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FULL BENCH—Appeals against decision of Commission—

2025 WAIRC 00993

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 119/2024 GIVEN ON 31 MARCH
2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2025 WAIRC 00993
CORAM : CHIEF COMMISSIONER S J KENNER
 COMMISSIONER T EMMANUEL
 COMMISSIONER T B WALKINGTON
HEARD : TUESDAY, 22 JULY 2025
DELIVERED : TUESDAY, 16 DECEMBER 2025
FILE NO. : FBA 5 OF 2025
BETWEEN : GLENN ROBERT MACDONALD
 Appellant
 AND
 PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
 First Respondent
 DEPARTMENT OF THE REGISTRAR OF WA INDUSTRIAL RELATIONS
 COMMISSION
 Second Respondent

ON APPEAL FROM:

Jurisdiction : WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram : COMMISSIONER T KUCERA
Citation : [2025] WAIRC 00200
File No : U 119 OF 2024

Catchwords : Industrial Law (WA) - Appeal against decision of Commission - Unfair dismissal - Application for extension of time to lodge appeal - Relevant principles applied - Merits of an appeal - 'Rough and ready' assessment - Procedural fairness - Unrepresented parties - Extension of time application dismissed - Appeal dismissed

Legislation : *Industrial Relations Act 1979* (WA) s 22B, s 23B, s 26, s 26(1), s 26(1)(a), s 26(3), s 27(1)(a)(i)(ii)(iii) and (iv), s 27(1)(n), s 28, s 29 (1)(c), s 32(8), s 35, s 35(1), s 35(1A), s 35(1AB), s 35(3), s 41A, s 42G, s 49

Result : Application to extend time refused. Appeal dismissed

Representation:

Counsel:

Appellant : In person

First Respondent : Mr J Carroll of counsel

Second

Respondent : No appearance required

Solicitors:

Respondent : State Solicitor's Office

Case(s) referred to in reasons:

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194

Cousins v YMCA of Perth [2001] WASCA 374; (2001) 82 WAIG 5

House v The King [1936] HCA 40; (1936) 55 CLR 499

Jackamarra v Krakouer [1998] HCA 27; (1998) 195 CLR 516

Medical Board of Australia v Woollard [2017] WSCA 64

Michael Wilson & Partners Ltd v Nicholls [2011] HCA 48; (2011) 244 CLR 427

My Foodie Box Limited v Alain Trabelsi [2025] WAIRC 00172; (2025) 105 WAIG 575

Palaloi v Director-General, Department of Education [2024] WAIRC 01009; (2024) 104 WAIG 2480

Palaloi v Director-General, Department of Education [2025] WASCA 130; (2025) 105 WAIG 2144

Rajski v Scitec Corporation Pty Ltd (Unreported, NSWCA, 16 June 1986)

Simmonds v Electricity Networks Corporation t/a Western Power [2025] WAIRC 00155

Reasons for Decision

THE FULL BENCH:

- 1 The appellant commenced proceedings on 15 November 2024 alleging that the respondent unfairly dismissed him from his employment as a Level 5 Safety Advisor. The appellant was appointed to this position for a fixed term from 29 January 2024 to 30 June 2026. The appellant had a six month probationary period, which was extended for a further three months on 27 June 2024, to 29 October 2024. On 8 October 2024, the appellant underwent a fitness for duty assessment at the respondent's direction. On 18 October 2024, the appellant's probationary appointment was terminated by payment of four weeks' salary in lieu of notice.
- 2 The respondent filed a response to the appellant's claim on 11 December 2024 in which it was contended that the reason for the appellant's dismissal was performance related, despite ongoing performance management and offers of training. For these reasons, the respondent terminated the appellant's probationary employment. Conciliation was unavailing in resolving the dispute and by consent, programming orders were made by the Commission on 19 February 2025. One of the orders made required the appellant to file any outlines of witness evidence and any documents to be relied upon by 17 March 2025. The respondent was then to file any witness outlines and documents to be relied upon by 31 March 2025. The matter was to be listed for hearing not before 12 May 2025.
- 3 On 6 March 2025, the application was listed for directions at the request of the respondent, in an endeavour to resolve some issues which had arisen regarding an agreed statement of facts. At that hearing, the learned Commissioner drew to the appellant's attention the need for him to promptly attend to the preparation and filing of his witness outlines and documents to be relied upon, by 17 March 2025. He reminded the parties of the obligation on the Commission in dealing with such an unfair dismissal application, to proceed with all due speed in accordance with s 23B of the *Industrial Relations Act 1979* (WA). Whilst referring to the need to take into account the appellant's interests, the learned Commissioner also referred to the respondent's interests and the fact that the appellant was employed on a time critical infrastructure project, which meant management on that project would be involved in the proceedings and any possible outcome of the matter may have an impact on it.
- 4 On 19 March 2025, two days after the day on which he was to file his material, the appellant sought an extension of time to file his material, to 1 April 2025. This was opposed by the respondent.
- 5 A further directions hearing was listed on 24 March 2025, to consider the appellant's application made on 19 March 2025 to extend the date for filing his witness outlines and documents. The application made by the appellant sought an extension of time to file both his and other witness materials. In the application, the appellant referred to his lack of representation and the fact that he was working full time as a reason to seek an extension. At the hearing, the appellant indicated that whilst his own

witness outline would be filed by 1 April 2025, there appeared to be some doubt about whether any other witness outlines would be filed at that time, or some later time.

- 6 In opposing the appellant's request, it was submitted by the respondent that the appellant's material was by that time, already one week overdue and it appeared material other than the appellant's, would not be filed on the extended date as sought by the appellant.

The decision at first instance

- 7 At the conclusion of the directions hearing on 24 March 2025, the learned Commissioner made his decision on the application by the appellant. At p 3 of the transcript the learned Commissioner observed:

KUCERA C: All right.

I'll just say to both parties, what I've got to do in relation to Mr Macdonald's request is to balance, if you like, the competing interests of both parties. And I'll say, straight up, that the - these programming directions were agreed to between the parties. There are a set of consent orders. And the parties were before me on 19 February, where, as I recall, we dealt with the question of the filing of a statement of agreed facts and discovery. But there was nothing raised at that time about whether there needed to be a corresponding extension to any of the other dates. And I seem to remember quite clearly indicating that the next step in the process was that Mr Macdonald's evidence was to be filed by 17 March. As I indicated the 17th of March.

As I indicated, there's a there's a statutory obligation on the Commission to deal with these matters with due speed. But as I've also said, I also need to balance the competing interests of the parties. I'm not minded to grant the extension that's sought. But what I'll say is this - and the reason I'm not minded to grant the extension is, firstly, the application for the extension was made after the date on which these materials should have been submitted.

In relation to Mr Macdonald's reasons for the extension, Mr Macdonald, frankly, these are the things you need to weigh up when you're deciding whether or not to proceed with an application. If you've got another job, if you've got other commitments in your life, if you decide not to engage representation in a matter, and that places you in a much harder predicament than if you engage representation, they are all decisions that you, yourself, have to weigh up when deciding whether or not to proceed to a hearing.

The project which the respondent is involved in is a public infrastructure project. The role that you were performing is a safety-critical role. And so the agency needs to be able to get on with ensuring that it's got someone into the position and is doing that job. And obviously, they need to commit resources to dealing with this application at the very same time as running the job that you were previously on.

What I'm going to do is this: I'm going to give you until close of business tomorrow, Mr Macdonald, to file any outlines of evidence. And if they're not filed, then I'll dismiss the application. I'm going to make what's called a "Springing order".

Now, if your materials are in, then there'll be a corresponding adjustment to the timeframe, so that the respondent's not prejudiced by the delay in filing the materials. As I indicated before, the Commission is under an obligation to deal with this matter quickly.

If your materials aren't filed by close of business tomorrow, Mr Macdonald, I'll dismiss the application. So you've got a day today and tomorrow and tonight. You've had a week. You should have put your mind towards this. You've had a week over and above the date by which this - these materials were due to be filed.

Unless there's anything further, that's what I'm going to do. And I'm going to adjourn the matter this morning.

- 8 On the same day, the learned Commissioner made the following orders ([2025] WAIRC 00200), in the nature of a springing order, as follows:

1. THAT the date by which the applicant is to file any outlines of witness evidence, in accordance with Order 3 of the Orders the Commission issued by consent, on 19 February 2025 (programming orders), be extended to Tuesday 25 March 2025.
2. THAT if the applicant fails to comply with, Order 3 of the programming orders, by Tuesday 25 March 2025, application U 119 of 2024 will be dismissed.

- 9 A witness outline and bundles of documents were filed by the appellant at 5.33 am on 26 March 2025, the day after the final date for compliance with the learned Commissioner's order of 24 March 2025. The learned Commissioner issued a further order on 31 March 2025, confirming that as a result of non-compliance with the Commission's earlier order of 24 March 2025, the appellant's unfair dismissal application was dismissed. Given that the order of 24 March 2025 was in the nature of a springing order and therefore was self-executing, it is arguable that the order of 31 March 2025 was unnecessary and the proceedings were dismissed as a result of the 25 March 2025 order. However, it is unnecessary to resolve that issue for the purposes of these proceedings. It only affects the extent of the delay in filing the appeal marginally.

The appeal

- 10 Given the large volume of somewhat confusing material filed by the appellant, it is not easy to discern his grounds of appeal. The original Form 8 - Notice of Appeal filed on 14 May 2024 sets out at p 10, eight unnumbered paragraphs in the following terms:

In summary, I present the reasons and grounds for my appeal against the Commission's decisions and findings surrounding order 2025 WAIRC 00200.

Pursuant to section 28 of the powers the Commission may exercise at any time after a matter has been lodged conferred under section 27 by the Commission, I believe -

- The date that I filed *Form 1A Application* in which I sought an extension of time for me to file any witness outlines and supporting documents by 1 April 2024 (**interlocutory application**) was reasonable extension of time to file my outline of witness evidence for the applicant and supporting documents in my particular circumstances and particular case;
- that in determining orders 2025 WAIRC 00182 and 2025 WAIRC 00200, the determination made by the Commission was not consistent with the intent and essence of the Act pursuant to s26; s27(1); s32(8) (a) (i)-(iii); s32A, s.44(6) (bb) (ii);
- I was not provided with an opportunity or reasonable time to give reason and provide a sense of the particular circumstances and particular case, and to object to the verbal direction given by the Commission during the Directions hearing on 24 March 2025, and object to the order 2025 WAIRC 00182 of the programming orders issued by the Commission that same day;
- the date by which I was to file any outlines of witness evidence, in accordance with Order 3 of the Orders the Commission issued by consent [2025 WAIRC 00100], on 19 February 2025 (programming orders), was extended to Tuesday, 25 March 2025, which was unreasonable and unrealistic in my particular circumstances and particular case;
- I filed my outline of witness evidence for the applicant and supporting documents less than 12 hours after the specified date on 26 March 2025.
- I was not offered the opportunity to give the reason for non-compliance with Order 1 of the programming orders issued by the Commission on 24 March 2025;
- the powers conferred on the Commission by section 27 were not fully exercised in relation to the matter, pursuant to s26; s27(1); s32(8) (a) (i)-(iii); s32A, s.44(6) (bb) (ii); notwithstanding procedures prescribed under the Act which at the time had not been complied with, to the extent necessary to enable the matter U 199 OF 2024 to be heard and determined by the Commission in arbitration;
- AND WHEREAS, in contrast, orders 2025 WAIRC 00182 and 2025 WAIRC 00200 issued by the Commission were not fair and just, did not take into account the interests of the persons immediately concerned, in which deteriorated the industrial relations in respect to the matter, disadvantaging and preventing the respondent and I from any further resolve of the matter by the interlocutory proceedings relating to order 2025 WAIRC 00100, and prevented my *Unfair Dismissal Application U 119 OF 2024* pursuant to s 29 (1)(c) of the *Industrial Relations Act 1979 (WA)* (**unfair dismissal application**) being heard in arbitration before the Commission.

I will provide my background, facts and supporting documents at a later stage, which will be outlined in the appeal book. These documents will be completed within 14 days of filing this Form 8.

- 11 Additionally, on 10 June 2025, the appellant filed a Form 1A application to amend his grounds of appeal. Whilst that application contained a considerable amount of other material, towards the end of the bundle of documents, are what I understand to be the appellant's proposed amended grounds of appeal, running to eight grounds. They are as follows (original document emphasis):

Grounds for Appeal: Adverse Effects, Procedural Challenges, and Unfairness of Commission Orders

In summary, the reasons why the applicant doesn't agree with the decision made by the Commission surrounding order 2025 WAIRC 00200 and further outline the grounds in support of their appeal, where they believe the errors in law and fact that the Commission made, in the determination of the order.

The applicant contends that the determination and resulting Order issued by the Commission failed to adhere to the fundamental intent and objectives of the *Industrial Relations Act 1979 (WA)*. Specifically, the decision does not appropriately consider the statutory provisions outlined in **sections 25, 26(1), 27(ha), (hb), (l)-(o), 28, 32(8), 33(4), 33(5), 35(A), and 35(1AB)**

Note 1: The appellant/applicant will provide additional pages (witness outline of evidence and supporting documents, about the background, facts in support of the grounds for appeal, before the Commission.

Note 2: The additional pages and supporting documents to support the grounds for appeal are to be included in part of the notice of appeal and to be included in the appeal book.

Ground 1 - Conflict of interest in Case Allocation (Section 25)

Section 25 of the *Industrial Relations Act 1979 (WA)* establishes the authority of the Chief Commissioner in the allocation, reassignment, and revocation of industrial matters.

- a. The applicant contends that the Commissioner assigned to the unfair dismissal case **U 119 of 2025** had a prior role in approving an industrial agreement directly relevant to the applicant's employment. The applicant believes this prior involvement **compromised the Commissioner's ability to remain impartial** in determining the dismissal claim.
- b. Specifically, the same **Commissioner** presiding over case U 119 of 2025 had previously approved **Order 2023 WAIRC 00673**, which endorsed the Public Transport Authority Salaried Officers Industrial Agreement 2022.
- c. The applicant was governed by this industrial agreement, making its provisions **central to the unfair dismissal claim**, thereby raising concerns regarding impartiality and procedural fairness.

- **Ground 2 - Failure to Consider Equity and Individual Circumstances and Procedural Unreasonableness - Section 26**

Section 26(1) of the *Industrial Relations Act 1979 (WA)* requires the Commission to act in accordance with **equity, good conscience, and substantial consideration of the case** while disregarding unnecessary technicalities or rigid legal formalities.

a) The applicant contends that the Commission **failed to uphold these principles**, as its determination did not sufficiently account for the applicant's **individual circumstances**, including their **medical conditions** and **personal hardship**, which directly impacted their ability to comply with procedural requirements.

b) The Industrial Relations Act 1979 (WA) does not explicitly use the term "person-centric approach," but certain provisions emphasise **equity, good conscience, and consideration of individual circumstances**.

For example, Section 26(1) requires the Commission to act **without undue technicality and with substantial regard for the persons immediately concerned**. This suggests a duty to consider the specific circumstances of individuals involved in industrial matters. Additionally, Sections 27(ha)-(o) empower the Commission to issue orders that **prevent industrial relations deterioration** and encourage resolution, which could imply a need for flexibility in addressing individual concerns.

c) The applicant contends that Order 2025 WAIRC 00100, issued by consent on 19 February 2025, extended the deadline for filing witness outlines until 25 March 2025 [Order 2025 WAIRC 0182]. However, given the applicant's personal circumstances, this timeframe was **unreasonable and unrealistic** for proper compliance.

d) The applicant contends they were not granted an opportunity to provide reasons for **non-compliance** with Order 1 of the programming orders [Order 2025 WAIRC 00182]. Their difficulties stemmed from:

i. **Limited Resources** - Lack of legal representation, and financial and resource constraints made procedural compliance disproportionately burdensome. The applicant struggled to navigate the complexities of industrial relations law and underestimated the time and effort required to prepare the necessary documentation.

ii. **Medical Conditions** - ADHD - Inattentive type, general anxiety disorder, and insomnia - hypersomnolence, compounded by **dental complications**, significantly hindered their ability to meet deadlines.

iii. **Employment & Family Responsibilities** - The probationary period of their job, medical leave concerns, and their concern about disclosing reasons for leave for dealing with matters about the interlocutory proceedings and led to financial stress and eventual job loss, worsening their disadvantage.

iv. **Procedural Challenges** - Difficulties obtaining legal advice, uncertainty in communicating with the respondent's representative and the Commission, and a lack of established procedures for preparing witness outlines and evidence.

v. **Unreasonable Expectations** - The procedural burdens imposed disproportionately impacted the applicant's ability to comply, increasing the likelihood of **dysregulation** and procedural failure.

- **Ground 3 - Misapplication of the Commission's Powers**

Sections 27(ha), (hb), (l)-(o) of the *Industrial Relations Act 1979 (WA)* empower the Commission to issue orders and directions aimed at **preventing industrial relations deterioration** and facilitating **amicable resolution** of disputes.

a) The applicant asserts that the Commission's orders failed to **appropriately weigh their individual circumstances**, particularly their **medical condition** and **personal hardships**, which directly affected their capacity to comply with procedural obligations.

b) The applicant further argues that the **interlocutory orders** imposed were **unduly rigid** and did not accommodate their needs, making compliance within the specified timeframes **unreasonably burdensome**. A **person-centric approach** should have been adopted to account for these challenges.

c) The applicant contends that the Commission **misapplied key provisions of the Act**, resulting in a legally flawed decision. The Commission's failure to **consider statutory flexibility** in procedural compliance led to an incorrect determination.

- **Ground 4 - Failure to Exercise Discretionary Powers Under and Denial of Opportunity to Object (Section 28)**

Section 28 of the *Industrial Relations Act 1979 (WA)* empowers the Commission **even if the procedural requirements have not been met**, ensuring that industrial matters still can be fairly determined.

a) The applicant contends that the Commission **failed to exercise its discretionary powers** under this section, resulting in a restrictive and unjust application of procedural compliance that prevented the matter from being adequately heard and determined.

- b) The applicant argues that their **Form 1A Application**, seeking an extension until **1 April 2025**, constituted a **reasonable request** aligned with this section. However, they were **not given a fair opportunity** to object or adequately explain their circumstances:
 - c) **On 24 March 2025**, the Commissioner issued a verbal directive during a directions hearing.
 - d) **On the same day**, Order **2025 WAIRC 00182** was served, **restricting the applicant's ability to present objections**.
- **Ground 5 - Procedural Injustice in Compliance and Failure to Prevent Deterioration of Industrial Relations - Section 26(1) and Section 32(8)**
- Section **32(8)** grants the Commission authority to issue orders and directions aimed at **preventing industrial relations deterioration, enabling conciliation or arbitration, and fostering the exchange of information to resolve disputes**.
- a) The applicant contends that the Commission **did not fully exercise these powers, thereby failing to facilitate an effective resolution process**.
 - b) The applicant submitted their witness outline and supporting documents on **26 March 2025, just 13 hours and 3 minutes after the deadline**. However, the Commission's rigid interpretation of procedural compliance led to:
 - c) **Unfair and unjust consequences** affecting the applicant's health and wellbeing (**Order 2025 WAIRC 00182**).
 - d) A lack of reasonable accommodation for procedural delays (**Order 2025 WAIRC 00200**).
- **Ground 6 - Improper Conduct Influence Hindering Compliance - Section 33A(4) and Section 35A(5)**
- Sections **33A(4)** and **33A(5)** prohibit conduct that obstructs compliance with Commission orders improper attempts to influence proceedings.
- a) The applicant argues that **repeated actions by the respondent and their representative;**
 - b) Undermined these provisions and **hindered compliance with procedural deadlines imposed**.
 - c) Included **spoken and written statements** that improperly influenced the Commissioner and **pressured the applicant** attending the directions hearings, and in response to the Commissioner's enquiry
- **Ground 7 - Unfair and Disadvantaging Orders - Section 35(1AB)**
- Section **35(1AB)** empowers the Commission to issue orders designed to **preserve industrial relations stability, enable conciliation or arbitration, and encourage information exchange**.
- a) The applicant contends that the orders issued were not fair and just, ultimately placing them at a disadvantage and restricting their ability to be heard in arbitration.
- **Ground 8 - Restriction of Rights to Address Decision Minutes - Section 35(3)**
- Section **35(3)** entitles parties to **speak on matters contained in the decision minutes** and allows the Commission to **modify** those minutes before issuing a final decision.
- a) The applicant argues that the Commission's orders **unfairly limited their ability to fully engage with the decision-making process** and, further, thereby **restricting their right to be heard in arbitration**.

Extension of time

12 In the appellant's Form 1A application to extend time for the filing of the appeal, filed on 9 July 2025, he advances a number of grounds as to why the extension of time should be granted. They are as follows (original document emphasis):

Grounds in support of application

- The applicant originally lodged a Form 8 - Notice of Appeal on **15 April 2025**, in good faith and within a short period following the dismissal of matter U 119 of 2024. Upon review, the Commission identified that the form did not meet procedural requirements. Rather than abandoning the appeal, the applicant acted diligently to correct the record—engaging in iterative correspondence, preparing a compliant amended Form 8 (lodged **10 June 2025**), and adhering to subsequent directions issued by the Full Bench under **Order 2025 WAIRC 00385**. This sequence reflects procedural engagement, diligence, good faith, and a genuine commitment to advancing the appeal in accordance with Commission practice.
- The delay was not deliberate and arose due to the applicant's limited legal literacy, drafting difficulty, and lack of representation.
- The applicant has shown sustained procedural engagement through correspondence with the Commission, timely lodgement of relevant applications, and the responsible management of procedural developments as they arose.
- Although **Order 2025 WAIRC 00200** recorded non-compliance with programming Order 1, the applicant submitted an outline of witness evidence and **33 supporting** documents on 26 March 2025—approximately 13 hours after the deadline. These were filed in good faith and were accepted by the Commission and circulated to

all parties, affirming the applicant's intent to comply with procedural directions and contributing to the appeal record.

- Those materials remain on file and are not re-attached here. However, they may be resubmitted at the Commission's direction, if required.
- In anticipation of the appeal being reinstated, and subject to the Full Bench granting the related applications for leave to amend and the procedural indulgence requested, the applicant has also prepared a further **117 pages of written submissions** and over **50 supporting documents**. These materials provide the consolidated evidentiary and legal basis for the amended Form 8 - Notice of Appeal, and are ready for immediate filing, subject to direction.
- The volume and complexity of this material—and the applicant's constrained technical and legal resources—necessitate further time to compile and serve a compliant appeal book in accordance with **Regulation 102(10)** of the *Industrial Relations Commission Regulations 2005* (WA).
- The Commission has previously acknowledged the complexity of this matter by waiving compliance with **Practice Note 1 of 2023**, indicating a pragmatic and fair approach to case management in these circumstances.
- The request is made in **good faith** and in the interests of procedural fairness, efficiency and substantive resolution. **No substantial prejudice** will be occasioned to the respondent who has had notice of the appeal and will have the opportunity to respond in accordance with any fresh programming orders.

Principles to apply

13 Recently in *Simmonds v Electricity Networks Corporation t/a Western Power* [2025] WAIRC 00155, the Full Bench referred to the principles applicable to the power conferred on the Full Bench to extend the time to commence an appeal under s 49 of the *Act*, relying upon the Commission's procedural power in s 27(1)(n) of the *Act*, which we adopt and apply in determining the present matter. At [10]-[12] the Full Bench observed:

- [10] The Full Bench has power to extend time to institute an appeal under s 49 of the IR Act: s 27(1)(n). The purpose of having this discretion is to do justice between the parties: *Kathleen Gallo v The Honourable Justice Dawson* [1990] HCA 30; 64 ALJR 458 (*Gallo v Dawson*). Mr Simmonds must show that strict compliance with the time prescribed by the IR Act would work an injustice on him *Gallo v Dawson* at 459.
- [11] In *Adrian Doyle v Roman Catholic Bishop of Bunbury* [2022] WAIRC 00799; (2022) 102 WAIG 1533 [6] (*Doyle*) the Full Bench described four major but not exhaustive factors which are considered in the exercise of the discretion, citing *Esther Investments Pty Ltd v Markalinga Pty Ltd* [1989] WASC 174; (1989) 2 WAR 196:
- (a) the length of the delay;
 - (b) the reasons for the delay;
 - (c) the prospects of success of the appeal; and
 - (d) the extent of any prejudice to the respondent.
- [12] As stated in *Doyle* [8], citing *Arpad Security Agency Pty Ltd v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1989) 69 WAIG 1287, Mr Simmonds needs to make out his case for the Full Bench to exercise its discretion to extend time in his favour.

Contentions of the parties

14 The respondent informed the Full Bench that it did not contest the length of the delay, the reason for the delay or the issue of any prejudice to it. The sole basis for the respondent's opposition to the appellant's extension of time application was the respondent's contention that the appeal was without merit. Despite this, it will be necessary for the Full Bench to consider all of the factors in determining whether an extension of time should be granted.

Appellant

- 15 In summary, the appellant contended that in the directions hearing held before the Commission on 24 March 2025, he did not have a sufficient opportunity to explain why he would not be able to file his material until 1 April 2025. The appellant also submitted that he had family and work responsibilities which made it difficult for him to meet the timetable. The appellant also adverted to medical issues causing him some difficulties, but he accepted that he did not directly raise these matters with the learned Commissioner.
- 16 For these reasons, the appellant contended that it was unreasonable for the Commission not to grant him further time to comply. He also contended, variously, that this refusal to allow him more time was contrary to s 26 of the *Act*. The appellant also submitted that the fact that he was not legally represented made it more difficult for him to comply with the programming orders. He also adverted to only one additional day having been given to him to comply, by 25 March 2025.
- 17 Additionally, it was suggested by the appellant that in a way that was not made clear, the learned Commissioner favoured the respondent by making reference to the infrastructure project that the appellant was employed to work on. It was contended that this evidenced bias of the learned Commissioner in favour of the respondent, and to the detriment of the appellant, although it was unclear as to how this was demonstration of bias.
- 18 As part of the appellant's submissions, he referred to and relied on some 117 pages of additional material, provided to the Full Bench and the respondent, separately to the filed documents, as part of his application to extend the time for filing the appeal and to amend his grounds of appeal. This material, which we will refer to as the 'Additional Pages', correlated with the eight grounds of the proposed amended grounds of appeal, which was the focus of the appellant's arguments. Furthermore, the appellant indicated he would file more written material by 15 August 2025, after the Full Bench reserved its decision on the

appeal on 28 July 2025. No material was filed by this date and the appellant was informed that the Full Bench would determine the appeal based on the material before it as at 28 July 2025, when its decision was reserved.

- 19 As to the proposed ground 1, the appellant contended that the learned Commissioner's prior approval of the *Public Transport Authority Salaried Officers Industrial Agreement 2022*, made in 2023, compromised his ability to remain impartial in dealing with the appellant's unfair dismissal claim. The basis upon which this asserted lack of impartiality was not made clear. As noted above, the appellant also submitted that the various rulings and observations made by the learned Commissioner in the directions hearings on 6 March and 24 March 2025, especially with reference to the respondent's major infrastructure project, the need for timeliness in the Commission dealing with the matter, and the safety critical role that the appellant occupied, further demonstrated a degree of favouritism towards the respondent. It was contended by the appellant that this constituted a reasonable apprehension of bias or partiality in favour of the respondent, to the detriment of the appellant.
- 20 As to the proposed ground 2, the appellant contended that s 26(1) of the *Act* required the Commission to have regard to the equity good conscience and the substantial merits of the case, and in this regard, the learned Commissioner ought to have had regard to the appellant's circumstances previously referred to in relation to his self-representation, his limited resources, his ADHD, and general anxiety, insomnia, hypersomnolence, all of which the appellant conceded was not expressly raised or established by evidence before the learned Commissioner. The additional factor of him being employed full time with family responsibilities, and his lack of understanding of procedural requirements, were further matters relevant to this consideration. The appellant submitted that the extension of only a further day to file his materials was unreasonable. He submitted that the extra day provided by the learned Commissioner placed him under undue pressure to comply.
- 21 In an overall sense, having regard to all of the above matters, the appellant contended that he did not have a meaningful opportunity to comply with the order.
- 22 As to the proposed ground 3, the appellant submitted that the learned Commissioner's emphasis on the Commission's obligation to deal with matters with all due speed under s 22B of the *Act*, was misplaced, was counterproductive and did not pay sufficient regard to the matters referred to above in relation to ground 2.
- 23 Proposed grounds 4 and 5 refer variously to the Commission's statutory powers and an assertion by the appellant that he was denied the opportunity to object to the extension of time of one day to 25 March 2025. Furthermore, the appellant contended that the date of 1 April 2025 which he proposed, was, in all the circumstances, reasonable. As an extension of this, the appellant contended that as at 24 March 2025, the date of the final directions hearing, the further time provided of one day was unreasonable. The appellant generally referred to factors relied upon in grounds 1 to 3 above in this respect.
- 24 As to proposed ground 5, relating to procedural injustice, the appellant largely repeated many of the matters raised in relation to proposed grounds 1 to 4 above. He also complained as to the lack of guidance provided by the Commission's Practice Notes in relation to the preparation of evidence for proceedings before the Commission. The appellant also contended that the learned Commissioner paid no regard to the fact that the appellant's materials were actually filed in the early hours of the following day, only 13 hours and 3 minutes after the deadline under the order of 25 March 2025.
- 25 As to these matters, the appellant referred to email correspondence from the learned Commissioner's Associate to the respondent's solicitor sent on Wednesday, 26 March 2025 at 2.08 pm. This email noted the filing of the appellant's documents that morning. Furthermore, it referred to the learned Commissioner's query whether the respondent would consent to the late filing of the documents, on the basis of an offer to the respondent to provide it with a corresponding 9-day extension of time to comply with order 4 of the programming orders.
- 26 By email reply of 27 March at 9.41 am, the respondent's solicitor, Ms Power, replied to the Associate. In the email Ms Power indicated that it would appear that the effect of order 2 of the springing order made on 24 March 2025 operated to automatically dismiss the appellant's claim. If this were correct, Ms Power indicated that the Commission would be functus officio. It was further indicated that the respondent would not have been able to consider its position in relation to a further time extension, in the absence of an explanation from the appellant for his non-compliance with order 1. There does not appear to have been any further correspondence between the learned Commissioner's Chambers and the parties until the further order was made on 31 March 2025, dismissing the appellant's unfair dismissal application. As to this matter, the appellant complained that he had no opportunity to comment or be heard on the order dismissing his claim.
- 27 I will return to these matters further below.
- 28 As to the proposed ground 6, the appellant asserted that the conduct of the respondent and its representative was unfair and prejudicial to him. Whilst this was not clearly articulated by the appellant, as we understood it, this was on the basis that the respondent employed the resources of the State, did not properly assist in the preparation of the draft statement of facts and unreasonably refused to include material in it of assistance to the appellant.
- 29 The appellant also referred to the respondent's reply to the email from the learned Commissioner's Associate referred to above, in relation to the expiration of the date for the appellant to file his material. He submitted that the respondent's solicitor questioned the legal capacity for the Commission to grant any further extension of time and whilst the respondent did not object to the suggestion contained in the Associate's email of a further nine days for the respondent to comply with order 4 of the order, the position taken by the respondent prejudiced any possibility of a further extension of time for the appellant. The appellant also submitted that the reference by the respondent's solicitor in her email of 27 March 2025, to not knowing the reason for the appellant's non-compliance and her speculation that it may have been that he 'wilfully disregarded' compliance with the order, was prejudicial to him and contributed to procedural unfairness.
- 30 It was submitted by the appellant that this was particularly unfair because the appellant was given no opportunity to explain his non-compliance, even though it was only some 13 hours after the deadline, that he filed his material.

- 31 Proposed ground 7 asserted that the springing order placed the appellant at a disadvantage and restricted his ability to be heard in the matter. The appellant repeated many of the contentions in this respect, that he advanced in relation to the other grounds of appeal set out above.
- 32 By proposed ground 8, the appellant contended that the learned Commissioner failed to comply with his obligation to issue the 31 March 2025 order as a minute of proposed order, in accordance with s 35 of the *Act*, it being a final order. The appellant submitted that this, along with the alleged unfairness referred to in earlier submissions set out above, deprived him of the opportunity to be heard before the application was dismissed.

Respondent

- 33 The respondent contended that the approach to the determination of the extension of time application is well settled. An extension of time should only be granted if the Full Bench is satisfied that the appeal has some prospect of success. This involves a 'rough and ready' assessment of the merits of the appeal. In reliance on *House v The King* [1936] HCA 40; (1936) 55 CLR 499, the respondent submitted that the appellant must demonstrate that the learned Commissioner's exercise of discretion miscarried.
- 34 The respondent submitted that nothing put by the appellant in his application to extend time for compliance with the original procedural directions, indicated that he had a medical condition or other health issue. Reference was only made to the appellant's lack of financial means to obtain representation, that he was working full time and suffered fatigue as a result of preparing his material for filing. Also, at the directions hearing on 24 March 2025, the respondent submitted that the appellant referred to these same issues, and it was also unclear if the appellant was only seeking further time to file only his witness outline, or whether an open-ended period of time was sought for the filing of other material.
- 35 The respondent referred to the observations of the learned Commissioner that the matter needed to be dealt with promptly and that the issues raised by the appellant now, before the Full Bench, were not raised before the learned Commissioner. On this basis, there was no case to establish a lack of procedural fairness.
- 36 As to the proposed appeal grounds themselves, the respondent referred to grounds 2, 3, 4, 5 and 7 together, and contended that taken collectively, they constitute an assemblage of contentions that do not set out and advance any error of the *House v The King* kind. It was submitted that they disclose that the appellant just disagreed with the learned Commissioner's decision.
- 37 As to proposed ground 1, which is the allegation dealing with a conflict of interest, the respondent submitted that the registration of the industrial agreement between the respondent and the relevant union could have no effect on the matter and could not possibly lead to an apprehension of bias. The Commission's responsibility in registration of an industrial agreement, is to ensure compliance with the *Act*, and not the content of the industrial agreement. It was therefore contended that this ground had no possible prospect of success.
- 38 As to proposed ground 6, the respondent submitted that it appeared to raise an allegation of impropriety in some way, by the respondent and/or the respondent's representative, but without any clear statement of what the impropriety was. It was submitted that this ground also has no prospect of success.
- 39 In relation to proposed ground 8, concerning the speaking to the minute requirement of s 35 of the *Act*, the respondent accepted that it applied to the order of 31 March 2025, as a final order. It was contended however, that the purpose of a speaking to the minutes is to enable a party to make submissions as to whether the order proposed to be issued properly reflects the decision of the Commission. In this case, there could be no question of this because the final order reflected the earlier springing order, that the appellant's application be dismissed. It was therefore contended that this could not constitute a material error or law.
- 40 The respondent also submitted that the eight dot points in the appellant's original notice of appeal were without merit, and do not allege appealable error in the *House v The King* sense. The third dot point refers to allegations of a denial of procedural fairness which the respondent submitted had already been dealt with in earlier submissions in relation to the directions hearing held on 24 March 2025. The respondent submitted that this ground raised nothing to justify the conclusion that based on what was before him, the learned Commissioner denied the appellant procedural fairness.
- 41 As to dot point eight, the alleged failure by the learned Commissioner to take into account the interests of the persons immediately concerned, the respondent submitted that this could not be made out. Reference was made to the transcript of the proceedings at the directions hearing on 24 March 2025 and the recitals to the order of the Commission of 31 May 2025. It was submitted that from this material, it was clear that the learned Commissioner took into account the interests of both parties to the proceedings. In this case, the respondent contended that the appellant just does not like the result.
- 42 In an overarching sense, the respondent submitted that the suggestion of the appellant that learned Commissioner favoured the respondent was without substance and there was no objective basis for such a conclusion to be reached. Consideration of the need for timeliness, given the appellant was employed on a fixed term basis on a time critical project into 2026, was a factor open to be taken into account on the respondent's submissions. Also, if the proceedings were delayed and not heard until 2026, this would make the remedy of reinstatement problematic, although there would be the prospect of compensation for loss or injury.
- 43 As to the issue of the effect of the springing order and the respondent's solicitors response to it in the email exchange with the learned Commissioner's Associate referred to above, it was submitted that all the solicitor indicated was the likely legal effect of the springing order being self-executing, as a matter of construction of the order itself, without commenting on any further extension of time. It was submitted that there was nothing untoward or problematic with this approach.
- 44 Finally, the Full Bench gave the respondent an opportunity to review the appellant's 'Additional Pages', being some 117 pages of submissions and material in connection with his proposed amended grounds of appeal. Brief written submission were filed by the respondent in response. Two areas were addressed. The first related to the proposed ground 1 in relation to the alleged conflict of interest. The respondent submitted that the appellant did not make out any denial of procedural fairness. Reference was made to the appellant's written submissions at [75] and onwards, and in reliance on *Michael Wilson & Partners Ltd v*

Nicholls [2011] HCA 48; (2011) 244 CLR 427 per Gummow ACJ, Hayne, Crennan and Bell JJ at [67], the respondent contended that to the extent that the appellant refers to the outcome of the decision of the learned Commissioner, this cannot of itself, establish a reasonable apprehension of bias. Rulings adverse to the appellant are not sufficient.

- 45 In this connection, it was contended that the appellant had failed to identify how, in the course of considering the matter, the learned Commissioner did not have regard to all relevant interests in making his decision. Based on the transcript of the directions hearing on 24 March 2025, the respondent contended that it was clear that the learned Commissioner did balance the interests of the parties, in the context of the objects of the *Act* and the need for a timely disposition of the proceedings. The fact that the learned Commissioner referred to the respondent's infrastructure project on which the appellant was employed, in the course of dealing with the matter, did not show any additional favour to the respondent's position. The respondent submitted that ultimately, the outcome of the directions hearing was to give the appellant more time to file his material, by an additional day.
- 46 Second, as to proposed grounds 4 and 5, referred to in the appellant's written submissions at [204], the respondent submitted that it was misconceived for the appellant to contend that it was for the learned Commissioner to ascertain how long the appellant needed in order to file his material. This is so because the appellant had already failed to comply with the consent directions by this time. The respondent contended that the learned Commissioner was required to balance the competing interests of the parties, and, having regard to the history of the matter, the objects of the *Act*, and the need to deal with the matter with all due speed, consider what would be an appropriate extension.
- 47 Additionally, the respondent contended that the appellant only focused on the additional day given to him to file his material, without having any regard to the fact of the period of time he had already been given to do so, under the original programming direction. In this respect, it was submitted by the respondent that the appellant sought to focus only on his interests, in the context of solely what occurred in the directions hearing on 24 March 2025, without any proper regard to the history of the proceedings up to that point in time.

Consideration

- 48 For the purposes of an extension of time to file an appeal under s 49 of the *Act*, relying on the general power to extend time in s 27(1)(n) of the *Act*, it is trite that the power is to be exercised consistent with equity, good conscience and the substantial merits of the case, as s 26(1)(a) of the *Act* requires. As correctly submitted by counsel for the respondent, in terms of the merits of an appeal in an extension of time application, the Full Bench can only at this stage, make a 'rough and ready' assessment of the merits: *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516. This does not require the Full Bench to form the view that the appeal has a good chance of success. What is required is the formation of a view that the appeal is arguable, in the sense that there is an issue(s) arising on the appeal grounds that has some prospect of a successful outcome: *Cousins v YMCA of Perth* [2001] WASCA 374; (2001) 82 WAIG 5.
- 49 Whilst not contested, we comment on the other issues to be determined, before returning to the merits of the appeal.

Length of the delay

- 50 As noted above, the appeal was accepted for filing, it being in proper form, on 14 May 2025. It is to be noted that the appellant did attempt to file the appeal on 15 April 2025, within time, but the Registry was required to reject the filing of the notice of appeal as it was defective. Depending on whether one uses the date of 25 March 2025, being the date of the springing order, or 31 March 2025, being the date of the final order, dismissing the appeal, the appeal is either 23 or 30 days out of time. In either case, whilst not inordinate, the delay is substantial.

Reason for the delay

- 51 In support of his application for an extension of time, the appellant referred to his lack of representation, confusion over the fact that two orders issued, and that he made various attempts to correct errors. In the case of an unrepresented party, it is accepted that procedural requirements of courts and tribunals may pose challenges. This is despite a significant amount of information being available on the Commission's website to assist unrepresented parties. This includes procedural steps and time limitations, in relation to appeals to the Full Bench and also applications to extend time for the filing of an appeal. However, we accept that the appellant in this case initially attempted to file his appeal within time, and took reasonable steps to pursue the correct lodgement of it.

Prejudice to the respondent

- 52 As noted, no issue is taken by the respondent with this factor. Whilst not pressed, aside from the obvious prejudice of defending the appeal, if an extension of time is given, the fact that the appellant was employed on a fixed term engagement to 30 June 2026, on a defined project with a critical timeline, would pose some prejudice if the extension of time were granted.

The merits

- 53 Returning then to the merits of the appeal as filed and the proposed grounds.
- 54 The decision of the Commission to dismiss the appellant's application at first instance, whether by the effect of the springing order of 25 March 2025, or the later order of 31 March 2025, arose from a discretionary decision by the learned Commissioner to grant a limited extension of time to the appellant, to file his material in accordance with directions originally made by consent of the parties on 19 February 2025. As an exercise of discretion, the appellant needs to establish that the discretion miscarried, in accordance with the well-known approach set out in *House v The King*.
- 55 In this respect, it is necessary for the appellant to establish that the learned Commissioner made an error in his decision. The nature of the error can include that he mistook the facts, applied a wrong principle, failed to take into account relevant considerations or took into account irrelevant considerations, or that the decision at first instance was so unjust that no reasonable tribunal could make it: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194; *Medical Board of Australia v Woollard* [2017] WASCA 64.

