the employee amounts payable in relation to the performance of work in full (and in money, and at least monthly), except as provided by s 324. There is nothing in the text or context of s 323 that suggests that the obligation to pay "in full" depends on whether those amounts are disputed, or the extent to which an employer has given "genuine consideration" as to the amounts due to the employee. A review of the text, context and purpose of the provision reveals that it confronts the mischief of ensuring that employees are not paid in kind but in full and have certainty as to the frequency of payment. If the approach in ***Wilkinson*** were taken it would mean that s 323 would operate in a different way to all other civil penalty provisions in the Act which require strict compliance with payment obligations. That approach might also, when applied in cases where the employer disputes an amount payable to an employee under a modern award, have the effect of undermining the objective of the Act to provide a "guaranteed safety net" of minimum terms and conditions provided under modern awards: s 3(b). Of course, while the employer's subjective view on the amount owing may be relevant to the assessment of any penalty, it is not relevant when determining a *breach* of s 323. (original emphasis)

13 Section 323 is therefore available in respect of amounts payable in relation to the performance of work pursuant to an employment contract.

14 It is not in dispute that Mr Taylor's employment contract provided for remuneration by way of a salary, described as a Total Remuneration Package, or **TRP**. Nor is it in dispute that the contract did not make provision for payment of overtime rates for hours worked in excess of the ordinary hours of work referred to in the contract.

15 NMT does not dispute that there was a verbal agreement relating to TOIL for additional hours worked, but says that the agreement was limited to provision of time off equal to the additional hours worked. It denies that there was any obligation for it to pay wages for the overtime worked, as 'overtime'.[3]

16 As I understand it, NMT says that it agreed that Mr Taylor could, at a future time, take paid time off work equal to the additional hours he had worked. However, that agreement extinguished any entitlement to be paid overtime, and did not equate to an entitlement to be paid out accrued but untaken TOIL, on the termination of employment. It says an agreement or entitlement to TOIL is not an agreement or entitlement to payment in relation to the performance of work, but an exchange of a period of time off work, referable to hours previously worked, without loss of pay or impact on any leave accruals.[4]

17 NMT therefore argues that it was never required to pay for the accrued but unused TOIL on the termination of the employment, and so there was no amount payable to Mr Taylor in relation to the performance of work, for the purpose of s 323.

18 However, Mr Taylor points out that the effect of NMT's position is that no wages at all have been paid for the additional days worked. In other words, if TOIL is not honoured, for whatever reason, then there remains an unsatisfied entitlement to be paid for the additional work performed. NMT would be in breach of s 323 because s 323 requires wages to be paid in money, and not in kind, and because time off with the payment of money has not occurred, the wages required have not been paid.

19 Consistent with this theme, Mr Taylor's claim states:

> By not paying the claimant for the overtime hours worked (and by indefinitely deferring compensation via untaken TOIL), the respondent has contravened section 323 of the Fair Work Act, which prohibits withholding earned entitlements.[5]

20 Mr Taylor's claim could be characterised simply as a claim for remuneration for the additional hours worked in February and March 2025 for which he has not been remunerated. The reference in his claim to TOIL is something of a red herring. Had he taken time off while maintaining pay, the requirement for payment in relation to work performed would have been satisfied. The fact that TOIL was not taken before the employment ended means there is arguably an amount payable in relation to the additional work performed in February and March 2025.

21 This position appears to be supported by s 327 of the FW Act which provides that 'anything given or provided by the employer contrary to paragraph 323(1)(b) and subsection 323(3) is taken never to have been given or provided to the employee.'

22 Whether overtime (or the value of the accrued and unused TOIL) is 'payable' depends on the terms of the employment contract, as varied or added to verbally. In ***Fair Work Ombudsman v Woolworths Group Ltd*** [2025] FCA 1092, Perram J said at [571] - [573]:

> My reasoning was that s 323(1) requires the employer to pay amounts which are payable at least monthly (s 323(1)(a)), to do so in full (s 323(1)(a)) and to include in the payment loadings, overtime rates and penalty rates (note 2). Section 323(1) operates upon 'amounts' which it assumes are 'payable' and erects upon them a monetary obligation to pay those amounts in full and in cash by the methods specified in s 323(2). Further, Note 2 clarifies that amounts are to be paid in that

manner if they become 'payable during a relevant period'. The requirement imposed by s 323(1) for payable amounts to be paid in full was recognised and reiterated by the Full Court in the recent decision of ***Australian Workers' Union v UGL Resources (Contracting) Pty Ltd*** [2025] FCAFC 107 at [81] per Raper, Dowling and Longbottom JJ.

The point for present purposes is that s 323(1) operates on amounts which are already payable, regulating only the timing and manner of their payment. It is, therefore, to matters outside of s 323(1) that one must look to find legal rules which operate to make amounts 'payable' and therefore susceptible to being picked by s 323(1).

Usually, it will be the contract of employment or any relevant industrial instrument which makes wages payable in this sense. In some cases (and in this case), the contract and the Award can make the same sum 'payable' for the purposes of s 323(a). For example, Coles had a contractual obligation to pay monthly salary payments which arose by operation of the contract of employment. But it also had an obligation to pay the minimum wage under the Award. In that sense, the minimum wage component of its salary payments was 'payable' for the purposes of s 323(1) both under the contract of employment and the Award. The amount by which the salary exceeded the minimum wage was probably payable under the contract and not under the Award (although it is not necessary to reach a view about that).

23 The determinative issues in Mr Taylor's claim are what were the terms of the employment contract concerning overtime worked by him, and how those terms are to be applied to the facts of the case.

24 It is clearly arguable that working 28 days consecutively over and above 14 rostered days is not 'reasonable additional hours' for the purpose of clause 13.2, and therefore they are not hours which Mr Taylor was required to work without compensation over and above the TRP.

25 Further, while clause 14.2 provides that the annual salary incorporates two categories of benefits which would otherwise be payable, it is not clear that the additional hours worked by Mr Taylor in February and March 2025 falls into either of those two categories:

a. As to 'payments that may be due… under an industrial instrument' the payments Mr Taylor seeks are not payments that would have been due under an industrial instrument.

b. As to 'compensation in respect of time worked *regularly* outside of ordinary hours of duty, and *availability* for work outside of ordinary hours' (emphasis added), this arguably applies to hours worked on rostered days, not the period of consecutive additional days worked which appears to have related to the start-up phase of operations, rather than a regular work pattern.

26 It is therefore arguable that the TRP did not satisfy Mr Taylor's entitlements in relation to the time he was required to work in February and March 2025 outside his rostered work days. Accordingly, I am satisfied that Mr Taylor's claim discloses an arguable cause of action under s 323.

27 When Mr Taylor commenced this claim, he elected to have the small claims procedure apply to the proceeding. Sections 548(1) and 548(1A) are relevant. They say:

(1) Proceedings are to be dealt with as small claims proceedings under this section if:

(a) a person applies for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit and Family Court of Australia (Division 2); and

(b) the order relates to an amount referred to in subsection (1A); and

(c) the person indicates, in a manner prescribed by the regulations or by the rules of the court, that he or she wants the small claims procedure to apply to the proceedings.

(1A) The amounts are as follows:

(a) An amount that that an employer was required to pay to, or on behalf of, an employee:

(i) under this Act or a fair work instrument; or

(ii) because of a safety net contractual entitlement; or

(iii) because of an entitlement of the employee arising under subsection 542(1);

(b) an amount that that an outworker entity was required to pay to, or on behalf of, an outworker under a modern award.

28 Section 323 is a civil penalty provision listed in s 539 of Division 2 and is a provision in respect of which an employee has standing to apply to an eligible State or Territory Court for orders in relation to a contravention of it.[6] The Industrial Magistrates Court, being an eligible State or Territory court, is able to make an order for an employer to pay an amount to an employee if the court is satisfied that the employer was required to pay the amount under the FW Act or a fair work instrument, and the employer has contravened a civil remedy provision by failing to pay the amount.[7]

29 Mr Taylor denies that his claim is for an amount that NMT was required to pay because of a safety net contractual entitlement or because of an entitlement arising under s 542(1). Mr Taylor was not an outworker, and so s 548(1A)(b) is inapplicable. Nor is the amount claimed by Mr Taylor payable under a fair work instrument.