- 56 Additionally, as to the power to dismiss a matter under s 27(1)(a) of the *Act*, in *Palaloi v Director-General, Department of Education* [2024] WAIRC 00991 01009; (2024) 104 WAIG 2481, the Full Bench relevantly observed at [24]-[25]:
- [24] The power of the Commission to dismiss a matter or to refrain from further hearing a matter, is a broad power...
- [25] Given that a person who brings proceedings before the Commission is entitled to have the jurisdiction invoked, the statutory power to dismiss a matter under s 27(1)(a) of the *Act* is to be exercised sparingly. Whilst the *PTA* case concerned a dismissal application in the public interest under s 27(1)(a)(ii), the same broad approach should be adopted to the other bases of the exercise of the power in s 27(1)(a)(i), (iii) and (iv), in that the power should only be exercised in a clear case.
- 57 This approach was upheld on appeal by the Industrial Appeal Court in *Palaloi v Director-General, Department of Education* [2025] WASCA 130; (2025) 105 WAIG 2144 at [26].
- 58 Two matters threaded through the appellant's grounds of appeal, proposed grounds of appeal and in his lengthy written submissions, were allegations of procedural unfairness and bias and, that as an unrepresented party, the appellant was at a disadvantage. Both of these matters were recently canvassed by the Full Bench in *My Foodie Box Limited v Alain Trabelsi* [2025] WAIRC 00172; (2025) 105 WAIG 575. As to the first issue of procedural fairness and bias, the Full Bench observed at [11] as follows:
- [11] At various points in the notice of appeal narrative, the appellant contended that the learned Commissioner did not afford the appellant procedural fairness and was biased in his hearing and determination of the respondent's claim. It was also submitted by the appellant that the learned Commissioner demonstrated undue leniency to the respondent in the conduct of his case. Recently, the Full Bench of the Commission set out the relevant principles applicable to procedural fairness to be afforded to a party to proceedings. In *Director-General Department of Justice v The Civil Service Association of WA (Inc.)* [2025] WAIRC 00146, the Full Bench observed at [36]-[38] as follows:
- [36] A party to proceedings before the Commission is entitled to procedural fairness in the conduct of their case. This requires a party being given a reasonable opportunity to present their respective cases and to respond to issues that may be adverse to them. As Le Miere J observed in *BHP Billiton Iron Ore v CFMEU* [2006] WASCA 49; (2006) 151 IR 362 at [33]-[34]:
- BHPB was denied right to be heard***
- [33] The second step is whether BHPB was denied the right to be heard in relation to those findings. Procedural fairness does not normally require a Judge to disclose his thinking processes or proposed conclusions. However, a party may be denied procedural fairness if a Judge departs from the basis upon which the case has been argued by the parties without notice to the parties.
- [34] The right to be heard includes a proper opportunity to present submissions seeking to persuade a court or tribunal that the evidence and inferences from it support or fail to support any fact necessary to be established. A restriction upon the opportunity afforded to one of the parties through their counsel to make submissions upon the facts that are said to be established by the evidence deprives a party of their right to be heard.
- [37] Recently, the Court of Appeal in *Davie* considered the relevant principles in relation to procedural fairness. The Court (Buss P, Vaughan JA and Seaward J) said at [86]-[91] as follows:
- [86] The principles relating to procedural fairness are well settled and were recently outlined by this court in *Defendi v Sziglietti* and approved in *Frigger v Frigger*.
- [87] It is axiomatic that a court is obliged to accord procedural fairness to a litigant. However, to say that a court is obliged to afford procedural fairness is only the first step of analysis. The second step (and usually the more critical step) is to identify the content of the requirements of procedural fairness.
- [88] Although sometimes expressed in terms referring to a necessity for a hearing, the fundamental requirement of procedural fairness is (relevantly for present purposes) that a party is given a reasonable opportunity to be heard, in other words, to present their case by evidence, information and submissions. However, the requirements of procedural fairness are not fixed or immutable. Procedural fairness is directed to avoid practical injustice, and what is necessary to avoid practical injustice will depend upon the circumstances.
- [89] Generally speaking, in litigation the parties must anticipate combinations and permutations of various findings and adduce evidence and make submissions at the trial on all the potential findings of fact on the issues litigated. Any gap in the evidence on an issue will generally operate to the detriment of the party carrying the burden of proof on that issue.
- [90] A person to whom procedural fairness is owed is, ordinarily, entitled to have brought to his or her attention the critical issues or factors on which the decision is likely to turn so as to give the person an opportunity to deal with them. However, a decision maker is not usually required to disclose to a person to whom procedural fairness must be accorded the decision maker's mental processes, provisional views or proposed conclusions before a final decision is made. The position may be different when the decision-maker's evaluation or conclusion is one that could not have reasonably been anticipated. In this context, the observations of

the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*, are relevant:

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

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

- 1 The subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it: *Kioa v West* at 587 (Mason J); *Sinnathamby* at 348 (Burchett J); *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 (Burchett J).
- 2 The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material: *Minister of Immigration and Ethnic Affairs v Kumar* (unreported, Full Court, Federal Court, 31 May 1990); *Kioa v West* at 573, 588 and 634.

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

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

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

59 As to unrepresented parties, and the approach to be taken by courts and tribunals in proceedings involving them, the Full Bench said at [16]:

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

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

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

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

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

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

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

- (a) The absence of legal representation on one side ought not to induce a court (or a tribunal) to deprive the other side of one jot of its lawful entitlement.
- (b) An unrepresented party is as much subject to the rules as any other litigant. The court (or tribunal) must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper

exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status would be unfair to the represented opponent.

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

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

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

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

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

- 60 Whilst recognising the inherent disadvantage that an unrepresented party may have in a matter before the Commission, it is important, as stated in the extracts above, not to elevate that to the point that the represented party is prejudiced, and deprived of its lawful rights, or otherwise that the unrepresented party is favoured in some material way. As to the issue of compliance, as noted in the above quote from *Rajski v Scitec Corporation Pty Ltd* (Unreported, NSWCA, 16 June 1986), whilst recognising the relative informality of Commission proceedings, orders and directions of the Commission are to be observed. To waive non-compliance in the case of an unrepresented party, absent very good reason to do so, is to confer an unfair advantage on the unrepresented party, possibility to the significant detriment of the other party to the proceedings.
- 61 Before considering the grounds of appeal themselves, some context in this matter is important. First, it is notable that the original programming directions, which were made by consent, setting out the agreed timetable for the future conduct of the matter, were made on 19 February 2025. There was a directions hearing on 6 March 2025, which seemed to relate to the preparation of an agreed statement of facts. At that directions hearing, the learned Commissioner urged the appellant to focus on the preparation of his witness outline and materials to be filed, because there was a timetable that had been agreed, timeliness was important, and the date for the filing of the appellant's material was looming.
- 62 Furthermore, the application by the appellant to extend the time for filing his materials was made on 19 March 2025, after the time limit for compliance with the programming directions had expired. At the directions hearing on 24 March 2025, the appellant indicated that he was seeking an extension of time to 1 April 2025 in order that he could file only his witness outline and material. Nothing was said by the appellant as to what he may need to do in relation to any other witnesses that he may call, leaving open the question as to how that material might be accommodated in any reasonable time. It is of note that by the time the matter came before the learned Commissioner on 24 March 2025, the appellant had nearly five weeks to file his material, including an additional week beyond the agreed programming date.
- 63 We will first deal with the appellant's grounds of appeal set out in the eight dot points in the notice of appeal filed on 14 May 2025. In order to take the appellant's case at its highest, we will then consider the appellant's proposed grounds of appeal, set out in the application to amend his notice of appeal filed on 10 June 2025. For ease of reference, we will number the dot points in the appellant's notice of appeal as 1 to 8.
- 64 As to these grounds, we are in general agreement with the respondent's submissions that most of the matters raised do not allege errors of the *House v The King* kind, that would give rise to intervention by the Full Bench. We only propose to deal with grounds 1, 3 and 8.

Grounds 1 and 3

- 65 These two grounds may conveniently be dealt with together. They contend in short that the time extension to 1 April 2025 sought by the appellant was reasonable and that the appellant did not have a reasonable opportunity to put his case for an extension of time. This must be rejected. As we have already mentioned as a matter of context, by the time the directions hearing was convened on 24 March 2025, the appellant had some five weeks to prepare and file his materials. Also, as noted above, at the earlier directions hearing on 6 March 2025, the learned Commissioner urged the appellant to focus his attention on the need to file his material by 17 March 2025, as agreed, and to focus on this. He also further referred to the obligation on the Commission to deal with matters with all due speed under s 23B of the *Act*.
- 66 Whilst the learned Commissioner referred to the interests of the appellant, during the hearing on 6 March 2025, he also properly referred to the interests of the respondent, and the timing of the respondent's infrastructure project on which the appellant was formerly employed, which the Commission was also obliged to take into account. In this respect, the appellant failed to acknowledge that he had already been given in effect, five weeks to comply with the programming directions.

- 67 As to the allegation of what amounts to a denial of procedural fairness, the essence of it appeared to be that at the directions hearings on both 6 March and 24 March 2025, the appellant raised his self-represented status, his lack of financial resources and that he worked full time with family responsibilities. There was no reference made by the appellant to health difficulties or a medical condition, or any substantiation of these matters, that the learned Commissioner would be obliged to take into account. These matters have been raised in the appellant's submissions before the Full Bench for the first time.
- 68 It is clear that the learned Commissioner did take into account the matters that the appellant raised. He referred to the appellant as an unrepresented party and that he needed to weigh up the fact that working full time was a relevant consideration in his decision to commence his unfair dismissal application, along with his other commitments (see transcript at first instance at p 4). The learned Commissioner also referred to the need to balance these interests with the interests of the respondent, as he was obliged to do. We are not persuaded that there was any denial of procedural fairness and these grounds have not been established. The learned Commissioner also clearly indicated the need for timeliness as being a factor he was obliged to take into account.

Ground 8

- 69 As to this matter, the allegation that the learned Commissioner did not take into account the interests of the parties cannot be sustained. We have referred above to the directions hearings held on both 6 March and 24 March 2025, and we refer to the transcript of these proceedings. The record of those proceedings clearly show that the learned Commissioner was alive to the parties' interests and that he had to balance both. This involved, as the learned Commissioner indicated, a balance between the disadvantage to the appellant as an unrepresented party, along with the need for relative expedition of the proceedings, having regard to the terms of the *Act*, and the respondent's interests.
- 70 Ultimately, the matter comes down to the fact that the appellant was dissatisfied with the outcome. This is a different question as to whether the Commission failed to take into account any matters that it should have taken into account. Whether the Full Bench would have reached a different view, is not material. The appellant needs to establish an appealable error and none has been established.

Proposed grounds of appeal

- 71 There is a degree of overlap between the appeal grounds advanced in the notice of appeal and the proposed grounds of appeal. Doing the best we can to discern the issues raised by the appellant, we will now consider the proposed grounds as follows.

Proposed ground 1

- 72 The assertion of the learned Commissioner registering the *Public Transport Authority Salaried Officers Industrial Agreement 2022* which raises in essence, an allegation of apprehended bias, is unmeritorious. The ground misunderstands the role of the Commission in the registration of an industrial agreement under ss 41 and 41A of the *Act*. The Commission's responsibility under the *Act* as to registration of an agreement as an industrial agreement, is to ensure compliance with the statutory requirements imposed on parties under the *Act*. The Commission has no discretion in this regard, if satisfied that the procedural requirements of the *Act* have been met, and must register an agreement as an industrial agreement.
- 73 There was no suggestion in these proceedings, that the Commission was involved in determining any terms of the industrial agreement, as it may do under s 42G of the *Act*. Even if this was so, unless it could be established that such involvement by the Commission was materially related to the appellant's circumstances, and specifically to his dismissal, then it is difficult to see how an apprehension of bias can arise in those circumstances.
- 74 Furthermore, as noted earlier in these reasons, the fact that the learned Commissioner referred to the respondent's infrastructure project, does not demonstrate he was favouring the respondent over the appellant. The learned Commissioner was required to take into account the interests of both parties, which he did.
- 75 There is no merit in this ground.

Proposed ground 2

- 76 This ground reasserts similar issues to those raised in the filed grounds of appeal to the effect that the learned Commissioner did not take into account the appellant's particular circumstances or interests. For the same reasons that we have already expressed, there is no substance to this ground.

Proposed ground 3

- 77 This proposed ground asserts a misapplication of provisions of the *Act* in relation to procedural powers of the Commission. It again asserts that the 24 March 2025 order of the Commission failed to have regard to the appellant's individual circumstances. There was no misapplication of provisions of the *Act* by the learned Commissioner in the making of the orders which he did make. The repeated assertions by the appellant of a failure to have regard to the appellant's interests are not made out, and no error is established.

Proposed ground 4

- 78 The reference to s 28 of the *Act* is misplaced and it has no application to the matters arising on the appeal. In other respects, the appellant again restated the same assertion of a lack of procedural fairness and a lack of an opportunity for the appellant to put his case in the making of the order of 24 March 2025. For reasons already expressed, the appellant was given every reasonable opportunity to put his case for an extension of time to the learned Commissioner and in fact he was partially successful. Further, as the respondent contended, correctly in our view, it was not for the learned Commissioner to ascertain how much time the appellant needed to file his materials, but to determine, having regard to all of the circumstances, what further time if any, would be reasonable. Again, this ground does not establish error and it is the case of the appellant not being satisfied with the outcome.

Proposed ground 5

79 This ground refers to s 32(8) of the *Act*, which had no application to the matter before the Commission. The reference to s 26(1) in the appellant's further written submissions, focuses on the same issues raised in relation to proposed ground 4. As we have already noted above, when referring to the context within which the orders were issued by the learned Commissioner, by 24 March 2025, the appellant already had five weeks to prepare and file his material. Despite this, he had failed to do so. The appellant's sole focus on the additional day given to him to comply by 25 March 2025, fails to have any regard to what had occurred prior. It was made crystal clear to the appellant by the learned Commissioner in the directions hearing of 24 March 2025, that the appellant had the additional day to prepare and file his material and if he did not do so, his application would be dismissed. There is no substance in this ground.

Proposed ground 6

80 As to this ground, the appellant made generalised assertions as to alleged improper conduct by the respondent and/or the respondent's solicitors. Despite the lengthy written submissions in support of this proposed ground, with respect, we are unable to clearly discern what the complaint is. Generalised submissions were made to the effect that the respondent was represented by counsel and had all of the resources of the State at its disposal. None of these assertions are relevant to any alleged error by the learned Commissioner in the making of the order.

81 The suggestion that the respondent's solicitor's response to the emails from the Associate to the learned Commissioner, referred to earlier in these reasons, following the failure of the appellant to comply with the springing order, which was said to be somehow improper, is misplaced. The respondent's solicitor made observations as to the effect of the springing order which it was entitled to do, and that as result, the Commission may be functus officio. There is nothing of any moment about this. Furthermore, any observations by the respondent as to reasons for the appellant's non-compliance, were matters of mere speculation, and were ultimately not material to the operation of the order.

Proposed ground 7

82 The reference to s 35(1AB) of the *Act* by the appellant is not relevant to the issues arising on the appeal. The general assertion of unfairness in the order issuing does not establish any appealable error.

Proposed ground 8

83 This ground asserts that the learned Commissioner erred in not publishing the order of 31 March 2025 as a minute of proposed order, and he did not give the parties an opportunity to speak to it, as required by ss 35(3) of the *Act*. Sections 35(1A) and 35(1) of the *Act* require a final decision of the Commission to be drawn up as a minute of proposed order. By s 35(3) of the *Act*, the parties are to be given an opportunity to speak to the minutes of a proposed order. This opportunity is to ensure that the proposed order properly reflects the Commission's reasons for decision, and that the order is workable.

84 However, importantly in this case, these obligations did not apply. By s 35(1AB) of the *Act*, an order made by the Commission under s 27(1)(a) of the *Act*, dismissing a matter for any of the reasons set out in sub-pars (i)-(iv), does not attract s 35(1). As the recitals to the order of the learned Commissioner made on 31 March 2025 make clear, this was the power relied on. Therefore, no obligation to publish a minute of proposed order arose. This ground is not established.

Conclusion

85 For the foregoing reasons, whilst the appellant may have been disappointed with the outcome of the proceedings before the learned Commissioner, we are not satisfied that there is any merit to the appeal grounds or the proposed appeal grounds. Accordingly, leave to extend the time to file the appeal should not be granted and we would dismiss both that application and the appeal.

2025 WAIRC 01010

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 119/2024 GIVEN ON 31 MARCH 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 01010
CORAM : CHIEF COMMISSIONER S J KENNER
 COMMISSIONER T EMMANUEL
 COMMISSIONER T B WALKINGTON
HEARD : 22 JULY 2025
DELIVERED : FRIDAY, 19 DECEMBER 2025
FILE NO. : FBA 5 OF 2025
BETWEEN : GLENN ROBERT MACDONALD
 Appellant
 AND
 PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
 First Respondent
 DEPARTMENT OF THE REGISTRAR OF WA INDUSTRIAL RELATIONS
 COMMISSION
 Second Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	COMMISSIONER T KUCERA
Citation	:	[2025] WAIRC 00200
File No	:	U 119 OF 2024

Catchwords	:	Industrial Law (WA) – Speaking to the minutes – Relevant principles applied – Final order issued
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 34, s 35, s 35(1A), s 35(3), s 35(4)
Result	:	Order issued

Representation:

Counsel:

Appellant	:	In person
First Respondent	:	Mr J Carroll of counsel
Second Respondent	:	No appearance required
Solicitors:		
First Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Palaloi v Director-General, Department of Education [2024] WAIRC 01009; (2024) 104 WAIG 2480

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2015] WAIRC 00828; (2015) 95 WAIG 1510

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

- 1 The Full Bench published its reasons for decision in relation to the appellant's application to extend time for filing his appeal on 16 December 2025. In accordance with ss 34 and 35 of the *Industrial Relations Act 1979* (WA) the reasons for decision and minutes of proposed order were published. Even though the order to be made by the Full Bench was an order of dismissal, as such an order is a 'final decision' for the purposes of s 35(1A) of the *Act*, it is required to be published in the form of minutes of proposed order. The parties are then to be given the opportunity to speak to the minutes of the proposed order in accordance with s 35(3), unless the parties consent to waive their requirement to do so under s 35(4) of the *Act*.
- 2 The appellant notified Chambers that he did not consent to waiving his right to speak to the minutes and indicated that he wished to speak to the minutes of the proposed order. This is despite the appellant being informed that the purpose of a speaking to the minutes is to ensure that the proposed order reflects the reasons for decision of the Full Bench and that it is not an opportunity to raise further issues or to reargue the appellant's case at first instance: *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2015] WAIRC 00828; (2015) 95 WAIG 1510; *Palaloi v Director-General, Department of Education* [2024] WAIRC 01009; (2024) 104 WAIG 2480.
- 3 In this case, the appellant has sought to raise alleged errors and omissions and what are said to be inconsistencies in the Full Bench's reasons for decision, not reflected in the minutes of proposed order. This is not a course permitted for the very limited purpose of a speaking to the minutes. It is our view that the minutes of proposed order dismissing the appellant's application to extend time to file the appeal and dismissing the appeal, properly reflect the reasons for decision of the Full Bench. For these reasons, the order now issues.

2025 WAIRC 01011

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 119/2024 GIVEN ON 31 MARCH 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GLENN ROBERT MACDONALD **APPELLANT**

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA **FIRST RESPONDENT**

DEPARTMENT OF THE REGISTRAR OF WA INDUSTRIAL RELATIONS COMMISSION **SECOND RESPONDENT**

CORAM FULL BENCH

CHIEF COMMISSIONER S J KENNER
COMMISSIONER T EMMANUEL
COMMISSIONER T B WALKINGTON

DATE FRIDAY, 19 DECEMBER 2025

FILE NO/S FBA 5 OF 2025

CITATION NO. 2025 WAIRC 01011

Result Application to extend time refused. Appeal dismissed

Representation

Appellant In person

First Respondent Mr J Carroll of counsel

Second Respondent No appearance required

Order

HAVING heard Mr G MacDonald on his own behalf and Mr J Carroll of counsel on behalf of the first respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979 (WA)*, hereby orders –

THAT the application to extend time and the appeal be and are hereby dismissed.

[L.S.]

By the Full Bench
(Sgd.) S J KENNER,
Chief Commissioner.

2026 WAIRC 00008

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 48 OF 2025 GIVEN ON 17 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA **APPELLANT**

-v-

BRAD CASSERLY **RESPONDENT**

CORAM FULL BENCH

CHIEF COMMISSIONER S J KENNER
COMMISSIONER T B WALKINGTON
COMMISSIONER C TSANG

DATE THURSDAY, 8 JANUARY 2026

FILE NO/S FBA 10 OF 2025

CITATION NO. 2026 WAIRC 00008

Result	Appeal discontinued by leave
Representation	
Appellant	Ms E Negus of counsel
Respondent	Mr K Sneddon of counsel

Order

WHEREAS on 1 October 2025, the appellant filed a notice of appeal to the Full Bench;

AND WHEREAS on 15 December 2025, the appellant filed a notice of application for leave to discontinue the appeal;

AND WHEREAS on 18 December 2025, in accordance with reg 103A(4) of the *Industrial Relations Commission Regulations 2005* (WA), the Full Bench provided an opportunity for the parties served with the application for leave to discontinue to be heard or to make submissions on the application;

AND WHEREAS on 19 December 2025, the respondent informed the Full Bench that he did not wish to be heard or make submissions in relation to the application for leave to discontinue;

NOW THEREFORE, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) and reg 103A of the *Industrial Relations Commission Regulations 2005* (WA), hereby orders —

THAT the appeal be and is hereby discontinued by leave

By the Full Bench
(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2025 WAIRC 00986

**APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 77/2024 GIVEN ON 28
FEBRUARY 2025**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FULL BENCH

CITATION	:	2025 WAIRC 00986
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	:	FRIDAY, 27 JUNE 2025
DELIVERED	:	FRIDAY, 12 DECEMBER 2025
FILE NO.	:	FBA 3 OF 2025
BETWEEN	:	REUBEN MOLINARI Appellant AND DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	COMMISSIONER C TSANG
Citation	:	[2025] WAIRC 00133
File No	:	U 77 OF 2024

Catchwords	:	Industrial Law (WA) – Appeal against decision of Commission – Unfair dismissal – Application to amend application at first instance refused – Discretionary interlocutory procedural decision – Appeal against a finding – Matter must be of such importance that in
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		the public interest an appeal lies – Relevant principles applied – Requirement not met – Appeal dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 26(1)(a), s 27(1), s 27(1)(b), s 27(1)(l), s 27(1)(v), s 27(1)(o), s 32A, s 49, s 49(2a) <i>Industrial Relations Commission Regulations 2005</i> (WA) reg 17, reg 22, reg 32A <i>Fair Work Act 2009</i> (Cth)
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	Mr D Rafferty of counsel
Respondent	:	Mr J Carroll of counsel
Solicitors:		
Appellant	:	Eureka Lawyers
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc [1981] HCA 39; (1981) 148 CLR 170

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72; (2005) 225 CLR 88

Australian, Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Calhoun v Sanitaire Pty Ltd [2002] WAIRC 07066; (2002) 82 WAIG 3186

Davie v Manuel [2024] WASCA 21; (2024) 107 MVR 147

Hammersley Iron Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Ors (1989) 69 WAIG 1024

House v The King [1936] HCA 40; (1936) 55 CLR 499

K-Generation Pty Limited v Liquor Licencing Court [2009] HCA 4; (2009) 237 CLR 501

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683

Nathanson v Minister for Home Affairs [2022] HCA 26; (2022) 276 CLR 80

R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board [1965] HCA 50; (1965) 113 CLR 228

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6

Western Australian Municipal, Administrative, Clerical and Services Union v The Construction, Forestry, Mining and Energy Union of Workers & Ors v (Not Applicable) [2025] WAIRC 00188; (2025) 105 WAIG 592

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

- The appellant claims that he was unfairly dismissed on or about 19 July 2024 from his position as a Conservation Employee of the respondent. The appellant's dismissal followed the completion of a disciplinary process. An application alleging that the appellant was unfairly dismissed from his employment was filed on 19 August 2024. The application was the subject of two conciliation conferences, the first of which was held on 26 November 2024 and the second was held on 11 February 2025. The matters in dispute were not resolved through conciliation. However, at the conciliation conference on 11 February 2025 it would appear, and it was common ground, that there was some discussion between the parties at the conciliation conference as to steps to be taken in order for the matter to be heard by the Commission. Resulting from that, the learned Commissioner through an email from her Associate to the parties, issued directions for the future conduct of the matter, the material terms of which were as follows:
 - By 21 February 2025, the applicant to file an application seeking leave to amend the *Form 2* filed on 19 August 2024 (**Application to Amend**).
 - By 28 February 2025, the respondent to file their response to the Application to Amend.
 - Unless the Commission determines otherwise, the Application to Amend will be determined on the papers.
- On 21 February 2025 a Form 11 Notification of Representative Commencing to Act was filed, placing the conduct of the appellant's claim in the hands of experienced industrial relations and employment law lawyers. The appellant was formerly

represented by a union acting as his agent. At the same time, an application to amend the application was also filed. In the application to amend, the background to the application and the reasons in support of the application were set out as follows:

At the conference held in this matter on 11 February 2025:

1. the Commissioner suggested that the applicant amend his application;
2. the applicant responded that he would be prepared to amend his application if required;
3. the respondent indicated that it would not likely object to the applicant amending his application.

Following the conference on 11 February 2025, the Commission issued directions by email which, among other things, directed the applicant to file an application seeking leave to amend his application by 21 February 2025.

Now, in accordance with the direction of the Commission, the applicant seeks leave to lodge the **attached** amended application.

Leave should be granted by reason of:

1. the positions that the Commission, applicant and respondent took at the conference in relation to the amendment of the application;
 2. the amendments are made early in the proceeding and unlikely to cause any prejudice to the respondent;
 3. the amendments are consistent with the purpose and effect of ss. 26(1)(a) and 27(1)(l) and (v) of the Act.
- 3 The proposed amendment to the claim was not in any sense minor. The proposed amendments constituted a substitution of the applicant's original claim with an entirely recast claim. The application to amend was opposed by the respondent.

The Commission's decision

- 4 In a decision made on the papers, as foreshadowed by the directions, the learned Commissioner refused the appellant's application to amend his claim. In doing so, she found and concluded as follows:
- (a) That as to ground 1, reference cannot be made to what was said and done at a conciliation conference given the private and confidential nature of those proceedings, which are conducted on a without prejudice basis;
 - (b) As to the second ground in relation to prejudice to the respondent, analogously with the principles discussed by the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51, prejudice to a party caused by delay will weigh against the application to amend. The mere absence of prejudice is not a basis to grant an amendment;
 - (c) That as to prejudice to the respondent, it was accepted that granting the amendment would lead to additional time and expense to be incurred by the respondent to amend its response. Further, that significant aspects of the proposed amended claim were ambiguous, prejudicing the respondent's capacity to know the case to be made against it;
 - (d) That the respondent's contentions that the proposed amended claim in part was inconsistent with the appellant's response to aspects of the disciplinary process was to a degree accepted;
 - (e) To the extent that the appellant relied upon ss 26(1)(a), 27(1)(l) and 27(1)(v) of the *Industrial Relations Act 1979* (WA) the appellant failed to establish the reasons why the Commission should exercise its discretion to grant the amendment sought. Further, the appellant did not put any evidence before the Commission as to how the allowance of the amendment to the claim would be consistent with these statutory provisions; and
 - (f) In the end, the appellant had failed to satisfy the Commission that there was demonstrable merit in support of the proposed amended claim, particularly in the absence of any evidence advanced to support it.

The appeal

- 5 The appellant has sought to challenge the learned Commissioner's decision on a number of grounds. Those grounds are as follows:

Grounds

The Commission was wrong in law, acted on wrong principle, or otherwise erred in deciding to dismiss the application to amend (decision at [29]-[30]). In particular, by:

1. denying the Appellant procedural fairness in determining to proceed to deal with the application to amend 'on the papers' in the absence of an oral hearing or seeking submissions, evidence or information from the Appellant in reply to the Respondent's response, which denied the Appellant a reasonable opportunity to present his case in reply to the response and in support of the application to amend;
2. further to Ground 1, constructively failing to exercise jurisdiction by failing to consider whether to deal with the application to amend otherwise than 'on the papers' (including per direction 5 of the **directions** issued on 11 February 2025) or failing to give reasons for so determining;
3. further to Grounds 1 and 2, finding that it was an abuse of process for the applicant to rely on what was said at conference in support of the application to amend (decision at [15]), and failing to take that material consideration into account, including because:
 - (a) at a conference there may be both conciliation functions and arbitration functions performed by the Commission (s.32A);
 - (b) arbitration functions conducted at a conference are public and are not, in the absence of an order, private (or confidential or 'without prejudice') (s.27(1a));

- (c) when the conference did not resolve the matter by conciliation and the Commission was dealing with the giving or making of directions relating to the application to amend, the Commission was performing arbitration functions (s.32(4), (6), (8)) (directions 2 to 7);
 - (d) contrary to s.32(4), the Commission prefaced the directions with a preamble detailing the Respondent's without prejudice offer of settlement rather than a summary of the circumstances at conference that led to the Commission giving or making the direction that the Appellant lodge the application to amend (per direction 3);
 - (e) the application to amend required the Appellant to refer to and rely on the circumstances that led to the Commission giving or making the direction that the Appellant lodge the application to amend (regs.18(2)(b) and (c) of the *Industrial Relations Commission Regulations 2005*);
4. further to Grounds 1 to 3, otherwise:
- (a) finding, acting on wrong principle, giving excessive weight, or taking into account irrelevant considerations, namely, that the Respondent would be prejudiced by being required to:
 - i. allocate costs and resources to amend its response to the primary application (decision at [21]), including when such costs and resources would be nominal;
 - ii. seek particulars from the Appellant prior to amending its response (decision at [22]-[23]), including when the Respondent had not written to the Appellant seeking any particulars, and to the extent particulars (or further amendment) were required there were mechanisms available under the Act and the Regulations for that to occur;
 - (b) constructively failing to exercise jurisdiction by failing to give proper consideration to, or proper reasons for accepting, the Respondent's allegation that the Appellant was attempting to pursue the proceedings in a way that was inconsistent with his response to the allegations (decision at [24]);
 - (c) finding, acting on wrong principle, giving excessive weight, or taking into account an irrelevant consideration, namely, that the Appellant had not provided any evidence (decision at [27]-[28]), including when neither the directions or reg.18 specified any requirement for the Appellant to provide evidence at the stage of lodging the application to amend, and even if there was a need for evidence, there were mechanisms under the Act and the Regulations for that to occur;
5. further to Grounds 1 to 6, arriving at a decision that was unreasonable or plainly unjust and resulted from the Commission failing to properly carry out the statutory duty it was purporting to perform.
6. Given that the decision of the Commission was a 'finding', being a decision, determination or ruling made in the course of proceedings that did not finally decide, determine or dispose of the matter to which the proceedings related, then, by s 49(2a), an appeal does not lie from such a finding, unless the Full Bench can be persuaded that the matter is of such importance, that in the public interest, the appeal should lie. Whilst the parties to the appeal referred to this issue as 'permission to appeal', it is noted that this is a concept relevant to appeals under the *Fair Work Act 2009* (Cth), which is foreign to appeals to the Full Bench in this jurisdiction under s 49 of the *Act*. As to s 49(2a), the appellant contended that in addressing this matter, the appeal was of such importance that it should lie, on the following bases:

Public Importance

To the extent s.49(2a) is engaged, the matter is of such importance that, in the public interest, an appeal should lie, including because:

1. as per Grounds 1 to 2, the decision involves a serious and fundamental denial of procedural fairness by the Commission failing to afford the Appellant a fair hearing, and it is in the public interest that the application to amend be determined according to law;
 2. as per Ground 3, the decision raises matters of general importance relating to the proper conduct of a conference, the issuance of directions at a conference, and the manner of dealing with an interlocutory application initiated by a direction of the Commission at a conference, and it is in the public interest for Full Bench guidance on these matters;
 3. as per Grounds 3 and 4, the decision involves the Commission making adverse findings against the Appellant in respect to matters in which he was not heard and did not warrant the dismissal of the application to amend, and it is in the public interest that these matters be determined according to law;
 4. of the matters alleged by Ground 5; and
 5. if the decision is not quashed, the Appellant will be denied the opportunity to advance the primary application in amended form which, having been directed to seek leave to do so by the Commission, he ought properly be permitted to advance.
7. As to the relief sought by the appellant it is as follows:

Relief Sought

The Appellant seeks order to the effect that:

1. Permission to appeal be granted and the appeal be upheld.
2. The decision and order the subject of the appeal be quashed.
3. The application to amend be granted or remitted to a different member of the Commission for redetermination.

4. The primary proceeding be reallocated to a different member of the Commission (which may be the same different member the subject of order 3).
5. Such other orders as the Full Bench deems suitable.

Contentions of the parties

Ground 1

- 8 As to this ground the appellant submitted that the learned Commissioner erred and denied the appellant procedural fairness in proceeding to hear the matter on the papers without an oral hearing. It was submitted by the appellant that given the response of the respondent, this should have prompted the learned Commissioner to invite further information from the appellant. In reliance on cases including *Nathanson v Minister for Home Affairs* [2022] HCA 26 and *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; (2005) 225 CLR 88, the appellant contended that he was denied an opportunity to present evidence or make submissions on issues that required consideration. This was necessary, according to the appellant, to afford him a fair hearing.
- 9 Ultimately, the appellant submitted that given the grounds for opposition to the proposed amendment to the claim, especially the assertion of the respondent that the appellant was seeking to impermissibly rely on matters raised in a conciliation conference that were confidential, this warranted further inquiry by the Commission.
- 10 In summary, the respondent submitted that there was no denial of natural justice. The submission was that the obligation on the Commission was to afford the appellant a reasonable opportunity of putting its case (*Davie v Manuel* [2024] WASCA 21; (2024) 107 MVR 147 at [88]) which the Commission did. It was contended that it is uncontroversial that the appellant, being represented by an experienced industrial practitioner, agreed with the programming directions issued by the learned Commissioner, in particular that the matter be determined on the papers. The respondent further submitted that it is at least inferred, from the directions and the learned Commissioner's reasons at [28], that if any evidence was to be put on in support of the application to amend, then it would accompany the application.
- 11 Furthermore, the respondent filed its material on 24 February 2025 and despite this, and the issues raised by the respondent, the appellant did not seek to reply or otherwise make an application that the matter not be heard on the papers, but rather orally. This was especially so on the respondent's submissions, given by that time, an experienced legal practitioner was representing the appellant.
- 12 It was further submitted in this context, that given that none of the above occurred, the inference is open to be drawn that the appellant simply chose to await the outcome of the Commission's decision, and then to complain of a denial of procedural fairness if the decision did not go his way.
- 13 A number of other matters were raised. First, the appellant chose not to put on any evidence explaining the very substantial substituted grounds which he sought, and the withdrawal of previous admissions that he had made. This was in the context of a long period of time elapsing after the statutory 28 day time limit to file an unfair dismissal claim had expired, and after two conciliation conferences before the Commission had been held. Second, it was also submitted by the respondent that the three grounds relied upon to amend the application could never support the terms of the amendment that was actually sought. What may or may not have been said in the conciliation conference is not supportive of any application to amend. The second point, that being the absence of prejudice to the respondent, would not positively support the grant of leave to amend. Finally, reference to the statutory provisions was, in reality, no reason at all to support the application to amend.

Ground 2

- 14 As to this ground, the appellant contended that the learned Commissioner failed to properly consider whether to continue to hear the matter on the papers, and in any event, failed to give reasons for this. The appellant submitted that the learned Commissioner's failure to consider this matter, constituted a denial of procedural fairness: *K-Generation Pty Limited v Liquor Licencing Court* [2009] HCA 4; (2009) 237 CLR 501; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6.
- 15 The respondent submitted that this ground appears little different to ground 1. In any event, the respondent submitted that the learned Commissioner was under no obligation to act as the appellant submitted. There was nothing in the directions which would require her to do so. Furthermore, whilst the learned Commissioner could have conducted an oral hearing, in the circumstances, by not doing so, this could not be regarded as a constructive failure to exercise jurisdiction as contended by the appellant. As to the alleged failure by the learned Commissioner to give reasons for dealing with the matter on the papers, the respondent submitted that there was no obligation to do so, as that was envisaged by the direction that she made, and as was agreed by the parties. The respondent submitted there was no merit in this ground of appeal.

Ground 3

- 16 In relation to this ground, the appellant submitted that the learned Commissioner erroneously referred to the confidentiality of the conciliation conference proceeding, when, by the time the future hearing of the matter was discussed at the conference, conciliation having failed to resolve the matter, the Commission was engaging in an arbitral function. It was submitted that this is particularly so, in circumstances whereby s 32A of the *Act*, the Commission may exercise conciliation and arbitration powers interchangeably.
- 17 Accordingly, it was submitted that contrary to the contentions advanced by the respondent, there was no abuse of process or breach of confidentiality in the matter at first instance.
- 18 Concerning the matters raised at the conciliation conference, the respondent contended that this ground must fail as the appellant put on no evidence as to what was said at the conciliation conference, to establish any other specific issue that he now asserts. Bare submissions from the bar table fall far short of establishing any merit in this ground, according to the respondent's submissions. The respondent further contested the appellant's submissions that the matters raised in the

conciliation conference were not confidential and without prejudice, which, in any event, it could not meet without both the respondent and its solicitor breaching that very same confidentiality. Given the assertions made by the appellant in this respect are challenged, the respondent submitted there can be no acceptance of them without evidence and a proper examination: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228.

- 19 More importantly, the respondent submitted that there is simply no evidence before the Full Bench as to the alleged impugned statements, nor the context in which they were made. Furthermore, there was no evidence before the Full Bench as to the alleged 'suggestion' by the learned Commissioner in relation to an application for leave to amend, or the later suggestion of a 'direction' that was given in this respect. As to the alleged utterance of the respondent, that it would 'not likely object', even if this was said, the respondent submitted that it would be meaningless, without the context in which such a matter was raised, especially the nature of any proposed amendment to the application.
- 20 As to the appellant's suggestion that whatever may have been said at the conference in these regards, was in the context of arbitration, the respondent disagreed with this submission. It submitted that the sorts of matters alleged to have been discussed could relate to future preparations for arbitration or they may not do so. Such discussions may take place in the context of a negotiated settlement of a matter, which would plainly be a part of the conciliation process. It was submitted that it cannot be concluded at all, especially in the absence of any evidence, that even if such comments were made at the conciliation conference, then they were made on an unrestricted, non-confidential and not on a without prejudice basis. In this respect too, it was contended by the respondent that the general approach of the Commission is that matters raised and discussed in conciliation conferences remain confidential, and this is something that the Full Bench can take judicial notice of.
- 21 Ultimately, the respondent submitted that regardless, none of the issues raised by the appellant go to a question of principle, rather, they raise matters of evidence. The appellant's reference to reg 17 of the *Industrial Relations Commission Regulations 2005*, seemingly to restrict what was necessary for the appellant to raise as grounds, was misconceived. The respondent submitted that nothing in reg 17 has that effect, and in any event, the facts and circumstances supporting the application to amend would necessarily involve why the need to amend in the terms applied for was necessary, as opposed to the original claim; why the application was not framed in the matter sought originally; why there was such a delay in seeking leave to amend; and why the appellant should be able to withdraw any admissions that he made during his disciplinary process.

Ground 4

- 22 This ground contended that the learned Commissioner placed excessive weight on the alleged prejudice to the respondent if the application to amend was granted. This related first, to assertions of costs and resources to be incurred by the respondent in circumstances where the appellant submitted that any such costs and resources were nominal, and would be borne by the State. Furthermore, any need by the respondent for particulars of the amended claim would be able to be progressed using existing procedures under s 27(1) of the *Act* and reg 22 of the *Industrial Relations Commission Regulations 2005*. It was submitted that this was not a sound basis to refuse the amendment.
- 23 It was also submitted by the appellant that the respondent's assertions, accepted by the learned Commissioner, as to alleged inconsistency between aspects of the proposed amended claim and the appellant's response to parts of the disciplinary allegations were without substance. It was submitted that the respondent did not advance any detail in connection with this, or how it may have affected the appellant's claim.
- 24 Additionally, the appellant contended that there was no obligation on him to support his application with evidence. This was not required by either the directions themselves or reg 22 of the *Regulations*.
- 25 As to prejudice, the respondent contended that it was clear the prejudice it may suffer. In responding to a completely substituted claim, it would need to file a significantly amended response, especially given the deficiencies in the proposed amended claim. As to costs, there was no merit to the appellant's suggestion that the increased cost to the State would be immaterial. As to the nominal costs assertion, there was no foundation advanced by the appellant in support of this. It was accepted that the prejudice to the respondent may be outweighed by other factors, however, in the absence of the appellant putting anything before the learned Commissioner in relation to the reasons for the amendment, including an explanation for the delay, any prejudice that he may suffer if the application to amend was not granted, then ultimately, nothing favoured the proposed amendment.
- 26 As to the alleged failure of the Commission to give proper consideration to the respondent's assertion that the appellant in the proposed amended claim, was seeking to progress the matter inconsistent with his original response to the disciplinary allegations, the respondent contended this was without substance. Having regard to the learned Commissioner's reasons, the respondent said that at [24], she noted this but at [25] of her reasons, she was not persuaded as to any alleged prejudice arising from any such inconsistency. For these reasons, the respondent contended that this was not a matter that weighed against leave to amend being granted. Therefore there could be no error.
- 27 As to the appellant's allegation that there was no obligation on him to file any evidence of his application to amend, the respondent contended that there was a clear inference from [28] of the learned Commissioner's reasons (see AB19) that in order to support his application, it was open for the appellant to file evidence for the Commission to consider. It was submitted that the appellant's failure to do so, meant that ultimately, his application to seek leave to amend was bound to fail, and no oral hearing would have remedied that deficiency.

Ground 5

- 28 Finally, the appellant submitted that in addition to the matters in grounds 1 to 4 above, the exercise of the Commission's discretion in refusing the application to amend miscarried because the decision was plainly unreasonable or unjust.
- 29 The respondent submitted that this ground could not succeed. The learned Commissioner was exercising a discretion, and her discretion was applied in accordance with well-established principles. The failure of the appellant to substantiate his

application to amend in the manner contended by the respondent in response to the other grounds of appeal above meant ultimately, the application was bound to fail.

Public Interest

- 30 As to the public interest, the appellant contended that the appeal raised matters in relation to a denial of procedural fairness; the proper procedures and processes to be adopted by the Commission at a conciliation conference regarding the future hearing of the matter, and how interlocutory applications should be dealt with.
- 31 On the other hand, the respondent submitted that the matters raised by the appellant do not give rise to any special point(s) of principle or matters of public interest.

Consideration

- 32 In the case of an appeal against a finding, the resolution of whether the matter is of such importance that in the public interest the appeal should lie, depends on the nature of the issue in dispute. In this case, it was a routine application to amend an application to the Commission. The learned Commissioner made directions as to how that matter should be progressed, which were unremarkable. As to what may or may not have been said in the conciliation conference, and the context of those matters, the Full Bench is unable to delve into what may or may not have been discussed before the Commission, at least based on submissions from the bar table. No evidence was put before the learned Commissioner to establish the matters he now relies on, and it is not possible for the Full Bench to explore them on this appeal.
- 33 Moreover, and importantly, matters of practice and procedure, which the matter and decision at first instance were, are not usually of such importance that in the public interest an appeal would lie. In *Hammersley Iron Pty Ltd v Amalgamated Metal Workers' and Shipwrights Union of Western Australia and Ors* (1989) 69 WAIG 1024 the Full Bench had before it an appeal from an order made by the Commission for the discovery of documents in the course of dealing with an industrial matter. As such an order is also a 'finding', it was necessary in that appeal for the appellant to establish that the matter was of such importance that an appeal should lie. In a unanimous decision, as to this issue, the Full Bench observed at 1024-1025 as follows:

...Merely because the documents involve the respondent company and a government, does not *ipso facto* make the matter of such importance that in the public interest an appeal should lie. In other words, the matter is not of that importance.

It would, of course, be unusual for an interlocutory matter to fit that category. That is not to say that this would not occur from time to time.

We will not attempt to define "public interest", which has a meaning which is quite obvious, although it has been judicially defined in other contexts from time to time [see *R. v. Sussex Confirming Authority ex parte Tamblin & Sons Brewery (Brighton) Ltd* (1937) 4 All ER 106 and *Woods v. Cinematograph Films Licensing Authority* (1978) 1 NZLR 851 (SC) per McMullin J. at 857].

As to importance, the matter is really an appeal against a normal sort of order for discovery. Thus, in our opinion, the matter is not of such importance that in the public interest an appeal should lie. We should also observe that for those reasons we are not called upon to decide whether the documents were relevant.

There is another reason also, even if section 49(11) did not exist, why this appeal would fail. The High Court has recently said that an appellate Court will exercise particular caution in undertaking to review a decision on a matter of practice or procedure. The question of injustice flowing from the order appealed from, according to the High Court, would generally be a relevant and necessary consideration. No injustice was caused to the appellant from the decision of the primary judge, in the case before the High Court, when he allowed complex questions of disputed facts to go to trial [see *Contender 1 Ltd v. LEP International Pty Ltd* (1988) 63 ALJR 26 (HC)].

As to the words "practice" and "procedure", according to Lord Westbury LC in *Attorney General v. Sillem* (1862-64) 10 HLC 704 at page 723 [Minister for Army v. Parbury Henty & Co Pty Ltd (1945), 70 CLR 459, per Latham C.J. at page 489], the common and ordinary sense of "practice" is "the rules that make or guide the *cursum curiae*, and regulate the proceedings of a cause within the walls of the Court itself".

"Procedure" has a wider meaning. "Procedure in a suit includes the whole course of practice, from the issuing of the first process by which the suitors are brought before the Court to the execution of the last process on the final judgment" - per Erle C.J. in *Attorney General v. Sillem* (1863) 2 H. & C. 431, at 627. In the appropriate context it comprehends all steps necessary to be taken in litigation for the establishment of a right in order that the right may be judicially recognised and declared in such manner as will enable the party asserting the right legally to enjoy it; it covers not only the acts of the judges of the Court, but also the acts of the officers of the Court which are necessary to give effect to judicial pronouncements". [White v. White (1947) ALR 342, *per cur*, at page 344]. This was clearly the review of the matter of practice and procedure as defined. There was no or no sufficient suggestion that there was any injustice in the order appealed against, sufficient to require our interference.

- 34 The above may be contrasted to the circumstances where an important matter of principle arises, as was the case in *Australian, Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801. In that case, the decision appealed against was an interlocutory order for general discovery by the union in proceedings where the union was seeking to be made a respondent to a number of awards, which was opposed by the employers. The matter of importance was consideration for the first time, of the scope of s 27(1)(o) of the *Act*, and whether orders for general discovery should be made by the Commission.
- 35 Another matter of importance in *Burswood* was whether the order for discovery should include confidential documents, and the degree to which such material may be prejudicial to a party or a third party, none of which issues had been authoritatively dealt with by the Full Bench or the Industrial Appeal Court. The Full Bench decision established an important principle in

relation to applications for discovery in proceedings before the Commission, and has been relied on since as a key authority in relation to applications for discovery and inspection. We mention this case to illustrate that there needs to be something of particular substance to satisfy the public interest criterion for the purposes of s 49(2a) of the *Act*, especially when appeals against interlocutory procedural decisions are being heard.

- 36 No such issues arise in this matter. It turns on its own facts. There is no injustice which arises. Nor is there any apparent procedural unfairness. A party is entitled to a reasonable opportunity to put its case, not an endless one. The application to amend was brought long after the dismissal of the appellant and after two conciliation conferences. There was no explanation for the delay. To that extent, the learned Commissioner's reference to *Malik* was not inapposite. There was no explanation as to why the claim as filed initially was inadequate or would not have properly advanced the appellant's case.
- 37 There was no explanation as to any prejudice to the appellant if the amendment was not made. All the learned Commissioner had before her from the appellant was what was in the application to amend, set out at [2] above. As noted earlier in these reasons, the proposed amendment was not minor; it constituted a complete recasting of the appellant's claim. The scope of the proposed amendment or the need for it, was not explained. To an extent, it also involved a partial departure from the acceptance by the appellant of some factual findings of the respondent arising from the disciplinary process, and whether they constituted a breach of discipline, none of which were contested in the unfair dismissal claim as originally filed. These were new matters.
- 38 Proceedings may be determined on the papers under reg 32A of the *Regulations*, which the learned Commissioner indicated she would do. There was no objection to this course. Both parties were represented by experienced legal practitioners. The original application was also prepared by experienced industrial relations practitioners. This is not a case where the appellant was originally unrepresented. In making the application to amend, it was open for the appellant to raise any issues he saw fit in support of the application. The appellant was on notice by the response filed by the respondent, of the issues that it intended to raise in opposition to the appellant's application to amend. There was no request by the appellant to be further heard by the Commission or alternatively, to put on further material in support of the application. Ultimately, the learned Commissioner was entitled to proceed to deal with the matter based on what was before her. The appellant appeared content to leave the matter to the learned Commissioner to decide the application, which she did.
- 39 As the decision at first instance was a discretionary decision, it is trite that the appellant needs to establish error of the *House v The King* ([1936] HCA 40; (1936) 55 CLR 499) kind. Furthermore, in the case of an appeal against a procedural discretionary decision, an appeal court such as the Full Bench, will generally exercise greater restraint than when considering an appeal against a decision determining substantive rights between parties: *Hamersley* at 1025 and see *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; (1981) 148 CLR 150 (cited and applied in *Calhoun v Sanitaire Pty Ltd* [2002] WAIRC 07066; (2002) 82 WAIG 3186).
- 40 In any event, as an interlocutory procedural matter, there is no barrier to a further application to amend being made, if, in any subsequent application, it can be demonstrated that there are changed circumstances, or it would otherwise be in the interests of justice for the further application to be entertained. Recently, in *Western Australian Municipal, Administrative, Clerical and Services Union of Employees v The Construction, Forestry, Mining and Energy Union of Workers and Ors* [2025] WAIRC 00188; (2025) 105 WAIG 592, the Commission in Court Session, when dealing with an interlocutory application for production of documents, which had been brought on two prior occasions in largely the same terms, said at [18]-[19] as follows:
- [18] Specifically in the context of interlocutory applications, the decisions of the New South Wales Court of Appeal in *Bajramovic v Calubaquib* [2015] NSWCA 139; (2015) 71 MVR 15 and *Liu v Age Company Ltd* [2016] NSWCA 115; (2016) 92 NSWLR 679 were referred to and relied upon in the written submissions. In *Bajramovic*, Emmett JA (Leeming JA and Adamson J agreeing) held at [40]-[41], that it may be an abuse of process to re-litigate in a second interlocutory application, a matter previously decided adversely to a party. However, it may not be so, if it can be demonstrated that there has been a change of circumstances, with the overriding principle being that it must be in the interests of justice to entertain the second application.
- [19] To a similar effect, are the observations of McColl JA in *Liu* at [199], that the question of whether a second application should be permitted will depend on where the interests of justice lay. Importantly in that respect, in making that assessment, consideration may need to be given to any change in circumstances and whether matters relied upon to demonstrate a change were available to be put in the earlier proceedings.
- 41 In this matter, despite counsel for the appellant's valiant attempt to persuade the Full Bench to the contrary, we are not of the view that the matter involves a significant issue of principle or otherwise raises an issue of such importance that in the public interest, the appeal should lie. Accordingly, we would dismiss the appeal.
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2025 WAIRC 00991

**APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 77/2024 GIVEN ON 28
FEBRUARY 2025**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPELLANT
	REUBEN MOLINARI	
	-v-	
	DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	MONDAY, 15 DECEMBER 2025	
FILE NO/S	FBA 3 OF 2025	
CITATION NO.	2025 WAIRC 00991	

Result	Appeal dismissed
Representation	
Appellant	Mr D Rafferty of counsel
Respondent	Mr J Carroll of counsel

Order

HAVING heard Mr D Rafferty of counsel on behalf of the appellant and Mr J Carroll 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 –

THAT the appeal be and is hereby dismissed.

By the Full Bench
(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

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

2025 WAIRC 00961

APPLICATION PURSUANT TO S 72A

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2025 WAIRC 00961
CORAM	: CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T KUCERA
HEARD	: MONDAY, 15 SEPTEMBER 2025, TUESDAY, 16 SEPTEMBER 2025, WEDNESDAY, 17 SEPTEMBER 2025, THURSDAY, 18 SEPTEMBER 2025, FRIDAY, 19 SEPTEMBER 2025
DELIVERED	: WEDNESDAY, 3 DECEMBER 2025
FILE NO.	: CICS 3 OF 2025
BETWEEN	: TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH Applicant AND WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES First Intervenor LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) Second Intervenor CITY OF GOSNELLS Third Intervenor

Catchwords	:	Industrial Law (WA) – s 72A <i>Industrial Relations Act 1979</i> (WA) – Seeking right to represent the industrial interests of employees – Relevant principles applied – Eligibility rules – Overlapping coverage – Employee preference – Employer preference – Freedom of association – Awards and enterprise bargaining agreements – Demarcation disputes – Union representation – Industrial behaviour – Capacity to service members – Application dismissed
Legislation	:	<i>Fair Work Act 2009</i> (Cth) s 617(10B) <i>Industrial Relations Act 1979</i> (WA) s 6, s 6(ab), s 6(e), s 41, s 41(8), s 46, s 61, s 72A, s 72A(1), s 72A(2)(b), s 72A(3) <i>Industrial Relations Legislation Amendment Act 2021</i> (WA) <i>Local Government Act 1995</i> (WA)
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr L Slaney on behalf of the Transport Workers’ Union of Australia, Industrial Union of Workers, Western Australian Branch
Intervenor	:	Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA) Mr C Beetham of counsel on behalf of the City of Gosnells

Case(s) referred to in reasons:

Amalgamated Road Transport Union of Workers, Perth v Australian Workers’ Union, Westralian Branch, Industrial Union of Workers (1952) 32 WAIG 375

Burswood Resort (Management) Ltd v Australian Liquor Hospitality & Miscellaneous Workers’ Union (Unreported, WASCA, Library No 90280, 2 June 1994).

Commission’s Own Motion [2023] WAIRC 00925; (2023) 103 WAIG 1952

Hospital Salaried Officers Association of Western Australia v Civil Service Association of Western Australia (1996) 76 WAIG 1673

Local Government, Racing and Cemeteries Employees Union (WA) v City of Kalamunda & Ors [2022] WAIRC 00219; (2022) 102 WAIG 340

Local Government, Racing and Cemeteries Union (WA) v Western Australian Municipal, Administrative, Clerical and Services Union & Ors [2024] WAIRC 00349; 104 WAIG 835

Re application by City of Gosnells [2021] FWCA 4895

Re application by The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers and The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia - Western Australian Branch (1999) 79 WAIG 2998

The Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union of Workers - Western Australian Branch [2000] WAIRC 00552; (2000) 80 WAIG 4615

The Merchant Service Guild of Australia, Western Australian Branch, Union of Workers [2001] WAIRC 02020; (2001) 81 WAIG 382

Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Armadale [2011] WAIRC 00230; 91 WAIG 21

Western Australian Municipal, Administrative, Clerical and Services Union of Employees & Anor v City of Kalamunda & Ors [2024] WAIRC 01008; (2024) 104 WAIG 2551

Reasons for Decision

THE COMMISSION IN COURT SESSION:**Contents**

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- 1 The City of Gosnells employs around 22 waste collection operators. In 2018, a small group of the waste collection operators (TWU group) signed up as members of the Transport Workers' Union (TWU)¹.
- 2 Until that time, the TWU had historically had no presence at the City of Gosnells.
- 3 Indeed, since the start of the Second Elizabethan era, the State registered organisation, the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (TWUWA) had no presence in local government in Western Australia. This was because, since 1952, its rules have expressly excluded local government employees from eligibility for membership.
- 4 Rule 3(f) of the TWUWA's Rules says:

Except as hereinafter contained, this Branch shall not enrol any person as a member who is employed:

...

(f) By any City Council, Municipal Council, Health Board, Shire Council, or by any body or person acting for, under or on behalf of any of the abovementioned local governing bodies or authorities.
- 5 At the time the TWU group joined the TWU, the City of Gosnells operated in the federal industrial relations system under the *Fair Work Act 2009* (Cth). The Transport Workers' Union of Australia's (TWUA) organisers were involved in bargaining for three enterprise agreements made under the *FW Act* with the City of Gosnells covering the waste collection operators in 2019, 2021 and 2022.
- 6 On 1 January 2023, the City of Gosnells transitioned to the State industrial relations system as a result of the combined effect of:
 - (a) the *Industrial Relations Legislation Amendment Act 2021* (WA);
 - (b) the *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* (Cth);
 - (c) the Fair Work (State Declarations – Employers not to be national system employers) Endorsement 2022 (No 1) (Cth); and
 - (d) the *Industrial Relations Regulations (Consequential Amendments) Regulations 2022* (WA) amending the *Industrial Relations (General) Regulations 1997* (WA).
- 7 The City of Gosnells was one of 139 Western Australian local governments that were declared not to be national system employers.
- 8 Accordingly, from 1 January 2023, neither the TWUA nor the TWUWA has had any ability to enrol the City of Gosnells employees as members, bargain for industrial agreements or exercise rights of entry at the City of Gosnells under the *Industrial Relations Act 1979* (WA).
- 9 Some two years after the transition to the State industrial relations system, the TWUWA made this application under s 72A(2)(b) of the *Act* requesting orders that it have the right to represent the interests of employees engaged as waste collection operators at the City of Gosnells.
- 10 The TWUWA is an organisation as defined in s 72A(1). The City of Gosnells is an enterprise for the purpose of that section.
- 11 The TWUWA's application was published in accordance with s 72A(3) and the application was listed for hearing before the Commission in Court Session after the period specified in s 72A(3) had expired.
- 12 There are two registered organisations which have constitutional coverage of waste collection operators at the City of Gosnells: the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU) and the Local Government, Racing and Cemeteries Employees Union (WA) (LGRCEU). Both of those organisations intervened in these proceedings, as did the City of Gosnells as the relevant employer.

13 In its application, the TWUWA says that its grounds for seeking orders under s 72A are:

- (a) because it has members at the City of Gosnells;
- (b) because it has been party to or bargained for recent collective agreements with the City of Gosnells covering those members; and
- (c) because it represents waste collection operators in the private sector including those employees of private sector entities who contract waste collection services to local governments.

Legislative provisions

14 It is convenient to set out s 72A(1) and s 72A(2)(b):

(1) In this section —

enterprise means —

- (a) a business, or part of a business, that is carried on by a single employer; or
- (b) a business, or part of a business, that is carried on by 2 or more employers as a joint venture or single enterprise; or
- (c) activities carried on by a public authority, or part of those activities; or
- (d) a single project, undertaking or place of work;

organisation means an organisation of employees and includes the Australian Medical Association (WA) Incorporated.

(2) An organisation, an employer or the Minister may apply to the Commission in Court Session for an order —

...

- (b) that an organisation that does not have the right to represent under this Act the industrial interests of a particular class or group of employees employed in an enterprise has that right;

...

15 Section 72A(2) gives the Commission a wide discretion within the confines of the *Act's* requirements to determine whether an organisation should have the right to represent the industrial interests of employees employed in an enterprise or workplace: *Re applications by Hospital Salaried Officers Association of Western Australia and Civil Service Association of Western Australia* (1996) 76 WAIG 1673 at 1686 (*HSOA case*).

16 The applicant, in this case the TWUWA, bears the onus of establishing the orders it seeks should be made: *HSOA case*.

17 The fact that an organisation's eligibility rules do not give an organisation that right is not a barrier to the Commission making such orders, but it is an important factor, which should not be lightly brushed aside: *Hospital Salaried Officers Association of Western Australia* (1999) 79 WAIG 2998 at 3010.

18 The relevant factors which may require consideration in assessing whether orders ought to be made under s 72A were enumerated in *The Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union of Workers - Western Australian Branch* [2000] WAIRC 00552; (2000) 80 WAIG 4615 at [281]. Not all of the listed factors will be relevant to all s 72A applications: *The Merchant Service Guild of Australia, Western Australian Branch, Union of Workers* [2001] WAIRC 02020; (2001) 81 WAIG 382 at [189].

19 In this case, the following factors are relevant:

- (a) constitutional coverage and eligibility;
- (b) the established pattern of membership and award and agreement coverage;
- (c) the industrial behaviour of the organisations concerned;
- (d) discouragement of overlapping coverage;
- (e) the effect of the orders sought;
- (f) employee preference;
- (g) the interests of the employees;
- (h) the interests of the TWUWA;
- (i) the interests of the WASU and the LGRCEU;
- (j) employer preference;
- (k) the interests of the employer;
- (l) the ability to service membership;
- (m) the interests of the community; and
- (n) the advancement of the objects of the Act.

Constitutional coverage and eligibility

20 The TWUWA properly concedes that it does not have coverage in relation to waste collection operators employed by the City of Gosnells. The TWU group of employees whom it has enrolled, are not eligible for membership. The TWUWA's eligibility rule 3 is an occupational rule. It refers to:

drivers and/or loaders and/or operators and/or washers of all mechanically propelled or animal-drawn vehicles or implements or machines and their assistants, aeroplane cabin attendants, air hostesses, conductors, collectors of fares, stablemen and yardmen, employed in or in connection with the cartage, conveyance, movement or transportation of persons, goods, merchandise, wares, implements, machines, vehicles, livestock, material or matter of any kind.

- 21 As mentioned above, rule 3(f) expressly prohibits the enrolment of persons employed by a City Council, Municipal Council or Shire Council, amongst other express exclusions.
- 22 The exclusion has been in place since 15 August 1952 when the then President of the Court of Arbitration of Western Australia made an order, on the union's application, amending the Rules of the Amalgamated Road Transport Union of Workers, Perth by deleting the existing rule 3 and inserting the current rule: ***Re Amalgamated Road Transport Union of Workers, Perth*** (1952) 32 WAIG 377; ***Amalgamated Road Transport Union of Workers, Perth v Australian Workers' Union, Westralian Branch, Industrial Union of Workers*** (1952) 32 WAIG 375.

History of membership and award and agreement coverage

- 23 The TWU says that, prior to January 2023, it had an established pattern of representing the waste collection operators under its federal rules whilst the City of Gosnells operated under the *FW Act*. The evidence puts this history as commencing sometime after 2016, and most likely after 2018. It was 'around' 2016 when the first of the TWU group joined the TWU. That was Mr David Phillips. He resigned from the Australian Services Union (ASU) and joined the TWU after the *City of Gosnells Operations Centre Employees Enterprise Agreement 2016* was made in June 2016, instigated by his dissatisfaction with the subsequent introduction of rostered days off. According to Mr Phillips, but only Mr Phillips, TWU organisers started visiting the City of Gosnells not long after he joined, or in 2017.
- 24 It is likely that any visits in 2016 or 2017 were informal and did not involve any official representations to the City of Gosnells. Mr Thomas Hastings is the City of Gosnells' Manager of Organisation Performance and has been in that role since December 2015. His role incorporates human resources and industrial relations. His evidence was that he was first aware of the TWU's presence at the City of Gosnells during bargaining for the 2019 enterprise agreement, as a TWU organiser was involved in the bargaining. He has checked the City's records to see if there was any history of the TWU being present on site before 2019, but could not find anything.
- 25 In addition to Mr Phillips, four others of the TWU group, which currently totals six waste collection operators, gave evidence in the proceedings.
- 26 Mr Bradley Marshall is currently a member of both the TWU and the WASU. He did not specify in his evidence when he joined the TWU, nor what exposure he had to the TWU at the City of Gosnells, other than in bargaining from 2019 onwards.
- 27 Mr Jason Cogswell joined the TWU in 2018 or 2019. By 2018, he was aware of the TWU representing others at the City of Gosnells. He was aware that the TWU organisers Glenn Barron and his replacement Tom Brennan, would visit the site every three or four months, and they would be involved in disciplinary matters, bargaining for enterprise agreements and a dispute concerning the RDOs, but this awareness was based on what he had been told by others. Mr Cogswell did not have direct interactions with the TWU organisers.
- 28 Mr Steven Uren joined the TWU on an unspecified date when he was the subject of disciplinary proceedings commenced against him by the City of Gosnells. At the time, Glenn Barron was the TWU organiser. While Mr Uren did not say on what date he joined the TWU, he remained an ASU member until July 2018: exhibit WASU-4. He did not refer to the TWU's representation of waste collection operators or its presence at the City of Gosnells prior to his own issue arising in about July 2018.
- 29 Mr Gary Barrett did not specify when he joined the TWU, but he remained a member of the ASU until December 2018. He joined the TWU after being encouraged to do so by Mr Phillips. In cross-examination he accepted that he would not have left the ASU except for Mr Phillips' encouragement. He did not describe the TWU having a presence at the City of Gosnells prior to the 2019 enterprise agreement bargaining.
- 30 There is no dispute that the TWU's organiser, Mr Glenn Barron, was involved in bargaining for the 2019, 2020 and 2021 enterprise agreements. Aside from the wage increases provided for in each of these agreements, they were substantially 'roll-over' agreements. The TWU did not point to any particular claims which it made or strategies it employed during bargaining which resulted in any substantive changes to or improvements in the terms and conditions of employment of the waste collection operators.
- 31 Mr Brennan has been in the role of TWU organiser since November 2023. His evidence was that since that time, he has interacted with the City of Gosnells' management seven to ten times in total, including by telephone and email, with most of the contact being with Mr Uren.
- 32 Other evidence about the TWU's presence at the City of Gosnells included:
- (a) The TWU objected to the registration of the *City of Gosnells Waste Collection Enterprise Agreement 2021*;
 - (b) In July 2022, the TWU made an application to the Fair Work Commission to deal with a dispute about whether waste collection operators who work on their RDO are entitled to be paid at the overtime rate of pay for the hours worked on that day: exhibit TWU-1;
 - (c) Mr Tom Brennan acted as a support person to Mr Uren in a mediation;
 - (d) Mr Brennan visited the City of Gosnells 'one or two' times to deal with members' disciplinary matters;
 - (e) Mr Brennan had dealings with the City of Gosnells about a long service leave issue raised by Mr Uren; and
 - (f) Mr Brennan and Mr Dawson met with the TWU group from outside the fence of the depot in March 2025.

- 33 It is worth elaborating on the TWU's involvement in the objection to registration of the 2021 agreement, and the 2022 dispute about the RDO arrangement.
- 34 From the Fair Work Commission's decision dismissing the TWU's objection to the registration of the 2021 agreement (*Re Application by City of Gosnells* [2021] FWCA 4895), it is apparent that:
- (i) The TWU was a bargaining representative for the agreement; and
 - (ii) The TWU had reached an in-principle agreement with the City of Gosnells. There was no evidence that it had advanced claims in the bargaining which were not resolved by agreement;
 - (iii) After the in-principle agreement was reached, Mr Hastings wrote to the TWU's Glenn Barron advising that he planned to proceed to put the agreement to a ballot of employees, and asked Mr Barron if he consented to this. This was in the context of a Stay at Home Order having been issued by the State Government during the pandemic, although the waste collection operators continued to work normally as essential workers;
 - (iv) Mr Barron responded to Mr Hastings' email "Not a problem at all Tom.";
 - (v) The vote went ahead on 30 June 2021 and the agreement was approved by a majority of employees who voted, with a margin of two votes;
 - (vi) Two employees were on annual leave on the day of the vote. One attempted to vote after the ballot had closed;
 - (viii) The TWU opposed registration on the ground that the agreement had not been genuinely agreed;
 - (ix) Commissioner Wilson found that both employees had a reasonable opportunity to attend and vote, but for reasons of their own, did not do so; and
 - (x) At [38] of the reasons, Commissioner Wilson was critical of Mr Barron, saying that he had to be held accountable to some degree for the situation which had developed, for having said to the employer that he saw no problem with the ballot proceeding, notwithstanding the State Government Stay at Home Orders. Patently he only saw a problem when his members complained within minutes of the vote having been declared. He should have thought more carefully about the situation and the implications for his members, before responding to Mr Hastings that the ballot could proceed.
- 35 As for the TWU's application to the Fair Work Commission concerning the RDO dispute, the RDO or 9-day fortnight arrangement was approved by a majority of employees in 2016, and involved working in excess of 76 hours a fortnight in order to accrue an RDO. However, this informal agreement was not reflected in the collective agreements subsequently made in 2019 and 2021.
- 36 The City opposed the TWU's application to the Fair Work Commission on the ground that the TWU had failed to comply with the dispute resolution procedure contained in the 2021 Agreement: exhibit TWU-2. The TWU therefore discontinued the Fair Work Commission application and Mr Barron met with the City of Gosnells on 4 August 2022. At this meeting the City agreed that hours worked by waste collection operators over 76 hours in a fortnight should be paid as overtime, and it made back payments accordingly.
- 37 While at least some of the waste collection operators received a back-payment of overtime following the 4 August 2022 meeting, the RDO arrangement is now a contentious issue with no entitlement for employees to work a 9-day fortnight, or preserve a substitute day if the RDO is worked. The majority of waste collection operators want the RDO arrangement. The WASU's Senior Organiser, Paul Cecchini, described the TWU's strategy as short-sighted and resulting in a 'one-off sugar hit' at the expense of enshrining RDO entitlements in a collective agreement.
- 38 The evidence overall of the TWU's representation of waste collection operators at the City of Gosnells is confined to a period of about seven years. The evidence does not demonstrate any significant benefits the TWU has achieved for waste collection operators collectively.
- 39 As against the TWU's history of representation at the City of Gosnells, the WASU/ASU's presence at the City of Gosnells well and truly predates the TWU's presence. The TWU group were all members of the ASU for many years prior to joining the TWU. In Mr Barrett's case, for example, he joined the ASU soon after he started working at the City of Gosnells some 30 years ago.
- 40 The ASU was covered by the *City of Gosnells Waste Collection Enterprise Agreement 2014*, and each and every agreement which superseded it.
- 41 The award history relevant to the City of Gosnells is as follows:
- (a) The *Municipal and Road Board Employees (Perth City Council and Other Local Governing Bodies) No.1 of 1948 Award* covered 'Sanitary Service Workers', 'Rubbish and dust carters (horse-drawn vehicles) who actually handle rubbish', 'Motor Truck drivers on sanitary work' and 'Horse drivers on sanitary work.' The Gosnells Road Board, the predecessor of the City of Gosnells, was a respondent to this award. The LGRCEU, which was then known as the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth, was the union applicant for the award. The award was made by the Court of Arbitration of Western Australia on 16 July 1948. The TWU (then the Amalgamated Road Transport Union of Workers, Perth) was not a party;
 - (b) The *Municipal Employees (Western Australia) Award 1982* was made by the Australian Conciliation and Arbitration Commission on the application of the LGRCEU's then federal counterpart, the Federated Municipal and Shire Councils Employees Union of Australia: exhibit WASU-5. It covered 'Sanitary Service Employees' including 'Motor-truck drivers on sanitary work' and named the City of Gosnells as a respondent. The TWU initially objected to the creation of this award but withdrew its objection;

- (c) The Federated Municipal and Shire Council Employees Union of Australia amalgamated with the Federated Clerks Union and other unions in 1993, to become the ASU;
- (d) The 1982 Award was renamed in 1999 to the *Municipal Employees (Western Australia) Award 1999*;
- (e) In 2010, the LGRCEU and the WASU successfully applied for an interim award to be made in this Commission, mirroring the terms of the *Municipal Employees (Western Australia) Award 1999: Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Armadale* [2011] WAIRC 00230; 91 WAIG 21. The resulting *Municipal Employees (Western Australia) Award 2011* covered waste collection operators. The TWU was not involved in the application and was not a party to the 2011 interim award;
- (f) In 2021 the LGRCEU and the WASU successfully applied for the 2011 interim award to be made as a final award, the *Municipal Employees (Western Australia) Award 2021: Western Australian Municipal, Administrative, Clerical and Services Union of Employees v City of Kalamunda & Ors* [2021] WAIRC 00116; 101 WAIG 375. The TWU was not involved in the proceedings and is not a party to the Award; and
- (g) The LGRCEU and the WASU have since applied for, or been parties to, applications concerning variations to the *Municipal Employees (Western Australia) Award 2021* to keep it up to date and relevant: Appl 80/2023 *Western Australian Municipal, Administrative, Clerical and Services Union of Employees & Anor v City of Kalamunda & Ors* [2024] WAIRC 01008; (2024) 104 WAIG 2551; Appl 6/2024 *Local Government, Racing and Cemeteries Union (WA) v Western Australian Municipal, Administrative, Clerical and Services Union & Ors* [2024] WAIRC 00349; 104 WAIG 835; Appl 27/2023 *Commission's Own Motion* [2023] WAIRC 00925; (2023) 103 WAIG 1952; Appl 12/2022 *Local Government, Racing and Cemeteries Employees Union (WA) v City of Kalamunda & Ors* [2022] WAIRC 00219; (2022) 102 WAIG 340. The TWU has not been involved in any of these proceedings.
- 42 Outside of the City of Gosnells, in the local government industry more generally, the TWUA has had a longstanding presence and pattern of coverage of employees of private sector entities engaged in waste collection, including those who contract to local governments. Examples include Cleanaway, Veolia and JJ Richards & Sons.
- 43 The TWUWA's Secretary Mr Tim Dawson gave evidence that the TWU had been in local government waste services 'for a number of years' although he had not himself organised in the waste services industry. His evidence was that the TWU had agreements with different local government employers over the years, but he did not specify which agreements, or which years, referring only to the Cities of Melville, Stirling and Gosnells. He later accepted in cross-examination that he could be wrong about the TWU ever being party to agreements in Melville and Stirling. No such agreements were put before the Commission. Mr Dawson confirmed that the TWU had not 'gone out and campaigned to recruit or organise specifically in local government.'
- 44 Mr Dawson noted that the TWU has had organisers who were responsible for the waste services industry going back to 'about 2012', but it was unclear to what extent those organisers had been representing local government employees, as opposed to employees in the private sector waste services industry as it related to local government.
- 45 Mr Dawson was asked about his knowledge of the TWU's involvement in local government outside Western Australia. He referred to the TWU being party to one local government agreement in NSW and two agreements in Queensland, but he was not aware of any other agreements to which the TWUA or its State counterparts were party.
- 46 Mr Dawson also accepted in cross-examination, that there has been a very long-standing demarcation line in Western Australia, of direct hire employees in local government being members of the ASU/WASU or the LGRCEU and employees of contractors to local government being members of the TWU.
- 47 This unwritten demarcation line was apparently in operation when Mr Phillips first commenced employment at the City of Gosnells in 2010. His evidence was that he was a member of the TWU at the time he commenced employment with the City. He contacted the TWU to find out whether, as a TWU member, he could support the ASU's campaigns at the City of Gosnells, as the ASU was involved in bargaining at the City and some of his co-workers were ASU members. The TWU advised him to leave the TWU and to join the ASU, which he did.
- 48 Mr Dawson said that while the TWU has not run a 'major campaign' to sign up waste workers in local government, it will not now turn people away if they want to join. It is unclear when the TWU changed its approach, but Mr Phillips' discussion with the TWU about his membership occurred before Mr Dawson became the TWUWA Secretary.
- 49 Aside from the TWU group at the City of Gosnells comprising six employees, the TWU did not lead evidence of having any other waste collection operators as members who are directly employed by local government, either historically or currently. This is, of course, consistent with the fact that such employees are not eligible to join the TWUWA.
- 50 The WASU, on the other hand, has around 2,300 members employed directly by local governments. Local government employees represent around 40% of its total membership. It is involved in making between 35 and 57 industrial agreements with local governments in Western Australia each year and employs nine organisers and other officials servicing its local government employee members (see transcript p 259 and p 266).
- 51 The LGRCEU also has an undisputed lengthy history of representing waste collection operators directly employed by local governments in Western Australia. Its current Secretary, Andrew Johnson, had himself worked in various local governments, as a gardener, tree pruner and rubbish collector, before becoming an Organiser and Industrial Officer for the LGRCEU. The LGRCEU has only one member at the City of Gosnells involved in waste collection services. It was not involved in bargaining for waste collection agreements at the City of Gosnells between 2016 and 2022; but it is a party to the current agreement; has been involved in agreements for the rest of the outside workforce at the City of Gosnells; and has a distant history of representing waste collection operators at the City of Gosnells in 1993, as a party to a Classification Structure Agreement: exhibit LGRCEU-6.

- 52 In the scheme of things, it cannot be said that the TWU has a history of City of Gosnells membership of any significance at any time prior to January 2023, when it could only legitimately enrol employees employed in local government as members under its federal rules. It has no history of award coverage; its involvement in agreements is limited to three agreements in the period 2019 to 2022; and its representation of members is both small in number and short in time.
- 53 Importantly, the recent incidence of TWU membership appears to have broken what had been a longstanding pattern of the TWU staying out of local government. In *The Merchant Service Guild of Australia, Western Australian Branch, Union of Workers* at [205], the Full Bench described a union's established and exclusive industrial coverage of Fisheries Officers as being 'interrupted by an unauthorised coverage' of less than two years by the rival union, a fact which the Commission said, 'plainly militates against the applicant in this case.' Similarly in this case, the TWU's recent purported membership coverage is unauthorised, and is an interruption to a pattern. It is not itself a pattern. This factor weighs against the TWUWA's application.

Employer preference

- 54 The City of Gosnells advised the Commission that it did not have any preference as to which organisations have the right to represent the industrial interests of the employees, but that it does have a preference for fewer rather than more unions.
- 55 Mr Hastings gave evidence to the effect that until these proceedings were commenced, he considered he had a civil relationship with the TWU's organisers and officials. However, since these proceedings were commenced, his respect for the TWU has diminished. He was not asked why that was the case. However, in the course of these proceedings, the TWU filed outlines of witness evidence which made allegations to the effect that Mr Hastings disliked the TWU, that he had discriminated against employees who were TWU members, and that Mr Hastings had refused to allow the TWU on site. The TWU made no attempt to substantiate any of these allegations in its evidence. The evidence painted quite a different picture.
- 56 The way the TWUWA has conducted this case could reasonably have caused damage to its relationship with the City of Gosnells and its standing with Mr Hastings.

Employee preference

- 57 Of the 22 waste collection operators, five gave evidence to the effect that they wanted, or preferred, to be members of the TWU. A common theme of these witnesses' evidence as to why they preferred the TWU was because they saw themselves as part of the transport industry because driving trucks is a major part of what they do on a daily basis.
- 58 We discuss the evidence and competing contentions about whether the waste collection operators are properly regarded as being part of the transport industry or the local government industry under the heading "Community of Interest" below. For present purposes, it is sufficient to acknowledge that the witnesses' evidence about their preference for TWU membership stems from a sense that they *identify* as transport workers. That much can be accepted, without having to find that they work *in the transport industry*.
- 59 The TWUWA also faintly alluded to the employees' preference as stemming from dissatisfaction with the ASU's representation at the City of Gosnells. However, the evidence did not establish there was an objectively reasonable basis for anyone to have left the ASU because of poor membership servicing.
- 60 Mr Phillips was the first to leave the ASU and join the TWU. His dissatisfaction was because 'RDOs were brought in and there were no negotiations with the unions.' The RDOs started after a vote of the waste collection operators, a majority of whom voted in favour of the roster system the City had proposed. There was no evidence that the ASU was aware of the introduction of the roster system, or was in any way involved in its introduction. Mr Phillips accepted in cross-examination that he did not know whether the ASU knew about the RDO issue, and he did not make contact with the ASU about it.
- 61 Mr Uren suggested that he left the ASU because he was disappointed with the lack of support he was given when he made a complaint about his supervisor's behaviour towards him, about 14 months after he commenced working at the City of Gosnells. This would have been in around December 2015. He complained about his supervisor's behaviour to his coordinator, who organised an informal meeting between Mr Uren and the supervisor to attempt to resolve the issue. Mr Uren expected the ASU to send an organiser to support him during the meeting, but the organiser was busy on the day, and suggested that the ASU's site delegate, Mr Stanley, attend the meeting with Mr Uren instead. Mr Stanley did so. The meeting occurred and the matter was resolved by the supervisor agreeing to certain steps being taken in future, without admitting that he had misconducted himself.
- 62 Mr Uren said that he was disappointed with this representation because Mr Stanley was 'just a greenhorn,' said very little in the meeting, and the meeting was 'very short and sweet' (see transcript p 177 and p 184). Mr Uren's evidence was that he remained unaffiliated with any union until sometime in 2018, when he joined the TWU because he was facing disciplinary action.
- 63 Mr Uren's account was contradicted by the ASU's records, which showed that he did not resign his ASU membership until July 2018, at least two and a half years after the meeting that Mr Stanley attended. We also note that according to the ASU's records, Mr Uren joined the ASU in September 2015, shortly before the meeting involving Mr Stanley occurred.
- 64 Mr Wayne Wood is the WASU Secretary. His evidence was that the ASU's records show that Mr Uren availed himself of the ASU's referral service for legal advice after December 2015 as well.
- 65 We therefore give little credence to Mr Uren's evidence. Not only is his account of resigning from the ASU unreliable, but his reasons for his dissatisfaction with the ASU are unfounded. Despite being a member for only around three months, and despite the fact that the meeting he attended was an informal meeting to deal with his grievance, the ASU's delegate attended, supported him and the outcome of the meeting was favourable to him.
- 66 Mr Barrett's gripe with the ASU was that in November 2014 when he was involved in disciplinary action, he asked the ASU for assistance and the organiser at the time told him he was too busy, and could not help him. Again, the site delegate,

Mr Stanley, attended the disciplinary meeting with him. He said he felt let down by the ASU because he thought Mr Stanley was 'very green.'

- 67 However, like Mr Uren, Mr Barrett's explanation for his disaffection with the ASU was not plausible either, because the outcome of the disciplinary meeting in November 2014 was that no written warning or disciplinary action was taken against him. The outcome was favourable to him and there was no reason for him to feel 'let down.'
- 68 Further, like Mr Uren, Mr Barrett did not resign from the ASU until several years later, in 2018 and accessed the ASU's services and support in the meantime. Mr Barrett fairly conceded in cross-examination that the trigger for him leaving the ASU and joining the TWU was that Mr Phillips advised him to the effect that the TWU was better for him because he drives trucks, and that's what the TWU is about, and Mr Barrett believed Mr Phillips.
- 69 Finally, we note that several of the TWU group expressed satisfaction with what the WASU and the LGRCEU had achieved in the most recent bargaining with the City of Gosnells, expressed support for the WASU delegate Mr Stanley and support for the WASU Senior Organiser Mr Cecchini.
- 70 Accordingly, we find that even if some or all of the TWU group felt disaffection for the WASU, such disaffection was not founded in any shortcoming in the WASU's capacity, conduct or representation of the employees. The chronology and evidence overall reveal that, aside from Mr Phillips, the TWU group would not have left the ASU and joined the TWU except for Mr Phillips' active recruitment of them.
- 71 The TWU acknowledged in its written submissions at [56] that if there is no cogent or legitimate reason given for an expressed employee opinion or employee preference, no or little weight should be attached to it: *HSA case* at 1690-1691; *The Merchant Service Guild of Australia, Western Australian Branch, Union of Workers* at [197]. As we find there is no justification for any ill will or criticism directed at the WASU, this factor does not greatly advance the TWUWA's application.

Discouragement of overlapping coverage

- 72 One of the *Act's* s 6 objects is:
- (e) to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations; and
- 73 This factor self-evidently weighs against the application, particularly when considering a small cohort of around 22 people.
- 74 The TWU argued in written submissions that s 6(e) is not determinative. There is no prohibition against overlapping coverage and the word 'discourage' does not equate to 'prevent': *Burswood Resort (Management) Ltd v Australian Liquor Hospitality & Miscellaneous Workers' Union* (Unreported, WASCA, Library No 90280C, 2 June 1994) (*Burswood Resort*).
- 75 In *Burswood Resort*, in the context of an application to alter a union's rules, Anderson J (with whom Rowland J agreed) rejected the suggestion that the object in s 6(e) is to 'be made sublime and be pursued to the exclusion of' all other of the *Act's* objects:

The proposition that the requirement to discourage overlapping so far as practicable must necessarily prevent the Commission from reaching the required state of satisfaction whenever there will be a substantial overlap of eligibility is open to the further objection that it elevates s6(e) beyond its true function. The subsection is plainly not intended to have the effect of a prohibition against a grant of dual coverage. The expression "...and to discourage, so far as practicable, overlapping..." in its very terms indicates that this particular object may yield to other legitimate objects from time to time and as occasion demands. The word "discourage" is not synonymous with "prevent" and the phrase "discourage, so far as practicable" allows us much room for evaluation and judgement. That the evaluation and judgement may even, in appropriate cases, properly lead to the grant of complete dual coverage is anyway shown by the terms of s55(5) itself. Reference to the provisions of the subsection make it clear that the Full Bench is entitled to be satisfied that there is "good reason" to allow a rule change even when it will enable the applicant to enrol all of the persons eligible to be enrolled in another registered organisation. The section plainly contemplates an exercise of jurisdiction to grant an application notwithstanding that to do so will bring about complete dual coverage.

- 76 The TWUWA argued that the presence of multiple unions has not hindered bargaining either at the City of Gosnells (when the TWUWA was involved) or at other local governments, for example where the Electrical Trades Union or the CFMEU have been party to bargaining. It argued that organisations had cooperated well and will continue to do so.
- 77 We readily accept that there is a possibility of multiple organisations cooperating. However, even Mr Dawson told the Commission that when multiple unions are involved in bargaining 'it's not as easy, in some respects' (see transcript p 26). His evidence, and the evidence of other union officials, was that the challenges with bargaining increase with the number of parties involved. Mr Dawson referred to bargaining being held up when numerous unions are involved and one or more feel they have to be the more aggressive.
- 78 In this case, past cooperation between the TWU and the ASU is not a good predictor of the future because the TWU's recent conduct is antagonistic and incompatible with cooperation. These proceedings were commenced without prior notice to the WASU or the LGRCEU. They were commenced without any prior approach by the TWUWA to the WASU and the LGRCEU to alert those organisations as to any reasons why the TWU should represent employees at the City of Gosnells, by reference to those other organisations' capacity or conduct or employee preference.
- 79 During the hearing, Mr Dawson told the Commission that whether or not this application is approved, the TWU will in any event seek to alter its rules and enrol waste collection operators across any and all local governments.
- 80 Conditions have changed. The environment is naturally now hostile. Permitting dual coverage will increase competition for members and obviously lead to a risk of further demarcation disputes. This factor weighs against the TWUWA's application.