30 NMT has objected to Mr Taylor's claim being dealt with as a small claim under s 548 of the FW Act, on the basis that s 548 does not extend to amounts arising under 'general contract law.'[8] In other words, NMT says the reference in s 548(1A) to an amount that an employer was required to pay 'under this Act' does not extend to an amount payable under a contract that is not a safety net contractual entitlement.

31 This jurisdictional argument has not been fully canvassed in the present show cause process. NMT has advised the Court that it reserves its right to press this jurisdictional objection.

32 Accordingly, as foreshadowed at the Directions Hearing on 16 October 2025, this matter will now be listed for a directions hearing and I will hear from the parties as to what programming ought to occur in light these reasons and the remaining dispute about jurisdiction.

R. COSENTINO

INDUSTRIAL MAGISTRATE

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[1] Statement of Claim paragraph 3.

[2] FW Act s 323(1).

[3] Responsive submissions paragraph 7.

[4] Responsive submissions paragraph 10.

[5] Statement of Claim paragraph 5.

[6] FW Act s 539 10; s 540(1).

[7] FW Act s 545(3).

[8] Respondent's Submissions paragraph 4(a).

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2025 WAIRC 00929

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2025 WAIRC 00929
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	FRIDAY, 28 MARCH 2025
DELIVERED	**:**	WEDNESDAY, 12 NOVEMBER 2025
FILE NO.	**:**	B 43 OF 2024
BETWEEN	**:**	BEVAN FERNANDEZ Applicant AND MMCE HOLDINGS PTY LTD Respondent

CatchWords	**:**	Industrial Law (WA) – Contractual benefit claim – s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) – Oral contract of employment – Whether employer denied a benefit due under the employment contract – Whether employee was a casual or full-time employee – Claimed entitlement to annual leave – Evidence uncontested – Contractual benefits claim established – Order issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Industrial Relations Commission Regulations 2005* (WA)
Result	**:**	Order Issued
Representation:		
Applicant	**:**	Mr B Fernandez
Respondent	**:**	No Appearance

Reasons for Decision

1 Mr Bevan Fernandez (**applicant**) applies to the Western Australian Industrial Relations Commission (**Commission**) for an order pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979 (*WA) (**IR Act**), for a denied contractual benefit. The applicant seeks a payment of $3,831.80, being the equivalent of 136 hours of annual leave he believes is due under his contract of employment with MMCE Holdings Pty Ltd (**respondent**).

2 On 16 July 2024, the respondent filed a response opposing the claim on the basis that the applicant did not execute a contract for full-time employment. The respondent considered the applicant a casual employee, and therefore not entitled to annual leave.

Procedural History

3 On 20 August 2024, a conciliation conference was initially listed for 1 November 2024 in accordance with the respondent's limited availability. The respondent did not attend. On 18 November 2024, a further conciliation conference was listed for 20 December 2024, again consistent with the respondent's limited availability. Similarly, the respondent failed to attend the conciliation conference for a second time.

4 On 20 December 2024, the parties were informed by email the matter would be set down for a Hearing. The Commission provided the parties a copy of the proposed Directions to issue, to program the steps to hear and determine the application.

5 The respondent advised of their availability for the Hearing and stated that a medical certificate for the conciliation conference dated 20 December 2024 was attached. However, the respondent did not attach a medical certificate in this correspondence.

6 The Hearing was listed for 28 March 2025, in accordance with the respondent's limited availability, and the Commission issued Directions to program the filing of evidence and submissions ([2024] WAIRC 01066]).

7 The applicant filed evidence and submissions in accordance with the Directions. The respondent did not comply with the Directions to produce documents, nor file evidence and submissions on the requested dates.

8 The respondent did not attend the Hearing listed for 28 March 2025. Given the respondent was notified of the Hearing in accordance with the requirements of the *Industrial Relations Commission Regulations 2005* (WA), I am satisfied the Hearing could proceed in the respondent's absence.

9 At the Hearing, the applicant gave evidence that he was employed as a permanent full-time Head Chef with the respondent, from 24 August 2022 to 16 August 2023. During that period, the applicant worked 40 hours per week from Wednesday to Sunday and was paid a salary of $75,000 per year.

10 The applicant's evidence is the contract of employment was oral and provided for two weeks' sick leave and four weeks' annual leave per year.

11 The applicant provided documents such as a copy of bank statements showing regular fortnightly payments of $2,254 from the respondent; an employment verification letter from the respondent dated 20 June 2023, confirming he held a full-time position; and a copy of an email from the applicant to the respondent notifying his resignation along with a record of personal leave days.

12 The applicant submitted he is entitled to payment equivalent to four weeks' annual leave because he was able to demonstrate that he consistently worked 40 hours per week. He submits the evidence indicates he was a permanent employee and not a casual, and the benefits of full-time employment formed a part of his contract of employment. The fact he was not paid weekend penalty rates, supports his contention that he was a permanent full-time employee. Further, the employment verification letter signed by the respondent, confirmed he was engaged as a permanent employee. The original job advertisement was for a full-time position.

13 The applicant's evidence and submissions were not contested because the respondent failed to appear.

14 I am satisfied there was an oral employment contract executed between the applicant and the respondent which provided for four weeks annual leave. I accept the applicant's evidence of his rate of pay due under the contract of employment. Moreover, I accept for the duration of his employment, the applicant did not take annual leave and is entitled to 136 hours of annual leave under the contract of employment.

15 The applicant has calculated the payment for an amount of salary equivalent to 136 hours of annual leave after tax is withheld. I will order a payment calculated on the gross amount. I accept the applicant's evidence that he was not paid this benefit when he resigned from his employment and consequently has been denied a benefit by the employment contract under s 29(1)(b)(ii) of the IR Act.

16 In accordance with my reasons, I will order the respondent to pay the applicant $4,888.18 gross within seven days of the Order issuing.

2025 WAIRC 00931

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVAN FERNANDEZ
	APPLICANT
	-v-
	MMCE HOLDINGS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 14 NOVEMBER 2025
FILE NO/S	B 43 OF 2024
CITATION NO.	2025 WAIRC 00931

Result	Order Issued
Representation	

Applicant	Mr B Fernandez
Respondent	No Appearance

Order

HAVING heard from the applicant on his own behalf there being no appearance 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 $4,888.18 gross within seven days of the date of this order.

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

2025 WAIRC 00969

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2025 WAIRC 00969
CORAM	**:**	COMMISSIONER C TSANG
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	MONDAY, 8 DECEMBER 2025
FILE NO.	**:**	B 52 OF 2025
BETWEEN	**:**	DANIEL ZICCARDI Applicant AND SKILLFORCE RECRUITMENT PTY LTD Respondent

CatchWords	**:**	Whether the Commission has jurisdiction to hear and determine a contractual benefit claim initiated by a bankrupt, or whether such claim vests in the Official Trustee in Bankruptcy
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 26(1)(b), s 29(1)(d) *Bankruptcy Act 1966* (Cth) s 58, s 116
Result	**:**	Jurisdiction established
Representation:		
Applicant	**:**	Mr D Ziccardi (on his own behalf)
Respondent	**:**	Ms C Lewin (of counsel)

Cases referred to in reasons:

Ambrose v Badcock, Re Badcock [2021] FCA 1647

Barwick v Goodridge [2011] NSWSC 1233

CXTB and Inspector-General in Bankruptcy [2019] AATA 5194

Impson v Bradley [2003] WAIRC 08019

Impson v Bradley [2003] WAIRC 10063

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114

Re Gillies; Ex parte Official Receiver in Bankruptcy (1993) 42 FCR 571

Re Love and Official Trustee in Bankruptcy [1996] AATA 11203

Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 466

Reasons for Decision

1 These reasons for decision concern the operation of ss 58 and 116 of the *Bankruptcy Act 1966* (Cth) (***Bankruptcy Act***) to the applicant's (**Mr Ziccardi's**) denied contractual benefits claim (**claim**), commenced after he became bankrupt.

2 Specifically, the preliminary issue of whether the Commission has jurisdiction to hear and determine Mr Ziccardi's claim, or whether his claim vests in the Official Trustee in Bankruptcy (**Trustee**).