Interests of the employer

- 81 Granting the TWUWA's application will cause some disadvantage or inconvenience to the City of Gosnells' interests, because it will have to deal with more unions in relation to the same categories of employees. In *Burswood Resort*, Anderson J observed that this kind of inconvenience 'needs no expiation.'

The interests of the employees

- 82 The LGRCEU submitted that the interests of the employees are best served by representation by an organisation with a depth of experience within the local government industry. The TWUWA did not address or rely on this factor, beyond what has been discussed under the heading 'Employee preference.'
- 83 The TWUWA did not demonstrate that it had any particular strategy to advance the interests of waste collection operators working for local government. Its absence from the history of award making and the maintenance of award conditions, is such that it has not made any meaningful contribution to bettering the terms and conditions of employment for local government employees.

Interests of the TWUWA

- 84 The TWUWA did not address or rely on this factor. It did not seek to advance any particular interest on its part which would be advantaged by the granting of the application or disadvantaged by disallowing it. It is difficult to identify any significant interest given:
- (a) The small number of potential members involved; and
 - (b) The confessed intention to alter the TWUWA's eligibility rule.

Interests of the WASU and the LGRCEU

- 85 As the LGRCEU pointed out in its written submission, the WASU and the LGRCEU, as organisations who have the existing right to represent waste collection operators, have an interest in preserving their coverage and minimising further duplicated coverage. As Mr Wood succinctly put it, the WASU's membership density is not helped by competitive unionism.

Community of interest

- 86 In its submissions, the TWUWA argued that the issues waste collection operators face are in common with transport workers, and more aligned with the transport industry than the local government industry.
- 87 It should be pointed out that waste collection operators do not exclusively drive trucks nor exclusively transport waste. The evidence was that on any day, some waste collection operators perform residential bin runs, which involves driving a one-arm heavy-rigid vehicle to collect and transport waste. However, other waste collection operators are engaged in green waste verge collections, during which an employee may be engaged primarily to operate a loader. This is Mr Barrett's main duty currently. Mr Uren's main duties currently relate to waste management in the City's parks and recreation areas.
- 88 Having said that, it is uncontentious that waste collection operators are often required to deal with issues like road safety, traffic, mechanical breakdown and fatigue. Many of these issues are common to other workers in the transport industry, to a greater or lesser extent depending on the nature of the particular work and who the employer is.
- 89 However, they are not issues that are unique to transport workers, nor do they lack commonality with other local government employees. Rangers and road and infrastructure maintenance employees likely also deal with road safety and traffic issues. Parks and gardens employees likely deal with plant and machinery maintenance and breakdown issues. Any employee who operates plant or equipment for the duration of a shift will face fatigue issues.
- 90 As Mr Cecchini confirmed during cross-examination, waste collection operators are not alone in being required to have a heavy-rigid vehicle licence. This is often a requirement of employees in parks and gardens and engineering departments of local government.
- 91 Local governments employ people of various occupations for a diverse range of roles, but that does not detract from the fact that those employees are engaged in the local government industry. The local government industry is a third tier of government. It is not private sector employment.
- 92 One of the most obvious factors pointing to a commonality of interest with local government and a lack of commonality with transport workers generally was the fact that local government employers and employees are in the State industrial relations system. Mr Brennan's evidence as to his dealings with members in waste collection focused on private sector employers who operate in the federal industrial relations system under the *FW Act*. This is of some significance because arguably one of the most important functions of an employee organisation is its participation in the system for setting terms and conditions of employment and collective bargaining.
- 93 Relatedly, the awards underpinning the terms and conditions of employment of the waste collection operators at the City of Gosnells are local government industry instruments, not transport industry instruments. Currently, in the absence of an industrial agreement, the *Municipal Employees (Western Australia) Award 2021* would apply to the waste collection operators. When the City of Gosnells operated under the *FW Act*, it was the *Local Government Industry Award 2020*.
- 94 Other aspects of the evidence which support the view that the relevant community of interest is local government, rather than the transport industry, emerged from Ms Ballantyne's evidence. Ms Ballantyne is the LGRCEU's Assistant Secretary. She spoke, for instance, about the impact of State Government policies or proposals for amalgamations of local governments, boundary changes, or changes to the *Local Government Act 1995* (WA), and the industry-wide human resource management consequences of such policies and legislative interventions.
- 95 Similarly, Mr Wood gave the example of privatisation of local government and local government services as an issue with significant implications for all employees in local government, regardless of occupation.

96 The TWUWA placed some reliance on the fact that the waste collection operators had their own collective agreement, separate from the rest of the outside workforce at the City of Gosnells, as an indication of ‘uniqueness’ or a lack of a community of interest with the local government outside workforce. It pointed to the fact that stand alone waste collection agreements existed in a handful of other local governments too. However, this fact does not take matters any further because there was no reliable or uniform evidence as to why there is a standalone waste collection agreement. In any event, the occurrence of standalone agreements for waste collection is relatively uncommon across the 139 local government entities in Western Australia.

97 The local government community of interest is greater than any transport industry community of interest.

The views of UnionsWA

98 No one informed the Commission as to the views of UnionsWA in relation to coverage of the waste collection operators at the City of Gosnells, despite the fact that the TWUWA and the WASU are both affiliated with it (the LGRCEU is not). This factor does not have relevance to the determination of this matter.

Industrial behaviour of the organisations concerned and the employer

99 There is no suggestion that the City of Gosnells’ industrial behaviour is relevant to the determination of this matter. While some of the TWU group mentioned in their evidence historical cultural and bullying issues in the waste collection services, those issues are not current.

100 The TWUWA’s industrial behaviour is relevant and weighs heavily against it.

101 The TWUWA ought to have known, from at least 1 January 2023, that it was unable to enrol the waste collection drivers. The transition of local government to the State system of industrial relations on 1 January 2023 was effected by the *Industrial Relations Legislation Amendment Act 2021* (WA), which was assented to on 22 December 2021.

102 Despite this, the TWUWA did not inform the TWU group of their ineligibility for membership until March 2025. Most concerningly, it did not tell the TWU group until after it had commenced these proceedings. The employee witnesses all confirmed that the first time the TWUWA explained its eligibility limitations to them was at a meeting that occurred at the City of Gosnells’ depot with Mr Brennan and Mr Dawson, in March 2025.

103 For nearly three years the TWUWA has accepted the TWU group’s membership dues, knowing that these individuals were ineligible for membership, and without having informed them of the fact.

104 In *Re application by The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers* (1999) 79 WAIG 2998 (*Re Application by the AWU*), the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia - Western Australia (CMETSWU) purported to enrol members over whom it had no constitutional coverage. At 3010, the Full Bench said that the CMETSWU paid little or no regard to its constitutional coverage and acted contrary to s 61 of the *Act* and observed that such behaviour weighed heavily against the CMETSWU.

Ability to service membership

105 The TWUWA argued that it was better able to service the waste collection membership because, unlike the WASU and the LGRCEU, it would not enrol supervisors and managers as members and therefore, it would not be in a position of a conflict of interest in its representation of members.

106 The WASU officials who gave evidence to the Commission frankly admitted that there was potential for a conflict of interest to arise if called upon to represent members on both sides of a workplace dispute. However, Mr Wood described how this situation is carefully managed. He said that if a member who was a supervisor or manager was supported in their actions by the employer, the WASU would not represent them. In other cases, each member would be supported by separate organisers.

107 There was no evidence before the Commission that showed that the WASU had not satisfactorily managed such a situation, or that it was an impediment to the WASU’s ability to service membership.

108 It is also possible that the TWUWA could face the same kind of dilemma if it were called upon to support two members who are on both sides of a workplace dispute. Such potential conflicts of interest are not limited to situations arising between one individual and their supervisor or manager, even though it may be accepted that disputes in a supervisor/supervisee context might more commonly arise.

109 Aside from the fact that the WASU and the LGRCEU might represent supervisors or managers, there was no suggestion that their organisers and delegates have not adequately represented members at the City of Gosnells or that they did not have the capacity to continue to do so. We are satisfied that they do have that capacity. More than that, we are compelled to acknowledge that the likes of Mr Wood, Mr Johnson, Ms Ballantyne and Mr Cecchini have committed many years of passionate and dedicated service to the improvement of the working lives of local government employees.

110 The TWUWA also submitted that it is a ‘major’ industrial organisation, has substantial resources and is well placed to service the waste collection operators. It submitted that it has ‘an experienced industrial team’ and a good track record of providing services to waste collection operators. Mr Dawson’s evidence was that the TWU has a legal team, a clerical team, a communications team, eight organisers and a senior organiser.

111 Mr Brennan said that as an organiser, he was allocated a ‘patch’ which included the waste industry, the concrete industry and regional locations. He is responsible for organising about 1000 members.

112 The TWUWA referred to its Secretary’s membership of the Road Freight Logistics Council (RFLC) as an example of its resources, might and capacity. Mr Dawson described this as a body established by the State Government to advise it on ports, rail, road and air transport. The RFLC considers the impact of the logistics network on the State’s economy, particularly imports and exports.

113 When Mr Dawson was asked how the RFLC's work related to local government, he all but admitted that the RFLC was not relevant to local government at all, because its focus was logistics in import and export activities. His response was:

Ah, well, I suppose, we talk about local roads...its really about how do we make the supply chain, import and export, more productive and safer (see transcript p 30)

114 The only potential relevance of the work of the RFLC to waste collection operators working in local government is indirect and incidental, in that local roads may be impacted by outcomes from the RFLC's recommendations.

115 Mr Dawson described the TWU as 'what I'd call a campaigning union.' He explained this meant that the TWU's focus was major change for the betterment of the whole industry. He contrasted this with a servicing union, which focuses on servicing individual members in individual workplace settings.

116 We note that none of the TWU group who gave evidence in this matter told the Commission that, as union members, they particularly valued national safety campaigns. Rather, the thrust of their evidence was that they wanted a union who was present in their workplace, for bargaining and for representation in individual matters.

117 Nevertheless, the TWUWA gave as an example of its superior ability to represent waste collection operators, Mr Dawson's evidence about the TWU's 20-year Transport Reform campaign, which resulted in amendments to the *FW Act*, implemented last year, establishing an Expert Panel for the road transport industry. We understand Mr Dawson to be referring to s 617(10B) of the *FW Act*. The Expert Panel's functions are those set out in Chapter 3B, concerning Minimum Standards for Persons in a Road Transport Contractual Chain, as well as matters relating to modern awards that relate to the road transport industry.

118 Again, it is difficult to see how this is a matter which benefits, or has relevance, to waste collection operators employed by the City of Gosnells, who are neither part of a road transport contractual chain nor covered by a modern award, let alone a modern award that relates to the road transport industry.

119 Asked in evidence-in-chief how transport reform relates to local government, Mr Dawson's answer was:

If councils decide that they want to put pressure on lowering wages of their contractors, that will also put pressure on lowering wages of waste workers that are employed in local council. So we see that that's potentially where the pressure will come through and where transport reform works. Because we're saying that no matter who you are in a supply chain, that there's an opportunity. If there's an opportunity for us to put an application into the panel to make sure supply chains are safe and sustainable and fairer, then that's where we can put applications into the panel at the Fair Work Commission: (see transcript p 28).

120 He continued by explaining that where a council engages a private contractor to provide waste services, a supply chain is created with the council at the top of the supply chain, seeking the best value for money in a tender process, with the people at the bottom of the chain, the transport company, working at marginal rates and therefore dangerous rates.

121 We understand this explanation to be, in effect, that there is very little relevance to the City of Gosnells directly employed workforce.

122 Neither of the TWUWA's officials attempted to demonstrate that they had knowledge of the federal or State awards that covered the City of Gosnells and the waste collection operators it employed, or the State system of industrial relations more generally. This is the exchange that occurred with Mr Brennan about the awards:

In relation to the previous industrial agreements that were registered in the Federal jurisdiction do you understand that those agreements when they were approved by the Commission were compared against the Local Government Industry Award? Did you know that?---No.

Did you know there was no comparison done with any transport awards, it was only a comparison done with the Local Government Industry Award?---Okay.

Did you know that?---No, that's fine. Okay.

...

And you're aware that a new agreement was registered to cover the waste workers at the City of Gosnells this year in August?---Mm hmm.

And do you know which award underpins that agreement?---I thought it would be the Waste Management Award.

If I told you it was the Municipal Employees Award is that something that would be familiar to you or not?---No, I haven't – no.

Have you ever looked at the Municipal Employees Award?---I imagine I have at some point. Yes.

Do you know which Commission made the Municipal Employees Award?---No, I don't.

(see transcript p 93)

123 This was Mr Brennan's evidence about his knowledge of the State industrial relations system under the *Act*:

You see from your evidence I drew the inference, and I put it to you, that all of the mentoring that you had was people who were operating in the Federal jurisdiction as opposed to the State. Do you agree with that?---Um, yes, that's – yeah, that could be possible. Yeah.

So my next question is given you were allocated Local Government what training were you provided with in terms of the State jurisdiction?---Well, as I said, when I – when I got my right of entries, um, right of entry cards then it was, um, I – I don't know what time then it was after that that, um, I went and done – um, sorry, done, visited the City of Gosnells, um, with the members there. Um - - -

Perhaps if I could assist you by focusing the question a little more. Were you given specific training in the difference between the Fair Work Commission matters and the State Commission matters?---Not a huge amount from memory. No.

Well, what specifically were you – what training were you given?---Well, just the difference with the Federal alluded to, um, industrial matters and the State was any State matters and – and safety matters. That was my understanding of it.

Were you told, for example, that there were differences or were you trained to the effect that there were differences between what you could do with an enterprise agreement versus an industrial agreement?---No. There was only a small amount of information on that in the initial - - -

(see transcript p 97)

124 Finally, in relation to the exercise of rights of entry under the *Act*, the only time that Mr Brennan sought to officially exercise a right of entry at the City of Gosnells, on 28 May 2024, he did so by giving the City of Gosnells notice under the *FW Act*. He said that he did not know that he needed to exercise right of entry rights under the *Act*, until after he had mistakenly given notice under the *FW Act*, and then his knowledge was only because Mr Hastings informed him of the fact. This was almost a year and a half after the City of Gosnells had transitioned to the State industrial relations system.

125 We do not mean to be critical of Mr Brennan. The impression we gleaned from the evidence was that he was put in a difficult position because the TWUWA did not ensure that he was adequately trained to represent members employed by local governments, despite knowing that local government was to be part of his portfolio.

126 All of this reflects adversely on the TWUWA's capacity to adequately service membership at the City of Gosnells.

The effect of the orders sought

127 At the commencement of the hearing of this application, the TWUWA's representative advised the Commission that the order the TWUWA was seeking was limited to 'employees covered by the *City of Gosnells Waste Collection Enterprise Agreement 2022*' but then, immediately conceded:

However, we understand that there is a subsequent agreement. But we know little about this most recent agreement. We can only assume that the classifications remain. (see transcript p 17)

128 This exposes a significant crack the in TWUWA's case. The orders the TWUWA seeks lack practical utility.

129 The fact that it is not party to the current industrial agreement, the *City of Gosnells Waste Collection Industrial Agreement 2025*, means that, by its own admission, it is unfamiliar with its terms and conditions, including its scope and classifications, although it could of course inform itself of these terms now that the industrial agreement is registered under s 41 of the *Act* and published on the Commission's website.

130 Even if s 72A representation rights orders were made, the TWUWA is not party to the current industrial agreement that covers the waste collection operators. Because it is not a party, it has no standing to enforce the current industrial agreement. Nor can it be party to a variation of the industrial agreement, or an application under s 46 of the *Act* for an interpretation of it. The TWUWA cannot effect the termination of the industrial agreement by retiring from it.

131 Even if the representation orders the TWUWA seeks are made, the TWUWA will be significantly hindered in its ability to effectively represent employees. It is also conceptually and practically inappropriate to frame representation orders which will have future effect by reference to the scope of an industrial agreement that is cancelled pursuant to s 41(8), and therefore has no current application.

132 And, as alluded to earlier, Mr Dawson told the Commission that regardless of the outcome of this matter, the TWUWA is likely to seek to change its rules to cover local government:

Let's be frank here. It may not matter what the end of this result is this week. We may do that anyway. (see transcript p 42)

133 Mr Dawson confirmed that the purpose of the foreshadowed rule change would be to enable enrolment of members for all local governments, not just the City of Gosnells. This too, undermines the utility of these proceedings.

134 Granting this application will, no doubt, risk industrial disharmony. Although the TWUWA downplayed this risk on the basis that the application does not seek to exclude any other unions from local government, the potential for disharmony was perceptible from the demeanour and words of the officials who gave evidence during the hearing of this matter.

135 This factor weighs against the TWUWA's application.

The interests of the community

136 The TWUWA did not identify any community interest that would be served by granting its application. The disutility referred to above also means that there is a lack of community interest in granting the application.

The advancement of the objects of the Act

137 The TWUWA argued that allowing the application would advance the *Act's* freedom of association objects. This submission was based on a misguided understanding of freedom of association, under the *Act*.

138 The *Act's* object s 6(ab) is:

to promote the principles of freedom of association and the right to organise; and

139 This object is directed at the freedom of individual employees to choose whether or not they wish to join a union. It is not directed at allowing employees the freedom to choose which union to join, regardless of a union's eligibility rules. In *Re Application by the AWU* at 3008, the Full Bench said:

It is trite to observe that all organisations are registered under the Act, and that all had eligibility rules which denote what employees and what industries they are able to represent (called Eligibility or Constitutional Coverage clauses).

This is, to some extent, a basis for awards coverage and the operation of s.37 of the Act. The importance of the eligibility rule is recognised by the fact that an eligibility rule cannot be altered except by authority of the Full Bench under s.62(2) of the Act. S.62(4) applies, with some modifications. The same considerations and requirements under the Act as apply to actually registering an organisation. That is an indication of the importance of eligibility rules and their inherent role in the registration of organisations.

S.6(e) of the Act also prescribes as an object the avoidance of overlapping coverage. That is also significant in the scheme of organisational coverage.

Freedom of association can only occur within the regime of registration of organisations as prescribed by the Act and is not a concept which permits unilateral or defacto organisation and/ or decisions as to coverage by members of an organisation.

The question in this matter is not one of freedom of association, but is one involving the consideration of a whole number of relevant factors. The legislation does not provide for freedom of association, removed from the eligibility rule of an organisation, as registered.

Conclusion and disposition

140 The TWUWA has not discharged the onus on it or satisfied us that the order it seeks ought to be made. The only factor in favour of the TWUWA's application is that there are a small number of employees who have expressed a preference for membership of the TWU. This is neither a sole nor a major determining factor: **Re Application by the AWU**. It is not enough to warrant an order under s 72A(2)(b) of the *Act*.

141 Accordingly we dismiss the TWUWA's application.

¹ In these reasons, TWU is used to refer to either or both of the federally registered Transport Workers' Union of Australia and/or the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch, where it is unnecessary to distinguish between them.

2025 WAIRC 01019

APPLICATION PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

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

FIRST INTERVENOR

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

SECOND INTERVENOR

CITY OF GOSNELLS

THIRD INTERVENOR

CORAM

COMMISSION IN COURT SESSION

CHIEF COMMISSIONER S J KENNER

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T KUCERA

DATE

MONDAY, 22 DECEMBER 2025

FILE NO/S

CICS 3 OF 2025

CITATION NO.

2025 WAIRC 01019

Result

Application dismissed

Representation

Applicant

Mr L Slaney on behalf of the Transport Workers' Union of Australia, Industrial Union of Workers,
Western Australian Branch

Intervenor Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
 Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)
 Mr C Beetham of counsel on behalf of the City of Gosnells

Order

HAVING heard Mr L Slaney on behalf of the applicant, Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA) and Mr C Beetham of counsel on behalf of the City of Gosnells, the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
 Chief Commissioner,

[L.S.]

By the Commission in Court Session.

COMMISSION IN COURT SESSION—Unions—Cancellation of registration—

2025 WAIRC 00987

APPLICATION TO CANCEL THE REGISTRATION OF THE BAKING INDUSTRY EMPLOYERS' ASSOCIATION OF WESTERN AUSTRALIA

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 00987
CORAM : CHIEF COMMISSIONER S J KENNER
 COMMISSIONER T B WALKINGTON
 COMMISSIONER T KUCERA
HEARD : ON THE PAPERS
DELIVERED : FRIDAY, 12 DECEMBER 2025
FILE NO. : CICS 10 OF 2025
BETWEEN : REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 Applicant
 AND
 BAKING INDUSTRY EMPLOYERS' ASSOCIATION OF WESTERN AUSTRALIA
 Respondent

Catchwords : Industrial Law (WA) – Application by the Registrar to cancel the registration of an organisation on the ground it is defunct – Relevant principles applied – Order cancelling registration made

Legislation : *Industrial Relations Act 1979* (WA) s 6(5), s 60, s 61, Division 4 of Part II, s 63, s 63(2), s 65, s 73(12), s 73(12)(b)
Industrial Relations Commission Regulations 2005 (WA) reg 75, reg 78(1)
Associations Incorporation Act 2015 (WA)

Result : Order issued

Representation:

Counsel:

Applicant : Mr J Carroll of counsel

Respondent : No appearance

Solicitors:

Applicant : State Solicitor's Office

Case(s) referred to in reasons:

The Registrar, Western Australian Industrial Relations Commission v Master Hairdressers' Association of WA, Industrial Union of Employers [2004] WAIRC 11936; (2004) 84 WAIG 2190

The Registrar, Western Australian Industrial Relations Commission v The Western Australian Branch of the Commonwealth Steamship Owners' Association, Industrial Union of Employers (Fremantle) [2021] WAIRC 00016; (2021) 101 WAIG 102

*Reasons for Decision***THE COMMISSION IN COURT SESSION:****Application**

- 1 The Registrar has commenced these proceedings under s 73(12) of the *Industrial Relations Act 1979* (WA) seeking an order of the Commission in Court Session that the respondent's registration as an organisation under the *Act* be cancelled. It is contended by the Registrar that the respondent is, for the purposes of s 73(12)(b) of the *Act*, defunct.

Grounds

- 2 The grounds in support of the application are as follows:

Grounds

5. Pursuant to section 73(12)(b), the Organisation is defunct.
6. An organisation is defunct within the meaning of section 73(12)(b) if it is no longer operative: *The Registrar, Western Australian Industrial Relations Commission -v- The Western Australian Branch of the Commonwealth Steamship Owners' Association, Industrial Union of Employers (Fremantle)* (101 WAIG 102).
7. The IR Act and the Regulations impose certain statutory obligations upon organisations registered pursuant to sections 53 and 54 of the IR Act. Relevant to this application, registered organisations have a statutory duty to report the following to the Registrar:
 - 7.1. The names, residential addresses, and occupations of the persons holding offices in the organisation must be provided to the Registrar annually as required by section 63(2) of the Act.
 - 7.2. The organisation must report on the number of members of the organisation annually to the Registrar as required by section 63(2) of the Act.
 - 7.3. The organisation must report on any changes in the holding of offices in the organisation as required by section 63(3) of the Act.
 - 7.4. Section 65(b) requires that each year the organisation must deliver to the Registrar copies of audited financial statements including a balance sheet of the assets and liabilities of the organisation, a statement of the receipts and expenditure of the organisation and a cash flow statement of the organisation. These reports must be accompanied by a statutory declaration made by the secretary of the organisation as required by regulation 79(2) of the Regulations.
8. The Organisation's lack of engagement with its statutory obligations, which is established in the **attached** statutory declaration and summarised below, has demonstrated to the Registrar that the Organisation is not presently functioning as a registered industrial organisation, has not functioned as a registered industrial organisation for many years, and it can be inferred that it is no longer capable of functioning as a registered industrial organisation for the purposes of the IR Act. On that basis, the Registrar's case is that the Organisation is defunct pursuant to section 73(12)(b).

Section 63(2)

9. Regulation 78(1) prescribes that the list of names, residential addresses and occupations of persons holding office, and a record of the number of members in an organisation, both required to be reported on by section 63(2) of the IR Act, must be filed with the Registrar during the month of January in each year. As set out in the **attached** statutory declaration, the Organisation has not submitted any required documentation for the following years: 2025, 2024, 2023, 2022, 2021, 2020, 2019 and 2018.

Section 63(3)

10. The Executive Committee of the Organisation consists of not more than 16 ordinary members as prescribed by rule 16 - EXECUTIVE. The Executive Committee of the Organisation is elected annually, with the offices elected by and from the Executive Committee. Rule 18 - NOMINATION FOR EXECUTIVE COMMITTEE prescribes that the nominations for election to the Executive Committee are called for and close in July each year.
11. Given the requirement for annual elections, the Registrar would anticipate receiving a notification of changes in the holding of offices from the Organisation, as required by section 63(3), at least once in every year. Regulation 78(3) requires that this notification be filed with the Registrar in writing within 14 days of the date of the change.
12. As set out in the **attached** statutory declaration, until 12 February 2024, the Registrar had last received correspondence from the Organisation notifying that there had been a change to the holding of offices on 1 July 2008, in which the Registrar was not explicitly informed that there had been a change to the holding of office, only a request to remove certain names of office holders as representatives of the Organisation.

Section 65(b)

13. The rules of the Organisation, at rules 3 and 26, prescribe that its financial year of ends on the last day of June in each year.
14. The IR Act prescribes at sub section 65(b) that an organisation delivers its audited accounting records to the Registrar within one calendar month after the completion of the financial audit process. The Organisation has not submitted this documentation in the following years ending 30 June: 2024, 2023, 2022, 2021, 2020, 2019 and 2018.

...

- 3 Whilst the application was initially listed for hearing on 4 December 2025, the respondent notified the Commission that it did not oppose the application. The Registrar requested, and the Commission in Court Session agreed, that the matter be determined on the papers.

Statutory provisions

- 4 Relevantly, ss 73(12) and 12(a) of the *Act* are in the following terms:

73. Cancelling and suspending registration of organisation, procedure for

...

- (12) The Commission in Court Session must cancel the registration of an organisation if it is satisfied on the application of the Registrar that —

- (a) the number of members of the organisation or, the number of employees of the members of the organisation would not entitle it to registration under section 53 or section 54, as the case may be; or
- (b) the organisation is defunct; or
- (c) the organisation has, in the manner prescribed, requested that its registration be cancelled.

- (12a) The Registrar must make an application under subsection (12) in every case where it appears to the Registrar that there are sufficient grounds for doing so.

...

- 5 Additionally, as discussed below, the terms of reg 75 of the *Industrial Relations Commission Regulations 2005* (WA) is also applicable. Regulation 75 is as follows:

75. Request by organisation or association for cancellation of registration

- (1) Any request by an organisation or association to cancel its registration must be made to the Registrar in the approved form.
- (2) The request must state clearly the grounds on which the request is made and contain sufficient evidence to satisfy the Registrar that the cancellation has the consent of a majority of the total number of members of the organisation or association.

- 6 As the Registrar contended, the meaning of ‘defunct’, for the purposes of s 73(12)(b) of the *Act*, is to be construed in accordance with its ordinary meaning. That is, that an organisation is no longer operative: *The Registrar, Western Australian Industrial Relations Commission v Master Hairdressers’ Association of WA, Industrial Union of Employers* [2004] WAIRC 11936; (2004) 84 WAIG 2190; *The Registrar, Western Australian Industrial Relations Commission v The Western Australian Branch of the Commonwealth Steamship Owners’ Association, Industrial Union of Employers (Fremantle)* [2021] WAIRC 00016; (2021) 101 WAIG 102.

Evidence in support of the application

- 7 The application is supported by two statutory declarations made by the Registrar, Ms Susan Ivey Bastian, the first made on 10 July 2025, and the second made on 19 August 2025, which we have considered carefully. Written submissions were also made by the Registrar, in support of the application.

Consideration

- 8 On the basis of the evidence and submissions before the Commission in Court Session, we are satisfied that the respondent should be regarded as a defunct organisation for the purposes of s 73(12)(b) of the *Act*. Being so satisfied, and the Commission in Court Session not having any discretion, the registration of the respondent must be cancelled. We reach this view for the following reasons, which we can relatively shortly state.
- 9 An organisation that is operative, is an organisation that conducts its business and complies with its statutory obligations. An organisation upon registration under s 60 of the *Act*, becomes incorporated and most importantly, is subject to and bound by the *Act* by the effect of s 61. Being bound by the *Act*, means that an organisation is to comply with the statutory requirements imposed by Division 4 of Part II of the *Act*, in relation to the operation of the organisation.
- 10 An important obligation on a registered organisation is to file records and returns with the Registrar as to its membership, office holders, and accounting and financial records, including audited accounts, in the manner and according to the frequency as specified by the *Act* and *Regulations*. Not only is this for the purposes of compliance, but it is also important for the purposes of the accountability of an organisation to its members, and for transparency, as documents filed with the Registrar under ss 63 and 65 of the *Act*, are, subject to s 63(7), open for inspection.
- 11 These obligations are also important for the purposes of the democratic control of registered organisations, and the participation of members of an organisation in its affairs, reflected in the objects of the *Act* in s 6(f). Whilst an organisation’s Rules may specify that members may access certain documents and information regarding the organisation, the requirement to

file material with the Registrar and it being open to access by persons as members of an organisation, is consistent with this object in s 6(f) of the *Act*.

- 12 It is abundantly clear from the evidence of Ms Bastian that the respondent has not complied, for many years, with its statutory obligations. First, office holder returns as required by s 63(2) of the *Act* and reg 78(1) of the *Regulations*, have not been filed from 2018 to 2025 inclusive. As the Rules of the respondent require annual elections for office holders, such notifications should have been made to the Registrar annually. The only contact made by the respondent with the Registrar in relation to office holders was in 2008, and that contact was not for the purpose of compliance, but for another purpose.
- 13 Second, in accordance with the Rules of the respondent, its financial year ends on 30 June in each year. An audited set of accounts is required to be furnished to the Registrar within one month of the audit, which audit must be completed within six calendar months of 30 June each year. On the evidence, again, for the years 2018 to 2025 inclusive, none of these accounts and financial records of the respondent have been delivered to the Registrar.
- 14 The failures to comply set out above, are not isolated, rather they are systemic. An organisation that systemically fails to comply with these important statutory obligations cannot be regarded as a functioning and operative organisation, given the effect of s 61 of the *Act* and the other provisions of the *Act* and *Regulations*, to which we have referred.
- 15 There is one final matter to note. As referred to in Ms Bastian's evidence, the respondent attempted to request its registration as an organisation be cancelled in Application 21 of 2025. However, the material included in support of the application made by the respondent did not enable the Registrar to form the view that the respondent had 'in the manner prescribed', requested that its registration be cancelled. As set out at [4] above, reg 75 of the *Regulations* requires the provision of evidence to the Registrar to the effect that the majority of members of an organisation consent to the cancellation of its registration. The respondent did not furnish such evidence. Nor was there evidence that the respondent had complied with its Rules in relation to the dissolution of the organisation.
- 16 It is clear however, that despite this, a body by the name of the 'Baking Industry Association of Western Australia' is now incorporated under the *Associations Incorporation Act 2015* (WA), as contained in Attachments SB-20 and 24 to Ms Bastian's statutory declaration of 10 July 2025.
- 17 An order cancelling the registration of the respondent now issues.

2025 WAIRC 00992

**APPLICATION TO CANCEL THE REGISTRATION OF THE BAKING INDUSTRY EMPLOYERS' ASSOCIATION
OF WESTERN AUSTRALIA**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-v-

BAKING INDUSTRY EMPLOYERS' ASSOCIATION OF WESTERN AUSTRALIA

RESPONDENT

CORAM

COMMISSION IN COURT SESSION

CHIEF COMMISSIONER S J KENNER

COMMISSIONER T B WALKINGTON

COMMISSIONER T KUCERA

DATE

MONDAY, 15 DECEMBER 2025

FILE NO/S

CICS 10 OF 2025

CITATION NO.

2025 WAIRC 00992

Result

Order issued

Representation

Applicant

Mr J Carroll of counsel

Respondent

No appearance

Order

THAT the registration of the Baking Industry Employers' Association of Western Australia be and is hereby cancelled.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.]

By the Commission in Court Session.

COMMISSION IN COURT SESSION—Awards/Agreements—Variation of—

2025 WAIRC 00988

REVIEW OF METAL TRADES (GENERAL) AWARD SCOPE CLAUSE PURSUANT TO S 37D OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 00988

CORAM : CHIEF COMMISSIONER S J KENNER
SENIOR COMMISSIONER R COSENTINO
COMMISSIONER T EMMANUEL

HEARD : TUESDAY, 9 SEPTEMBER 2025

DELIVERED : FRIDAY, 12 DECEMBER 2025

FILE NO. : CICS 5 OF 2025

BETWEEN : COMMISSION'S OWN MOTION

Applicant
AND
(NOT APPLICABLE)
Respondent

Catchwords : Industrial Law (WA) – Commission’s Own Motion – s 37D –Variation to scope of private sector award – Consolidation of five State awards with the *Metal Trades (General) Award* – New title and definition of ‘Manufacturing, Maintenance, Metal Trades and Associated Industries and Occupations’ – Incidental variations – Award scope varied

Legislation : *Industrial Relations Act 1979* (WA) s 37D, s 37D (6), s 37D(6)(b)

Result : Award varied

Representation:

Mr B Entrekın on behalf of the Honourable Minister for Industrial Relations.
Ms K Rashleigh on behalf of the Electrical Trades Union (WA)

Case(s) referred to in reasons:

Commission’s Own Motion v (Not applicable) [2023] WAIRC 00900; (2023) 103 WAIG 1943
Electrical Trades Union WA v CAI Fencing Pty Ltd and others [2025] WAIRC 00799

Reasons for Decision

THE COMMISSION IN COURT SESSION:

- 1 In November 2023, the Commission in Court Session made variations to the scope provisions of the *Metal Trades (General) Award* pursuant to s 37D of the *Industrial Relations Act 1979* (WA). Our reasons for making those variations were published in *Commission’s Own Motion v (Not applicable)* [2023] WAIRC 00900; (2023) 103 WAIG 1943.
- 2 In our reasons at that time, we noted that in the course of the proceedings, the Minister for Industrial Relations had identified other State awards that could potentially be consolidated with the Award. We stated that we did not intend the scope variations made at that time to limit the possibility of further scope variations to achieve consolidation in the future, if consolidation was supported by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch (AMWU).
- 3 Since then, the Private Sector Labour Relations division of the Department of Local Government, Industry Regulation and Safety, on behalf of the Minister, informed the Commission of several existing State awards that it considered could be consolidated without too much complexity. The awards identified either used the same classification scale contained in Award or had a close historic nexus with the Award, adopting some or most of its conditions.
- 4 The awards identified were the:
 - (a) *Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979*;
 - (b) *Gate, Fence and Frames Manufacturing Award*;
 - (c) *Sheet Metal Workers’ Award No. 10 of 1973*;
 - (d) *Thermal Insulation Contracting Industry Award*; and
 - (e) *Vehicle Builders’ Award 1971*.

- 5 The Commission of its own motion initiated these proceedings pursuant to s 37D of the *Act* to further vary the scope of the Award to include and cover employers and employees within the scope of the above five awards, with a view to those five awards then being cancelled.
- 6 Notice of these proceedings was given to:
- (a) the Minister;
 - (b) UnionsWA;
 - (c) the Chamber of Commerce and Industry WA;
 - (d) the AMWU as a union party to the Award;
 - (e) the Electrical Trades Union WA (ETUW) as a union party to the Award;
 - (f) the Motor Trade Association of Western Australia; and
 - (g) twenty private sector employers as directed by the Commission, constituting in the opinion of the Commission, a sufficient number of employers reasonably representative of the employers who would be bound by the proposed variations.
- 7 The matter was listed for mention and directions on 4 April 2025 to ascertain who might want to be heard in relation to these proceedings. Except for an appearance on behalf of the Minister, no other person or organisation participated in that hearing.
- 8 The Commission published notice of the proposed variations to the Award on 25 July 2025 as required by s 37D(6) of the *Act* and afforded the persons listed in s 37D(6)(b) an opportunity to be heard in relation to the proposed variations at a final hearing on 9 September 2025. In the meantime, in the course of developing the draft variations, the Commission received some feedback and correspondence on behalf of the AMWU and the ETUW. The AMWU advised the Commission that it generally supported consolidation of the awards.
- 9 The ETUW is the union party to the *Gate, Fence and Frames Manufacturing Award*. It advised the Commission that it had a longstanding interest in the preservation of award coverage and representation rights for employees engaged in electrical and related work in Western Australia. While it supported variations to improve clarity of award coverage, it was concerned that such changes should not prejudice its representational rights or diminish existing award entitlements.
- 10 Before the final hearing of this matter, the ETUW had made an application to the Commission to update the allowances in the *Gate, Fence and Frames Manufacturing Award*: APPL 43 of 2025, ***Electrical Trades Union WA v CAI Fencing Pty Ltd & Ors*** [2025] WAIRC 00799. Upon the grant of that application, the *Gate, Fence and Frames Manufacturing Award* would provide for higher rates for some allowances than the existing allowances in the Award.
- 11 The Minister's and the ETUW's representatives appeared at the final hearing on 9 September 2025. Aside from some minor drafting matters, the Commission was advised that the Minister supported the proposed variations. The ETUW also supported the proposed variations if further variations were made to bring the Award's allowances in line with any variations that would be made to the *Gate, Fence and Frames Manufacturing Award* in APPL 43 of 2025, ***Electrical Trades Union WA v CAI Fencing Pty Ltd & Ors*** [2025] WAIRC 00799.
- 12 We agreed with the ETUW's suggestion and deferred making orders to vary the Award until after APPL 43 of 2025 was determined. The allowance rates as determined in ***Electrical Trades Union WA v CAI Fencing Pty Ltd and others*** [2025] WAIRC 00799 have been incorporated in the variations we made to the Award, which issued on 23 October 2025.
- 13 These are our reasons for our orders varying the Award.
- 14 The intent of the variations is to expand the scope of the Award to encompass the scope of the above five awards without otherwise substantively altering terms and conditions or creating detriment to any employee. To reflect the broadened scope, the title of the Award has been changed to the *Manufacturing, Maintenance and Metal Trades Award*. Schedule 1 lists the five awards replaced as a result of the scope variations.
- 15 The broadening of the scope has been achieved primarily through the inclusion of the term 'Manufacturing, Maintenance, Metal Trades and Associated Industries and Occupations' in the area and scope clause 1.3.1 combined with variations to the definitions clause. The definition of Manufacturing, Maintenance, Metal Trades and Associated Industries and Occupations includes all those industries and occupations listed in the five consolidated awards.
- 16 Consequential amendments have been made to include additional classifications in clause 13 – Wages. Specifically, the classifications of Instrument Fitter, Structural Steel Tradesperson, Sheetmetal Employee First Class and Sheetmetal Employee Second Class have been added. Where necessary, allowances have been aligned to the higher of whichever allowances currently apply across the six relevant awards. Special provisions for the Airconditioning and Refrigeration Industry (Construction and Servicing) have been included and ring-fenced.
- 17 The classifications and definitions currently contained in each of the five consolidated awards have been retained by adding them to Appendix 1 and Appendix 2 of the Award.
- 18 We would like to acknowledge the significant volume of work undertaken by Mr Brendon Entrekin and his team at the Department in comparing the terms and conditions contained in the six awards, reviewing the draft variations and providing feedback on them. This work has helped us significantly, enabling the scope review whilst preserving conditions.
- 19 The variations to the Award take effect from the beginning of the first pay period on or after 23 October 2025.
-

2025 WAIRC 00873

REVIEW OF METAL TRADES (GENERAL) AWARD SCOPE CLAUSE PURSUANT TO S 37D OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT**CORAM**

COMMISSION IN COURT SESSION

CHIEF COMMISSIONER S J KENNER

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

DATE

THURSDAY, 23 OCTOBER 2025

FILE NO/S

CICS 5 OF 2025

CITATION NO.

2025 WAIRC 00873

Result

Award varied

Representation

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

Ms K Rashleigh on behalf of the Electrical Trades Union (WA)

Order

HAVING heard from Mr B Entrekin on behalf of the Honourable Minister for Industrial Relations and Ms K Rashleigh on behalf of the Electrical Trades Union (WA), the Commission in Court Session, pursuant to the powers conferred under s 37D of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the *Metal Trades (General) Award* be varied in accordance with the following Schedule and that the variations shall have effect from the beginning of the first pay period on or after the date of this order.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.]

By the Commission in Court Session.

SCHEDULE**1. Clause 1.1 - TITLE: Delete this clause and insert the following in lieu thereof:**

This Award shall be known as the “Manufacturing, Maintenance and Metal Trades Award” and consolidates and replaces the awards listed in Schedule 1.

2. Clause 1.3 - AREA AND SCOPE: Delete this clause and insert the following in lieu thereof:

1.3.1

- (a) This Award applies to employers in the “manufacturing, maintenance, metal trades and associated industries and occupations” and to all employees employed by those employers in any classification mentioned in Clause 4.8 - Wages and Supplementary Payments of PART 1 - GENERAL or Clause 13. - Wages of PART 2 - CONSTRUCTION WORK of this Award.
- (b) For the avoidance of doubt, this Award also continues to apply to all employers and employees who were previously bound by the Award prior to CICS 15 of 2022.

Note: A list of the industries the Award previously applied to prior to CICS 15 of 2022 is included at Appendix 5.

1.3.2 This Award also applies to:

- (a) employers that supply labour on an on-hire basis to host employers in the “manufacturing, maintenance, metal trades and associated industries and occupations” in respect of on-hire employees employed in the classifications mentioned in this Award, and those on-hire employees, while engaged in the performance of work covered by this Award; and
- (b) employers that provide group training services for apprentices and/or trainees in the “manufacturing, maintenance, metal trades and associated industries and occupations” in respect of apprentices and/or trainees employed in one or more of the classifications mentioned in this Award, and those apprentices and/or trainees, while engaged by a host employer in the performance of work covered by this Award.

Exclusion to scope clause

1.3.3 This Award does not apply to:

- (a) employees who are on-hired to electrical contracting businesses or to employers who are engaged in the electrical contracting industry as defined under the terms of the Electrical Contracting Industry Award R 22 of 1978.
- (b) employers and employees who are subject to the national industrial relations system.

3. Clause 1.6 - DEFINITIONS AND CLASSIFICATION STRUCTURE:

A. Delete the definition of “Metal trades and associated industries and occupations” in subclause 1.6.1 of this clause and insert the following in lieu thereof:

“Manufacturing, maintenance, metal trades and associated industries and occupations” means the metal working and engineering and fabricating industries, including any of the following:

- (1) mechanical and electrical engineering.
- (2) smithing, welding, metal moulding, metal machining, metal pressing and stamping, boilermaking, diecasting, galvanising, tinning, steel pickling and plastic moulding.
- (3) casting or fabricating in synthetic resins, or similar materials and including the production of synthetic resins, powders, tablets, etc, as used in such processes.
- (4) tool, die, gauge and mould making.
- (5) porcelain enamelling including wet and dry porcelain enamelling, and the manufacture of porcelain enamels, oxides, glazes and similar materials.
- (6) electroplateware manufacturing and electroplating of all types.
- (7) japanning, enamelling, painting etc, of metallic articles.
- (8) drawing and insulation of wire for the conducting of electricity.
- (9) generation and distribution of electric energy.
- (10) production by mechanical means of industrial gases.
- (11) building, making, assembling, repairing and maintenance of vehicles, caravan and metal motor body parts.
- (12) making, repairing, reconditioning and maintenance of motor engines, and/or parts thereof, and of the mechanical and electrical parts including the transmission and chassis of motor cars, motor cycles and other motor driven vehicles.
- (13) selling, handling, retreading, storing, distributing, fitting, and/or repairing of tyres made of any material.
- (14) hand and machine engraving.
- (15) installation of all classes and types of electrical wiring equipment and plant, and the repair and maintenance thereof.
- (16) manufacture of ceramic articles for use in the metal trades industries.
- (17) the manufacture, making, construction, assembling, erection, reconditioning, installation, maintenance, testing and/or repair of:
 - (a) agricultural implements.
 - (b) badges and name-plates (including chemical engraving).
 - (c) bicycles.
 - (d) bolts, nuts, screws, rivets, washers and similar articles.
 - (e) bridges and girders.
 - (f) bright steel bars, rods, shafting, etc.
 - (g) cannisters.
 - (h) circulating radiators.
 - (i) electrical advertising equipment (including neon signs).
 - (j) electrical machinery, apparatus and appliances (including valve and globe manufacturing).
 - (k) fluorescent lighting.
 - (l) gates, fences and frames.
 - (m) insulation materials and articles.
 - (n) lifts and elevators.
 - (o) metal furniture.
 - (p) perambulators.
 - (q) radios, telephones and X-ray machines.
 - (r) recording, measuring and controlling devices for electricity, fluids, gases, heat, temperature, pressure, time, etc.
 - (s) refrigerators, stoves and ovens.
 - (t) safe and strong-rooms.
 - (u) scales and machines for measuring mass and equipment.

- (v) ships and boats.
- (w) ventilating and air-conditioning plant and equipment.
- (x) watches and clocks, including cases.
- (y) water fittings.
- (z) wet and dry batteries.
- (za) window frames.
- (18) The manufacture, making, assembly, processing, treatment, fabrication and preparation of all products made from, or containing, galvanised iron, steel, iron, metal, sheet metal, sheet-tin, tin, brass, copper and nonferrous metal.
- (19) Making, manufacture, treatment, installation, maintenance, repair and reconditioning of any articles, part or component, whether of metal and/or other material in any of the above industries.
- (20) Making, manufacture, installation, construction, maintenance, repair and reconditioning of plant, equipment, buildings and services (including power supply) in establishments connected with the industries and work described in this clause and maintenance work generally.
- (21) Mixing, fixing or applying thermal insulating material including the fixing of protective coverings of canvas, sheet metals, fabrics, plastics, bituminous fibre glass, or other similar materials to such insulation but not including the installation of building grade insulation material in walls and ceilings
- (22) Every operation, process, duty and function carried on or performed in or in connection with or incidental to any of the above industries.

B. Immediately following the definition of “Manufacturing, maintenance, metal trades and associated industries and occupations” in subclause 1.6.1 of this clause insert the following new definition:

“Sheetmetal worker - first class” shall mean a worker required:

- (1) to work from blue prints, drawings or measurements (whichever is required of them) for completed articles and to make the articles throughout; or
- (2) to do work the ability to do which involves the ability to do the work specified in paragraph (1) hereof.

The expression "blue prints, drawings or measurements" means blue prints, drawings or measurements furnished by the customer to the employer for the purpose of specifying the nature and/or dimensions of the articles, ordered or part thereof, or blue prints, drawings or measurements of a similar nature but the expression does not include drawings, sketches or measurements supplied to the individual workman to understand the nature of and to carry out the work required of him.

C. Immediately following the definition of “Sheetmetal worker - first class” in subclause 1.6.1 of this clause insert the following new definition:

“Sheetmetal worker - second class” shall mean a tinsmith or sheetmetal worker, other than a sheetmetal worker - first class, employed in manufacturing or partly manufacturing articles out of any class of sheetmetal of ten gauge or lighter and including wire work in connection with such articles

4. Clause 2.3 - REDUNDANCY: Delete subclause 2.3.3 Severance Pay of this clause and insert the following in lieu thereof:

2.3.3 Severance Pay

- (1) In addition to the period of notice prescribed in 2.1.2(1) in Clause 2.1 - Contract of Service of this Award, for ordinary termination, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in 2.3.1 shall be entitled to the following amount of severance pay in respect of a continuous period of service.

<u>PERIOD OF CONTINUOUS SERVICE</u>	<u>SEVERANCE PAY</u>
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

“Weeks’ Pay” means the ordinary weekly rate of wage for the employee concerned.

Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee’s normal retirement date.

- (1A) An employee whose period of continuous service is less than one year shall be entitled to severance pay of \$25 for each completed week of service if they are employed in:

- (a) the construction, erection or alteration of any other building, structure or civil engineering project, in the installation of industrial and commercial air conditioning and refrigeration systems but not packaged units; or
 - (b) the service and repair of industrial and commercial air conditioning and refrigeration systems other than on the business premises, factory or workshop of the employer; or
 - (c) mixing, fixing or applying any thermal insulating material.
- (2) For the purpose of this clause continuity of service shall not be broken on account of -
- (a) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;
 - (b) any absence from work on account of paid leave or on account of leave lawfully granted by the employer; or
 - (c) any absence with reasonable cause, proof whereof shall be upon the employee;
- Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.
- (3) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with section 6 of the *Long Service Leave Act 1958* shall also constitute continuous service for the purpose of this clause.

5. Clause 4.8 - WAGES AND SUPPLEMENTARY PAYMENTS:

A. Delete subclause 4.8.2 of this clause and insert the following in lieu thereof:

4.8.2

(1) Leading Hands:

In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week -

	\$
(a) If placed in charge of not less than three and not more than 10 other employees	43.00
(b) If placed in charge of more than 10 and not more than 20 other employees	65.90
(c) If placed in charge of more than 20 other employees	85.10

- (2) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten (10) other workers.

B. Delete subclause 4.8.4 of this clause and insert the following in lieu thereof:

4.8.4 The minimum rate of pay for a junior employee is the following percentage of the C13 total rate:

Age	% of C13
Under 16 years of age	40%
16 years of age	50%
17 years of age	60%
18 years of age	70%
19 years of age	80%
20 years of age	93%

C. Delete subclause 4.8.6 of this clause and insert the following in lieu thereof:

4.8.6 Tool Allowance:

- (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:

- (a) \$24.00 per week to such tradesperson; or
- (b) in the case of an apprentice a percentage of \$24.00 being the percentage which appears against the year of apprenticeship in 4.8.3;

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

- (2) Any tool allowance paid pursuant to 4.8.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
- (3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

- (4) A tradesperson or apprentice shall replace or pay for any tool supplied by the employer if lost through the employee's negligence.

6. Clause 4.9 - TRAINEESHIPS: Delete subclause 4.9.1 of this clause and insert the following in lieu thereof:

4.9.1 Scope:

- (1) This clause shall apply to persons:
- (a) who are undertaking a Traineeship (as defined); and
- (b) who are employed in the "manufacturing, maintenance, metal trades and associated industries and occupations" and in a classification covered by this Award.

7. Clause 5.2 - SPECIAL ALLOWANCES AND FACILITIES:

A. Delete subclause 5.2.2 of this clause and insert the following in lieu thereof:

- 5.2.2 Dirt Money: An employee shall be paid an allowance of 80 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

B. Delete subclause 5.2.4 of this clause and insert the following in lieu thereof:

- 5.2.4 Confined Space: An employee shall be paid an allowance of \$1.00 per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.

C. Delete subclause 5.2.21 of this clause and insert the following in lieu thereof:

- 5.2.21 An employee, holding a Provide First Aid certificate (HLTAID011) or equivalent, appointed by the employer to perform first aid duties, shall be paid \$16.50 per week in addition to the employee's ordinary rate.

D. Immediately following subclause 5.2.22 of this clause insert the following new subclauses:

- 5.2.23 The following provisions apply to painters engaged in vehicle and caravan building and repair trades:
- (a) no surface painted with lead paint shall be rubbed down or scraped by dry process other than by hand.
- (b) the employer shall provide washing facilities and soap suitable as a solvent for paint mixtures, in a convenient place, for employee use before meals and after knocking off work.
- (i) Where spray painting is carried out, employers must ensure adequate protection of employee health. Employers must provide employees with respirators. Spray painting operations must be carried on in compliance with the relevant Code of Practice under s 274 of the *Work Health and Safety Act 2020* (WA).
- (ii) Painters shall be allowed five minutes each day before ceasing work at end of shift to wash and clean up.
- 5.2.24 The following provisions apply to employees engaged in vehicle and caravan building and repair trades:
- (a) No employee shall be permitted to have a meal in any paint shop, or in such close proximity to any place where painting operations are being carried on as is likely to cause injury to employee health.
- (b) where practicable, blowers shall be installed in and around wood-working machines where dust is created and likely to affect the health of employees.
- 5.2.25 A sheet metal worker employed at the Alumina Refinery, Kwinana on construction in areas 40,30, 35K, 45, 25, 35f (where operating), 35c (where operating), 50 (A to E tanks) shall be supplied with overalls and boots by the employer.

7. Clause 13 - WAGES:

A. Delete subclause 13.2 of this clause and insert the following in lieu thereof:

13.2	(1) Classification	Base Rate \$	Special Payment Adjustment \$	Arbitrated Safety Net \$	Total Rate Per Week \$
(a)	Instrumentation and Controls Tradesperson	423.80	96.00	674.10	1193.90
(b)	Instrument Tradesperson - Complex Systems	386.60	84.90	655.70	1127.20
(c)	Instrument Tradesperson/Instrument Fitter	380.10	80.10	654.40	1114.60
(d)	Scientific Instrument Maker	380.10	80.10	654.40	1114.60
(e)	Welder - Special Class	371.40	80.10	650.90	1102.40
(f)	Welder	362.90	80.10	647.70	1090.70
(g)	Electrician - Special Class	386.60	84.90	655.70	1127.20
(h)	Electrical Fitter	362.90	80.10	647.70	1090.70
(i)	Electrical Installer	362.90	80.10	647.70	1090.70
(j)	Boilermaker including Structural Steel Tradesperson	362.90	80.10	647.70	1090.70
(k)	Tradesperson the greater part of whose time is occupied in marking off and/or template making	367.10	80.10	649.50	1096.70
(l)	Mechanical Tradesperson - Special Class	386.60	84.90	655.70	1127.20
(m)	Tradesperson	362.90	80.10	647.70	1090.70

(n)	Pipe Fitter	362.90	80.10	647.70	1090.70
(o)	Fitter - Refrigeration	362.90	80.10	647.70	1090.70
(p)	Fitter - Window Frame	362.90	80.10	647.70	1090.70
(q)	Motor Mechanic	362.90	80.10	647.70	1090.70
(r)	Machinist - Engineering:				
	First Class	362.90	80.10	647.70	1090.70
	Second Class	327.20	66.80	625.90	1019.90
(s)	Certificated Rigger or Scaffolder	345.70	68.90	631.70	1046.30
(t)	Rigger or Scaffolder - Other	334.70	67.70	628.10	1030.50
(u)	Tool and Material Storesperson	322.90	65.80	624.10	1012.80
(v)	Tradesperson's Assistant	310.20	64.30	620.30	994.80
(w)	Tradesperson's Assistant - who from time to time uses a grinding machine	311.70	65.80	621.00	998.50
(x)	Lagger -				
	first 6 months' experience	310.20	63.40	619.80	993.40
	2nd and 3rd six months' experience	311.70	65.40	621.00	998.10
	4th and 5th six months' experience	315.90	65.60	622.00	1003.50
	thereafter	317.40	66.60	622.90	1006.90
(y)	Grinder using portable machine	315.90	65.70	622.20	1003.80
(z)	Crane Attendant and Dogger	334.70	67.70	628.10	1030.50
(aa)	Labourer	291.60	62.10	614.30	968.00
(ab)	Sheetmetal Employee - First Class	362.80	80.00	647.60	1090.40
(ac)	Sheetmetal Employee - Second Class	327.20	66.80	625.90	1019.90

- (2) A certificated rigger, other than a leading hand, who in compliance with the provisions of the regulations made pursuant to the *Work Health and Safety Act 2020*, is responsible for the supervision of other employees shall be deemed to be a leading hand and be paid the additional rate prescribed for a leading hand placed in charge of not less than three (3) and not more than ten (10) other employees.

B. Delete subclause 13.5 and insert the following in lieu thereof:

13.5 Leading Hands

Subject to clause 13.5A.2, in addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid:

	\$
(1) If placed in charge of not less than three (3) and not more than ten (10) other employees	31.20
(2) If placed in charge of more than ten (10) and not more than twenty (20) other employees	47.70
(3) If placed in charge of more than twenty (20) other employees	61.70

C. Immediately following subclause 13.5 of this clause insert the following new subclause:

13.5A Air Conditioning and Refrigeration Industry (Construction and Servicing)

13.5A.1 This clause applies to the exclusion of clause 13.5 and 13.6 to employees engaged:

- (1) in the construction, erection or alteration of any other building, structure or civil engineering project, in the installation of industrial and commercial air conditioning and refrigeration systems but not packaged units; or
- (2) to service and repair industrial and commercial air conditioning and refrigeration systems other than on the business premises, factory or workshop of the employer.

13.5A.2 In addition to the appropriate total wage prescribed in clause 13.2, a leading hand shall be paid:

	\$
(a) If placed in charge of not less than three and not more than 10 other employees	26.70
(b) If placed in charge of more than 10 and not more than 20 other employees	40.50
(c) If placed in charge of more than 20 other employees	52.40

13.5A.3 Where an employer does not provide a tradesperson, second-class sheetmetal employee or an apprentice with the tools ordinarily required by them in the performance of their work the employer shall pay a tool allowance of -

- (1) \$14.70 per week to such tradesperson or second class sheetmetal employee; or
- (2) \$14.70 per week to an apprentice.

Any tool allowance paid pursuant to this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this subclause.

13.5A.4 An employer shall provide for the use of tradesperson, second-class sheetmetal employee and apprentice all necessary power tools, special purpose tools and precision measuring instruments.

13.5A.5 A tradesperson, second-class sheetmetal employee or an apprentice shall replace or pay for any tools supplied by the employer, if lost through the employee's negligence.

D. Delete subclause 13.6 and insert the following in lieu thereof:

- 13.6 (1) Subject to clause 13.5A.3, where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -
- (a) \$17.10 per week to such tradesperson; or
 - (b) In the case of an apprentice a percentage of \$17.10 being the percentage which appears against their year of apprenticeship in 4.8.3 of Clause 4.8 - Wages and Supplementary Payments of PART 1 - GENERAL (subject to Clause 12.2 - Apprentices of PART 2) of this Award,
- for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

8. Clause 15.2 - ALLOWANCE FOR TRAVELLING AND EMPLOYMENT IN CONSTRUCTION WORK: Delete subclause 15.2.1 of this clause and insert the following in lieu thereof:

- 15.2.1 An employee, who on any day is required by the employer to report directly to the job, shall be paid an allowance in accordance with the provisions of this subclause to compensate for travel patterns and costs peculiar to the industry, which includes mobility requirements of employees, and the nature of employment in construction work covered by this Award -
- (1) On places within a radius of 50 kilometres from the General Post Office, Perth - \$21.90 per day.
 - (2) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 98 cents per kilometre.
 - (3) Subject to the provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 98 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.
 - (4) In respect of work carried out from an employer's depot situated outside a radius of 60 kilometres from the General Post Office, Perth the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.
 - (5) Where transport to and from the job is supplied by the employer from and to the depot or such other place more convenient to the employee as is mutually agreed upon between the employer and the employee, half the above rates shall be paid, provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

9. Clause 15.3 - DISTANT WORK: Delete subclauses 15.3.6 and 15.3.7 of this clause and insert the following in lieu thereof:

- 15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of \$42.20 for any weekend that the employee returns home from the job, but only if -
- (1) The employee advises their employer or the employer's agent of their intention not later than the Tuesday immediately preceding the weekend in which they so return;
 - (2) The employee is not required for work during that weekend;
 - (3) The employee returns to the job on the first working day following the weekend; and
 - (4) The employer does not provide, or offer to provide, suitable transport.
- 15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of \$18.55 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

10. Schedule 1 - AWARDS, INDUSTRIAL AGREEMENTS AND ORDERS REPLACED: Delete this Schedule and insert the following in lieu thereof:**SCHEDULE 1****AWARDS REPLACED**

Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979

Gate, Fence and Frames Manufacturing Award

Sheet Metal Workers' Award No 10 of 1973

Thermal Insulation Contracting Industry Award

Vehicle Builders' Award 1971

11. Appendix 1 - OLD CLASSIFICATIONS:**A. Delete subclause (1) of this Appendix and insert the following in lieu thereof:**

- (1)

- (a) The following classification structure provides a reference point for task and craft based work titles prior to award restructuring. The following old classifications "line up" previous wage groups with the new career path levels. This Appendix will subsequently be deleted by agreement between the parties.
- (b)
- | | |
|-----|-------------|
| C5 | AA |
| C6 | A1 |
| C7 | A2 |
| C8 | A |
| C9 | B + C |
| C10 | D |
| C11 | E, F + G |
| C12 | H, I, J + K |
| C13 | L + M |
| C14 | N |

B. Immediately following paragraph (n) of subclause (2) of this Appendix insert the following new Classification and Wage Groups:

- (o) **Gate, Fence and Frames Manufacturing Section**
- | | |
|---------------------------------------|---|
| Machinist (Wire) "A" | H |
| Machinist (Wire) "B" | M |
| Machinist (Wire) Assistant | M |
| Framer "A" | H |
| Framer "B" | M |
| Process Employee | M |
| Wirer | M |
| Welder "A" | D |
| Welder "B" | M |
| Welder "C" | M |
| Painter of Iron Work | M |
| Erector | L |
| Erector's Assistant | M |
| Tool and Material Storeperson | I |
| Tradesperson | D |
| Mechanical Tradesperson-Special Class | C |
- (p) **Vehicle Building Section**
- | | |
|--|----|
| Advanced Tradesperson/Production Technician Vehicle Building | AA |
| Vehicle Building Tradesperson - Level IV | A2 |
| Vehicle Building Tradesperson - Level III | A |
| Vehicle Building Tradesperson - Level II | B |
| Vehicle Building Tradesperson - Level I | D |
| Vehicle Builder - Level IV | F |
| Vehicle Builder - Level III | J |
| Vehicle Builder - Level II | M |
| Vehicle Builder - Level I | N |

12. Appendix 2 - OLD DEFINITIONS: Immediately following the definition of "Industrial Instrumentation" of this Appendix insert the following new definitions:

Gate, Fence and Frame Manufacturing:

"**Erector**" means an employee engaged in erecting hand rails, fencing, gates and enclosures of any description and who is required to set out and align the work properly.

"**Erector's Assistant**" means an employee directly assisting an erector in the erection of hand rails, fencing, gates and enclosures of any description.

"Framer":

- (a) means an employee required without supervision to both measure and make specific tubular and/or steel products from sketches and to perform all framing operations incidental thereto.
- (b) means an employee required under supervision to both measure and make specific tubular and/or steel products from sketches and to perform framing operations incidental thereto.

"Machinist - (Wire)":

- (a) means an employee who without supervision is required to set up and operate automatic wire working machinery.
- (b) means an employee who under supervision is required to set up and operate automatic wire working machinery.

"**Machinist - (Wire) Assistant**" means an employee who assists in the loading and unloading of automatic wire working machinery.

"**Painter of Iron Work**" means an employee (other than coach painter or ship painter) who paints iron work using brush or spray or dip equipment including air, airless or electrostatic equipment.

"**Process Employee**" means an employee who under supervision is required to carry out on single purpose machines repetitive operations in connection with the manufacture of gates, fences and frames.

"Tool and Material Storeperson" means an employee responsible for the safe custody of, and the recording of issue and/or return of, tools and consumable materials.

"Tradesperson" means an employee who in the course of employment works from drawings or prints, or makes precision measurements or applies general trade experience.

"Wirer" means an employee who is required to attach wire mesh to tubular or steel frames including cutting the mesh to shape and size.

"Welder A" means an employee using electric arc or petrol or coal gas blow pipe on any work other than that of a B or C class welder as defined.

"Welder B" means an employee who - (a) uses any of the foregoing types of welding apparatus in filling castings; or (b) welds with the aid of jigs; or (c) operates automatic welding machines for the setting up of which the employee is not responsible; or (d) operates a profile cutting or a straight line cutting machine.

"Welder C" means an employee who uses any of the foregoing types of welding apparatus in tacking preparatory to the completion of work by any other employee.

Industrial Instrumentation:

"Instrument tradesperson" means a tradesperson who is mainly engaged in installing, repairing, maintaining, servicing, industrial instruments and control systems.

An instrument tradesperson will have completed an apprenticeship the greater part of which involved industrial instrumentation, or alternatively can demonstrate a knowledge and understanding of industrial instrumentation and can apply that knowledge and understanding to the tasks assigned by the employer. The required knowledge and understanding would have been gained by undertaking a formal training course run by a State Education Department or Technical Education Department or its equivalent or by at least 12 months on the job experience as a tradesperson at instrument work.

"Instrument tradesperson - complex systems" means an instrument tradesperson who is mainly engaged in installing, repairing, maintaining, servicing, testing, modifying, commissioning, calibrating and fault finding instruments which make up a complex control system which utilises some combination of electrical, electronic, mechanical, hydraulic and pneumatic principles.

To be classified as an instrument tradesperson - complex systems a tradesperson will have:

- (i) Had a minimum of two years on the job experience as a tradesperson working predominantly on complex and/or intricate instruments and instrument systems as will enable him to perform such work under minimum supervision and technical guidance, and;
- (ii) Satisfactorily completed an appropriate post trade course equivalent to at least two years part time study or has achieved to the satisfaction of the employer a comparable standard of skill and knowledge by other means including in-plant training or on the job experience referred to in (i) above.

"Instrumentation and controls tradesperson" means an instrument tradesperson working at a level beyond that of instrument tradesperson - complex systems and who is mainly engaged in applying skills and knowledge to installing, repairing, maintaining, servicing, testing, modifying, commissioning, calibrating, and fault finding industrial instruments which make up a complex control system which utilises some combination of electrical, mechanical, hydraulic and pneumatic principles and electronic circuitry containing complex analogue and/or digital control systems utilising integrated circuitry.

The application of this skill and knowledge would require an overall understanding of the operating mode or principles of the various types of measurement and control devices on which the tradesperson is required to perform tasks. To be classified as an instrumentation and controls tradesperson a tradesperson must have at least three years' on the job experience as a tradesperson - 12 months of which must be at the level of instrument tradesperson - complex systems and in addition must have completed a related post-trades course equivalent to at least two years part time study.

In addition, to be classified as an instrumentation and controls tradesperson, a tradesperson must be capable of:

- (i) Maintaining and repairing multi-function printed circuitry of the type described in this definition using circuit diagrams and test equipment.
- (ii) Working under minimum supervision and technical guidance.
- (iii) Providing technical guidance within the scope of the work described in the definition.
- (iv) Preparing reports of a technical nature on specific tasks or assignments as directed and within the scope of the work described in this definition.

Vehicle Building:

"Vehicle Builder Level 1" means an employee who undertakes up to 38 hours induction training which may include information on the enterprise, conditions of employment, introduction to supervisors and fellow employees, training and career path opportunities, plant layout, work and documentation procedures, occupational health and safety, equal employment opportunity and quality control/assurance.

An employee at this level performs routine duties essentially of a manual nature and to the level of their training -

- (i) Performs general labouring and cleaning duties.
- (ii) Exercises minimal judgement.
- (iii) Works under direct supervision.
- (iv) May undertake structured training so as to enable them to work at Vehicle Builder - Level II.

Pre 18 June 1990 - General Labourer.

“Vehicle Builder Level II” means an employee who has completed up to three months’ structured training so as to enable the employee to perform work within the scope of this level.

At this level an employee performs work above and beyond the skills of an employee at Vehicle Builder - Level I and to the level of their training -

- (i) Works under direct supervision either individually or in a team environment.
- (ii) Understands and undertakes basic quality control/assurance procedures including the ability to recognise basic quality deviations and faults.
- (iii) Understands and utilises basic statistical process control procedures.

Indicative of the tasks which an employee at this level may perform are the following -

Repetitive work on automatic, semi-automatic or single purpose machines or equipment.

Assembles components using basic written, spoken and/or diagrammatic instructions in an assembly environment.

Basic soldering or butt and spot welding skills or cutting scrap with oxy-acetylene blow pipe.

Uses selected hand tools.

Basic maintenance of equipment and cleanliness of work area.

Maintains simple records.

Uses hand trolleys and pallet trucks.

Assists in the provision of on-the-job training in conjunction with tradespersons and supervisor/trainers.

Performs basic store functions.

Operation of mobile equipment including forklifts, hand trolleys, pallet trucks, overhead cranes and winch operation.

Pre 18 June 1990 - Counterhand, Painter’s Labourer, 4th Class Welder, Assembler.

“Vehicle Builder Level III” means an employee who has completed a Vehicle Building Certificate I or equivalent training to enable the employee to perform work within the scope of this level.

At this level an employee performs work above and beyond the skills of an employee at Vehicle Builder Level II and to the level of their training -

- (i) Is responsible for the quality of their own work subject to routine supervision.
- (ii) Works under routine supervision either individually or in a team environment.
- (iii) Exercises discretion within their level of skills and training.

Indicative of the tasks which an employee at this level may perform are the following -

Operates flexibly between assembly stations.

Operates machinery and equipment which requires exercising skills and knowledge beyond that of an employee at Vehicle Builder Level II.

Non-trade engineering skills.

Basic tracing and sketching skills.

Receiving, despatching, distributing, sorting, checking, packing (other than repetitive packing in a standard container or containers in which such goods are ordinarily sold), documenting and recording of goods, materials and components.

Basic inventory control in the context of a production process.

Basic keyboard skills.

Ability to measure accurately.

Assists one or more tradespersons.

Welding which requires use of an electric spot or butt welding machine or cutting scrap or tack welding.

Pre 18 June 1990 - Delivery Person, Storeperson, Third Class Welder, Sectional Trimmer, Panel Fixer, Fibreglass Hand Laminator.

“Vehicle Builder Level IV” means an employee who has completed a Vehicle Building Certificate II or equivalent training so as to enable the employee to perform work within the scope of this level.

An employee at this level performs work above and beyond the skills of an employee at Vehicle Builder Level III and to the level of their training -

- (i) Works from complex instructions and procedures.
- (ii) Assists in the provision of on-the-job training to a limited degree.
- (iii) Co-ordinates work in a team environment or works individually under general supervision.
- (iv) Is responsible for assuring the quality of their own work.

Indicative of the tasks which an employee at this level may perform are the following -

Use of precision measuring instruments.

Machine setting, loading and operation.

Responsibility for the operation and co-ordination of a store.

Intermediate keyboard skills.

Basic engineering and fault finding skills.

Basic quality checks on the work of others.

Knowledge of the employer's operations as it relates to production processes.

Pre 18 June 1990 - Second Class Welder, Metal Finisher, Fibreglass Gun Operator and Mould Preparator.

“Vehicle Building Tradesperson Level I” means an employee who holds a Trade Certificate or Tradesperson's Rights Certificate as a -

Springmaker, fitter, electrician, body builder, panel beater, first class welder, painter, spray painter, trimmer, signwriter, fitter and turner or auto electrician

and is able to exercise the skills and knowledge of that trade.

A Vehicle Building Tradesperson - Level I works above and beyond an employee at Vehicle Builder - Level IV and to the level of their training -

- (i) Understands and applies quality control techniques.
- (ii) Performs basic draughting and planning skills.
- (iii) Exercises good interpersonal and communications skills.
- (iv) Provides trade guidance and assistance.
- (v) Exercises keyboard skills at a level higher than Vehicle Builder Level II.
- (vi) Exercises discretion within the scope of this grade.
- (vii) Performs work under limited supervision either individually or in a team environment.
- (viii) Operates all lifting equipment incidental to their work.
- (ix) Performs non-trade tasks incidental to their work.
- (x) Performs work which while primarily involving the skills of the employee's trade is incidental or peripheral to the primary task and facilitates the completion of the whole task. Such incidental or peripheral work would not require additional formal technical training.
- (xi) Performs painting, trimming, signwriting, panel beating, fibreglassing or electrical work.

“Vehicle Building Tradesperson Level II” means a Vehicle Building Tradesperson - Level I who has completed the following training requirements -

33% of the modules towards an appropriate Post Trade Certificate; or

x percentage of modules towards an Advanced Certificate; or

y percentage of modules towards an Associate Diploma,

A Vehicle Building Tradesperson - Level II works above and beyond a Tradesperson at Vehicle Building Tradesperson - Level I and to the level of his/her training -

- (i) Exercises the skills attained through satisfactory completion of the training for this classification, subject to prescribed standards.
- (ii) Exercises discretion within the scope of this grade.
- (iii) Works under general supervision, either individually or in a team environment.
- (iv) Understands and implements quality control techniques.
- (v) Provides trade guidance and assistance as part of a work team.
- (vi) Exercises trade skills relevant to specific requirements of the enterprise at a level higher than Vehicle Building Tradesperson - Level I.

Tasks which an employee at this level may perform are subject to the employee having the appropriate Trade and Post Trade Training to enable such particular tasks to be performed.

“Vehicle Building Tradesperson Level III” means a Vehicle Builder - Level II who has completed the following training requirements -

66% of the modules towards an appropriate Post Trade Certificate; or

x percentage of modules towards an Advanced Certificate; or

y percentage of modules towards an Associate Diploma.

A Special Class Vehicle Builder Tradesperson - Level I works above and beyond a Vehicle Builder Tradesperson - Level II and to the level of their training -

- (i) Exercises the skills attained through satisfactory completion of the training prescribed for this classification.

- (ii) Provides trade guidance and assistance as part of a work team.
- (iii) Assists in the provision of training in conjunction with supervisors and trainers.
- (iv) Understands and implements quality control techniques.
- (v) Works under minimal supervision, either individually or in a team environment.

The following tasks are indicative of what an employee at this level may perform, subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed -

Exercises high precision trade skills using various materials and/or specialised techniques.

Performs operations on a CAD/CAM terminal in the performance of routine modifications to NC/CNC programmes.

Works on complex machinery and equipment which utilises hydraulic and/or pneumatic principles and in the course of such work, is required to read and understand hydraulic and pneumatic circuitry which controls fluid power systems; or

Works on complex or intricate electrical interconnected low voltage circuits.

“Vehicle Building Tradesperson Level IV” means an Advanced Vehicle Builder who has completed the following training requirements -

an appropriate Post Trade Certificate; or

x percentage of modules towards an Advanced Certificate; or

y percentage of modules towards an Associate Diploma.

An Advanced Vehicle Builder works above and beyond a Special Class Vehicle Builder and to the level of their training -

- (i) Exercises the skills attained through satisfactory completion of the training prescribed for this classification, subject to the standards prescribed by the Implementation Manual.
- (ii) Is able to provide trade guidance and assistance as part of a work team.
- (iii) Provides training in conjunction with supervisors and trainers.
- (iv) Understands and implements quality control techniques.
- (v) Works under minimal supervision, either individually or in a team environment.

The following tasks are indicative of what an employee at this level may perform, subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed -

Works on machines or equipment which utilise complex mechanical, hydraulic and/or pneumatic low voltage circuitry and controls, or a combination thereof.

Works on machinery or equipment which utilises complex electrical/electronic circuitry and controls.

Works on instruments which make up a complex control system which utilises some combination of electrical, electronic, mechanical or fluid power principles.

Applies advanced computer numerical control techniques in machining or cutting or welding or fabrication.

“Advanced Tradesperson/Production Technician - Vehicle Building” means a Vehicle Building Tradesperson - Level IV who has completed -

An Advanced Certificate; or

Y modules of an Associate Diploma.

An Advanced Tradesperson/Production Technician works above and beyond a Vehicle Building Tradesperson - Level IV and to the level of his/her training -

- (i) Provides technical guidance or advice within the scope of this level;
- (ii) Prepares reports of a technical nature on specific tasks or assignments as directed or within the scope of discretion at this level;
- (iii) Has an overall knowledge and understanding of the operating principle of the systems and equipment on which the tradesperson is required to carry out their task;
- (iv) Assists in the provision of on the job training in conjunction with supervisors and trainers.

The following are indicative of tasks which an employee at this level may perform subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed -

Through a systems approach is able to exercise high level diagnostic skills on complex forms of machinery, equipment and instruments which utilise some combination of electrical, electronic, mechanical or fluid power principles.

Sets up, commissions, maintains and operates sophisticated maintenance, production and test equipment and/or systems involving the application of computer operating skills at a higher level than Vehicle Building Tradesperson Level IV.

works on various forms of machinery and equipment electronically controlled by complex digital and/or analogue control systems using integrated circuitry.

Works on complex electronics or instruments or communications equipment or control systems which utilise electronic principles and electronic circuitry containing complex analogue and/or digital control systems using integrated circuitry.

AWARDS/AGREEMENTS—Application for—

2026 WAIRC 00005

CITY OF CANNING INDUSTRIAL AGREEMENT 2025 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00005

CORAM : COMMISSIONER T KUCERA

HEARD : 3 OCTOBER 2025

DELIVERED : 7 JANUARY 2026

FILE NO. : AG 9 OF 2025

BETWEEN : CITY OF CANNING

Applicant

AND

WESTERN AUSTRALIAN MUNICIPAL, CLERICAL AND SERVICES UNION (WASU), THE LOCAL GOVERNMENT RACING CEMETRIES EMPLOYEES UNION (LGRCEU)

Respondents

AND

THE CONSTRUCTION, FORESTY, MINING AND ENERGY UNION OF WORKERS (CFMEUW)

Intervenor

Catchwords : Industrial Law (WA) – Application to register the *City of Canning Industrial Agreement 2025* – Application for union to be named as a party to the proposed agreement – Requirements under ss 41 and 41A(2) of the *Industrial Relations Act 1979* (WA)

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Commission Regulations 2005 (WA)
Interpretation Act 1984 (WA)
Labour Relations Reform Act 2002 (WA)
Industrial Relations Act 1979 (WA)
Workplace Agreements Act 1993 (WA)
Workplace Relations Act 1998 (Cth)

Result : Agreement registered

Representation:

Applicant : Mr C Beetham (of counsel)

Respondents : Mr C Fogliani (of counsel) on behalf of the Western Australian Municipal, Clerical and Services Union (WASU)

Mr K Trainer on behalf of the Local Government Racing Cemeteries Employees Union (LGRCEU)

Intervenor : Mr O Fagir (of counsel) on behalf of the Construction, Forestry, Mining and Energy Union of Workers (CFMEUW)

Case(s) referred to in reasons:

City of Cockburn v the Western Australian Municipal Administrative Clerical and Services Union of Employees [2023] WAIRC 00787; 103 WAIG 1723

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board [2021] WASCA 208; (2021) 101 WAIG 1457

Project Blue Sky & Ors v Australian Broadcasting Authority [1998] 194 CLR 355

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Reasons for Decision

- 1 This matter relates to an application the City of Canning (**COC**) has made (**registration application**) to register the *City of Canning Industrial Agreement 2025* (**proposed agreement**) under s 41 of the *Industrial Relations Act 1979* (WA) (**IR Act**).
- 2 The registration application is supported by two unions, both of whom are named as parties to the proposed agreement: the Western Australian Municipal, Administrative, Clerical and Services Union (**WASU**) and the Local Government, Racing and Cemeteries Employees Union of Western Australia (**LGRCEU**).
- 3 After the registration application was filed, the Construction Mining and Energy Union of Workers (**CFMEUW**) made an application to intervene in the registration application (**intervention application**).
- 4 By its intervention application the CFMEUW sought the opportunity to make submissions on:
 - i. whether the proposed agreement should be registered under s 41 of the IR Act; and

- ii. if the proposed agreement is to be registered, whether the Commission should make an order under s 41(3) of the IR Act to include the CFMEUW as a party to the agreement.

- 5 On 5 May 2025, I issued my Reasons for Decision [2025] WAIRC 00265 in the intervention application and permitted the CFMEUW to appear and make submissions as an intervenor (**intervention decision**).
- 6 In the reasons to follow, I will explain why, notwithstanding the submissions the CFMEUW has made in relation to the registration application, I have determined that it is appropriate to register the proposed agreement, without the CFMEUW being named as a party.

Background to the registration application

- 7 As I noted in the intervention decision, the COC commenced negotiations for an industrial agreement to replace the *City of Canning Enterprise Agreement 2021 (2021 Agreement)* which was made under the provisions of the *Fair Work Act 2009 (Cth) (FW Act)* in or around April 2024.
- 8 As a result of legislative changes that came into force on 1 January 2023, the local government industry transitioned from the National industrial relations system to the State industrial relations system. A full description of these legislative changes was provided in *City of Cockburn v the Western Australian Municipal Administrative Clerical and Services Union of Employees [2023] WAIRC 00787; 103 WAIG 1723 at [1]-[4] (City of Cockburn)*.
- 9 Under s 80BB of the IR Act, pre-existing industrial agreements made under the FW Act would continue to apply as new State instruments, until they are renewed or replaced.
- 10 The 2021 Agreement is cast in terms that are very similar to the provisions of the proposed agreement. It covers all the employees who are engaged in the classifications that are described in the 2021 Agreement as well as the WASU and the LGRCEU.
- 11 The classifications that appear in Appendices 1 and 1.1 of the proposed agreement include employees who work 'inside' for the COC in administrative roles and COC employees who work 'outside', performing duties that include maintenance, horticultural, waste disposal and minor construction work.
- 12 The participants in the negotiations for the proposed agreement included representatives from the COC, the WASU, the LGRCEU and the CFMEUW (**negotiating parties**). The COC also allowed the CFMEUW to hold meetings with some of the employees who will be covered by the proposed agreement, even though the CFMEUW is not a party to the 2021 Agreement.
- 13 During the negotiations, the CFMEUW raised the issue of whether it would be joined as a union party to the proposed agreement (**representation issue**). Although raised, it is reasonable to say this matter was not resolved between the negotiating parties.
- 14 Despite their disagreement over the representation issue, the negotiating parties reached agreement on all the other terms of the proposed agreement, including rates of pay, wage increases and classification structure.

Section 72A proceedings

- 15 At the same time as negotiations for the proposed agreement were occurring, the WASU, LGRCEU and CFMEUW have been involved in proceedings before a Commission in Court Session (**CICS**) under s 72A of the IR Act (**72A proceedings**).
- 16 The 72A proceedings are comprised of three separate applications that were joined and heard together by the CICS. The first of these is CICS 5 of 2023 in which the WASU is seeking an order under s 72A(2)(a) of the IR Act, which confirms the WASU has the right, to the exclusion of the CFMEUW, to represent the industrial interests of the outside employees, who work at the City of Rockingham.
- 17 Alternatively, the WASU in CICS 5 of 2023 seeks an order under s 72A(2)(c) that the CFMEUW does not have the right under the IR Act to represent the industrial interests of the outside employees, who work at the City of Rockingham.
- 18 The second, CICS 8 of 2023 is a responsive application from the CFMEUW which seeks an order under s 72A(2)(b) of the IR Act, in the event the CICS makes or proposes to make a finding, the CFMEUW does not have the right to represent the industrial interests of the outside employees, who work at the City of Rockingham.
- 19 By its application in CICS 8 of 2023, the CFMEUW seeks an order that it has the right to represent the industrial interests of outside employees who work at the City of Rockingham, who are employed as carpenters, painters and plant operators.
- 20 The third application, CICS 9 of 2023 is an application by the WASU in which the relief sought in CICS 5 of 2023, is also being pursued in relation to a list of local councils that includes the COC.
- 21 The LGRCEU supported the WASU in CICS 5 and 9 of 2023. The LGRCEU opposed the CFMEUW in CICS 8 of 2023.
- 22 If the CFMEUW is not successful in the 72A proceedings, then it may lose its right to be a party to industrial agreements in the local government industry.
- 23 Noting the COC has an interest in the 72A proceedings, particularly as it is a party to CICS 9 of 2023, the COC has formed the view, that the outcome of the 72A proceedings has the potential to decide the issues of:
 - i. whether any of its employees, who are bound by the proposed agreement are eligible to be members of the CFMEUW, thereby determining whether the CFMEUW has the right to become a party to the proposed agreement; or
 - ii. if the WASU and LGRCEU should have the exclusive rights to represent the industrial interests of the outside employees who work for the COC.
- 24 It is on this basis, the COC says, that it was not prepared to agree to the CFMEUW being a party to the proposed agreement, until after the 72A proceedings are determined.

- 25 For this reason, the COC throughout the negotiations for the proposed agreement, maintained that its position on the representation issue was dependent upon what happened in the 72A proceedings.
- 26 At the time of finalising these reasons, the hearing of the 72A proceedings was completed and the CICS had reserved its decision.