Background

3 On 17 June 2025, Mr Ziccardi filed a *Form 3 – Contractual Benefit Claim* (**Form 3**).

4 On 25 July 2025, the respondent filed a *Form 3A – Employer Response to Contractual Benefit Claim* (**Form 3A**), raising

jurisdictional objections, which are not the subject of these reasons for decision.

5 On 2 September 2025, the matter was listed for a Directions Hearing on 22 September 2025 at 11:00am.

6 On 18 September 2025, for reasons not the subject of these reasons for decision, the Directions Hearing was vacated.

7 On 22 September 2025, the respondent notified the Commission that Mr Ziccardi was declared bankrupt on 24 March 2025. The respondent noted that as Mr Ziccardi was declared bankrupt prior to the filing of his Form 3, ss 58, 60 and 116 of the *Bankruptcy Act* have the combined effect of preventing Mr Ziccardi from commencing these proceedings unless the Trustee elects to pursue it.

8 On 23 September 2025, the Commission wrote to the parties indicating that it proposes to adjourn the proceedings until such time it receives notice, in writing, from the Trustee, electing to prosecute the proceedings.

9 On 23 September 2025, Mr Ziccardi replied to the Commission's correspondence (at [8] above), copied his correspondence to the Trustee, and requested the Trustee to review and respond to the matters raised.

10 On 25 September 2025, Mr Ziccardi stated, in an email copied to the Trustee, that the Trustee 'will be in contact with approvals [as soon as possible]'.

11 On 23 October 2025, the respondent noted that despite Mr Ziccardi's request by way of his 23 September 2025 email (at [9] above) for the Trustee to elect to prosecute the proceedings pursuant to s 60 of the *Bankruptcy Act*, the Trustee has made no such election. The respondent contended that given s 60(3) of the *Bankruptcy Act* requires the Trustee to make an election within 28 days of notice of the proceedings being served upon the Trustee, that the Trustee should be deemed to have abandoned the proceedings.

12 On 23 October 2025, Mr Ziccardi informed the Commission that the Trustee has been reviewing the matter and 'will be in contact shortly.'

13 On 7 November 2025, the Commission wrote to the parties noting that it had not received any correspondence from Mr Ziccardi since his email of 23 October 2025 (at [12] above), and requesting that if the Trustee elects to prosecute the proceedings, that the Trustee file a *Form 1A – Application*, confirming both their election to prosecute the proceedings and their consent for the Commission to issue an Order for the named applicant in the proceedings to be replaced with the name of the Trustee, by 14 November 2025.

14 On 12 November 2025, the Commission received correspondence from the Trustee's solicitors, stating:

> It is the Trustee's opinion that the chose in action giving rise to the Application does not vest in the Trustee. The 'contractual benefits' claimed in the Application are leave entitlements, which have the essential characteristics of 'income'. Mr Ziccardi's employment was terminated after he entered bankruptcy. Any payments arising from his employment termination would be after-acquired 'income' of the bankrupt, which remains vested in the bankrupt. It follows that the chose in action to recover any such contractual benefits (including by the Application) also remains with the bankrupt. On that basis, the Trustee is not required to make an election in relation to the Application.

15 On 13 November 2025, the Trustee's solicitors also stated that 'For the avoidance of doubt, the Official Trustee's position is that they neither consent, nor object, to the application that has been brought.'

16 This issue arises in the following circumstances:

(a) ***Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)*** (1986) 67 WAIG 466 (***Springdale***) provides that where an issue of the Commission's jurisdiction arises, further steps should only be taken by the Commission if the necessary jurisdiction is established;

(b) Prior to receiving the respondent's email at [22(c)] below, this was the first occasion, within my knowledge, where the Commission was required to consider whether it has jurisdiction to hear and determine proceedings commenced by a bankrupt;

(c) The signature blocks to the Trustee's solicitors' emails indicate that they practice in the Commercial Disputes & Insolvency team of a national law firm; and

(d) Section 26(1)(b) of the *Industrial Relations Act 1979* (WA) provides that the Commission may inform itself on any matter in such a way as it deems just.

17 In these circumstances, on 13 November 2025, I requested the Trustee's solicitors' assistance in clarifying the Commission's jurisdiction in relation to the operation of the *Bankruptcy Act,* on the following terms:

- It appears to us that s 58(1)(b) applies to Mr Ziccardi's Form 3. Specifically, that the claimed contractual benefits, payable on 7 April 2025, would constitute '*after-acquired property*'. If so, s 58(6) applies.
- Section 58(6) references property that is '*divisible amongst the creditors of the bankrupt*', which appears to be a reference to s 116.
- It does not appear to us that s 116 contains any reference to 'income'.
- We note that s 139L(1)(a)(ii) defines 'income' as including '*a payment to the bankrupt in consequence of a termination of any office or employment*'.
- However, the chapeau to s 139L states that this meaning only applies to '*this Division*', being Division 4B (of Part VI).
- Given the above, it is not clear to us how the definition of 'income', which appears in s 139L (contained in Part VI – Division 4B) interacts with s 58 (contained in Part IV – Division 4) and s 116 (contained in Part VI – Division 3).

18 On 20 November 2025, the Trustee's solicitors responded to the Commission, stating:

'Income' during bankruptcy does not constitute 'after acquired property'

1. ***Re Gillies; Ex parte Official Receiver in Bankruptcy*** (1993) 42 FCR 571 (French J) (***Gillies***) is authority for the principle that income earned by a bankrupt, during his or her bankruptcy, does not come within the definition of 'after-acquired property' and accordingly does not automatically vest in the bankrupt's trustee. After considering the legislative history in relation to the current structure of the Bankruptcy Act, French J in *Gillies* commented at 577:

> It is true that the after acquired property to which ss 58 and 116 apply is defined widely enough to encompass income. However, in my opinion, the legislative scheme now in place is quite inconsistent with the application of those provisions to after acquired income. This follows from the comprehensive scheme embodied in Div 4B which approaches a code for dealing with after acquired income of the bankrupt. There is nothing in the extrinsic material to support a change in the approach to after acquired income which would bring it within after acquired property vesting in the trustee. In my opinion such income does not vest in the trustee.

2. ***Gillies*** has been followed and referred to in several later decisions, including those cited by White J in ***Ambrose v Badcock, Re Badcock*** [2021] FCA 1647 at [45] [(***Ambrose***)]. After citing several authorities in [45], White J said at [46] that:

> These authorities support the proposition that the after-acquired income of a bankrupt remains vested in the bankrupt rather than in the bankrupt's trustee pursuant to ss 58 and 116, subject, however, to the bankrupt's obligations to make a contribution under Div 4B of Pt VI of the *Bankruptcy Act*: ***Barwick v Goodridge*** [2011] NSWSC 1233; (2011) 255 FLR 245 at [24].

3. It follows from the above cases that the right to sue for that income is also retained by the bankrupt.

The 'Contractual benefits' claimed have the essential characteristics of 'income'

4. In s 29(1)(d) matters, the Commission's jurisdiction is, we understand, limited to hearing and determining whether an employee has a benefit under a common law contract of employment that has been denied and, if so, to make an order for the benefit to be provided.

5. The term 'benefit' includes an advantage, entitlement, right, superiority, favour or good to which an employee is entitled under his or her contract of service: ***Matthews v Cool or Cosy Pty Ltd*** [2004] WASCA 114 at [18]. This is, in our client's view, broad enough to encompass the leave entitlements claimed by Mr Ziccardi in the Application (which we understand to be accrued but untaken annual leave, personal leave and long service leave).

6. In ***Re Love and Official Trustee in Bankruptcy*** [1996] AATA 11203, the Tribunal held that as unused annual leave was a payment clearly paid to the bankrupt as a product of his employment, and a payment in lieu of salary which would have been paid to him while on leave; it retained the essential characteristics of income derived from employment. The Tribunal further opined that the fact that the payment was in a lump-sum, or that it was paid as a lump sum because of the termination of his employment, did not change the essential characteristic that the payment nonetheless constituted income within the meaning of section 139L of the Bankruptcy Act. See also ***CXTB and Inspector-General in Bankruptcy*** [2019] AATA 5194 at [45] and Bankruptcy Act, s 139L(1)(a)(ii).