Applications to the Commission on the representation issue

- 27 During bargaining for the proposed agreement, two applications in which the representation issue was raised, were made to the Commission, under s 44 of the IR Act.
- 28 The first of these, C 25 of 2024 was made by the CFMEUW on 3 July 2024, while the negotiating parties were still bargaining for the proposed agreement (**first application**).
- 29 At the conclusion of a conciliation conference that was held on Monday, 8 July 2024 in relation to the first application, Senior Commissioner Cosentino ordered:
- THAT the conference be adjourned to a date to be fixed to consider the matter of the named parties to the replacement agreement, no earlier than the time that agreement on the balance of the terms of the replacement agreement are reached or the s 72A proceedings are determined.
- 30 The Senior Commissioner also made the following recommendation (**recommendation**):
- THAT the parties continue to bargain with each other in good faith in relation to the terms and conditions of a replacement agreement, other than the question of who is to be named parties to such a replacement agreement.
- 31 Following the issuance of the recommendation, bargaining between the negotiating parties continued. On or around 19 December 2024, the negotiating parties reached agreement on the terms of a proposed agreement, save and except for an agreed position on the representation issue.
- 32 On 14 January 2025, the COC made an application to the Commission under s 44 of the IR Act: C 2 of 2025 (**second application**). The second application was also referred to Senior Commissioner Cosentino, who convened a conciliation conference that was held on 17 January 2025.
- 33 Each of the negotiating parties attended the conciliation conference. The representation issue was the only matter that was traversed during the conference.
- 34 In an email that was sent to the negotiating parties following the conciliation conference it was agreed the following would occur:
- i. The COC, WASU and LGRCEU would sign a copy of the proposed agreement as soon as reasonably practical;
 - ii. Once the proposed agreement was signed, the COC would prepare and lodge an application to the Commission to register the proposed agreement;
 - iii. The COC agreed that it would copy the CFMEUW into the application to register the proposed agreement to ensure the CFMEUW had notice of the fact the application for registration had been made;
 - iv. The CFMEUW agreed to make any application to intervene in the COC's application to register the proposed agreement within 7 days of the application being lodged; and
 - v. The first and second applications would be withdrawn.
- 35 Following the conciliation conference, the COC made the registration application. Having regard to the context in which the first and second applications were withdrawn, I reached the conclusion in the intervention decision, that the representation issue was not resolved between the negotiating parties in conciliation before the Senior Commissioner and was in effect, left for another day.

The registration application

- 36 With the registration application, the COC, WASU and LGRCEU have applied to the Commission to register the proposed agreement as 'industrial agreement', that will:
- i. subject to a limited number of exceptions, bind all the employees, who work for the COC in the classifications that are described in Appendix 1 of the proposed agreement; and
 - ii. name the WASU and the LGRCEU as parties to the proposed agreement with the COC.
- 37 In dealing with the registration application, the Commission must decide whether the proposed agreement, satisfies the relevant criteria for the making of an industrial agreement, including those set out under ss 41 and 41A of the IR Act.
- 38 To this end, a copy of the proposed agreement was provided to the Commission in accordance with regulation 55(1) of the *Industrial Relations Commission Regulations 2005* (WA), together with a table that describes the changes the parties have made to the 2021 Agreement that are reflected in the terms of the proposed agreement.

Industrial agreements under Division 2B of the IR Act

- 39 Sections 41 and 41A are contained in Division 2B of the IR Act, which I have extracted below:

41. Industrial agreements, making, registration and effect of

- (1) An agreement with respect to any industrial matter or for the prevention or resolution under this Act of any related disputes, disagreements, or questions may be made between an organization or association of employees and any employer or organization or association of employers.
- (1a) An agreement may apply to a single enterprise or more than a single enterprise.

- (1b) For the purposes of subsection (1a) an agreement applies to more than a single enterprise if it applies to –
- (a) more than one business, project or undertaking; or
 - (b) the activities carried on by more than one public authority.
- (2) Subject to subsection (3) and sections 41A and 49N, where the parties to an agreement referred to in subsection (1) apply to the Commission for registration of the agreement as an industrial agreement the Commission must register the agreement as an industrial agreement.
- (3) Before registering an industrial agreement, the Commission may require the parties to effect such variation as the Commission considers necessary or desirable for the purpose of giving clear expression to the true intention of the parties.
- (4) An industrial agreement extends to and binds –
- (a) all employees who are employed –
 - (i) in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies; and
 - (ii) by an employer who is –
 - (I) a party to the industrial agreement; or
 - (II) a member of an organisation of employers that is a party to the industrial agreement or that is a member of an association of employers that is a party to the industrial agreement;
 - and
 - (b) all employers referred to in paragraph (a)(ii), and no other employee or employer, and its scope must be expressly so limited in the industrial agreement.
- (5) An industrial agreement operates –
- (a) in the area specified in the agreement; and
 - (b) for the term specified in the agreement.
- (6) Notwithstanding the expiry of the term of an industrial agreement, it continues in force in respect of all parties to the agreement, except those who retire from the agreement, until a new agreement or an award in substitution for the first-mentioned agreement has been made.

...

41A Which industrial agreements must not be registered under s.41

- (1) The Commission must not under section 41 register an agreement as an industrial agreement unless the agreement –
- (a) specifies a nominal expiry date that is no later than 3 years after the date on which the agreement will come into operation; and
 - (b) includes any provision specified in relation to that agreement by an order referred to in section 42G; and
 - (c) includes an estimate of the number of employees who will be bound by the agreement upon registration.
- (2) The Commission must not under section 41 register an agreement as an industrial agreement to which an organisation or association of employees is a party, unless the employees who will be bound by the agreement upon registration are members of, or eligible to be members of, that organisation or association.

Programming Orders

- 40 After issuing the intervention decision, I listed the registration application for a conciliation conference that was held on Thursday, 12 July 2025.
- 41 At the conclusion of the conciliation conference, I issued programming orders to deal with the registration application as follows (**programming orders**):
1. THAT the City, WASU and LGRCEU (**parties**) are to file any written submissions and materials in support of the application to register the *City of Canning Industrial Agreement 2025* (**application**) by 3 July 2025;
 2. THAT the CFMEUW is to file any written submissions and materials in opposition to the application by 31 July 2025;
 3. THAT the parties file any submissions in reply by 7 August 2025;
 4. THAT the matter be listed for a 1-day hearing on a date to be fixed;
 5. THAT the parties and the CFMEUW have liberty to apply.
- 42 After the parties filed their submissions, the registration application was listed for a one day hearing that was held on Friday 3 October 2025 (**registration hearing**).

COC's Submissions in support of the registration application

- 43 In the *City of Canning's Submissions in Support of Registration (COC's First Outline)*, the COC submitted the proposed agreement meets the requirements of s 41(1) of the IR Act which included that the proposed agreement was:
- i. 'with respect to' an industrial matter.
 - ii. made between the COC (an 'employer') and the WASU and LGRCEU (each of which is an 'organisation or association of employees' within the meaning of section 7 of the IR Act).
- 44 It was submitted that while subsection 41(1) refers to 'an agreement ... made between an organisation or association of employees', it does not limit the number of organisations or associations that may be a party to an industrial agreement.
- 45 The COC submitted that s 41(1) is permissive, not preclusive. It was contended the provision confers a statutory permission to make agreements of a certain type; 'with respect to any industrial matter'.
- 46 It was submitted s 41(1) does not require an industrial agreement to take any particular form and nor does it prohibit an employer from reaching the same agreement with different organisations and embodying those agreements in the one instrument.
- 47 The COC submitted the IR Act must be read together with the *Interpretation Act 1984 (WA) (Interpretation Act)*. It was submitted that due to the operation of s 10 of the Interpretation Act, words expressed in the singular; 'organisation or association of employees' includes the plural; 'organisations or associations of employees'.
- 48 In support of this submission, the COC provided examples of terms in the IR Act which support the language of ss 41 and 41A being construed in plural. One of the examples cited was s 42(1) of the IR Act, which provides that bargaining for an industrial agreement, may be initiated by an employer giving an 'intended party' a written notice that complies with, the requirement in s 42(3)(c) which describes who the 'intended parties' to an industrial agreement will be.
- 49 The COC also referred to s 42(6), which states:
- 'where bargaining is initiated under subsection (1) with more than one intended party to the agreement, all the negotiating parties are to bargain together'.
- 50 The COC submitted that its construction of s 41(1) of the IR Act is consistent with the obligation on the Commission to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms.
- 51 It was submitted that construing s 41(1) to require an employer to strike multiple (identical) agreements with different organisations or associations of employees would, 'in addition to running contrary to the text of the statute, be a triumph of form over substance'.
- 52 The COC submitted that its construction of s 41(1) of the IR Act is consistent with established practice as reflected in the industrial agreements that have been registered by the Commission. Referring to 57 industrial agreements, the Commission had registered since 1 January 2023, where a local government is the employer party, the COC noted that 21 of these were made with more than one organisation or association of employees.
- 53 The COC submitted the Commission must register the proposed agreement as an industrial agreement because:
- (a) the Commission has not identified any variations to the Agreement that it considers necessary or desirable for the purpose of giving clear expression to the true intention of the parties, and the parties have not suggested nor sought any;
 - (b) the Agreement specifies a nominal expiry date of 30 June 2027 which is no later than 3 years after the date on which the Agreement will come into operation;
 - (c) no application has been made under section 42G of the IR Act, so there are no provisions specified in an order made by the Commission under section 42G that need to be included in the Agreement;
 - (d) the Agreement specifies that approximately 800 employees will be bound by the Agreement;
 - (e) both the WASU and/or the LGRCEU are eligible to enrol as members the employees who will be bound by the Agreement.

See *COC's First Outline* paragraph 2.14.

WASU's Submissions in support of the registration application

- 54 In the *WASU's Outline of Submission (WASU's First Outline)* the WASU adopted the arguments the COC made regarding the construction of s 41(1) of the IR Act. The WASU said that it is of no significance s 41(1) refers to an 'organisation or association of employees' in the singular.
- 55 It was submitted the singular/plural rule in section 10 of the Interpretation Act is clearly intended to apply to s 41(1) and that this can be ascertained by reading subsections 41(1a) and (1b) of the Act – which confirm that multiple employers can be parties to an industrial agreement.
- 56 The WASU submitted the whole purpose of the proposed agreement, which can be discerned from its provisions, is setting the wages, salaries, allowances, hours of work, and other terms and conditions of employment of the COC's employees. It was submitted that in this respect, the proposed agreement is 'with respect to an industrial matter'.
- 57 Regarding the inclusion of the CFMEUW as a party to the proposed agreement, the WASU, referring to the decision of the Full Bench in *City of Cockburn* at [170], submitted the only type of variations the Commission can require the parties to make to an industrial agreement, before registering it under section 41(2) of the IR Act are those changes which meet the purpose in section 41(3).

- 58 It was submitted that in the present case, the difficulty with the CFMEUW's request to vary the proposed agreement, is that it is not a type of variation falling within the scope of section 41(3).
- 59 The WASU acknowledged the parties to the proposed agreement were aware that the CFMEUW wanted to be party but made a conscious decision to make the proposed agreement without the CFMEUW. The WASU submitted it was the clear intention of the parties the CFMEUW would not be a party to the proposed agreement.
- 60 As such, it was contended the Commission has no power under section 41(3) of the IR Act to require the parties to vary the proposed agreement to include the CFMEUW as a party.
- 61 Regarding the requirements under s 41A(2) of the IR Act, the WASU submitted that on a plain reading of the section, it was arguable the Commission cannot register an agreement under s 41(1) if at least one of the union parties cannot cover all the employees, who will be bound by the terms of the proposed agreement.
- 62 After making this submission, the WASU noted there was no case law expressly dealing with the construction of s 41A(2) despite the age of the provision. However, the WASU submitted the resolution of the issue will be inconsequential for the WASU as its eligibility rules are broad enough to cover every directly hired local government employee: See WASU's *First Outline* paragraphs 29-30.
- 63 It was submitted s 41A(2) would never prove to be an obstacle for the WASU when making industrial agreements for local government workers and the issue is more significant for the LGRCEU and the CFMEUW: See *WASU's First Outline* paragraph 31.
- 64 The WASU submitted that if a literal interpretation of s 41A(2) is adopted, the effect would likely be that:
- (a) The LGRCEU could never be a party to a 'combined industrial agreement' – even if the WASU was involved. The LGRCEU could only be a party to outside industrial agreements that do not include staff officers or clerical workers.
 - (b) The CFMEUW could never be a party to a 'combined industrial agreement' or an outside industrial agreement that applies to outside workers. It could only ever be a party to an industrial agreement in local government that was confined to carpenters, engine drivers, and potentially painters. It was submitted that it is unlikely such an agreement would ever exist in the local government industry:

See *WASU's First Outline* paragraph 34.

- 65 The WASU submitted that if the Commission is satisfied the proposed agreement meets the requirements of ss 41(1), 41(2), 41(3), 41A, 49N, 49Y, and 48A of the IR Act, then it must register the proposed agreement.

LGRCEU's Submissions in support of the registration application

- 66 The LGRCEU broadly agreed with the submissions the WASU and the COC made in support of the registration application. The LGRCEU submitted the process to register an industrial agreement is driven by those who are named as the parties.
- 67 As I understood the LGRCEU's submissions, it falls to the parties named in an industrial agreement to determine the matters upon which they have agreed, that are to be reflected in an industrial agreement, which in the present case, relates to the terms and conditions that will apply to the COC's workforce and the organisations that will be parties to the proposed agreement.
- 68 It was submitted the COC had reached the view, that an industrial agreement with the LGRCEU and the WASU resolved its dispute with those parties. The LGRCEU also submitted an agreement on the parties to be included in an industrial agreement is an industrial matter.
- 69 The LGRCEU contended that it was open to the parties who are named as being a party to the proposed agreement, to make an industrial agreement with the COC for those classifications within their constitutional coverage, even though other organisations who are not named as parties (in this case the CFMEUW) may have been participants in negotiations for the proposed agreement.
- 70 The LGRCEU described the registration application as a routine matter. It was submitted the parties to the proposed agreement had presented an industrial agreement to the Commission which complied with the statutory requirements under the IR Act and that none of the prohibitions that may prevent the proposed agreement from being registered, apply in the present case.

CFMEUW's Submissions in opposition to the registration application

- 71 The bulk of the argument in opposition to the registration application was set out in the *CFMEUW Submissions Opposing Application* (CFMEUW's submissions).
- 72 It was submitted the proposed agreement should not be registered because it does not comply with s 41A(2) and/or is not a registrable agreement, within the meaning of s 41 of the IR Act.
- 73 In the alternative, the CFMEUW submitted that if the proposed agreement is to be registered, it should be varied under s 41(3) of the IR Act, to give clear expression to the true intention of the parties, by including the CFMEUW as a party.

Submission on s 41A(2)

- 74 It was submitted the Commission's power to register an industrial agreement is not unlimited and is subject to the requirement under s 41A(2) of the IR Act.
- 75 The CFMEUW submitted that s 41A(2) should be interpreted by reference to the ordinary meaning of the words used in the section. It was submitted the resolution of the tension between s 41(1) and s 41A(2) having regard to the purposes of all the provisions of the scheme in the IR Act, is best resolved by affording paramouncy to s 41A(2).

- 76 Referring to s 83(1) of the IR Act, the CFMEUW submitted that it is clear any named party to an industrial agreement has standing to apply to the Industrial Magistrates' Court for the enforcement of an entitlement as against the person who contravenes it. However it was noted, the IR Act generally only allows unions to represent workers who are eligible for membership.
- 77 It was submitted that if the plain reading of s 41A(2) is subordinated in the way the parties named in the proposed agreement say it should, any party to an industrial agreement would have standing to bring an application concerning a contravention.
- 78 The CFMEUW said this would, for example, allow a union that does not otherwise have the right to represent the interests of an employee who is covered by an industrial agreement, to bring an underpayment claim against the employer in the union's name under s 83(1) in its capacity as a party to the industrial agreement, rather than relying on its ability to do so as the employee's representative.
- 79 It was submitted the same union, despite having the standing to bring a claim under s 83(1), is not permitted to refer any other industrial matter to the Commission under s 29(1)(a)(ii) of the IR Act unless the person[s] to whom the industrial matter relates are eligible to be members of the union.
- 80 The CFMEUW contended that similar language to that used in s 29(1)(a)(ii) is not in s 83(1)(c) of the IR Act because of the limiting effect of s 41A(2) of the IR Act on s 83(1)(c).
- 81 It was submitted a plain reading of s 41A(2) would not lead to absurd outcomes. By way of example, the CFMEUW referred to a situation where one union party to an industrial agreement, decides to retire from an industrial agreement under s 41(6), in circumstances where multiple unions are parties.
- 82 The CFMEUW submitted that in this situation, the industrial agreement would continue to apply to the employees and the remaining union parties, notwithstanding that many employees covered by the industrial agreement may be outside the constitutional coverage of the union[s] that remain parties.
- 83 It was submitted that s 41A(2), on any reasonable construction, was included in the IR Act to prevent the situation described in the preceding paragraph [81].

Effect on multi-union agreements

- 84 It was submitted that if s 41A(2) of the IR Act is read strictly, an industrial agreement could only include multiple union parties, if all the employees to be covered, are eligible to be members of all the unions, that are named as parties.
- 85 On this construction of s 41A(2), ss 41(6) and 83(1) could then be applied consistently with the other provisions of the IR Act that limit the right of organisations (unions) to represent members or those persons who are eligible to be members.
- 86 The CFMEUW submitted, that although unions bargaining together, is something contemplated by the IR Act under s 42(6), the effect of s 41A(2) is to require each union to make separate industrial agreements in the same or similar terms, once an agreement is reached.
- 87 It was submitted the practical outcome of this process would be the same as a 'combined industrial agreement'; except the employees covered by the industrial agreement would have to fall within the constitutional coverage of the named union party.
- 88 The CFMEUW suggested that multiple unions being required to make separate agreements will only cause a practical inconvenience or a disadvantage to negotiating parties if the default is that unions or employers, must bargain separately and negotiate terms that are not identical.
- 89 In support of this argument, the CFMEUW submitted that the norm or default that is established by s 42 of the IR Act (Bargaining for industrial agreement, initiating), is that even if each of the union parties, initially seek different terms and have different interests; there is one combined set of terms that will form the basis of their respective agreements if a final agreement is successfully reached among them.
- 90 It was submitted that to deviate from this norm, a negotiating party must seek permission from the Commission under s 42(6) to allow it to negotiate separately for a separate agreement in different terms. The CFMEUW went on to acknowledge, the IR Act provides several ways in which issues that arise in bargaining may be resolved.
- 91 The CFMEUW submitted that if the purpose of s 42(6) is not to address the implications of s 41A(2) in a situation where multiple unions are negotiating agreements with an employer, it is not clear what purpose it serves. It was submitted that giving primacy to the clear wording of s 41A(2) was conducive to a more harmonious interpretation of the IR Act that gives meaning to all the words used in s 41A(2) and s 42(6).
- 92 The CFMEUW submitted that if its construction of s 41A(2) is accepted, the Commission would not be permitted to register the proposed agreement because the LGRCEU under its rules, cannot represent staff officers and clerical workers in local government, who will be covered by the proposed agreement.
- 93 It was submitted the Commission cannot, because of s 41A(2), register the proposed agreement, as it purports to bind employees the LGRCEU is not eligible to enrol as members.

CFMEUW's misrepresentation allegations

- 94 The CFMEUW submitted the proposed agreement is not a registrable instrument, because the CFMEUW is a party to the 'agreement' for the purposes of s 41(1) of the IR Act, that was agreed upon in bargaining by the negotiating parties.
- 95 It was submitted the proposed agreement represents an agreement made between some of the parties, but not all of them, with the result that an industrial agreement has not been made between all the parties for the purposes of s 41(2).
- 96 By this submission the CFMEUW says that before, the Commission can register the proposed agreement, it must turn its mind to whether it is an agreement as to an industrial matter, an agreement made between an organisation or association of

employees and an employer or organisation or association of employers and that it had to be made for the purposes of s 41 and not for some extraneous or unlawful purpose.

- 97 The CFMEUW submitted the proposed agreement must be genuinely made within the meaning of s 41(1) to be capable of registration. This includes considering whether the agreement was made under misrepresentation.
- 98 To this end, it was submitted that in the early stages of bargaining for the proposed agreement, the COC made a representation to the CFMEUW that if there were no orders preventing the CFMEUW from having coverage of employees in local government and there were employees who were be eligible for membership of the CFMEUW at the time of registration, the CFMEUW would be included as a party to the proposed agreement.
- 99 On this basis, the CFMEUW says the union and its members who work at the COC, did not take any industrial action and they participated in the bargaining process in good faith. It was submitted that if this representation had not been made, the CFMEUW and its members would have likely taken a different course of action and arguably be in a different position.
- 100 It was submitted that as a result, the proposed agreement is vitiated by the COC's misrepresentation, and the mandatory requirement for registration pursuant to s 41 has not come into effect. In other words, the proposed agreement does not meet the threshold requirement that it is a bona fide agreement made for the purposes of s 41(1) of the Act.
- 101 The CFMEUW submitted that refusing registration on the ground the proposed agreement does not meet the threshold requirements of s 41, would accord with the requirement to read the IR Act consistently with its overall objects.
- 102 The relevant objects the CFMEUW referred to as set out in s 6, include:
- a. to promote goodwill in industry and in enterprises within industry: (s 6(a));
 - b. to provide for rights and obligations in relation to good faith bargaining: (s 6(aa));
 - c. 'to promote the principles of freedom of association and the right to organise: (s 6(ab));
 - d. 'to promote collective bargaining and to establish the primacy of collective agreements over individual agreements: (s 6(ad));
 - e. to ensure all agreements registered under the Act provide for fair terms and conditions of employment: (s 6(ae)); and
 - f. to encourage employers, employees, and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises: (s 6(ag)).

Why the Commission should refuse to register the proposed agreement

- 103 The CFMEUW submitted the Commission was required under s 26 of the IR Act to 'act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms, and to have regard to the interests of persons immediately concerned'.
- 104 It was submitted the express and mandatory provision regarding the registration of industrial agreements in s 41(2), and the requirement found in case law, for there to be a 'genuine agreement' must be interpreted and applied in pursuit of the objects of the IR Act.
- 105 The CFMEUW said that when s 41(2) was drafted, it is unlikely the conduct the CFMEUW has alleged against the COC was expected. More specifically, the CFMEUW submitted the IR Act does not contemplate employers allowing a union to participate in bargaining without, at any point, intending to register an industrial agreement with that union as a party.
- 106 It was submitted the IR Act clearly contemplated unions and employers participating in bargaining with the expectation that if an in-principal agreement is reached, all the unions that participated in the bargaining, will be party to the resulting agreement.
- 107 The CFMEUW contended that if the Commission allowed the other parties to make the proposed agreement without including the CFMEUW, it would effectively be 'greenlighting' employers engaging in conduct to pacify a union in bargaining, in pursuit of adverse outcomes for employees.

Variation to include the CFMEUW as a party

- 108 It was submitted the registration of the proposed agreement is subject to s 41(3) of the IR Act, which empowers the Commission to require the parties, to effect such variation[s] as it considers necessary or desirable, to give clear expression to the true intention of the parties.
- 109 The CFMEUW submitted that as a participant in bargaining, it was always intended that it would be included as a party under clause 1.2 of the proposed agreement. To this end, it was submitted the Commission should, exercise its power under s 41(3) of the IR Act and require the other parties to vary the proposed agreement to include the CFMEUW as a party.
- 110 It was submitted the other parties' reliance on the decision in *City of Cockburn* is misplaced, as that decision did not address the specific issue of whether section 41(3) can be used to add a party to an industrial agreement.
- 111 The CFMEUW contended the emphasis in *City of Cockburn* on the limited role of s 41(3) does not preclude its use to ensure that the true intention of the parties is reflected in a resulting industrial agreement, including who will be named as parties. It was submitted this is particularly pertinent, in light the CFMEUW's involvement in bargaining from the start of negotiations.

Reasons the Commission should vary the proposed agreement

- 112 The CFMEUW submitted that its involvement in bargaining was evidence of the parties' intention that it also be included as a party. This is despite the CFMEUW not being named in the application to register the proposed agreement. It was submitted the decision in *City of Cockburn* did not involve a case in which the true intention of the parties had been 'misrepresented'.

- 113 The CFMEUW argued that s 41(3) is not limited to clarifying the wording of an agreement. Rather the section could be invoked to ensure the proposed agreement reflects the fair and proper representation of an agreement that was reached all parties who were involved in bargaining.
- 114 The CFMEUW said that because it represents a significant proportion of the COC's workforce, its exclusion could undermine the fairness and legitimacy of the proposed agreement, which would be contrary to the objects of the IR Act.
- 115 It was submitted the CFMEUW's inclusion as a named party to the proposed agreement would be consistent with the objects of the IR Act and would support fair and inclusive collective bargaining.
- 116 The CFMEUW submitted its exclusion from the proposed agreement would undermine the promotion and primacy of collective bargaining by forcing the CFMEUW to litigate for its inclusion as a party, notwithstanding it had participated in bargaining and there was no suggestion the CFMEUW had engaged in conduct that warranted its exclusion.
- 117 It was submitted the CFMEUW's exclusion from the proposed agreement was one possible outcome of the 72A proceedings. The CFMEUW in effect submitted the other parties to the proposed agreement had made a pre-emptive decision to exclude the CFMEUW, had undercut its harmonious participation in collective bargaining and encouraged unnecessary disputation: (CFMEUW's submissions paragraphs 46-48).
- 118 The CFMEUW submitted that even if section 41(3) of the IR Act is construed narrowly, the Commission has broad discretionary powers to ensure that industrial agreements are consistent with the objects of the IR Act. The CFMEUW submitted the circumstances of this matter involve extraordinary and novel conduct by the other parties to the proposed agreement, which justified the variation that was sought: (CFMEUW's submissions paragraph 49).
- 119 It was submitted the kind of conduct at issue in this matter has not been contemplated in previous authorities. The CFMEUW submitted that in these unique circumstances, the decision in *City of Cockburn* case can clearly be distinguished.
- 120 The CFMEUW submitted that if the Commission, prefers the construction of s 41A(2) being pressed by the other parties and accepts that it can vary the proposed agreement under s 41(3) of the IR Act, the variation will comply with s 41A(2) because the CFMEUW has constitutional coverage of employees who work at the COC in classifications that are covered by the proposed agreement.
- 121 In relation to this, the CFMEUW submitted that it has constitutional coverage of 'outside' employees who are employed by the COC as;
- (a) carpenters;
 - (b) painters and graffiti removalists; and
 - (c) plant operators.

Reply Submissions

- 122 In the *City of Cannings' Submissions in Reply (COC's Reply Submissions)*, the COC argued the Commission should reject the CFMEUW's construction of s 41A(2). It was submitted this interpretation of the provision is contrary to the text, context and purpose of the IR Act, and over 20 years of industrial practice.
- 123 The COC submitted that if the Commission accepts the CFMEUW's construction of s 41A(2), it could jeopardise the validity of numerous industrial agreements registered by the Commission across several decades.
- 124 It was submitted the CFMEUW's submission that it should be treated as party to the proposed agreement, was inconsistent with its claim for an order under s 41(3) of the IR Act to be added as a party. The COC together with the LGRCEU, submitted the CFMEUW's construction of s 41A(2) relies upon the insertion of the word 'all' into the section. It was submitted that if Parliament had intended s 41A(2) to mean that all the employees who will be bound by the proposed agreement must be eligible to members of all the unions that are named as parties, s 41A(2) would have said this.
- 125 It was submitted the meaning to be given to s 41A(2) must be arrived at having regard to its text, in the context of the provision and its purpose. That context includes:
- (a) the explanatory memorandum for the bill that introduced the provision, which records that an 'employer may commence bargaining with several unions to cover their entire workforce in an industrial agreement';
 - (b) s 6(e) of the IR Act, by which it is an object of the IR Act to discourage, so far as practicable, overlapping of eligibility for membership of employee organisations;
 - (c) s 42(6) of the IR Act, which contemplates bargaining between an employer and more than one union as intended parties to an industrial agreement.

See *COC's Reply Submissions* - paragraph 9.

- 126 The COC submitted the construction advanced by the CFMEUW is contrary to the evident purpose disclosed by the broader context, namely that employers may reach an agreement with multiple unions whose membership does not overlap (at all, or in its entirety). It was submitted the construction advanced by the COC and the LGRCEU, and adopted by the Commission for two decades, is consistent with the evident purpose of the statute.
- 127 The COC did not accept the CFMEUW's argument that a union party, which may not have coverage of all employees bound by an industrial agreement, might be afforded a greater rights to enforce an entitlement provision under s 83(1)(c) of the IR Act, even in respect of employees bound who are not eligible to be members, presented a difficulty that warranted a narrower construction of s 41A(2).

- 128 It was submitted the contravention of an industrial agreement, regardless of the identity of the employee affected by the contravention, is an industrial matter which relates to all the employees who are bound by an industrial agreement (as they all have an interest in the enforcement of the agreement).
- 129 On the construction of s 41, the COC submitted ‘the parties’ referred to in s 41(2) of the IR Act are the parties to the instrument, to which the application to register an industrial agreement relates. It was submitted the only agreement that has been made is the proposed agreement between the COC, the WASU and the LGRCEU, to which the CFMEUW is not and was never a party.
- 130 The COC denied the parties to the proposed agreement ‘arbitrarily excluded’ the CFMEUW. It was submitted the issue of whether the CFMEUW would be a named party was the subject of bargaining. The COC accepted this much was made clear in the CFMEUW’s log of claims and in the minutes of bargaining meetings.
- 131 It was submitted the CFMEUW did not however, convince the COC, the WASU and the LGRCEU in bargaining that it should be included as a party to the proposed agreement. It is on this basis the COC strenuously denied the CFMEUW’s misrepresentation allegations: see *COC’s Reply Submissions* paragraph 25.
- 132 Similarly, the WASU and the LGRCEU, both in their reply submissions and during the registration hearing, each denied the CFMEUW’s misrepresentation allegations.

WASU Reply Submissions

- 133 In the *WASU’s Outline of Submissions in Reply*, the WASU argued that although the CFMEUW was a party to the negotiations for the proposed agreement, the WASU did not accept that it automatically followed, the CFMEUW had to be a party to the proposed agreement.
- 134 It was submitted the CFMEUW in its argument about the construction of the provisions in Division 2B of the IR Act, had conflated its role as a ‘negotiating party’ with the function of being a party to a resulting industrial agreement.
- 135 The WASU submitted the concepts are different, with the provisions of Division 2B, including s 42H, illustrating the distinction between a ‘negotiating party’ and who may ultimately go on to be made a party to an industrial agreement.
- 136 The WASU submitted that because of the distinction described, the IR Act allows some of the negotiating parties to reach agreement on the terms of an industrial agreement that will apply to them, including which organisations will be named as parties. As I understood the WASU’s submission, this is what happened with the proposed agreement.
- 137 It was submitted that while the CFMEUW might have wanted to be a party to the proposed agreement the CFMEUW was ultimately unable to convince the COC, WASU and the LGRCEU that this should occur.
- 138 To illustrate its point about the distinction between the role of a negotiating party, and being made a party to an industrial agreement, the WASU noted that Division 2B contains provisions that allow a negotiating party that does not reach an agreement to continue bargaining.
- 139 It was submitted that where there is no prospect of an agreement being reached, a ‘negotiating party’ may seek a declaration under s 42H(1) that will allow that negotiating party, to be carved out of the bargaining process and to make a separate application for an enterprise order under s 42I of the IR Act.
- 140 The WASU submitted that although the CFMEUW may have participated in bargaining and have members who work at the COC, there is nothing in the IR Act that required the COC, WASU and LGRCEU to make the proposed agreement with the CFMEUW.
- 141 It was further submitted there is no evidence the COC, WASU and the LGRCEU ever intended the CFMEUW would be made a party to the proposed agreement or that either party had misrepresented its position on the representation issue either.

Consideration – principles to be applied

- 142 To determine this matter, the Commission is required to apply the principles of statutory construction to the provisions that are in issue.
- 143 These principles were referred to in *City of Cockburn* and extracted from the decision of the Industrial Appeal Court in *Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board* [2021] WASCA 208; (2021) 101 WAIG 1457 (*Programmed*).
- 144 At paragraphs at [58] to [63] of *Programmed* Kenneth Martin J observed as follows:
- 58 There was no major disagreement between the parties (save in a respect discussed later in these reasons) over the principles of statutory construction applicable to the present task. Those principles are found extensively discussed by both Scott CC and later in the Full Bench reasons of Kenner SC.
- 59 Given those principles are well settled, I mention only three leading case authorities relevant towards the present exercise. First, I mention the observations of Buss J as the presiding member of the Industrial Appeal Court in *The Commissioner of Police v Ferguson*. In that appeal, Buss J addressed the principles of statutory construction relevant to the interpretation of s 33W of the *Police Act 1892* (WA). Conducting the exercise by reference to High Court authorities, his Honour observed:

70 In *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd*, French CJ, Hayne, Crennan, Bell and Gageler JJ observed:

‘This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text’ (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41). So must the task of

statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself [39].

See also *Saeed v Minister for Immigration and Citizenship*; *Thiess v Collector of Customs*.

- 71 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the existing state of the law, the history of the legislative scheme and the general purpose and policy of the provision (in particular, the mischief it is seeking to remedy). See *CIC Insurance Ltd v Bankstown Football Club Ltd*; *Project Blue Sky Inc v Australian Broadcasting Authority*; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.
- 72 The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See *Certain Lloyd's Underwriters v Cross*. The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd*.
- 73 As Crennan J noted in *Northern Territory v Collins*, '[s]econdary material seeking to explain the words of a statute cannot displace the clear meaning of the text of a provision (*Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ; [2006] HCA 11), not least because such material may confuse what was "intended ... with the effect of the language which in fact has been employed" (*Hilder v Dexter* [1902] AC 474 at 477 per Earl of Halsbury LC) [99]. That statement of principle applies to extrinsic evidence admissible at common law and also to extrinsic evidence admissible under s 19 of the *Interpretation Act 1984* (WA). In other words, the statutory text, and not non-statutory language seeking to explain the statutory text, is paramount. See *Nominal Defendant v GLG Australia Pty Ltd*. (footnotes omitted)
- 60 Second, a significant decision concerning statutory interpretation was provided by the joint reasons of Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection*; *SZTGM v Minister for Immigration and Border Protection*.^[40] Their Honours had observed there that:
- The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of the word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
- 61 Gageler J, in providing separate reasons towards situations where a court is confronted with a 'constructional choice' towards the possible meanings of a statute, observed:
- 37 ... The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.
- 38 The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.
- 39 Integral to making such a choice is a discernment of statutory purpose...
- 62 Gageler J's observations in *SZTAL* are presently relied upon by PIM to bear upon two aspects of its arguments supporting a narrower construction of the term 'construction industry' as deployed in the Act. First, PIM submits that its contended meaning of 'construction industry' (which would limit the application of the definition only to nominated activities carried out at either building sites or construction sites) is open as one possible constructional choice. It is a meaning that PIM, invoking the observations of Gageler J, says is not wholly ungrammatical or unnatural.^[43] Next, building from the assumed platform of that construction being open, PIM says that its contended meaning of the defined term 'construction industry' is a better fit overall - measured against the statutory purpose of the Act. This point will be elaborated upon later in these reasons.
- 63 The last case authority I mention regarding statutory construction is *Commonwealth v Baume*. It provides longstanding authority for the proposition that the task of statutory interpretation should proceed on a basis of

assuming that words in legislation be afforded some measure of coherent utility. Put in more colloquial terms, text deployed within legislation ought to be assessed on the basis that it has some 'work to do'. The more recent observations in *Project Blue Sky Inc v Australian Broadcasting Authority* reaffirm this principle.

145 Having regard to the principles that are contained in the paragraphs I have extracted, it is necessary to first consider the meaning of s 41A(2) from its text.

First constructional choice

146 I accept that there are two ways in which s 41A(2) of the IR Act may be interpreted. The first of these is favoured by the CFMEUW and largely relies upon a narrower construction of the provision.

147 The CFMEUW's construction of s 41A(2), views the words 'the employees' as meaning 'all' or 'each one of' the employees who will be covered by an industrial agreement. Like the construction being pressed by the COC and LGRCEU, this interpretation would require additional words to be read into the provision.

148 In addition, the CFMEUW's construction relies upon the Interpretation Act having no application to the present case.

149 If the CFMEUW's construction is preferred, it follows the Commission would not be permitted to register the proposed agreement in its current form. This is because only one of the two union parties to the proposed agreement, (the WASU) has the right to enrol 'all' the employees who are bound by the proposed agreement, as members.

150 As the proposed agreement applies to both 'inside' and 'outside' classifications, the WASU is the only union party to the proposed agreement that is entitled under its rules, to represent both groups of employees.

Second constructional choice

151 The second constructional choice is that which is favoured by the COC and the LGRCEU. It relies upon a much broader construction of s 41A(2). It is also dependent upon the Commission accepting the Interpretation Act applies when interpreting the IR Act.

152 If this construction is preferred and I form the view an 'agreement' as referred to in the text of s 41 of the IR Act, means a written instrument, to which the COC, WASU and LGRCEU are named as parties, then subject to the other requirements being met, including those under ss 41 and 41A(1), the Commission must register the proposed agreement.

Interpretation Act

153 An issue that is pivotal to determining the matters at issue in this case is whether the Interpretation Act applies.

154 At s 3 the Interpretation Act relevantly says as follows:

3. Application

(1) The provisions of this Act apply to every written law, whether the law was enacted, passed, made, or issued before or after the commencement of this Act, unless in relation to a particular written law —

(a) express provision is made to the contrary; or

(b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application;

...

155 From a review of the IR Act, it is difficult to see how the Interpretation Act would not apply to the construction of the provisions that are in issue.

156 More specifically, there does not appear to be anything in the IR Act, whether express or implied, that in my view, would exclude the Interpretation Act in the manner contemplated by s 3(1)(a) or (b) that I have extracted above.

157 Having formed this view, I am also mindful that because of s 19 of the Interpretation Act the Commission is permitted to have regard to the specified range of extrinsic materials (**extrinsic materials**), that go some way, albeit to a limited extent, to explaining how I should construe s 41A(2) of the IR Act in its proper context.

Legislative history of s 41A(2)

158 Section 41A(2) as it currently appears in the IR Act was inserted as part of suite of amendments that were introduced with the *Labour Relations Reform Act 2002 (LRR Act)*.

159 The LRR Act was principally directed at establishing an industrial relations system, in Western Australia to promote a collective approach to industrial relations. Also important was re-establishing the Commission's role as an effective independent umpire in industrial relations: see *Explanatory Memorandum, Labour Relations Reform Bill 2002 (WA) (LRREM)* paragraphs 2(e) – 2(f).

160 To this end the IR Act was amended to include a requirement for negotiating parties to bargain in good faith. Provisions were also inserted to give the Commission increased powers to make arbitrated enterprise orders, in circumstances where negotiations for an industrial agreement became deadlocked or one party or the other, breached the requirement to bargain in good faith; see *LRREM* paragraphs [121] – [122].

161 A greater role for unions in representing the industrial interests of employees in bargaining for wages and working conditions, was envisaged by the amendments that were contained in the LRR Act. This role was acknowledged in the new objects the CFMEUW referred to in its submissions, that I set out in the preceding paragraph [102] of these reasons.

162 To this end the good faith bargaining requirements that were inserted into the s 42B of the IR Act following the passage of the LRR Act include the following:

42B. Bargaining for industrial agreements, good faith required etc.

- (1) When bargaining for an industrial agreement, a negotiating party must bargain in good faith.
- (2) Without limiting the meaning of the expression, bargaining in good faith (emphasis added) by negotiating parties includes doing the following things –
 - (a) stating their position on matters at issue, and explaining that position;
 - (b) meeting at reasonable times, intervals and places for the purpose of conducting face-to-face bargaining;
 - (c) disclosing relevant and necessary information for bargaining;
 - (d) acting honestly and openly, which includes not capriciously adding or withdrawing items for bargaining;
 - (e) recognising bargaining agents;
 - (f) providing reasonable facilities to representatives of organisations and associations of employees necessary for them to carry out their functions;
 - (g) bargaining genuinely and dedicating sufficient resources to ensure this occurs;
 - (h) adhering to agreed outcomes and commitments made by the parties.

...

Abolition of individual workplace agreements

163 The LRR Act repealed the *Workplace Agreements Act 1993* (WA) (**WA Act**) which at that time had promoted the making of 'workplace agreements' between individual employees and their employers, to the exclusion of collective instruments such as awards and industrial agreements.

164 Organisations (unions) prior the amendments made by the LRR Act, were unable to be parties to workplace agreements that were made under the WA Act. That is because workplace agreements could only be made between an employer and an individual employee: (s 5 WA Act).

165 As a result of the repeal of the WA Act, individual workplace agreements were abolished, with employees' wages and working conditions to be covered;

- i. at a minimum, by awards;
- ii. replaced by industrial agreements made under s 41 of the IR Act to which a union/unions would be a party;
- iii. arbitrated enterprise orders; or
- iv. by a new stream of collective instruments 'Employer Employee Agreements' to which union would not be a party:

See *LRREM* – Part 3.

166 Consistent with the promotion of a collective approach to industrial relations, a restriction on bargaining for 'multi-employer' industrial agreements was also removed: *LRREM* paragraph [110].

Previous s 41A

167 The provision that preceded the current s 41A, was cast in very different terms and directed to a whole other purpose; ensuring industrial agreements were confined in their scope and application to a single enterprise.

168 Section 41A as it appeared in the IR Act immediately prior to the passage of the LRR Act was the provision that in effect, placed a prohibition on industry wide or multi-employer industrial agreements. It was previously framed in the following terms:

41A. Restriction on power to register industrial agreements

- (1) The Commission shall not under section 41 register an agreement as an industrial agreement if –
 - (a) the agreement applies to more than a single enterprise; and
 - (b) any term of the agreement is contrary to this Act or any General Order made under section 51, or any principles formulated in the course of proceedings in which a General Order is made under section.
- (1A) The Commission shall not under section 41 register an agreement as an industrial agreement unless the agreement includes an estimate of the number of employees who will be bound by the agreement upon registration.
- (2) For the purposes of subsection (1)(a) an agreement applies to more than a single enterprise if it applies to –
 - (a) more than one business, project or undertaking; or
 - (b) the activities carried on by more than one public authority.

[Section 41A inserted by No. 15 of 1993 s.14; amended by No. 79 of 1995 s.10]

169 The change to s 41A as it now appears in the IR Act that followed the LLR Act, removed the prohibition that I have described in the preceding paragraph [168].

Single union agreements

170 To discern the proper construction of s 41A(2), I have considered two different scenarios the Commission may be presented with, in an application to register an industrial agreement under s 41 of the IR Act and how the language of the provision could apply to those scenarios.

171 The first scenario is the least controversial and having regard to the text of the provision is the easiest to grasp. It involves an application to register an industrial agreement where one only organisation (union) is a party.

172 The Commission in these circumstances would, by virtue of s 41A(2) of the IR Act only be permitted to register the agreement if ‘the employees’ who work in the classifications to which the industrial agreement applies, are either members of or eligible to be members of the union and;

- i. who work in the enterprise to which the agreement applies; or
- ii. in the case of multi-employer agreements, who work for the employers to whom the industrial agreement applies.

173 Local Government provides some very workable illustrations of how s 41A(2) applies in practice to the registration of single union industrial agreements.

174 By way of example, the Commission can register an industrial agreement with a local government employer to which the WASU is a sole union party, because of the broad coverage the WASU has under its rules, to represent the industrial interests of employees in the local government industry both ‘inside’ and ‘outside’ (*WASU Rules* – Rule 5).

175 The LGRCEU by contrast, would because of its eligibility rule that confines the LGRCEU’s coverage to ‘outside workers’ would only be permitted to apply to register an industrial agreement as a single union agreement for those workers alone (*LGRCEU Rules* – Rule 3).

176 The section would also prevent the Commission from making multi-employer agreements with a single union as a party unless each of the employees who work in the classifications to which the industrial agreement applies, are eligible to be members.

177 This construction of s 41A(2) for single union agreements is supported by the context in which the WA Act was repealed and the IR Act was amended by the LRR Act.

178 It also sits comfortably alongside s 72A of the IR Act, which allows the Commission to modify an organisation’s capacity to represent the industrial interests of employees (which would include making industrial agreements) in particular enterprises or industries who work in callings that fall outside of its constitutional coverage.

Greenfields agreements

179 When construing the words used in s 41A(2), in the context in which it was drafted, it is worth noting the provision, may be applied to the making of ‘Greenfields agreements’, under s 41 of the IR Act where unlike the present case there are no employees employed by the employer at the time the agreement is made.

180 Like the equivalent provisions of the *Workplace Relations Act 1998* (Cth) that were in force at the time the LRR Act was passed, s 41 of the IR Act would allow an industrial agreement to be made between an employer and a union where a new plant or business is being established.

181 It stands to reason that where a greenfields agreement is being made, the function of s 41A(2) is to ensure the organisation, that will be party to what is an entirely new industrial agreement, is entitled to represent the industrial interests of the employees who will be bound by the resulting agreement.

182 S 41A(2) in these circumstances, would operate to prevent an employer from attempting to make an industrial agreement to the exclusion of the union with the legitimate right to represent the interests of its employees who will be bound by it, with an organisation that not only lacks the constitutional coverage to represent its workforce, but which the employer might regard as more quiescent: (A contemporary description of the relevant provision under s 170LL of the *Workplace Relations Act 1998* (Cth) is provided in Creighton & Stewart, *Labour Law – Third Edition* [6.76]-[6.78]).

183 While I am not suggesting the situation that I have described in the preceding paragraph [183] has occurred in the present case, in the context of statutory provisions promoting good faith bargaining and freedom of association, the use of s 41A(2) as a mechanism to constrain such conduct, is a purpose that is readily discernible from the text of the provision.

184 Such conduct might also be viewed as contrary to both the object to promote ‘freedom of association and the right to organise’ under s 6 of the IR Act, but also the requirements of good faith bargaining under s 42B.

Extrinsic materials

185 The content of the extrinsic materials lends some weight to my assessment of the purpose for which s 41A(2) was included in the IR Act. That said, I accept that beyond the explanation I have gleaned from the *LRREM* on why s 41A in its previous form was amended, there is a small amount extrinsic material to explain why the provision as it now appears in the IR Act is there and the subject matter it was intended to address.

186 In addition to the *LRREM*, a search of Hansard which captured the parliamentary debate for the introduction of the Labour Relations Reform Bill 2002 (WA) reveals the amendment of s 41A of the IR Act was canvassed: *Hansard – Legislative Assembly* - 27 March 2002 p 9503.

187 In a robust exchange with his opposition colleagues, the then Minister for Industrial Relations; the Hon John Kobelke MLA said the following about s 41A:

Mr Kobelke: Proposed section 41A does not substantially amend the legislation; although it is amended to deal with demarcation matters. If two parties formulate an industrial agreement, they will then seek to have that agreement registered. Proposed section 41A does not change that. The commission will register the agreement subject to certain matters; that is, the nominal expiry date cannot be more than three years, it cannot be registered if it includes any provisions specified in relation to that agreement by an order referred to in section 42G, and it must include an estimate of the number of employees who will be bound by it. If it complies, it will be registered.

Proposed subsection (2) includes another requirement in an attempt to reduce the potential for a demarcation dispute when two different organisations seek to register an industrial agreement to get coverage.

- 188 While the Minister's statement might be somewhat light on detail, I nevertheless regard his acknowledgement that the amendment to s 41A(2) of the IR Act, was made to 'reduce demarcation disputes' as significant.
- 189 When the Minister's comments are viewed alongside the contents of the *LRREM* that I earlier referred to, it appears reasonable to conclude s 41A(2) was intended to place a limit on the extent to which organisations (unions) would be allowed to secure an industrial agreement in businesses or for groups of employees whose employment arrangements were previously covered by individual workplace agreements, to which a union was not a party.
- 190 This limit involved placing a restriction on a union using industrial agreements as a means to extend its coverage to employees, which the union, under its rules, is not entitled to represent. This it appears, is despite the recognition of a bargaining agents as part of the good faith bargaining requirements being mandated in the amendments to the IR Act.
- 191 Although these contextual observations on the purposes of s 41A(2) might lend some weight to the interpretation being pressed by the CFMEUW, the argument in support of this construction faces some difficulty where the Interpretation Act applies, a point to which I will return.

Multi-union industrial agreements

- 192 The second scenario that I have considered to discern the proper construction of s 41A(2) and which is at issue in this case, is where an application is made to register an industrial agreement to which two or more unions are parties.
- 193 As I indicated earlier in these reasons and despite the CFMEUW's submission to the contrary, I do not consider that s 10 of the Interpretation Act has by reference to the context, objects or purpose of the IR Act, been excluded.
- 194 Having formed this view, it follows that the language used in ss 41(1) and 41A(2) that is expressed in the singular, must be construed in plural. As a result, the words '*that organisation*' which appear in the final sentence of s 41A(2), when read in plural, should be read as 'the organisations' (emphasis added).
- 195 When interpreted this way, s 41A(2) would be taken to mean that employees who are bound by an industrial agreement, must be either members of or eligible to be members of at least one of the organisations that are parties to an industrial agreement.
- 196 I have acknowledged, this construction like the interpretation being pressed by the CFMEUW would require words to be read into s 41A(2). However, this in my view is as a result of the operation of s 10 of the Interpretation Act and not because I have imported words into the statute to correct a drafting deficiency.

A construction consistent with the objects of the IR Act

- 197 I consider that a construction that does not impede the making of industrial agreements with more than one union as a party, would support and be consistent with the objects in s 6 of the IR Act.
- 198 Specifically, I consider this construction would enable parties to make industrial agreements that are appropriate to their needs, whether at an enterprise or industry level, thereby giving effect to an important object as described in s 6 of the IR Act as follows;
- (ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees;'

- 199 It would also be consistent with the other objects under s 6 of the IR Act, including the promotion of freedom of association and the right to organise and the promotion of collective bargaining.

Relationship with other provisions in the IR Act

- 200 I consider the construction s 41A(2) that is favoured by the COC and the LGRCEU, but which relies on s 10 of the Interpretation Act, aligns with other provisions in the IR Act
- 201 One example is the requirement under s 61, that an organisation is subject to the jurisdiction of the Commission and the IR Act and all the members of an organisation are bound by the rules of the organisation, while they are members.
- 202 The effect of s 61, where more than one organisation is a party to an industrial agreement, is that each organisation, will only be permitted to enrol employees as members, who work in a classification or classifications under the industrial agreement, which the organisation is entitled to enrol as members, under its rules: (s 61 of the IR Act).
- 203 If it is accepted that s 41A(2) is taken to mean that employees who are bound by an industrial agreement, must be either members of or eligible to be members of at least one of the organisations that are named as parties to an industrial agreement, then because of s 61 there would be a limit, under its rules, on the employees a union could enrol as members.
- 204 This construction of s 41A(2) would have the effect that organisations who have either only partial coverage (for example where there are two organisations named as parties and each one represents the industrial interests of different classifications) or as in the case of the LGRCEU in this matter, overlapping coverage, (for example both unions may enrol outside workers as members), could each be parties to the same industrial agreement.

Relationship with s 42 of the IR Act

205 I do not accept the CFMEUW's submission that s 42 of the IR Act assists with the construction of s 41A(2). More specifically, I do not consider that s 42(6) was inserted into the IR Act to address implications presented by s 41A(2).

206 Those parts of s 42 of the IR Act that are relevant on this point are in the following terms:

42. Bargaining for industrial agreement, initiating

(1) Bargaining for an industrial agreement may be initiated by an organisation or association of employees, an employer or an organisation or association of employers giving to an intended party to the agreement a written notice that complies with subsection (3).

...

(6) Where bargaining is initiated under subsection (1) with more than one intended party to the agreement, all the negotiating parties are to bargain together unless the Commission, on the application of a negotiating party, directs that that negotiating party may negotiate separately with the initiating party.

...

207 While s 42 falls within the same division of the IR Act as s 41A(2), it appears its inclusion is for a designated purpose; the initiation of bargaining and the circumstances in which parties (which could include employers against whom bargaining is initiated for a multi-employer agreement) are to bargain together.

208 Section 42 is not concerned with the requirements that must be met for the registration of an industrial agreement. It is directed to commencing a process to trigger the parties' rights when one or the other is not bargaining in good faith or bargaining is at a stalemate, rather than the requirements that must be satisfied for the registration of an industrial agreement.

209 I am therefore respectfully inclined to accept that the CFMEUW in its submissions, has conflated the concept of being a party to an industrial agreement with that of a negotiating party, a point to which I will return.

Section 41A(2) is not the leading provision

210 It is well established that reconciling conflicting provisions in a statute will often require a court or tribunal to determine which is the leading provision and which is the subordinate provision, and which must give way to the other; *Project Blue Sky & Ors v Australian Broadcasting Authority* [1998] 194 CLR 355 (*Project Blue Sky*) at [70].

211 It is only by determining the hierarchy of provisions will it be possible to give each provision the meaning, which best gives effect to a statute's purpose and language, while maintaining the unity of the statutory scheme: *Project Blue Sky* at [70]

212 Having applied this principle to the present case, it is my view the provision that should make way for s 41A(2) is s 41(1). This is because a paramount purpose of the IR Act is the promotion collective bargaining and the making of industrial agreements that best suit the needs of enterprises within industries. A narrow construction of s 41A(2) would clearly hinder this purpose.

Not an absurd construction

213 I am not convinced that the construction of s 41A(2) favoured by the COC and the LGRCEU, would lead to the types of absurd results the CFMEUW has foreshadowed in its submissions.

214 Moreover, the construction of s 41A(2) that has enabled the making of multi-union industrial agreements, has as a matter of longstanding practice, been supported across industries and previously, by each of the union parties in this matter: (see *LGRCEU Submissions* at paragraph 8 and accompanying footnotes on the previous agreements that have been made to which the CFMEUW is a joint party).

Conclusion on the construction of s 41A(2)

215 For all the reasons I have set out in the previous paragraphs [143]-[215], I do not accept that s 41A(2) of the IR Act presents as a barrier to the registration of the proposed agreement.

216 I consider that the construction of s 41A(2) of the IR Act that applies without controversy, for the registration of an industrial agreement where only one organisation is a party, may by operation of s 10 of the Interpretation Act, be applied so that unions with either partial or overlapping coverage may be made parties to a single industrial agreement.

217 Having reached this conclusion, I will now turn to consider the CFMEUW's next argument in opposition to the registration of the proposed agreement.

The CFMEUW's submission on whether there is an agreement

218 As I understand the CFMEUW's submissions, the CFMEUW says that because it was involved in the negotiations for the proposed agreement as a negotiating party and a final agreement was reached in those negotiations which the CFMEUW supported, it follows that I should find the outcome that was reached in those negotiations was an agreement, to which the CFMEUW is a party: (t-s 15-18).

219 The CFMEUW's submission put another way, is that the proposed agreement is not a registrable agreement in respect of an industrial matter because it does not reflect what was agreed between the negotiating parties in bargaining.

220 By its submission, the CFMEUW in effect contends that an industrial agreement within the meaning of s 41(1) of the IR Act is not just the signed instrument that is put before the Commission for registration.

221 Rather, the CFMEUW submits the Commission is required to take a more expansive view of what an industrial agreement means. It was submitted I should therefore conclude that an agreement can only be made where each of the organisations who were involved in bargaining for the industrial agreement are named as parties.

Distinction between negotiating parties and the parties to an industrial agreement

222 I consider that there are several difficulties with the CFMEUW's submission that despite what the registration application says, the CFMEUW should be treated as a party to the proposed agreement.

223 Firstly, I consider the language used in s 41 in the context of Division 2B, makes a separation between bargaining for an industrial agreement and the various instruments that may result from this process.

224 I consider that Division 2B of the IR Act contemplates three separate, yet related processes as follows:

- i. bargaining for an industrial agreement (which includes the initiation of bargaining and the requirement to bargain in good faith);
- ii. the making, registration and effect of an industrial agreement;
- iii. the recourse that is available when a negotiating party does not bargain in good faith, bargaining becomes deadlocked or when bargaining is at an end.

225 Relevantly s 40C, which precedes s 41 within Division 2B, is in the following terms:

40C. Terms used

In this Division –

initiating party, (emphasis added) in relation to a proposed industrial agreement, means the party that initiated the bargaining for the agreement under section 41(1);

negotiating party, (emphasis added) in relation to a proposed industrial agreement, means –

- (a) the initiating party; and
- (b) a person who notifies the initiating party under section 41A(1) that that person will bargain for the industrial agreement;

...

226 The terms 'initiating party' and 'negotiating party' are used throughout Division 2B, particularly in those sections that relate to the bargaining process that were introduced with the LRR Act; (see for example ss 40C, 42, 42A, 42B, 42C, 42D, 42E, 42F, 42G, 42H and 42I).

227 Significantly, neither term (initiating party or negotiating party) appears in the description of the parties who may make an industrial agreement under s 41(1) of the IR Act.

228 Section 41 of the IR Act is not a new provision. By this, I mean that while s 41 sits alongside those parts of Division 2B that were introduced with the passage of the LRR Act that I have referred to, the section as it appears now, was in previous versions of the IR Act.

229 It is my view that if parliament had intended that an industrial agreement could only be made between the initiating party and negotiating parties, (which is the construction the CFMEUW in effect contends I should prefer), s 41 would have been amended to say this.

230 I consider that the exclusion of these terms from s 41 (initiating party, negotiating party) was a deliberate constructional choice, with the intention that s 41 was directed to the form of an industrial instrument to be registered, where an agreement with respect to an industrial matter is reached, between an employer or employers and the organisation or organisations, who are the parties to an industrial agreement.

231 The effect of this finding is that even if I proceed on the basis the CFMEUW was a negotiating party within the meaning of s 40C of the IR Act, it does not follow that there is a requirement under ss 41(1) or 41(2) for the CFMEUW to be included as a party to an industrial agreement.

Industrial agreement must be a registrable instrument

232 The second difficulty I have with the CFMEUW's submission that the agreement should be regarded as the registrable instrument, is one to which the CFMEUW is a party, is that the language of s 41, strongly suggests an 'industrial agreement' must be a tangible document, that is capable of being 'registered', provided the relevant pre-conditions for registration are met.

233 In other words, I consider that the purpose of s 41 is to provide the legislative mechanism by which an 'agreement with respect to an industrial matter', between an employer or employers and an organisation or organisations, is to be formalised and reduced to a documentary form.

234 Consistent with this construction, an 'industrial agreement' is a term defined under s 7 of the IR Act as follows;

'industrial agreement means an agreement registered by the Commission under this Act as an industrial agreement'.

235 The requirement for an industrial agreement to be produced in a signed documentary form is evident from Regulation 55 of the *Industrial Relations Commission Regulations 2005 (WA)* which relevantly provides:

55. Application for industrial agreement

- (1) Any application for registration of an industrial agreement must be accompanied by –
 - (a) a copy of the agreement, as executed by all of the parties to that agreement; and
 - (b) a statement that summarises any changes that the agreement effects in the relevant rates of pay and conditions of employment of the employees to whom the agreement relates.
- (2A) An application by all of the parties to an agreement must be signed by each of them or their agents, and when necessary, sealed by them.

...

236 It is trite that before an industrial agreement can be registered, there must be an 'agreement with respect to an industrial matter'.

237 The *Macquarie Dictionary* variously defines an 'agreement' as;

'the act of coming to a mutual arrangement';

'a unanimity of opinion';

'an expression of assent by two or more parties to the same object', and

'the phraseology, written or oral of an exchange of promises'.

238 There is no dispute the matters regulated by the proposed agreement including the organisations that are the parties to the proposed agreement, fall within the description of an 'industrial matter' that may be the subject of an industrial agreement.

239 It is also not disputed the COC, WASU, LGRCEU and CFMEUW had each agreed on the wages and working conditions to apply under the proposed agreement.

240 However, the matter the parties have not reached 'a unanimity of opinion or mutual arrangement' on, was in respect of the representation issue and the CFMEUW being made a party to the proposed agreement.

Parties to an industrial agreement must be agreed

241 It is of relevance that the requirement to bargain in good faith in s 42D that appears in Division 2B, does not require a negotiating party to agree upon any matter to be included in or excluded from an industrial agreement: s 42D(a).

242 It is also relevant the duty to bargain in good faith, does not require a negotiating party to enter into an industrial agreement either: s 42D(b).

243 Also significant is the restriction on the Commission's power to give any directions or make an order requiring or that would have the effect of requiring a negotiating party to enter into an industrial agreement or to include any matters that are not agreed: s 42F.

244 While I accept the negotiating parties in this matter have agreed upon the wages and working conditions that will apply to the COC's employees who will be covered by the proposed agreement, they have not agreed the CFMEUW would be made a party.

245 The inclusion of the CFMEUW as a party is something each of the negotiating parties would have had to agree to. As there was no agreement between the negotiating parties on the representation issue, I am not satisfied the proposed agreement is an instrument to which the CFMEUW is a party.

246 For this reason, I am satisfied the parties to the proposed agreement are the organisations that are described in Clause 1.2 of the proposed agreement.

Variation of the proposed agreement under s 41(3)

247 There is in my view two difficulties with the submission on s 41(3) being pressed by the CFMEUW. Firstly, and as the text of the provision suggests, I consider that the Commission's power under s 41(3) may only be exercised in respect of the named parties to an industrial agreement.

248 In view of my finding that the organisations named (WASU and LGRCEU), are the union parties to the proposed agreement, I do not consider that I have the power under s 41(3) of the IR Act to join the CFMEUW as a party.

249 The power under s 41(3) of the IR Act is confined to requiring the parties' (emphasis added) to an industrial agreement, to effect such variation as the Commission considers necessary for the purpose of giving clear expression to the true intention of 'the parties'.

250 Secondly, and more crucially, if the Commission had the power under s 41(3) to make the variation sought, I would need to be satisfied the COC, WASU and LGRCEU had intended the CFMEUW would be made a party to the proposed agreement.

251 While I accept the three parties to the proposed agreement were content for the CFMEUW to take part in bargaining as a 'negotiating party', I am not satisfied that a consensus was ever reached on the representation issue.

252 Thirdly, I do not consider that s 41(3) of the IR Act gives the Commission a broad, discretionary power to compel parties to make a variation to an industrial agreement on a matter they have not agreed upon.

253 As the decision of the Full Bench in *City of Cockburn* at [170] makes clear, so long as the minimal conditions under ss 41 and 41A are met, the Commission must register an industrial agreement. It seems that s 41(3) is there to give the Commission the power to correct spelling, grammatical and other drafting errors that may make provisions of an agreement unclear or give rise to confusion.

254 There is a limit to the Commission's power under s 41(3) and it is not directed to major alterations of an industrial agreement: see *City of Cockburn* at [169] citing *Construction Forestry Mining and Energy Union of Workers v Sanwell Pty Ltd and the Chamber of Commerce and Industry of Western Australia* [2004] WAIRC 10947; (2004) 84 WAIG 727 at [56].

Requirements for the registration of the proposed agreement

255 I am satisfied the requirements for the registration of the proposed agreement that apply under ss 41(1), 41(2), 41A(1), 48A 49Y, of the IR Act have been met. Each of the matters that must be complied with under these provisions are not in controversy.

Applicant Ms K Boey (of counsel)
Respondent Ms J Broderick (as agent)

Order

WHEREAS this is an application under s 40 of the *Industrial Relations Act 1979* (WA)
 AND WHEREAS on 12 June 2024, the applicant filed an application;
 AND WHEREAS on 9 July 2024, the respondent filed its response;
 AND WHEREAS on 19 November 2025 the applicant asked to discontinue application P 15 of 2024 at the Commission;
 AND WHEREAS on 16 December 2025, the respondent consented to discontinue application P 15 of 2024 at the Commission;
 NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders by consent –

THAT application P 15 of 2024 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

2026 WAIRC 00004

REVIEW OF THE MANUFACTURING, MAINTENANCE, AND METAL TRADES AWARD PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00004
CORAM : SENIOR COMMISSIONER R COSENTINO
HEARD : MONDAY, 22 DECEMBER 2025
DELIVERED : TUESDAY, 6 JANUARY 2026
FILE NO. : APPL 6 OF 2025
BETWEEN : COMMISSION'S OWN MOTION
 Applicant
 AND
 (NOT APPLICABLE)
 Respondent

CatchWords : Industrial Law (WA) - Award variation - Commission's Own Motion - Section 40B of the *Industrial Relations Act 1979* (WA) - *Metal Trades (General) Award/Manufacturing, Maintenance, and Metal Trades Award* - Removal of obsolete and out of date provisions - Variations to ensure Award facilitates efficient organisation and performance of work balanced with fairness - variations to ensure award does not contain conditions less favourable than statutory minimum conditions - Award varied

Legislation : *Industrial Relations Act 1979* (WA)
Minimum Conditions of Employment Act 1993 (WA)
Industrial Relations Legislation Amendment Act 2024 (WA)
Fair Work Act 2009 (Cth)

Result : Award varied

Representation:

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

Mr C Fogliani (of counsel) on behalf of The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch

Case(s) referred to in reasons:

Commission's Own Motion v (Not Applicable) [2025] WAIRC 00365, (2025) 105 WAIG 1184

Commission's Own motion v (Not Applicable) [2025] WAIRC 00988

Provisions in industrial instruments for special days appointed under section 7 of the Public and Bank Holidays Act 1972 General Order [2023] WAIRC 00276, (2023) 103 WAIG 530

Termination, Change and Redundancy General Order [2005] WAIRC 01715; (2005) 85 WAIG 1681

Reasons for Decision

- 1 The Western Australian Industrial Relations **Commission** of its own motion, initiated this matter for variation of the *Manufacturing, Maintenance and Metal Trades Award*, previously known as the *Metal Trades (General) Award*, under s 40B of the *Industrial Relations Act 1979* (WA) (**IR Act**). Section 40B allows the Commission to vary an award for any one or more of the following purposes:
 - (a) to ensure that the award does not contain wages that are less than the minimum award wage as ordered by the Commission under s 50A;
 - (b) to ensure that the award does not contain conditions of employment that are less favourable than those provided by the *Minimum Conditions of Employment Act 1993* (WA) (**MCE Act**);
 - (c) to ensure that the award does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984* (WA);
 - (d) to ensure that the award does not contain provisions that are obsolete or need updating; and
 - (e) to ensure that the award is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises.
- 2 Recently, in CICS 5 of 2025, the Commission in Court Session varied the Award's scope under s 37D to consolidate it with five other awards in the manufacturing, maintenance, metal trades and associated industries and occupations. The Commission in Court Session made other incidental variations as a consequence of the scope variations: *Commission's Own motion v (Not Applicable)* [2025] WAIRC 00988.
- 3 The Private Sector Labour Relations Division of the Department of Local Government, Industry Regulation and Safety (**PSLR**), on behalf of the Minister, advised the Commission that the Award is one of the most frequently referenced in the State industrial relations system. It is therefore important, particularly in light of its now expanded scope, that it be up to date and fit for purpose in the sense described in s 40B(1)(e).
- 4 The Commission provided notice of its intention to vary the Award to:
 - (a) UnionsWA;
 - (b) the Chamber of Commerce and Industry WA;
 - (c) the Minister for Industrial Relations,
 - (d) the Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch being a union party to the Award (**AFMEPKIU**);
 - (e) the Electrical Trades Union WA (**ETU**) being a union party to the Award;
 - (f) the named employer parties to the Award;
 - (g) The Australian Industry Group; and
 - (h) The Motor Trade Association of Western Australia.
- 5 The Commission then sought input from interested parties about the issues with the Award, and the appropriate revisions to address them. Input was provided by PSLR on behalf of the Minister, and by the union parties. PSLR and the AFMEPKIU participated in three conferences conducted to identify and work through desirable variations. A consensus position was reached between PSLR, the AFMEPKIU and the ETU.
- 6 All notified persons have had an opportunity to provide comments in relation to draft variations which were circulated.
- 7 Following publication of the notice of proposed variations to the Award, pursuant to s 40B(2) of the IR Act, a hearing was convened on 22 December 2025 for the purpose of affording interested persons an opportunity to be heard in relation to those proposed variations.
- 8 The Minister and the unions confirmed their support for the proposed variations with some further minor variations for accuracy and clarity. No one has opposed the proposed variations.
- 9 Accordingly, I have determined that it is appropriate to vary the Award in accordance with the Schedule to these reasons.
- 10 In the following paragraphs, I set out briefly the rationale for the variations contained in the Schedule.

Clause 1.6 – Definitions

- 11 A new definition of 'casual employee' is inserted to reflect the definition contained in s 7B of the IR Act which was inserted with effect from 21 January 2025: *Industrial Relations Legislation Amendment Act 2024* (WA) s 6.
- 12 A new definition is included defining 'Modern Award' as the *Manufacturing and Associated Industries and Occupations Award 2020* made under the *Fair Work Act 2009* (Cth) (**FWA**). The Modern Award is referred to in several of the varied clauses.

Clause 1.7 – Award Modernisation

- 13 The clause is deleted as it is obsolete. The clause reflected the old Structural Efficiency Principles of the late 1980s and 1990s. The clause now serves no function.

Clause 2.1 – Contract of Service

- 14 The notice of termination provisions have been updated for consistency with s 17D of the MCE Act.

- 15 Clause 2.1.6 has been amended to clarify that the exception from the obligation to pay wages does not apply where an employee is entitled to be absent from work under the provisions of the Award, an industrial agreement, an order of the Commission or a statute.

Clause 2.2 – Trainees

- 16 A minor amendment has been made to ensure that costs and fees that are to be reimbursed by the employer are paid either on an annual basis or, if the employment comes to an end, within a reasonable period following termination of the employment.

Clause 2.3 – Redundancy

- 17 The definition of redundancy has been varied to align with the definition contained in the *Termination, Change and Redundancy General Order* [2005] WAIRC 01715; (2005) 85 WAIG 1681.
- 18 Terminology has been updated: clause 2.3.3(3) refers to employment ‘transferring’ from one employer to another, in place of ‘transmitted.’
- 19 Clause 2.3.5 has also been amended to align with the provisions of the *Termination, Change and Redundancy General Order*

Clause 3.1– Hours and Clause 14.1 – Rest Period

- 20 Parts of clause 3.1 have been varied for simplicity and clarity. The reworded clause makes it clear that the default position is that ordinary working hours shall be no more than 8 hours per day. The clause sets out when and how ordinary hours can be extended beyond the default position.
- 21 New sub-clauses 3.1.1 (7A) and (7B) deal with rest breaks in lieu of the existing clauses 3.1(7). The provision is simplified for clarity, and ensures a subsequent rest break is afforded when overtime is worked. Clause 14.1 has also been amended to align with these provisions.
- 22 Clause 3.1.1(9) which dealt with work performed in the week prior to Good Friday, is deleted as it is obsolete in light of contemporary retail trading hours. The disparate treatment of Easter Saturday reflected now repealed retail trade award conditions.
- 23 Shift work provisions in clause 3.1.2 have been simplified and clarified, including updating the reference to the ACTU Code of Conduct which was contained in Appendix 2, but has been replaced.

Clause 3.3 and Clause 14.2 – Shift Work

- 24 Definitions of Afternoon Shift, Day Shift and Night Shift have been added to clause 3.3 ensure shift provisions operate harmoniously and without unintended overlap or gaps.
- 25 The words ‘per shift for eight (8) hours’ in clause 14.2.4 have been removed as they are superfluous, as the relevant shift loading applies regardless of the length of the shift.

Clause 4.4– Junior Employees

- 26 This clause has been deleted so as to avoid the unintended effect of excluding some junior employees from coverage under the Award, and because it is also arguably discriminatory.

Clause 4.6 – Payment of Wages

- 27 Obsolete provisions reflecting the historical transition from a 40 hour to a 38 hour working week have been removed from this clause. Appendix 4 now contains provisions which explain the historical method of averaging of wages for a 38 hour week.
- 28 Reference to payment of wages by cheque has been removed.
- 29 The obligation to provide details in relation to payments in clause 4.6.8 has been varied to align with the provisions of s 49DA of the IR Act, with access to records in accordance with s 49E of the IR Act.

Clause 4.7 – Time and Wages Record

- 30 These provisions were out of date. The clause has been replaced with provisions referring directly to the relevant parts of the IR Act and LSL Act

Clause 4.8, Clause 13.2 and Clause 17– Wages, Supplementary Payments and Structural Efficiency

- 31 A simplified wages table has been inserted in clauses 4.8 and 13.2, removing the columns for supplementary payments and arbitrated safety net adjustments, so that wages are expressed simply as a total rate per week.
- 32 Clauses referring to the supplementary payments and arbitrated safety net adjustments have been deleted as they are obsolete, but a note has been included in clause 4.8 referring to the history and composition of the total rate per week.
- 33 Clauses 4.8.8 and 17 have been deleted. They reflected the 1989 Structural Efficiency Principle and are both obsolete and inconsistent with the scheme of the IR Act.
- 34 Clause 13.8 has been deleted as it duplicates other provisions in the Award.

Clause 4.9 – Traineeships

- 35 A minor update has been made to clause 4.9.5(1) to reflect the fact that some traineeships may be for a duration of greater than 12 months. The existing clause assumed that a traineeship would be for a maximum of 12 months.
- 36 A further minor update has been made to clause 4.9.6(4) to update terminology, substituting ‘AQFIV traineeship’ with ‘AQF Level IV traineeship.’

Clause 5.3 – Car Allowance

- 37 This clause contained anomalies which have been removed, and the formatting has been slightly altered for better readability.

Clause 5.5 and Clause 15.3 – Distant Work

38 Minor variations have been made to clause 5.5, 15.3.2 and 15.3.5 to remove reference to deductions from wages which potentially conflict with s 17D of the MCE Act.

Clause 6.1 – Annual Leave

39 Clause 6.1.1(2)(a) has been deleted as it is potentially inconsistent with the provisions of the MCE Act.

40 Clause 6.1.2(2) required employers to apply different frequencies of accrual of annual leave for seven-day shift employees. This provision has been amended to remove the inconvenience of different accrual rates, and align the accrual rate with the weekly basis of accrual provided for in the MCE Act.

41 Clause 6.1.3 has been deleted. It dealt with the interaction of public holidays and annual leave, in a manner that is inconsistent with the current provisions of the MCE Act.

Clause 6.2 – Sick/Carer’s Leave

42 Terminology in this clause has been updated. ‘Personal leave’ is used in substitution for ‘Sick/Carer’s leave,’ and ‘transfer’ is used in the place of ‘transmission’ in clause 6.2.5 dealing with the deeming of continuous service for employees who transfer from one business to another.

Clause 6.5 – Parental Leave

43 This clause referred to parental leave being in accordance with the MCE Act. The MCE Act no longer deals with parental leave, but the statutory minimum conditions concerning parental leave are contained in Division 5 of Part 2-2 of the FWA.

Clause 6.6– Family and Domestic Violence Leave

44 This new clause has been added mirroring the statutory minimum conditions for family and domestic violence leave as contained in the FWA and the MCE Act.

Clause 6.7 – Public Holidays

45 Minor changes have been made to this clause to bring the provisions in line with the MCE Act and the *Provisions in industrial instruments for special days appointed under section 7 of the Public and Bank Holidays Act 1972 General Order* [2023] WAIRC 00276, (2023) 103 WAIG 530.

Clause 8.2 – Right of Entry to Investigate Breaches

46 This clause has been amended to mirror the relevant provisions of the IR Act.

Clause 8.3 – Posting of Award and Union Notice

47 This clause has been amended to permit provision of a copy of the Award electronically.

Clause 9 – Superannuation

48 The clause made provision for payment of superannuation on a monthly basis. Given frequency of payment of superannuation is a matter provided for in Commonwealth superannuation legislation, this had the potential to create a conflict between the Award’s provisions and the provisions of superannuation legislation. The amendment simply provides for superannuation to be paid in accordance with superannuation legislation.

49 Redundant provisions of the clause have been removed, including provisions about matters that are dealt with in superannuation legislation and need not be referred to in the Award.

Clause 12.3- Redundancy

50 The words “and severance” have been added to the heading to this clause, to make it clear that the clause deals with severance pay.

Appendices

51 Appendix 3 contained the ACTU Code of Conduct on Twelve Hour Shift Work. It was outdated. It is not known whether the ACTU has maintained a current Code of Conduct dealing with Twelve Hour Shift Work. The content of the appendix has therefore been replaced with a new, contemporary code provided by the AFMEPKIU, reflecting the same core principles.

52 The old appendix 4 contained special provisions for named architectural aluminium fabrication businesses who are either dissolved, deregistered or not operating in the State industrial relations system. It has been deleted as being obsolete.

53 A new appendix 4 now reproduces the explanation of the averaging system previously forming part of clause 3.1.

Other variations

54 Many of the allowances contained in the Award had not been updated since 2014 or 2015. Where the same type of allowance is provided for in the Modern Award, the Modern Award allowance has been cross-referenced and incorporated to ensure allowances automatically increase each year. Other allowances have been increased in accordance with the *Statement of Principles- July 2025* in Schedule 2 of the 2025 State Wage Case: *Commission’s Own Motion v (Not Applicable)* [2025] WAIRC 00365, (2025) 105 WAIG 1184.

55 Reference to ‘supplementary payments’ has been removed wherever referred to, as the Award now refers to total minimum rates of pay without separating out supplementary payments.

56 Gendered language has been replaced with gender neutral language where it appeared.

Date of effect of variations

- 57 The variations contained in the schedule to these reasons are to take effect from the date that is 21 days after the date of publication of the Commission's order in the Industrial Gazette.

SCHEDULE

1. CLAUSE 1.6 - DEFINITIONS AND CLASSIFICATION STRUCTURE

- A. Delete the definition of "Casual Employee" in clause 1.6.1 and substitute with the following definition:**
"Casual Employee" means an employee engaged and paid as such applying s 7B of the *Industrial Relations Act 1979* (WA).
- B. Insert the following new definition in clause 1.6.1:**
"Modern Award" means the *Manufacturing and Associated Industries and Occupations Award 2020* made under the *Fair Work Act 2009* (Cth) or any modern award that replaces it.
- C. In the definition of "Sheetmetal worker – first class" in clause 1.6.1, substitute "employee" for "workman" and "them" for "him"**
- D. Delete clauses 1.6.2(3) and (4) in clause 1.6.2 and substitute the following clauses**
- (3) Reclassification shall be on the basis of skills obtained through accredited training or an objective analysis of the employee's job in the context of the classification structure set out in this Award.
- (4) Subject to clause 1.6.2(3), appointment to any wage level in the classification structure is contingent upon such additional work being available and required to be performed by the employer.

<u>Wage Group</u>	<u>Classification Title</u>	<u>Minimum Training Requirement</u>
C 5	Advanced Engineering Tradesperson - Level II	Diploma of Engineering - Advanced Trade, or equivalent.
C 6	Advanced Engineering Tradesperson - Level I	C10 + 80% towards a Diploma of Engineering - Advanced Trade, or equivalent.
C 7	Engineering Tradesperson Special Class - Level II	Certificate IV in Engineering, or C10 + 60% towards a Diploma of Engineering, or equivalent.
C 8	Engineering Tradesperson Special Class - Level I	C10 + 40% towards a Diploma of Engineering, or equivalent.
C 9	Engineering Tradesperson - Level II	C10 + 20% towards a Diploma of Engineering, or equivalent.
C 10	Engineering Tradesperson - Level I Engineering / Production Employee	Recognised Trade Certificate, or Certificate III in Engineering Mechanical Trade, or Certificate III in Engineering - Fabrication Trade, or Certificate III in Engineering - Electrical/Electronic Trade, or equivalent.
C 11	Engineering / Production Employee - Level IV	Engineering Production Certificate II, or Certificate II in Engineering Production Technology, or equivalent.
C 12	Engineering / Production Employee - Level III	Engineering Production Certificate I or Certificate II in Engineering, or equivalent.
C 13	Engineering / Production Employee - Level II	In-house Training
C 14	Engineering / Production Employee - Level I	Up to 38 hours' induction training

- E. Delete the words "his or her" in Clause 1.6.3(2) and substitute "their."**
- F. Delete the words "him/her" in Clause 1.6.3(2)(d) and substitute "them"**
- G. Delete the words "his or her" wherever they appear in Clause 1.6.5(2) and substitute "their."**
- H. Delete the words "his or her" in Clause 1.6.6(2)(d) and substitute "their."**
- 2. CLAUSE 1.7 – AWARD MODERNISATION**
- A. Delete clause 1.7 in its entirety.**

3. **CLAUSE 2.1 – CONTRACT OF SERVICE**

A. **Delete clause 2.1.3 and substitute:**

- (1) The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned, and the required period of notice to be given by any casual employee shall be one hour.
- (2) Any contract of employment or other arrangement requiring an employee to give a greater period of notice than that provided for in clause 2.1.3(1) is prohibited.
- (3) An employer and employee may agree to include a term in a contract of employment requiring the employee to provide a period of notice that is not more than the period of notice required by clause 2.1.3(1).

B. **Delete the words “he or she” in clause 2.1.4(2) and substitute “they.”**

C. **Delete clause 2.1.6 and substitute:**

2.1.6 Absence From Duty

The employer shall be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence is due to paid leave to which the employee is entitled under the provisions of this Award, an industrial agreement, an order of the Commission, or a statute.

4. **CLAUSE 2.2 – TRAINING**

A. **Delete the words “and Supplementary Payments” in clause 2.2.2 of clause 2.2.**

B. **Delete clause 2.2.4 of clause 2.2 and substitute:**

- 2.2.4 (1) Where, as a result of consultation in accordance with 4.8.8 of Clause 4.8 - Wages or through a training committee and/or with the employee concerned, it is agreed that additional training in accordance with the programme developed pursuant to 2.2.2 should be undertaken by an employee, that training may be undertaken either on or off the job and if the training is undertaken during ordinary working hours, the employee concerned shall not suffer any loss of pay. The employer shall not unreasonably withhold such paid training leave.
- (2) Any costs associated with standard fees for prescribed courses and prescribed textbooks (excluding those textbooks which are available in the employer's technical library) incurred with the undertaking of training shall be reimbursed by the employer upon production of evidence of such expenditure. Provided that reimbursement shall be the earlier of the following:
- (a) on an annual basis; or
 - (b) if the employment comes to an end, within a reasonable period following the termination of the employment;
- subject to the presentation of reports of satisfactory progress.
- (3) Travel costs incurred by an employee undertaking training in accordance with this clause, which exceed those normally incurred in travelling to and from work, shall be reimbursed by the employer.

5. **CLAUSE 2.3 – REDUNDANCY**

A. **Delete the words “and this is not due to the ordinary and customary turnover of labour” in clause 2.3.1**

B. **Delete clause 2.3.3(3) of clause 2.3.3 and substitute:**

- (3) Service by the employee with a business which has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with the *Long Service Leave Act 1958* (WA) shall also constitute continuous service for the purpose of this clause.

C. **Delete clause 2.3.5 and substitute:**

2.3.5 Alternative Employment

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an employee and it would be unreasonable in the circumstances for the employee to refuse that alternative employment.

6. **CLAUSE 3.1 – HOURS**

A. **Delete clause 3.1.1(5), (6) and (7) of clause 3.1.1 and substitute:**

- (5) An employee's ordinary hours of work on any given day shall be confined as follows:
- (a) The default position is that the ordinary working hours shall be no more than eight hours per day.

- (b) If the employer and the majority of employees in the workplace, or section of the workplace, agree, then the maximum ordinary hours for that workplace, or section of the workplace, may be up to ten hours per day. Any such agreement shall be documented in writing and signed and dated by the relevant parties.
- (c) The maximum ordinary hours for the workplace, or a section of the workplace, may be up to 12 hours per day if the following conditions are met:
 - (i) The employer, the relevant union(s), and the majority of employees in the workplace, or relevant section of the workplace, agree. Any such agreement shall be documented in writing and signed and dated by the relevant parties.
 - (ii) The employer and the employees concerned are guided by the Code of Conduct on 12 Hour Shifts as set out in Appendix 3 of this Award.
 - (iii) The employer introduces and maintains proper health monitoring procedures to manage employee fatigue and mental health.
 - (iv) Suitable roster arrangements are made to accommodate the extended shift lengths.
 - (v) The employer provides proper supervision of its employees taking into account the increased risk to the employees' health and safety when working 12 hour shifts.
- (6) An employee's ordinary hours of work shall be consecutive and shall not be divided into split shifts.
- (7) Employees are entitled to a meal break not exceeding one hour. The meal break shall be provided for as follows:
 - (a) An employee shall not be compelled to work for more than five (5) hours without a meal break except where an alternative arrangement is entered into as a result of discussions between the employer and the relevant employee.
 - (b) By arrangement between an employer and the majority of employees in the plant, section or sections concerned, an employee or employees may be required to work in excess of five (5) hours, but not more than six (6), at ordinary rates of pay without a meal break.
 - (c) The time of taking a scheduled meal break or rest break by one or more employees may be altered by the employer if it is necessary to do so in order to meet a requirement for continuity of operations.
 - (d) An employer may stagger the time of taking a meal or rest break to meet operational requirements.
 - (e) When an employee is required for duty during the employee's usual meal break and the meal break is thereby postponed for more than half an hour, the employee shall be paid at overtime rates until the employee gets the meal break.
- (7A) Employees are entitled to a seven minute rest break at a convenient time between the second and fourth hours of their shift. In relation to the rest break:
 - (a) The rest period shall be paid at the employee's ordinary rate of pay.
 - (b) Refreshments may be taken by employees during the rest period.
 - (c) The period of seven minutes shall not be exceeded unless authorised by the employer.
- (7B) In addition to the rest break in clause 3.1.1(7A), where at least 30 minutes of overtime is worked, employees are entitled to a second seven minute rest break, in accordance with the conditions in clause 3.1.1(7A).