7. Therefore, we respectfully submit, the claimed contractual benefits allegedly payable on 7 April 2025 because of Mr Ziccardi's termination are to be treated as after-acquired 'income' that does not vest in the Trustee.

19 On 24 November 2025, the Commission requested the parties to confirm their position on the following matters, by 28 November 2025:

(a) Whether they are content with the preliminary issue (of whether the *Bankruptcy Act* prevents the Commission from hearing and determining the matter in circumstances where Mr Ziccardi became bankrupt prior to instituting the matter), being dealt with on the papers, or if a hearing is necessary.

(b) Whether they accept the matters raised in the Trustee's solicitors' email (at [18] above]).

(c) Whether they wish to be heard further on the matters raised in the Trustee's solicitors' email (at [18] above]), and if so, when they would be in a position to submit their submissions.

20 On 24 November 2025, Mr Ziccardi indicated that:

(a) He was content for the preliminary issue to be dealt with on the papers.

(b) He consents to the Commission utilising the information provided by the Trustee's solicitors.

21 On Friday, 28 November 2025, the respondent requested a short extension (to Monday, 1 December 2025) to respond to the matters at [19] above, which was granted.

22 On 1 December 2025, the respondent indicated that:

(a) It was content for the preliminary issue to be dealt with on the papers.

(b) It does not object to the Trustee's position, noting their expertise on the subject matter and legislation, and respects the Commission's ability to determine the matter.

(c) It does not seek to make further substantive submissions on the issue, except to note two cases of relevance, ***Impson v Bradley*** [2003] WAIRC 08019 (***Impson No.1***) and ***Impson v Bradley*** [2003] WAIRC 10063 (***Impson No.2***), in which the Commission had held that Mr Impson, who became bankrupt while employed, and commenced a denied

contractual benefits claim after the end of his employment, was required to have the Trustee joined. When Mr Impson failed to do so, the Commission dismissed Mr Impson's claim for want of prosecution.

Consideration

23 First and foremost, I acknowledge the Trustee's assistance to the Commission, provided in circumstances where the Trustee's position is that they neither consent nor object to the proceedings, and otherwise do not seek to be heard in the matter.

24 As outlined at [20(b)] and [22(b)] above, the parties do not object to the matters raised in the Trustee's solicitors' email (at [18] above]); with the respondent noting that the Commission dealt with the issue of a bankrupt's authority to prosecute a denied contractual benefits claim in ***Impson No.1*** and ***Impson No.2***.

25 In ***Impson No.2*** [9], the Trustee of Mr Impson's bankrupt estate indicated to the Commission that they had decided not to pursue Mr Impson's claim on behalf of the bankrupt estate, and would consider assigning the right of action to Mr Impson for $1,000, if Mr Impson wished to continue the action himself.

26 However, it does not appear from ***Impson No.1*** and ***Impson No.2*** that the issue of whether Mr Impson *could* prosecute the claim in his own right was squarely placed before the Trustee of Mr Impson's bankrupt estate or addressed in light of ***Gillies***.

27 While ***Impson No.1*** was delivered on 28 March 2003 and ***Impson No.2*** was delivered on 20 November 2003, subsequent to ***Gillies*** (delivered on 11 June 1993), ***Impson No.1*** and ***Impson No.2*** make no mention of ***Gillies***.

28 ***Ambrose*** [45] refers to ***Gillies*** having been followed, or referred to with approval, in a number of subsequent decisions:

> The decision of French J in [***Gillies***] has been followed, or referred to with approval, in a number of subsequent decisions. These include ***Re Hawkins; Ex parte Worrell*** (1996) 71 FCR 371 at 375 (Spender J) (in relation to payments made pursuant to a maintenance agreement between husband and wife); ***Re Sharpe; Ex parte Donnelly*** (1998) 80 FCR 536 at 540 (Lockhart J) (in relation to fees earnt by a barrister before his bankruptcy but paid during the bankruptcy); ***Trustee of the Property of O'Reilly v Law Society of New South Wales*** [2001] FCA 701, (2001) 110 FCR 574 at [8] (Katz J) (in relation to the fees and disbursements due to a solicitor in respect of work performed before his bankruptcy); ***Combis v Harding*** [2014] FCA 1391 at [20] (Siopis J) (in relation to income under a testamentary trust); ***Michell, in the matter of Lee*** [2012] FCA 1046, (2012) 207 FCR 96 at [18]-[19] (Gray J) (in relation to the pre-bankruptcy fees earnt by a barrister); ***Davey v Dessco Pty Ltd*** [2017] VSC 744 at [29]-[30] (J Forrest) (in relation to the ability of a bankrupt to sue in his or her own name for personal income earned during the bankruptcy).

29 While some of the decisions cited in ***Ambrose*** [45] post-date ***Impson No.1*** and ***Impson No.2***, some of the decisions pre-date ***Impson No.1*** and ***Impson No.2***.

30 Accordingly, I conclude that the Commission in ***Impson No.1*** and ***Impson No.2*** did not have the benefit of the arguments relating to the decisions that have been raised in this matter by the Trustee's solicitors at [18] above.

31 As noted at [16(c)] above, the Trustee's solicitors appear to practice in their firm's Commercial Disputes & Insolvency team. Furthermore, the Trustee's 'expertise on the subject matter and legislation' is accepted by the respondent (at [22(b)] above).

32 Therefore, and in reliance on the Trustee's solicitors' submissions at [18] above, I find that in the circumstances of this matter, ss 58 and 116 of the *Bankruptcy Act* do not prevent the Commission from hearing and determining Mr Ziccardi's claim.

Conclusion

33 For the preceding reasons, I find that ss 58 and 116 of the *Bankruptcy Act* do not prevent the Commission from hearing and determining the matter in circumstances where Mr Ziccardi became bankrupt prior to instituting the matter.

34 However, and as outlined at [16(a)] above, ***Springdale*** (which is a Full Bench decision that is binding on the Commission) provides that where an issue of the Commission's jurisdiction arises, further steps should only be taken by the Commission if the necessary jurisdiction is established.

35 Therefore, having resolved the jurisdictional issue arising under the *Bankruptcy Act*, I will now list the matter for a Directions Hearing to hear from the parties regarding the jurisdictional issues raised in the Form 3A (as noted at [4] above).

2025 WAIRC 00980

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL ZICCARDI
	APPLICANT
	-v-
	SKILLFORCE RECRUITMENT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	THURSDAY, 11 DECEMBER 2025
FILE NO.	B 52 OF 2025
CITATION NO.	2025 WAIRC 00980

Result	Order issued
Representation	
Applicant	Mr D Ziccardi
Respondent	Ms C Lewin (of counsel)

Order

HAVING heard from Mr D Ziccardi on his own behalf, and Ms C Lewin (of counsel) on behalf of the respondent, and reasons for decision [2025] WAIRC 00969 having been delivered on 8 December 2025, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application B 52 of 2025 be listed for a Directions Hearing.

(Sgd.) C TSANG,
[L.S.] Commissioner.

CORRECTIONS—

2025 WAIRC 00959

ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ELECTRICAL TRADES UNION WA

APPLICANT

-v-

KELMEC SERVICES, DRAKE INDUSTRIAL, MACKENZIE ELECTRICAL SERVICE, INDUSTRELEC PTY LTD, PROGRAMMED SKILLED WORKFORCE PTY LTD, J & S CASTLEHOW ELECTRICAL SERVICES, WORMALD FIRE SYSTEMS, DOMINIC RIGGIO

RESPONDENTS

CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 2 DECEMBER 2025
FILE NO.	APPL 44 OF 2025
CITATION NO.	2025 WAIRC 00959

Result	Correction Order Issued

Correction Order

WHEREAS a 'slip' error occurred in the Order ([2025] WAIRC 00862) that was deposited in the office of the Registrar on 15 October 2025; and

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

THAT cl 36(b)(i) set out at paragraph 4 in the Schedule to the Order ([2025] WAIRC 00862) be amended to read:

(i) For apprentices not engaged on construction work, a weekly contribution calculated as 12.0% of the rate of pay prescribed in the First Schedule – Wages of this Award as follows:

Four Year Term		**Three and a Half Year Term**		**Three Year Term**	
1st Year	$52.50	Six Months	$52.50		
2nd Year	$68.60	Next Year	$68.60	1st Year	$68.60
3rd Year	$90.20	Next Year	$90.20	2nd Year	$90.20
4th Year	$106.30	Last Year	$106.30	3rd Year	$106.30

(Sgd.) T KUCERA,
[L.S.] Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2025 WAIRC 00948

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUZANNE STEWART
	APPLICANT
	-v-
	SWAN VALLEY ANGLICAN COMMUNITY SCHOOL
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	FRIDAY, 28 NOVEMBER 2025
FILE NO.	B 82 OF 2025
CITATION NO.	2025 WAIRC 00948

Result	Directions issued
Representation	
Applicant	Dr S Stewart
Respondent	Mr Al Asadi (of counsel)

Direction

HAVING heard from Dr S Stewart on her own behalf and Mr Al Asadi (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the matter be listed for a 2-day hearing on dates to be determined not before Thursday, 4 June 2026 (**Hearing**).
2. THAT the parties file **by Friday, 30 January 2026**:
   (a) An agreed statement that identifies:
      (i) The agreed facts.
      (ii) The agreed issues that are to be determined at the Hearing.
      (iii) The agreed legal principles applicable to the issues at 2(a)(ii) above.
   (b) A bundle of agreed documents.
3. THAT the applicant file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 27 February 2026**.
4. THAT the respondent file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Thursday, 2 April 2026**.
5. THAT the applicant file an outline of legal submissions **by Thursday, 30 April 2026**.
6. THAT the respondent file an outline of legal submissions **by Thursday, 28 May 2026**.
7. THAT the respondent file a court book (in a paginated bundle, with an index identifying the document by number, name, date and page numbers) **by Thursday, 4 June 2026**.
8. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2025 WAIRC 00965

DISPUTE RE DIRECTIONS TO UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF FIRE AND EMERGENCY SERVICES
	APPLICANT
	-v-
	UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 4 DECEMBER 2025
FILE NO/S	C 28 OF 2025
CITATION NO.	2025 WAIRC 00965

Result	Interim order issued
Representation	
Applicant	Mr T Bishop (of counsel)
Respondent	Mr T Nolan (of counsel)

Interim Order

HAVING heard from Mr T Bishop on behalf of the applicant, and Mr T Nolan on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (*WA), and by consent, hereby orders –

THAT the Interim Order issued on 20 October 2025 ([2025] WAIRC 00866), be and is hereby extended to 11 December 2025.

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

2025 WAIRC 00944

DISPUTE RE BARGAINING

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF FIRE AND EMERGENCY SERVICES
	APPLICANT
	-v-
	UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	TUESDAY, 25 NOVEMBER 2025
FILE NO.	C 29 OF 2025
CITATION NO.	2025 WAIRC 00944

Result	Directions issued
Representation	
Applicant	Mr T Bishop of counsel
Respondent	Mr C Fogliani of counsel

Direction

HAVING heard from Mr T Bishop of counsel on behalf of the applicant and Mr C Fogliani of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

(1) THAT the applicant file an amended application specifying, in relation to industrial action taken by the respondent, the orders sought and the grounds in support by 5.00 pm on 25 November 2025.

(2) THAT if the respondent intends to proceed with its application under s 27(1)(a) of the *Act* filed on 18 November 2025 that it be heard and determined at the same time as the application for orders made by the applicant and that:

  (a) The respondent file a written outline of submissions that it intends to rely upon in support of the application by 5.00 pm on 4 December 2025; and

  (b) The applicant file a written outline of submissions that it intends to rely upon in opposition to the application by 5.00 pm on 9 December 2025.

(3) THAT in connection with the application for orders in relation to the lifting of all industrial action by the respondent, the applicant file any witness statements, documents and an outline of submissions that it intends to rely upon by no later than 5.00 pm on 27 November 2025.

(4) THAT in connection with the application for orders in relation to the lifting of all industrial action by the respondent, the respondent file and serve any witness statements, documents and an outline of submissions that it intends to rely upon by no later than 5.00 pm on 4 December 2025.

(5) THAT the application for orders and the application to dismiss (if proceeded with) be listed for hearing for one day on 11 December 2025.

(6) THAT the parties have liberty to apply on short notice.

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

2025 WAIRC 00971

AN APPLICATION TO REVOKE THE RIGHT OF ENTRY PERMIT OF EDMOND MARGJINI

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-v-

EDMOND MARGJINI

FIRST RESPONDENT

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

SECOND RESPONDENT

CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON COMMISSIONER C TSANG
DATE	TUESDAY, 9 DECEMBER 2025
FILE NO/S	CICS 12 OF 2025
CITATION NO.	2025 WAIRC 00971

Result	Order issued
Representation **Applicant**	Mr J Carroll of counsel
First Respondent	Mr P Boncardo of counsel
Second Respondent	Mr P Boncardo of counsel

Order

HAVING heard Mr J Carroll of counsel on behalf of the applicant and Mr P Boncardo of counsel on behalf of the respondents, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the proceedings be and are hereby adjourned to 15 December 2025 at 9.30 am.

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

2025 WAIRC 00970

AN APPLICATION TO REVOKE THE RIGHT OF ENTRY PERMIT OF EDMOND MARGJINI

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-v-

EDMOND MARGJINI

FIRST RESPONDENT

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

SECOND RESPONDENT

CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON COMMISSIONER C TSANG
DATE	TUESDAY, 9 DECEMBER 2025
FILE NO/S	CICS 12 OF 2025
CITATION NO.	2025 WAIRC 00970

Order

WHEREAS on 1 September 2025 the applicant filed in the Commission an application to revoke the right of entry permit issued to the First Respondent on 3 October 2022 pursuant to s 49T of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the applicant issued a summons to give evidence directed to Mr Joe Calabro to give evidence in the herein proceedings listed for hearing on 8 December 2025;

AND WHEREAS Mr Calabro did not respond to the summons to give evidence on 8 December 2025 and provided medical evidence to the Commission in Court Session in relation to his inability to do so and the summons was extended to 9 December 2025;

AND WHEREAS Mr Calabro did not respond to the summons on 9 December 2025 on the grounds of continued illness;

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

(1) THAT the summons to give evidence directed to Mr Calabro be and is hereby further extended to 15 December 2025 at 9.30 am.

(2) THAT substituted service of the summons to give evidence directed to Mr Calabro be effected on his solicitors Kingston Reid.

(3) THAT at the time of serving the summons in accordance with par (2) of this order the applicant is to also serve a copy of this order.

(4) THAT within 48 hours of the date of this order Mr Calabro is to provide to the Commission in Court Session medical evidence as to his inability to respond to the summons on 9 December 2025.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.] By the Commission in Court Session.

2025 WAIRC 00957

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 9 OF 2024 GIVEN ON 15 AUGUST 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MYANDRAN SUBRAYAN
	APPELLANT
	-v-
	LYNWOOD CHRISTIAN CHURCH
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER T KUCERA
DATE	TUESDAY, 2 DECEMBER 2025
FILE NO/S	FBA 7 OF 2025
CITATION NO.	2025 WAIRC 00957

Result	Extension of time granted
Representation	
Appellant	In person
Respondent	Mr C Fordham of counsel and later Mr L Davies of counsel

Order

HAVING heard the appellant on his own behalf and Mr C Fordham of counsel and later Mr L Davies of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

(1) THAT the appellant's Form 1A application filed on 19 September 2025 for an extension of time to file and serve the appeal book be and is hereby granted.

(2) THAT the time for filing of the appeal book in the herein appeal be and is hereby extended to 22 September 2025.

(3) THAT the appellant serve the respondent with a stamped copy of the appeal book within 48 hours of it being returned to him for service.

By the Full Bench

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

2025 WAIRC 00951

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 27 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEAN-PIERRE CLEMENT
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER C TSANG – CHAIR
	MR G LEE – BOARD MEMBER
	MR M NORTON – BOARD MEMBER
DATE	FRIDAY, 28 NOVEMBER 2025
FILE NO.	PSAB 3 OF 2025
CITATION NO.	2025 WAIRC 00951

Result	Order issued
Representation	
Appellant	Dr J Schoombee (of counsel)
Respondent	Mr S Pack (of counsel)

Order

HAVING heard from Dr J Schoombee (of counsel) on behalf of the appellant and Mr S Pack (of counsel) on behalf of the respondent at the hearing of the parties' interlocutory applications on Thursday, 27 November 2025, the Public Service Appeal Board (**Board**), pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT **by Thursday, 11 December 2025**, the appellant is to provide discovery of any communication (including, but not limited to, emails, online messages, text messages) between 4 July 2024 and 27 December 2024:
   (a) He sent to Ms De Jesus Arocho (or any email address to which she had access) containing any information relating to the report he made to the respondent on 25 July 2024 alleging suspected misconduct and corruption (**Report**); and
   (b) The appellant received from Ms De Jesus Arocho (or any email address to which she had access) containing any information relating to the Report.
2. THAT the following be redacted from any copy of the document held by the Board or in the Registry of the Commission:
   (a) The first sentence of paragraph 85 of the appellant's submissions filed on Monday, 17 November 2025.
   (b) The second-half of paragraph 93.6 of the appellant's submissions filed on Monday, 17 November 2025, commencing with the word "while".
   (c) Paragraphs 3(a) and 3(b) of the appellant's application for discovery filed on Monday, 17 November 2025.
3. THAT Order 3 of the Orders made by the Board on Monday, 15 September 2025 ([2025] WAIRC 00783) (**these orders**) be varied to:

THAT the persons referred to in paragraph 1(a) to (e) of these orders, unless they have access to the Confidential Documents by reason other than their involvement in these proceedings:

(a) In the case of the persons in paragraphs 1(a) to (c), may not open or read the Confidential Documents except with the leave of the Board; and

(b) In the case of the persons in paragraph (d), may not make use of, or make copies of, the Confidential Documents, whether for the purposes of these proceedings or otherwise, save that they may refer to or copy the Confidential Document in paragraph 2(c) for the purposes of preparing an updated witness outline which removes or redacts any reference to or disclosure of the contents of legal advice where the LPP in respect of such advice is held by the Attorney-General on behalf of the State of Western Australia.

4. THAT the appellant file an amended *Form 8B – Notice of Appeal - Government Officers, Public Service Officers* **by Friday, 16 January 2026**.

5. THAT the respondent file an amended *Form 4 – Response* **by Friday, 30 January 2026**.

6. THAT the parties file **by Friday, 20 February 2026**:

   (a) An amended agreed statement that identifies:

      (i) The agreed facts.

      (ii) The agreed issues that are to be determined at the hearing of this matter.

      (iii) The agreed legal principles applicable to the issues at 6(a)(ii) above.

7. THAT the parties file an amended bundle of agreed documents **by Friday, 20 February 2026**.

8. THAT the appellant file any outlines of witness evidence and documents (other than those in the amended bundle of agreed documents) **by Friday, 20 March 2026**.

9. THAT the matter be listed for a Directions Hearing **on Wednesday, 1 April 2026 at 10:30am**.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00964

APPEAL AGAINST THE DECISION TO DISMISS GIVEN ON 21 NOVEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GORDON MILLER
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T B WALKINGTON – CHAIRPERSON
	MS B CONWAY – BOARD MEMBER
	MS S SHAR – BOARD MEMBER
DATE	THURSDAY, 4 DECEMBER 2025
FILE NO.	PSAB 31 OF 2024
CITATION NO.	2025 WAIRC 00964

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 amended witness outlines, a bundle of documents and an outline of written submissions by 17 February 2026;

2. THAT the respondent file an outline of written submissions by 3 March 2026; and
3. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2025 WAIRC 00967

APPLICATION TO ISSUE TROY SMART WITH A RIGHT OF ENTRY PERMIT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 8 DECEMBER 2025
FILE NO/S	ROE 160 OF 2025
CITATION NO.	2025 WAIRC 00967

Result	Application for leave to intervene granted
Representation	
Applicant	Mr T Smart (as agent) and Mr P Coffey (as agent)
Respondent	N/A
Proposed intervenor	Mr J Carroll (of counsel)

Order

WHEREAS this is an application to issue a Right of Entry Permit;

AND HAVING heard from Mr P Coffey (as agent) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the proposed intervenor;

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

THAT the Registrar, Western Australian Industrial Relations Commission be granted leave to intervene in application ROE 160 of 2025.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2025 WAIRC 00966

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAMERON MITCHELL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 5 DECEMBER 2025
FILE NO.	U 21 OF 2025
CITATION NO.	2025 WAIRC 00966

Result	Direction issued
Representation	
Applicant	Mr C Mitchell
Respondent	Mr J Carroll (of counsel)

Direction

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

1. THAT Discovery be informal.
2. THAT the parties file any agreed statement of facts and any agreed bundle of documents by no later than 4.00 pm on 23 January 2026.
3. THAT the applicant is to file any witness outlines and any documents, not being agreed documents, upon which they intend to rely at the hearing by no later than 4.00 pm on 27 February 2026.
4. THAT the respondent is to file any witness outlines and any documents, not being agreed documents, upon which they intend to rely at the hearing by no later than 4.00 pm on 20 March 2026.
5. THAT the applicant is to file an outline of written submissions upon which they intend to rely at the hearing by no later than 4.00 pm on 3 April 2026.
6. THAT the respondent is to file an outline of written submissions upon which they intend to rely at the hearing by no later than 4.00 pm on 17 April 2026.
7. THAT The matter be listed for a hearing for two days on a date to be fixed not before 27 April 2026.
8. THAT the parties have liberty to apply on short notice.

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

2025 WAIRC 00979

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONALD JOHN HINKLEY
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	WEDNESDAY, 10 DECEMBER 2025
FILE NO.	U 85 OF 2025
CITATION NO.	2025 WAIRC 00979

Result	Direction issued
Representation	
Applicant	In person
Respondent	Ms M Farrar of counsel

Direction

HAVING heard the applicant on his own behalf and Ms M Farrar of counsel 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 directions in the herein matter dated 21 November 2025 ([2025] WAIRC 00934) be and are hereby stayed pending the hearing and determination of the respondent's s 27(1)(a) application to dismiss the substantive claim (Dismissal Application).

(2) THAT in relation to the Dismissal Application the respondent file:

(a) any affidavits upon which it intends to rely (with any documents referred to annexed); and

(b) a written outline of submissions

by no later than 19 December 2025.

(3) THAT in relation to the Dismissal Application the applicant file:

(a) any affidavits upon which he intends to rely (with any documents referred to annexed); and

(b) a written outline of submissions

by no later than 16 January 2025.

(4) THAT the Dismissal Application be listed for hearing on a date to be fixed.

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

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

2025 WAIRC 00934

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONALD JOHN HINKLEY
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 21 NOVEMBER 2025
FILE NO.	U 85 OF 2025
CITATION NO.	2025 WAIRC 00934

Result	Directions issued
Representation	
Applicant	Mr R Hinkley on his own behalf
Respondent	Ms M Farrar on behalf of the Department of Communities

Direction

HAVING heard from Mr R Hinkley, applicant, and Ms M Farrar, of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

(1) THAT by 19 December 2025 the applicant is to file:

a. an outline of the evidence of each witness whose evidence the applicant will rely upon at the final hearing of this matter. Each outline of evidence must comply with Practice Note 9 of 2021.

b. a bundle containing each document which is in the applicant's possession or control, and which the applicant will rely upon at the final hearing of this matter;

(2) THAT by 19 January 2026 the respondent is to file:

a. an outline of the evidence of each witness whose evidence the respondent will rely upon at the final hearing of this matter. Each outline of evidence must comply with Practice Note 9 of 2021;

b. a bundle containing each document the respondent intends to rely upon at the final hearing of this matter, except documents that are included in the applicant's bundle; and

(3) THAT there be liberty to apply

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

2025 WAIRC 00945

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARRELL CURNOW
	APPLICANT
	-v-
	SHIRE OF COOROW
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	THURSDAY, 27 NOVEMBER 2025
FILE NO.	U 98 OF 2025
CITATION NO.	2025 WAIRC 00945

Result	Directions issued
Representation	
Applicant	No appearance
Respondent	Mr A Sinanovic (of counsel) for the Shire of Coorow

Direction

HAVING heard from Mr A Sinanovic (of counsel) on behalf of the respondent and there being no appearance on behalf of the applicant, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby directs –

1 THAT by 5 January 2026, the applicant file:

(a) an outline of the evidence of each witness whose evidence the applicant will seek to rely upon at the final hearing of this matter, such outlines to comply with Practice Note 9 of 2021;

(b) a bundle of all the documents the applicant will seek to rely upon at the final hearing of this matter;

2 THAT by 23 January 2026, the respondent file:

(a) an outline of the evidence of each witness whose evidence the respondent will seek to rely upon at the final hearing of this matter, such outlines to comply with Practice Note 9 of 2021;

(b) an indexed and paginated bundle of all documents the respondent will seek to rely upon at the final hearing of this matter, except that the bundle need not include any documents filed by the applicant in compliance with direction 1(b); and

3 THAT the matter be listed for a further directions hearing for the purpose of listing the matter for final hearing, on Thursday 29 January 2026 at 10:00 a.m.

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

2025 WAIRC 00975

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSH STOLTON
	APPLICANT
	-v-
	LUKE FRANCIS DOCHERTY
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 10 DECEMBER 2025
FILE NO.	U 127 OF 2025
CITATION NO.	2025 WAIRC 00975

Result	Directions issued
Representation	
Applicant	Mr D Mezger (of counsel)
Respondent	Ms L Howard (of counsel)

Directions

HAVING received a Minute of Proposed Consent Orders signed by Mr D Mezger (of counsel) on behalf of the applicant and Ms L Howard (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the respondent's jurisdictional objection be listed for hearing as a preliminary issue not before **Monday, 2 March 2026** (**Hearing**).
2. THAT the parties are to provide to the Chambers of the Commission their unavailable dates for the Hearing in the months of March and April 2026 **by Friday, 23 January 2026**.
3. THAT the parties are to file any outlines of witness evidence and documents **by Friday, 30 January 2026**.
4. THAT the applicant file an outline of submissions **by Friday, 6 February 2026**.

5. THAT the respondent file an outline of submissions **by Friday, 13 February 2026**.

6. THAT the parties file any outline of submissions responsive to the outline of submissions at Directions 4 and 5 above **by Friday, 20 February 2026**.

(Sgd.) C TSANG,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Joondalup Outside Workforce Industrial Agreement 2025 AG 74/2025	13/11/2025	City of Joondalup	Local Government, Racing and Cemeteries Employees Union (WA) (LGRCEU), Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Senior Commissioner R Cosentino	Agreement registered
Shire of York Inside Staff Industrial Agreement 2025 AG 73/2025	28/11/2025	Shire of York	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2025 WAIRC 00956

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 31 OCTOBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES STEVEN GRAHAM INNES

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRPERSON
MR D HILL - BOARD MEMBER
MR J RAJA - BOARD MEMBER

DATE TUESDAY, 2 DECEMBER 2025

FILE NO PSAB 27 OF 2024

CITATION NO. 2025 WAIRC 00956

Result Application dismissed

Representation

Appellant No appearance

Respondent Mr J Carroll (of counsel)

Order

WHEREAS this is an appeal to the Public Service Appeal Board (**Board**) against a decision or finding referred to in section 172(1)(b) of the *Health Services Act 2016* (WA) under section 80I(1)(c) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS application PSAB 27 of 2024 was listed for hearing on 19 and 20 August 2025, and on Tuesday, 3 June 2025, the parties were served with Notices of Hearing;

AND WHEREAS at the hearing on Tuesday, 19 August 2025, there was no appearance for or by Mr Innes;

AND WHEREAS on Tuesday, 19 August 2025, the Board's Associate telephoned Mr Innes to explain that there was a hearing listed in the matter on Wednesday, 20 August 2025 at 10:30am, and the Board via its Associate had sent Mr Innes an email about the matter;

AND WHEREAS on Tuesday, 19 August 2025, the Board via its Associate emailed Mr Innes to the effect that neither he nor his representative appeared at the hearing, the hearing was adjourned until 10:30am the next day on Wednesday, 20 August 2025 for Mr Innes to show cause why application PSAB 27 of 2024 should not be dismissed for want of prosecution, and if he did not attend the hearing and did not show cause why his application should not be dismissed, then it will be dismissed for want of prosecution;

AND WHEREAS on Tuesday, 19 August 2025 Mr Innes emailed the Board and said:

> I acknowledge with thanks, your email from your office received by me today, and the follow up phone call at about 12:30pm today, concerning my application PSAB 27/2024.
>
> I note that I was supposed to attend a hearing of this matter today, the 19th of August, at 10:30 am, and again on the 20th of August, at 10:30 am, at 111 St Georges Terrace, Perth.
>
> I was not aware of this requirement to attend, the matter being in the hands of my Lawyer, nor even aware of the scheduled hearing dates.
>
> I have not heard anything from my Lawyer, Mr Haydon Bawden, of Juris Partners, since April 20th, 2025, confirming receipt of required payment made by myself, for services rendered, on the due date.
>
> My last contact with Haydon Bawden was on 1st September, making enquiry as to the latest updates pertaining to my case, but had not received any reply as of this date, being 19th August.
>
> Reading through these emails received, I note that Haydon Bawden is on business in Indonesia, with return due in September, and I must wonder if he was aware of the scheduled hearing dates?
>
> It is not for me to speculate, however, and I ask what is required of me at this point, to attend the hearing scheduled for 10:30 am on the 20th of August, without the representation of my lawyer, or will the matter be set aside until the return of Haydon Bawden in September, whichever date that may be?
>
> Sorry to drone on, but this latest revelation is the source of quite some anxiety at present.
>
> I will call you on the number provided [redacted] shortly, if you do not mind, for any advice you may have to impart.

AND WHEREAS on Tuesday, 19 August 2025, Mr Innes emailed the parties and the Board and said:

> I am advised I am to attend my hearing tomorrow, being PSAB 27/2024, at 10:30 am, on the 20th of August, 2025, at 111 St Georges Terrace, Perth.
>
> I also learned that I was supposed to attend today, being the 19th or August also, but was not aware of this fact, having not had any contact from Mr Bawden, currently away on business overseas, nor from Juris Partners.
>
> I have spoken on the phone with Rhianne Dehne, of Emmanuel Chambers office, to this end, explaining my situation, and she has advised me to copy yourselves into these communications.
>
> I will be attending the hearing tomorrow, with or without representation.
>
> For your information.

AND WHEREAS at the hearing on Wednesday, 20 August 2025, Mr Innes appeared on his own behalf, and Mr J Carroll (of counsel) appeared on behalf of the respondent;

AND WHEREAS on Wednesday, 20 August 2025, the Board did not dismiss application PSAB 27 of 2024 because it was satisfied that the reason for Mr Innes' non-appearance at the hearing on Tuesday, 19 August 2025 was due to his representative;

AND WHEREAS the Board provided copies of the documents filed in application PSAB 27 of 2024 to Mr Innes for his records, and Mr Innes agreed to update the Board by 4pm on Friday, 5 September 2025 about application PSAB 27 of 2024;

AND WHEREAS Mr Innes did not update the Board by 4pm on Friday, 5 September 2025 and the Board heard nothing further of substance from Mr Innes or his representative until Friday, 24 October 2025, when Mr Innes emailed the Board and said:

> Thank you for your previous emails, dated 16th and 22nd September, concerning the new listing for my hearing of PSAB 27/2024.
>
> These were not immediately read, as where I was located was remote, and with no internet or phone service available, relying on satellite phone and UHF/VHF radio only.
>
> I have only just recently returned to Perth after a work assignment in the north of the State, and have also found in my letterbox, the similar notification of the date and time of the hearing.
>
> I certainly do intend to attend, hopefully with Mr Bawden, whom I am about to contact, and I thank you for your communication and advice.

AND WHEREAS the show cause hearing on Tuesday, 28 October 2025 was vacated at short notice, and that morning, the Board's Associate wrote to Mr Innes and said:

> **This morning's hearing is vacated**
>
> The show cause hearing in application PSAB 27/2024 this morning is **vacated** because one of the Public Service Appeal Board (**Board**) members is attending to an emergency.
>
> **Mr Innes**, as you know this matter was listed for a show cause hearing because the Board had concerns that you have not been prosecuting your application. At the hearing on 20 August 2025, you agreed several times to update the Board by 5 September 2025. Specifically, you agreed to update the Board about:
>
> - whether you wanted to proceed with your application at all;
> - if so, whether you would proceed with Mr Bawden as your representative or with someone else representing you; and
> - whether this matter could be listed for substantive hearing.
>
> You did not update the Board.
>
> Indeed, from the Board's perspective, you have done nothing to prosecute application PSAB 27/2024 for several months following the previous show cause hearing.
>
> From your email to the Board's Associate on 24 October 2025, it seems you have been in a remote location for some time, where you were not contactable by telephone or email. Despite this, you have not provided the Board with alternative contact details or an alternative contact person in your absence.
>
> Further, the Board informed you at the hearing on 20 August 2025 that it had concerns about the documents that have been filed on your behalf in this matter, given your evidence that you had never seen (let alone agreed to) the statement of agreed facts, agreed documents, your outline of evidence and your written submissions.
>
> In the circumstances, the Board considers that you are not prosecuting your application. **Unless you can show cause why application PSAB 27/2024 should not be dismissed for want of prosecution, it will be dismissed**.
>
> **Direction**
>
> The Board directs you to file:
>
> 1. the documents;
> 2. outlines of witness evidence; and
> 3. written submissions setting out your arguments
>
> that you rely on in this matter. You must do this by sending them to the Registry at registry@wairc.wa.gov.au **by 4pm on Tuesday 11 November 2025**.

AND WHEREAS Mr Innes did not comply with the Board's direction to file the materials he relies on in application PSAB 27 of 2024, nor did he request more time to comply or explain why he has not complied with the Board's directions;

AND WHEREAS on Thursday, 20 November 2025, the Board again emailed Mr Innes to explain a show cause hearing was listed in the circumstances for Mr Innes to show cause why application PSAB 27 of 2024 should not be dismissed, emailing and posting Notices of Hearing to the parties, and to Mr Innes directly, in application PSAB 27 of 2024: r 24(2)(d) *Industrial Relations Commission Regulations 2005* (WA);

AND WHEREAS at the hearing on Tuesday, 2 December 2025 there was no appearance for or by Mr Innes;

AND WHEREAS the Board has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings in accordance with s 27(1)(d) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the Board was satisfied that Mr Innes had been duly served with notice of the show cause hearing and proceeded in Mr Innes' absence;

AND WHEREAS at the show cause hearing the respondent said the Board should dismiss application PSAB 27 of 2024 because:

a) Mr Innes has not provided an adequate explanation for the delay since 20 August 2025;

b) Mr Innes has not complied with the Board's directions;

c) Mr Innes did not attend the show cause hearing; and

d) the delay would cause some prejudice to the respondent if the application proceeded to substantive hearing and Mr Innes were reinstated, because it would increase the amount of backpay associated with reinstatement;

AND WHEREAS Mr Innes did not attend the show cause hearing on Tuesday, 2 December 2025 despite being served with Notice of Hearing;

AND WHEREAS the Board considers that Mr Innes:

a) has not adequately updated the Board about application PSAB 27 of 2024;

b) has not complied with the Board's directions;

c) has not asked for an extension of time to comply with the directions dated 28 October 2025;

d) did not provide a means of contact or an alternate contact person to the Board in circumstances where the effect of Mr Innes' emails to the Board dated 29 September and 24 October 2025 is that he was in a remote location and uncontactable;

e) has shown a general pattern of not progressing his application for many months; and

f) has not provided an adequate reason for the delay and his failure to prosecute his application;

AND WHEREAS the Board considers that the delay of over three months is a long delay in the context of this application, there has not been an adequate explanation for that delay, there is some prejudice to the respondent, there is no evidence of hardship to Mr Innes if his application is dismissed and there is nothing before the Board to suggest that the respondent's conduct in the matter has in any way contributed to Mr Innes' lack of prosecution of his application;

AND WHEREAS the Board considers that Mr Innes has had more than a reasonable opportunity to prosecute his application, but since the show cause hearing on 20 August 2025, Mr Innes has not done so. In all the circumstances, the Board considers that application PSAB 27 of 2024 should be dismissed under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) for want of prosecution;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT application PSAB 27 of 2024 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

WORK HEALTH AND SAFETY ACT—Matters dealt with

2025 WAIRC 00939

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	AARON ANDERTON
	APPLICANT
	-v-
	WORKSAFE COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 25 NOVEMBER 2025
FILE NO/S	WHST 9 OF 2024
CITATION NO.	2025 WAIRC 00939

Result	Application discontinued
Representation	
Applicant	Mr M Quinn (of counsel)
Respondent	Ms H Wreford (of counsel)
Intervenor	Ms S Goodhew (of counsel) and Mr C Deckers (of counsel)

Order

WHEREAS this is an application for external review under s 229 of the *Work Health and Safety Act 2020* (WA);

AND WHEREAS on 19 November 2025, the applicant emailed the Work Health and Safety Tribunal (**Tribunal**) to say that he wishes to discontinue his application;

AND WHEREAS on 21 November 2025, the respondent confirmed she consents to application WHST 9 of 2024 being discontinued;

NOW THEREFORE, the Tribunal, pursuant to the powers conferred under the *Work Health and Safety Act 2020* (WA) and the *Industrial Relations Act 1979* (WA), orders –

THAT application WHST 9 of 2024 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2025 WAIRC 00936

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	BRODY JUSTIN THOMSON
	APPLICANT
	-v-
	WORKSAFE COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 25 NOVEMBER 2025
FILE NO/S	WHST 8 OF 2025
CITATION NO.	2025 WAIRC 00936

Result	Order issued
Representation	
Applicant	On his own behalf
Respondent	Mr M Blundell (of counsel)

Order

WHEREAS this is an application for an external review of a decision under s 229 of the *Work Health and Safety Act 2020* (WA);

AND WHEREAS the applicant filed an application at the Work Health and Safety Tribunal (**Tribunal**) on 9 October 2025;

AND WHEREAS the applicant disputes that the internal review on 3 October 2025 of the reviewable decision made on 12 August 2025 was correct;

AND WHEREAS the applicant and the decision-maker have asked the Tribunal to make consent orders reflecting their agreement to resolve the matter on the basis of the internal review decision being set aside and a substitute internal review being properly conducted in conformity with the applicable law and procedure;

AND WHEREAS in accordance with s 229A(6) of the *Work Health and Safety Act 2020* (WA), the Tribunal may act under s 229A(5)(b) and set aside the decision with the agreement of the applicant and the decision-maker without starting or completing the external review;

NOW THEREFORE the Tribunal orders, by consent, that –

1. the internal review decision of the respondent dated 3 October 2025, being a review of the reviewable decision made on 12 August 2025, is set aside;
2. the respondent's properly appointed person shall review the reviewable decision in accordance with the *Work Health and Safety (Mines) Regulations 2022* (WA) and the *Work Health and Safety Act 2020* (WA), and make a decision within the period stipulated in regulation 680 of the *Work Health and Safety (Mines) Regulations 2022* (WA);
3. further to order 2 above and without limiting or qualifying the application of the *Work Health and Safety (Mines) Regulations 2022* (WA) or the *Work Health and Safety Act 2020* (WA), the substitute internal reviewer appointed by the respondent shall ensure that they are adequately informed in order to determine whether they require any additional information from the applicant so as to properly conduct the substitute internal review. In particular:
   - 3.1. the substitute internal review shall consider whether the applicant's degree Masters of Engineering Technology (Mining Engineering) constitutes a degree in mining engineering from an Australian university (Required Degree), alternatively the equivalent of a qualification approved by the Mining Competence Advisory Committee to be equivalent to the Required Degree;
   - 3.2. the decision by the substitute internal review shall be delivered within 14 days after the date these orders are made;
   - 3.3. such decision shall provide detailed reasons, including explanation of how equivalency was assessed, and the basis for accepting or rejecting the applicant's AQF Level 9 qualifications; and
   - 3.4. if the decision by the substitute internal review confirms the reviewable decision made on 12 August 2025, the applicant shall have the right to apply to the Tribunal for an external review of that decision.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.