B. Delete clause 3.1.1(9) of clause 3.1.1.

C. Delete clause 3.1.2(3) of clause 3.1.2 and substitute:

- (3) An employee's ordinary hours of work on any given day shall be confined as follows:
 - (a) The default position is that the ordinary working hours shall be no more than eight hours per day.
 - (b) If the employer and the majority of employees in the workplace, or section of the workplace, agree, then the maximum ordinary hours for that workplace, or section of the workplace, may be up to ten hours per day. Any such agreement shall be documented in writing and signed and dated by the relevant parties.
 - (c) The maximum ordinary hours for the workplace, or a section of the workplace, may be up to 12 hours per day if the following conditions are met:
 - (i) The employer, the relevant union(s), and the majority of employees in the workplace, or relevant section of the workplace, agree. Any such agreement shall be documented in writing and signed and dated by the relevant parties.
 - (ii) The employer and the employees concerned are guided by the Code of Conduct on 12 Hour Shifts as set out in Appendix 3 of this Award.

- (iii) The employer introduces and maintains proper health monitoring procedures to manage employee fatigue and mental health.
- (iv) Suitable roster arrangements are made to accommodate the extended shift lengths.
- (v) The employer provides proper supervision of its employees taking into account the increased risk to the employees' health and safety when working 12 hour shifts.

7. CLAUSE 3.2 – OVERTIME

A. Delete clause 3.2.3(6) of clause 3.2.3 and substitute:

- (6) Subject to the provisions of 3.2.3(7), an employee required to work overtime for more than two (2) hours shall be supplied with a meal by the employer or be paid a meal allowance in the amount of the allowance contained in clause 30.3(c)(ii) of the Modern Award as adjusted from time to time. Such allowance is payable for each period when, because of the amount of overtime worked, a second or subsequent meal is required.

8. CLAUSE 3.3 – SHIFT WORK

A. Delete clause 3.3.1 and substitute:

- 3.3.1 The provisions of this clause apply to shift work whether continuous or otherwise. For the purpose of this clause:

Afternoon shift means a shift where the majority of the hours during the shift fall between 2:00 pm and 8:00 pm on Monday to Friday inclusive.

Day shift means a shift where the majority of the hours during the shift fall between 6:00 am and 6:00 pm on Monday to Friday inclusive that is not an Afternoon shift or a Night shift.

Night shift means a shift where either:

- (a) At least half of the hours during the shift fall between 8:00 pm and 6:00 am on Monday to Friday inclusive; or
- (b) The shift starts sometime between 8:00 pm and 3:59 am on Monday to Friday inclusive.

9. CLAUSE 4.4 – JUNIOR EMPLOYEES

A. Delete clause 4.4 in its entirety.

10. CLAUSE 4.6 – PAYMENT OF WAGES

A. Delete clause 4.6 and substitute:

4.6 - PAYMENT OF WAGES

- 4.6.1 Each employee shall be paid the appropriate rate shown in Clause 4.8 - Wages of PART 1 - GENERAL or Clause 13. - Wages of PART 2 - CONSTRUCTION WORK of this Award. Subject to 4.6.2 payment shall be pro rata where less than the full week is worked.

- 4.6.2 Wages shall be paid as follows:-

- (1) Actual ordinary hours

In the case of an employee who works the same number of ordinary hours each week, wages shall be paid weekly or fortnightly according to the actual ordinary hours worked each week or fortnight.

- (2) Average of ordinary hours

Subject to 4.6.3 and 4.6.4, in the case of an employee who works an average of ordinary hours each week during a particular work cycle, wages shall be paid weekly or fortnightly according to a weekly average of ordinary hours worked even though more or less ordinary hours may be worked in any particular week of the work cycle.

Note: Appendix 4 reproduces earlier provisions of this clause explaining the method of averaging wages for a 38 hour week.

- 4.6.3 Alternative Method of Payment

An alternative method of paying wages to that prescribed by 4.6.2 may be agreed between the employer and the majority of the employees concerned.

- 4.6.4 Day Off Coinciding with Pay Day

In the event that an employee who is paid by cash is rostered off duty on their usual pay day, such employee shall be paid no later than the working day immediately following pay day. Provided that, where the employer is able to make suitable arrangements, wages may be paid on the working day preceding pay day.

- 4.6.5 Payment by Cash or Electronic Fund Transfer

An employee's wages may be paid by cash or direct transfer into the employee's bank (or other recognised financial institution) account.

- 4.6.6 Termination of Employment

An employee shall be paid all monies due at the termination of service with the employer.

Provided that in the case of an employee whose ordinary hours are arranged in accordance with 3.1.3(1)(c) or 3.1.3(1)(d) of Clause 3.1 - Hours of this Award and who is paid average pay and who has not taken time off due to the employee during the work cycle in which the employment is terminated, the wages due to that employee shall include a total of credits accrued during the work cycle.

Provided further, where the employee has taken time off during the work cycle in which the employment is terminated, the wages due to that employee shall be reduced by the total of credits which have not accrued during the work cycle.

4.6.7 Details of Payments to be Given

Employers must provide pay slips in accordance with section 49DA of the Act and provide an employee with access to records upon the employee's written request in accordance with section 49E of the Act.

4.6.8 Calculation of Hourly Rate

Except as provided in 4.6.3 the ordinary rate per hour shall be calculated by dividing the appropriate weekly rate by 38.

11. **CLAUSE 4.7 – TIME AND WAGES RECORD**

A. **Delete clause 4.7 and substitute:**

4.7 - **TIME AND WAGES RECORD**

Employers must keep time and wages records in accordance with Part II, Division 2F Keeping of and access to employment records and pay slips of the Act, regulation 4 of the *Industrial Relations (General) Regulations 1997* (WA) and section 26 of the *Long Service Leave Act 1958* (WA).

12. **CLAUSE 4.8 – WAGES AND SUPPLEMENTARY PAYMENTS**

A. **Delete the words “and supplementary payments” from the clause heading.**

B. **Delete clause 4.8.1 and substitute:**

4.8.1 The minimum award rate payable weekly to adult employees (other than apprentices) classified under a defined level specified in Clause 1.6 - Definitions and Classification Structure, shall be as follows:

Wage Group	Total Rate Per Week \$
Level C14	953.00
Level C13	953.00
Level C12	981.90
Level C11	1008.90
Level C10	1055.10
Level C9	1084.00
Level C8	1112.40
Level C7	1138.70
Level C6	1195.90
Level C5	1224.70

Note: The Total Rate Per Week contained in this clause includes components for supplementary payments and arbitrated safety net adjustments. Reference to the history and composition of the Total Rate Per Week can be found in the Western Australian Industrial Gazette at 70 WAIG 2597.

C. **Delete clause 4.8.2(1) of clause 4.8.2 and substitute:**

4.8.2 Leading Hands:

- (1) In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week the allowance prescribed by clause 30.2(a)(i) of the Modern Award, as adjusted from time to time.

D. **Delete clause 4.8.5, 4.8.6, 4.8.7 and 4.8.8. of clause 4.8 substitute:**

- 4.8.5 A casual employee shall be paid 25 per cent of the ordinary rate in addition to the ordinary rate for the calling in which they are employed.
- 4.8.6 Tool Allowance:
- (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance equal to the greater of \$24.00 per week or the allowance contained in clause 30.2(c)(ii) of the Modern Award, as adjusted from time to time for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.
 - (2) Any tool allowance paid pursuant to 4.8.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
 - (3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
 - (4) A tradesperson or apprentice shall replace or pay for any tool supplied by the employer if lost through the employee's negligence.
- 4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of \$38.25 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities, but an employee so employed for not more than three days shall be paid on a pro rata basis.

13. **CLAUSE 4.9 – TRAINEESHIPS**

A. Delete clause 4.9.5(1) of clause 4.9.5 and substitute:

- (1) A full time Trainee shall be engaged for the nominal duration of the traineeship, provided that a Trainee shall be subject to a satisfactory probation period of one month which may be reduced at the discretion of the employer. By agreement in writing, and with the consent of the Training Authority, the relevant employer and the Trainee may vary the duration of the Traineeship and the extent of approved training provided that any agreement to vary is in accordance with the relevant Traineeship Scheme. A part-time trainee shall be engaged in accordance with the provisions of 4.9.6(5).

B. Delete clause 4.9.6(4) of clause 4.9.6 and substitute:

- (4) AQFIV Traineeships
Trainees undertaking an AQF Level IV traineeship shall receive the relevant weekly wage rate for AQF Level III trainees at Skill/Industry Levels A, B and C as applicable with the addition of 3.8% of that wage rate.

C. Delete the words “and Supplementary Payments” in clause 4.9.6(6) of clause 4.9.6.

14. **CLAUSE 5.2 - SPECIAL ALLOWANCES AND FACILITIES**

A. Delete clause 5.2 and substitute:

5.2 – SPECIAL ALLOWANCES AND FACILITIES

- 5.2.1 Height Money: An employee shall be paid an allowance in the amount specified in clause 30.4(h) of the Modern Award as adjusted from time to time for each hour during which the employee works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to lines people nor to riggers and splicers on ships and buildings.
- 5.2.2 Dirt Money: An employee shall be paid an allowance in the amount specified in clause 30.4(g) of the Modern Award as adjusted from time to time for each hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
- 5.2.3 Grain Dust: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Commission determines that employees employed under this Award are unduly affected by that dust, the Commission may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding \$1.42 per hour.
- 5.2.4 Confined Space: An employee shall be paid an allowance in the amount specified in clause 30.4(f) of the Modern Award as adjusted from time to time for each hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.
- 5.2.5 Diesel Engine Ships: The provisions of 5.2.2 and 5.2.4 do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of \$1.42 per hour whilst so engaged.
- 5.2.6 Boiler Work: An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any

allowance to which the employee may be entitled under 5.2.2 and 5.2.4.

- 5.2.7 Hot Work: An employee shall be paid the applicable allowance specified in clause 30.4(d) of the Modern Award as adjusted from time to time for each hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1° and 54.4° Celsius.
- 5.2.8 (1) Where in the opinion of the Commission, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Commission may –
- (a) Fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;
 - (b) Fix the period (including a minimum period) during which any allowance so fixed is to be paid; and
 - (c) Prescribe such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Commission sees fit.
- (2) The provisions of 5.2.8(1) do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.
- (3) An allowance fixed pursuant to 5.2.8(1) includes any other allowance which would otherwise be payable under this clause.
- 5.2.9 Tarring Pipes: The provisions of 5.2.2 and 5.2.4 do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of \$1.38 per day whilst so engaged.
- 5.2.10 Percussion Tools: An employee shall be paid an allowance of 50 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.
- 5.2.11 Chemical, Artificial Manure and Cement Works: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of \$21.00 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.
- 5.2.12 Abattoirs and Tallow Rendering Works: An employee, employed in and about an abattoir or in a rendering section of tallow works, shall be paid an allowance in the amount specified in clause 30.4(1) of the Modern Award as adjusted from time to time. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this Clause.
- 5.2.13 An employee who is employed at a timber sawmill or is sent to work at a timber sawmill shall be paid for the time there engaged a disability allowance equivalent to what the majority of the employees at the mill receive under the appropriate award. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause with the exception of that prescribed in 5.2.1 - Height Money.
- 5.2.14 Phosphate Ships: An employee shall be paid an allowance of \$1.20 for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.
- 5.2.15 An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than they would be entitled to receive pursuant to the award which would apply if such employee was employed in the gold mine concerned.
- 5.2.16 An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.
- 5.2.17 The work of an electrical fitter shall not be tested by an employee of a lower grade.
- 5.2.18 Special Rates Not Cumulative: Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely – the highest for the disabilities prevailing. Provided that this subclause shall not apply to confined space, dirt money, height money, or hot work, the rates for which are cumulative.
- 5.2.19 Protective Equipment:
- (1) An employer shall have available a sufficient supply of protective equipment (as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by employees when engaged on work for which some protective equipment is reasonably necessary.
 - (2) An employee shall sign an acknowledgement when issued with any article of protective equipment and shall return that article to the employer when finished using it or on leaving employment.

- (3) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.
- (4) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.
- 5.2.20 (1) Subject to the provisions of this Clause, an employee whilst employed on foundry work shall be paid a disability allowance in the amount specified in clause 30.4(q) of the Modern Award as adjusted from time to time for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces, and noise.
- (2) The foundry allowance herein prescribed shall also apply to apprentices and un-apprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to the employee shall be decreased proportionately.
- (3) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this Clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.
- (4) For the purpose of this subclause 'foundry work' shall mean -
- (a) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and
- (b) Where carried on as an incidental process in connection with and in the course of production to which 5.2.20(4)(a) applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -
- (i) Non-ferrous die casting (including gravity and pressure)
- (ii) Casting of billets and/or ingots in metal moulds;
- (iii) Continuous casting of metal into billets;
- (iv) Melting of metal for use in printing;
- (v) Refining of metal.
- 5.2.21 An employee, holding a Provide First Aid certificate (HLTAID011) or equivalent, appointed by the employer to perform first aid duties, shall be paid in the amount specified in clause 30.3(b) of the Modern Award as adjusted from time to time per week in addition to the employee's ordinary rate.
- 5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current electrical licence (unrestricted) issued pursuant to the relevant Regulation in force under the *Electricity Act 1945* (WA), shall be paid an allowance of \$34.20 per week.

15. CLAUSE 5.3 - CAR ALLOWANCE

A. Delete clause 5.3 and substitute:

5.3 - CAR ALLOWANCE

- 5.3.1 Where an employee is required and authorised to use their own motor vehicle in the course of the employee's duties the employee shall be paid an allowance not less than that provided for in the table set out hereunder. Notwithstanding anything contained in this subclause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

PER KM RATES FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS				
AREA	MOTOR CAR	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
		RATE PER KILOMETRE (\$)		
	Motorcycle	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
Metropolitan Area		1.04	0.93	0.81
South West Land Division		1.06	0.95	0.83
North of 23.5° South Latitude		1.17	1.05	0.91
Rest of the State		1.10	0.98	0.86
All areas	0.36			

- 5.3.2 "Metropolitan Area" means that area within a radius of fifty kilometres from the Perth Railway Station.
- "South West Land Division" means the South West Land Division as defined by Schedule 1 of the *Land Administration Act 1997* (WA) excluding the area contained within the Metropolitan Area.
- 5.3.3 Where an employee in the course of a journey travels through two (2) or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.

16. CLAUSE 5.5 - DISTANT WORK

A. Delete clauses 5.5.4 and 5.5.5 of clause 5.5 and substitute:

- 5.5.4 An employee, to whom the provisions of 5.5.1 apply, shall be paid an allowance of \$44.00 for any weekend the employee returns home from the job, but only if -
- (1) the employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;
 - (2) the employee is not required for work during that weekend;
 - (3) the employee returns to the job on the first working day following the weekend; and
 - (4) the employer does not provide, or offer to provide, suitable transport.
- 5.5.5 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$19.45 per day, provided that where the time actually spent in travelling either to or from the job exceeds twenty (20) minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

17. CLAUSE 6.1 - ANNUAL LEAVE

A. Delete clause 6.1.1(2)(a) of clause 6.1.1.

B. Delete the words "and Supplementary Payments" in clause 6.1.1(2)(b)(i).

C. Delete clause 6.1.2(2) of clause 6.1.2 and substitute:

- (2) The additional week of annual leave provided for in clause 6.1.2(1) shall accrue pro rata throughout the year at the rate of 1/52 of a week for each completed week the employee is continuously so engaged.

D. Delete clause 6.1.3 of clause 6.1.

18. CLAUSE 6.2 - SICK/CARERS LEAVE

A. Delete the words "Sick/carer's leave" wherever it appears in clause 6.2 and substitute "Personal leave."

B. Delete the words "his or her" in clause 6.2.2 and substitute "their."

C. Delete clause 6.2.5 and substitute:

- 6.2.5 Where a business has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with the *Long Service Leave Act 1958* (WA), the paid personal leave standing to the credit of the employee at the date of transfer from service with the transferor shall stand to the credit of the employee at the commencement of service with the transferee and may be claimed in accordance with the provisions of this clause.

19. CLAUSE 6.5 - PARENTAL LEAVE

A. Delete clause 6.5.1 of clause 6.5 and substitute:

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

20. NEW CLAUSE 6.6 - FAMILY AND DOMESTIC VIOLENCE LEAVE

A. Insert a new clause 6.6 as follows:

6.6 - FAMILY AND DOMESTIC VIOLENCE LEAVE

Family and Domestic Violence leave is as provided for in accordance with the National Employment Standards of the *Fair Work Act 2009* (Cth) and Part 4 Division 7 of the *Minimum Conditions of Employment Act 1993* (WA).

21. CLAUSE 6.7 - PUBLIC HOLIDAYS

A. Insert the words "Easter Sunday" after "Good Friday" in clause 6.7.1(1) of clause 6.7.1.

B. Insert the words "other than Easter Sunday" after the number 6.7.1(1) in clause 6.7.1(3).

C. Delete clause 6.7.2 and renumber clause 6.7.3 accordingly.

22. CLAUSE 8.2 - RIGHT OF ENTRY TO INVESTIGATE BREACHES

A. Delete clause 8.2 and substitute:

8.2 – RIGHT OF ENTRY TO INVESTIGATE BREACHES

Conditions regarding right of entry by authorised representatives of the union are dealt with in Part II, Division G – Right of entry and inspection by authorised representatives of the Act.

23. CLAUSE 8.3 - POSTING OF AWARD AND UNION NOTICES**A. Delete clause 8.3 and substitute:****8.3 - POSTING OF AWARD AND UNION NOTICES**

The employer shall keep a copy of this Award in a convenient and accessible place in the workplace or provide a copy electronically, and the employer shall also provide a notice board for the posting of union notices.

24. CLAUSE 9. – SUPERANNUATION**A. Delete the words “(including supplementary payment)” in the definition of “Ordinary time earnings” in clause 9.2.****B. Delete clauses 9.3(2) and 9.3(3) of clause 9.3 and substitute:**

(2) Employer contributions shall be paid in accordance with the superannuation legislation.

C. Delete clause 9.5 of clause 9 and substitute:

9.5 Subject to the Trust Deed to the Fund of which an employee is a member, the following provisions will apply:

(1) Work Related Injury or Illness

If an eligible employee's absence from work is due to work related injury or work related illness, contributions at the normal rate must continue for the period of the absence provided that:

(a) the member of the fund is receiving workers' compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements or the provisions of this Award;

(b) the person remains an employee of the employer.

D. Delete clause 9.6 of clause 9.**25. CLAUSE 12.3 – REDUNDANCY****A. Delete the heading to clause 12.3 and substitute the heading “Redundancy and Severance.”****B. Delete the words “respondent to this Award” in clause 12.3.1(a) of clause 12.3.1.****C. Delete the words “his or her” wherever they appear in clauses 12.3.2(1), 12.3.2(5), 12.3.2(6) and 12.3.3 of clause 12.3 and substitute “their.”****26. CLAUSE 13. – WAGES****A. Delete clause 13.1(2) of clause 13.1.****B. Delete the columns “Base Rate”, “Special Payment Adjustment” and “Arbitrated Safety Net” of clause 13.2(1).****C. Delete the words “and Supplementary Payments” in clause 13.3 and substitute “clause 4.1.10” for “Clause 13.8(10)” in the note to clause 13.3 of clause 13.****D. Delete clause 13.3, 13.4, 13.5, and 13.5A of clause 13 and substitute:**

13.3 The ordinary weekly wage of an apprentice shall be calculated by applying the percentage applicable under 4.8.3 of Clause 4.8 - Wages of PART 1 – GENERAL of this Award to the rate prescribed for a "Tradesperson" in 13.2 for the construction work upon which they are engaged.

Note:

* *Adult apprentices aged 21 or more are entitled to receive the minimum adult apprentice wage, as set out in Clause 13.8(10) of this Award, or the relevant amount referred to above, whichever is the higher.*

* *The General Order on Wage structures for school-based and part-time apprentices applies to apprentices working under this Award.*

13.4 Construction Allowances

(1) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -

(a) \$76.20 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(b) \$68.60 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon

which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

- (c) \$40.20 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.

- (2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Commission.

13.5 Leading Hands

In addition to the appropriate total wage prescribed in this clause a leading hand shall be paid an allowance in the relevant amount specified in clause 30.2(a) of the Modern Award as adjusted from time to time.

E. Delete clause 13.6 of clause 13 and substitute:

- 13.6 (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance equal to the greater of \$24.00 per week or the allowance contained in clause 30.2(c)(ii) of the Modern Award as adjusted from time to time. Any tool allowance paid pursuant to 13.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
- (2) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (3) A tradesperson or an apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

F. Delete clause 13.8.

27. CLAUSE 14.1 - REST PERIOD

A. Delete clause 14.1 of clause 14 and substitute:

14.1 - REST PERIOD

- 14.1.1 Employees are entitled to a seven minute rest break at a convenient time between the second and fourth hours of their shift. In relation to the rest break:
- (a) The rest period shall be paid at the employee's ordinary rate of pay.
- (b) Refreshments may be taken by employees during the rest period.
- (c) The period of seven minutes shall not be exceeded unless authorised by the employer.
- 14.1.2 In addition to the rest break in clause 14.1.1, where at least 30 minutes of overtime is worked, employees are entitled to a second seven minute rest break, in accordance with the conditions in clause 14.1.1.

28. CLAUSE 14.2 - SHIFT WORK

A. Delete the words "per shift for eight (8) hours" in clause 14.2.4.

29. CLAUSE 15.1 - SPECIAL ALLOWANCES AND PROVISIONS

A. Delete clauses 15.1.2 of clause 15.1 and substitute:

- 15.1.2 (1) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of an employee's tools when not in use and an employee's working clothes and where an employee is absent from work in accordance with the provisions of Clause 6.2 – Personal Leave of PART 1 - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during the employee's absence.
- (2) Subject to 15.1.3 where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under 15.1.2(1) the employer shall reimburse the employee for that loss but only up to a maximum of \$1,187.50.
- (3) The provisions of 15.1.2(2) shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four (24) hours before being lost by fire or theft and if the employee has reported any theft to the police.

B. Delete Clause 15.1.3 of Clause 15.1 and substitute:

- 15.1.3 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current electrical licence (unrestricted) issued pursuant to the relevant regulation in force under the *Electricity Act 1945* (WA), shall be paid an allowance of \$34.20 per week.

30. CLAUSE 15.2 - ALLOWANCE FOR TRAVELLING AND EMPLOYMENT IN CONSTRUCTION WORK

A. Delete clause 15.2.1 of clause 15.2 and substitute:

- 15.2.1 An employee, who on any day is required by the employer to report directly to the job, shall be paid an allowance in accordance with the provisions of this subclause to compensate for travel patterns and costs peculiar to the industry, which includes mobility requirements of employees, and the nature of employment in construction work covered by this Award –
- (1) On places within a radius of 50 kilometres from the General Post Office, Perth - \$21.90 per day.
 - (2) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – \$1.15 per kilometre.
 - (3) Subject to the provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of \$1.15 per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.
 - (4) In respect of work carried out from an employer's depot situated outside a radius of 60 kilometres from the General Post Office, Perth the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.
 - (5) Where transport to and from the job is supplied by the employer from and to the depot or such other place more convenient to the employee as is mutually agreed upon between the employer and the employee, half the above rates shall be paid, provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

31. CLAUSE 15.3 - DISTANT WORK

A. Delete clause 15.3.2 of clause 15.3 and substitute:

- 15.3.2 Notwithstanding the provisions of 15.3.1, an employer shall be under no obligation to pay for board or lodging for any period the employee is absent without reasonable excuse.

B. Delete clause 15.3.5 and substitute:

- 15.3.5 If an employee works north of the 26th parallel of South Latitude for at least 6 months or if the work ceases sooner, for so long as the work continues, the employer shall, on termination of the employee's engagement, pay the employee's fare from the place of work to the place of engagement on the employee's request.

C. Delete clause 15.3.6 and clause 15.3.7 of clause 15.3 and substitute:

- 15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of \$44.00 for any weekend that the employee returns home from the job, but only if -
- (1) The employee advises their employer or the employer's agent of their intention not later than the Tuesday immediately preceding the weekend in which they so return;
 - (2) The employee is not required for work during that weekend;
 - (3) The employee returns to the job on the first working day following the weekend; and
 - (4) The employer does not provide, or offer to provide, suitable transport.
- 15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of \$19.45 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

D. Delete the words "his or her" wherever it appears in clause 15.3.8 and substitute "their."

E. Delete the words "Sick/Carer's" in clause 15.3.9 and substitute "Clause 6.2 - Personal Leave, Clause 6.4 - Bereavement Leave or Clause 6.6 - Family and Domestic Violence Leave"

32. CLAUSE 15.4 - SPECIAL PROVISION - WESTERN POWER

A. Delete clause 15.4.2, 15.4.3, 15.4.4 and 15.4.5 of clause 15.4 and substitute:

- 15.4.2 In addition to the wage otherwise payable to an employee pursuant to the provisions of PART 2 - CONSTRUCTION WORK of this Award, an employee (other than an apprentice) shall be paid –
- (1) \$3.40 per hour for each hour worked if employed at Muja;
 - (2) \$1.94 per hour for each hour worked if employed at Kwinana;
 - (3) A safety footwear allowance of twelve (12) cents per hour for each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee.
- 15.4.3 (1) An employee, to whom Clause 15.2 - Allowance for Travelling and Employment in Construction Work of this PART applies and who is engaged on construction work at Muja,

shall be paid –

- (a) An allowance of \$21.50 per day if the employee resides within a radius of 50 kilometres from the Muja power station;
 - (b) An allowance of \$56.85 per day if the employee resides outside that radius.
- in lieu of the allowance prescribed in the said clause.

- (2) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

15.4.4 In addition to the allowance payable pursuant to 15.3.6 of Clause 15.3 – Distant Work of this PART, an employee to whom that clause applies shall be paid \$42.40 on each occasion upon which the employee returns home at the weekend, but only if -

- (1) The employee has completed three months' continuous service with the employer;
- (2) The employee is not required for work during the weekend;
- (3) The employee returns to the job on the first working day following the weekend;
- (4) The employer does not provide, or offer to provide, suitable transport; and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

15.4.5 An employee to whom Clause 15.3 - Distant Work of this PART applies and who proceeds to construction work at Muja from home where located within a radius of 50 kilometres from the General Post Office, Perth -

- (a) Shall be paid an amount of \$99.60 and for three hours at ordinary rates in lieu of expenses and payment prescribed in 15.3.3 of the said clause; and
- (b) In lieu of the provisions of 15.3.4 of the said clause, shall be paid \$99.60 and for three (3) hours at ordinary rates when the employee's services terminate, if the employee has completed three (3) months' continuous service; and
- (c) The provisions of 15.3.3 and 15.3.4 of Clause 15.3 - Distant Work of this PART shall not apply to such employee.

33. CLAUSE 17. - STRUCTURAL EFFICIENCY PRINCIPLE

- A. Delete clause 17 in its entirety.**

34. APPENDIX 3

- A. Delete Appendix 3 and substitute:**

APPENDIX 3

CODE OF CONDUCT ON TWELVE-HOUR SHIFTS

1. Principles

The following principles underpin this Code of Conduct:

- 1.1 Twelve-hour shifts can present both risks and opportunities. Those risks and opportunities must be properly and adequately considered and balanced on a case-by-case basis.
- 1.2 The short-term risks of twelve-hour shifts include disrupted sleep patterns, fatigue, changes in eating habits, social isolation, psychological strain, and the increased risk of making mistakes at work.
- 1.3 Whereas the long-term risk associated with twelve-hour shifts includes an increased risk of developing cardiovascular disease, digestive disorders, fatigue-related illnesses, depression and anxiety, mood changes, susceptibility to suicide and self-harm, as well as breakdowns of relationships and family units.
- 1.4 While day work does not involve the same disturbances to circadian rhythms as night work, twelve-hour day work still increases the likelihood of the above risks occurring.
- 1.5 Well-designed rosters and proper support measures can help reduce fatigue, improve work-life balance, and provide extended rest and recovery opportunities for workers who perform twelve-hour shifts. For twelve-hour shift work to be advantageous, the increased leisure time must be used for recuperation and recreation, rather than as an opportunity for additional employment.
- 1.6 All workplaces that utilise twelve-hour shifts must do so with the health, safety, and well-being of employees as the primary consideration.
- 1.7 When considering the introduction or maintenance of twelve-hour shift arrangements, employers should take into account the impact of twelve-hour shifts on all workers, taking into account factors such as an employee's caring responsibilities.

2. Introduction of Twelve-Hour Shifts

- 2.1 The introduction of twelve-hour shifts should only be introduced where:

- (a) there is a continuous work process or genuine operational requirement;
 - (b) the workload is not excessive;
 - (c) on-going and regular health and safety risk assessments are conducted on an employee-by-employee basis to monitor the risks associated with twelve-hour shifts;
 - (d) affected employees are fully consulted and have given majority support (in conjunction with their union) to the working of twelve-hour shifts; and
 - (e) wherever possible, steps have been taken to reduce overall working hours.
- 2.2 The introduction of twelve-hour shifts should be on a trial basis for twelve months to allow workers to evaluate the changed shifts.

3. Control Measures

3.1 Risk Assessment

- 3.1.1 The likelihood of a risk of injury or harm resulting from twelve-hour shifts will vary from person to person, and from task to task, and may change over the course of a person's working life. As such, employers who have implemented twelve-hour shifts must constantly monitor the effects of twelve-hour shifts on the health and safety of each of their individual workers. The primary mechanism for doing so should be through regular and ongoing risk assessments.
- 3.1.2 Wherever it is reasonably practicable to do so, employers should consult with affected employees, medical professionals, and unions when assessing the risks associated with twelve-hour shifts.

3.2 Rosters

- 3.2.1 Rosters must be developed in consultation with employees through their unions, and provisions must be made for ongoing consultation and resolution of disputes about the rosters.
- 3.2.2 To reduce the hazards associated with night and shift work, rosters should be designed to:
- (a) have a maximum of two night shifts in succession;
 - (b) have at least a twelve-hour interval between shifts;
 - (c) have a short cycle period with regular rotations;
 - (d) have the day shift not start before 6:00 am;
 - (e) allow workers some flexibility about shift change times and shift length;
 - (f) provide, in addition to normal breaks, where practicable, an extended rest period during night shift;
 - (g) wherever possible, breaks should occur at the same time each night; and
 - (h) ensure that there is adequate employee coverage so workers are not required to work beyond 12 hours.
- 3.2.3 Overtime should not be worked in conjunction with twelve-hour shifts. In no circumstances should overtime work override the basic principles of roster design.
- 3.2.4 Where the work performed by employees is particularly hazardous or there is a higher risk of injury or death, those risks need to be accounted for in the development of rosters.

3.3 Additional protections and support

- 3.3.1 Persons under 18 should not be employed on twelve-hour night shifts.
- 3.3.2 Workers exposed to hazardous substances or circumstances (including noise and vibration) must not exceed safe exposure standards.
- 3.3.3 Where workers report adverse health effects or breakdowns in their personal circumstances that could be related to twelve-hour shifts, those reports must be adequately investigated and addressed by employers.
- 3.3.4 Employers must ensure that there is adequate health surveillance of workers engaged in twelve-hour shifts.
- 3.3.5 Employers should, as far as practicable, provide employees who work twelve-hour shifts with:
- (a) clear information on fatigue, health, rest, and nutrition;
 - (b) safe transport options from the workplace where an employee reports feeling fatigued at the end of a twelve-hour shift;
 - (c) appropriate rest and break areas in the workplace;
 - (d) supervisor training on managing shift work;

- (e) flexible work options for workers with childcare and family responsibilities;
- (f) periodic health assessments;
- (g) health counselling and transfer options where required;
- (h) confidentiality of medical results;
- (i) suitable alternate duties without financial disadvantage where a worker is unable to continue on shift work for health reasons.

35. APPENDIX 4

A. Delete Appendix 4 and substitute:

APPENDIX 4 - Explanation of Averaging System

As provided in 4.6.2(2) an employee whose ordinary hours may be more or less than 38 in any particular week of a work cycle, is to be paid the wage on the basis of an average of 38 ordinary hours so as to avoid fluctuating wage payments each week. An explanation of the averaging system of paying wages is set out below:

- (a) Clause 3.1 - Hours in 3.1.3(1)(c) and 3.1.3(1)(d) provides that in implementing a 38 hour week the ordinary hours of an employee may be arranged so that the employee is entitled to a day off, on a fixed day or rostered day basis, during each work cycle. It is in these circumstances that the averaging system would apply.
- (b) If the 38 hour week is to be implemented so as to give an employee a day off in each work cycle this would be achieved if, during a work cycle of 28 consecutive days (that is, over four consecutive weeks) the employee's ordinary hours were arranged on the basis that for three of the four weeks the employee worked 40 ordinary hours each week and in the fourth week worked 32 ordinary hours. That is, the employee would work for 8 ordinary hours each day, Monday to Friday inclusive for three weeks and 8 ordinary hours on four days only in the fourth week - a total of 19 days during the work cycle.
- (c) In such a case the averaging system applies and the weekly wage rates for ordinary hours of work applicable to the employee shall be the average weekly wage rates set out for the employee's classification in Clause 4.8 – Wages of PART 1 - GENERAL or Clause 13 - Wages of PART 2 - CONSTRUCTION WORK of this Award, and shall be paid each week even though more or less than 38 ordinary hours are worked that week.

In effect, under the averaging system, the employee accrues a "credit" each day the employee works actual ordinary hours in excess of the daily average which would otherwise be 7 hours 36 minutes. This "credit" is carried forward so that in the week of the cycle that the employee works only four days, the actual pay would be for an average of 38 ordinary hours even though, that week, the employee works a total of 32 ordinary hours.

Consequently, for each day an employee works 8 ordinary hours the employee accrues a "credit" of 24 minutes (0.4 hours). The maximum "credit" the employee may accrue under this system is 0.4 hours on 19 days; that is, a total of 7 hours 36 minutes.
- (d) As provided in 4.6.3, an employee will not accrue a "credit" for each day the employee is absent from duty other than on paid leave.

4.6.3 Absences from Duty

- (1) An employee whose ordinary hours are arranged in accordance with 3.1.3(1)(c) or 3.1.3(1)(d) of Clause 3.1 - Hours of this Award and who is paid wages in accordance with 4.6.2(2) and is absent from duty (other than on paid leave) shall, for each day the employee is so absent, lose average pay for that day calculated by dividing the employee's average weekly wage rate by 5.

An employee who is so absent from duty for part of a day shall lose average pay for each hour the employee is absent by dividing the employee's average daily pay rate by 8.
- (2) Provided when such an employee is absent from duty (other than on paid leave) for a whole day the employee will not accrue a "credit" because the employee would not have worked ordinary hours that day in excess of 7 hours 36 minutes for which the employee would otherwise have been paid. Consequently, during the week of the work cycle the employee is to work less than 38 ordinary hours the employee will not be entitled to average pay for that week. In that week, the average pay will be reduced by the amount of the "credit" the employee does not accrue for each whole day during the work cycle the employee is absent (other than on paid leave).

The amount by which an employee's average weekly pay will be reduced when the employee is absent from duty (other than on paid leave) is to be calculated as follows:

$$\text{Total of 'credits' not accrued during cycle} \times \frac{\text{Average weekly pay}}{38}$$

Examples

- 1 Employee takes one day off without authorisation in first week of cycle

<u>Week of Cycle</u>	<u>Payment</u>
1st week	= average weekly pay <u>less</u> one day's pay (i.e. 1/5 th)
2nd & 3rd weeks	= average weekly pay each week
4th Week	= average pay <u>less</u> credit not accrued on day of absence = average pay <u>less</u> 0.4 hours x (average weekly pay / 38)
2. Employee takes each of the 4 days off without authorisation in the 4th week.	
<u>Week of Cycle</u>	<u>Payment</u>
1st, 2nd & 3rd weeks	= average pay each week
4th week	= average pay <u>less</u> 4/5 ^{ths} of average pay for the four days absent <u>less</u> total of credits not accrued that week = 1/5 th average pay <u>less</u> 4 x 0.4 hours x (average weekly pay / 38) = 1/5 th average pay <u>less</u> 1.6 hours x (average weekly pay / 38)

2026 WAIRC 00007

REVIEW OF THE MANUFACTURING, MAINTENANCE, AND METAL TRADES AWARD PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE TUESDAY, 6 JANUARY 2026
FILE NO/S APPL 6 OF 2025
CITATION NO. 2026 WAIRC 00007

Result Award varied

Representation

Mr B Entrekin on behalf of the Minister

Mr C Fogliani (of counsel) on behalf of The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch

Order

HAVING heard from Mr B Entrekin on behalf of the Minister and Mr C Fogliani (of counsel) on behalf of The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979 (WA)*, hereby orders –

THAT the *Manufacturing, Maintenance and Metal Trades Award* (formerly known as the *Metal Trades (General) Award*) be varied in accordance with the attached Schedule, such variations to have effect 21 days from the date of publication of this order in the Industrial Gazette.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

SCHEDULE

1. CLAUSE 1.6 - DEFINITIONS AND CLASSIFICATION STRUCTURE

- A. Delete the definition of “Casual Employee” in clause 1.6.1 and substitute with the following definition:**
“Casual Employee” means an employee engaged and paid as such applying s 7B of the *Industrial Relations Act 1979 (WA)*.
- B. Insert the following new definition in clause 1.6.1:**

“Modern Award” means the *Manufacturing and Associated Industries and Occupations Award 2020* made under the *Fair Work Act 2009* (Cth) or any modern award that replaces it.

C. In the definition of “Sheetmetal worker – first class” in clause 1.6.1, substitute “employee” for “workman” and “them” for “him”

D. Delete clauses 1.6.2(3) and (4) in clause 1.6.2 and substitute the following clauses

- (3) Reclassification shall be on the basis of skills obtained through accredited training or an objective analysis of the employee’s job in the context of the classification structure set out in this Award.
- (4) Subject to clause 1.6.2(3), appointment to any wage level in the classification structure is contingent upon such additional work being available and required to be performed by the employer.

<u>Wage Group</u>	<u>Classification Title</u>	<u>Minimum Training Requirement</u>
C 5	Advanced Engineering Tradesperson - Level II	Diploma of Engineering - Advanced Trade, or equivalent.
C 6	Advanced Engineering Tradesperson - Level I	C10 + 80% towards a Diploma of Engineering - Advanced Trade, or equivalent.
C 7	Engineering Tradesperson Special Class - Level II	Certificate IV in Engineering, or C10 + 60% towards a Diploma of Engineering, or equivalent.
C 8	Engineering Tradesperson Special Class - Level I	C10 + 40% towards a Diploma of Engineering, or equivalent.
C 9	Engineering Tradesperson - Level II	C10 + 20% towards a Diploma of Engineering, or equivalent.
C 10	Engineering Tradesperson - Level I Engineering / Production Employee	Recognised Trade Certificate, or Certificate III in Engineering Mechanical Trade, or Certificate III in Engineering - Fabrication Trade, or Certificate III in Engineering - Electrical/Electronic Trade, or equivalent.
C 11	Engineering / Production Employee - Level IV	Engineering Production Certificate II, or Certificate II in Engineering Production Technology, or equivalent.
C 12	Engineering / Production Employee - Level III	Engineering Production Certificate I or Certificate II in Engineering, or equivalent.
C 13	Engineering / Production Employee - Level II	In-house Training
C 14	Engineering / Production Employee - Level I	Up to 38 hours' induction training

E. Delete the words “his or her” in Clause 1.6.3(2) and substitute “their.”

F. Delete the words “him/her” in Clause 1.6.3(2)(d) and substitute “them”

G. Delete the words “his or her” wherever they appear in Clause 1.6.5(2) and substitute “their.”

H. Delete the words “his or her” in Clause 1.6.6(2)(d) and substitute “their.”

2. CLAUSE 1.7 – AWARD MODERNISATION

A. Delete clause 1.7 in its entirety.

3. CLAUSE 2.1 – CONTRACT OF SERVICE

A. Delete clause 2.1.3 and substitute:

- (1) The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned, and the required period of notice to be given by any casual employee shall be one hour.
- (2) Any contract of employment or other arrangement requiring an employee to give a greater period of notice than that provided for in clause 2.1.3(1) is prohibited.

- (3) An employer and employee may agree to include a term in a contract of employment requiring the employee to provide a period of notice that is not more than the period of notice required by clause 2.1.3(1).

B. Delete the words “he or she” in clause 2.1.4(2) and substitute “they.”

C. Delete clause 2.1.6 and substitute:

2.1.6 Absence From Duty

The employer shall be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence is due to paid leave to which the employee is entitled under the provisions of this Award, an industrial agreement, an order of the Commission, or a statute.

4. CLAUSE 2.2 – TRAINING

A. Delete the words “and Supplementary Payments” in clause 2.2.2 of clause 2.2.

B. Delete clause 2.2.4 of clause 2.2 and substitute:

- 2.2.4 (1) Where, as a result of consultation in accordance with 4.8.8 of Clause 4.8 - Wages or through a training committee and/or with the employee concerned, it is agreed that additional training in accordance with the programme developed pursuant to 2.2.2 should be undertaken by an employee, that training may be undertaken either on or off the job and if the training is undertaken during ordinary working hours, the employee concerned shall not suffer any loss of pay. The employer shall not unreasonably withhold such paid training leave.
- (2) Any costs associated with standard fees for prescribed courses and prescribed textbooks (excluding those textbooks which are available in the employer's technical library) incurred with the undertaking of training shall be reimbursed by the employer upon production of evidence of such expenditure. Provided that reimbursement shall be the earlier of the following:
- (a) on an annual basis; or
- (b) if the employment comes to an end, within a reasonable period following the termination of the employment;
- subject to the presentation of reports of satisfactory progress.
- (3) Travel costs incurred by an employee undertaking training in accordance with this clause, which exceed those normally incurred in travelling to and from work, shall be reimbursed by the employer.

5. CLAUSE 2.3 – REDUNDANCY

A. Delete the words “and this is not due to the ordinary and customary turnover of labour” in clause 2.3.1

B. Delete clause 2.3.3(3) of clause 2.3.3 and substitute:

- (3) Service by the employee with a business which has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with the *Long Service Leave Act 1958* (WA) shall also constitute continuous service for the purpose of this clause.

C. Delete clause 2.3.5 and substitute:

2.3.5 Alternative Employment

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an employee and it would be unreasonable in the circumstances for the employee to refuse that alternative employment.

6. CLAUSE 3.1 – HOURS

A. Delete clause 3.1.1(5), (6) and (7) of clause 3.1.1 and substitute:

- (5) An employee's ordinary hours of work on any given day shall be confined as follows:
- (a) The default position is that the ordinary working hours shall be no more than eight hours per day.
- (b) If the employer and the majority of employees in the workplace, or section of the workplace, agree, then the maximum ordinary hours for that workplace, or section of the workplace, may be up to ten hours per day. Any such agreement shall be documented in writing and signed and dated by the relevant parties.
- (c) The maximum ordinary hours for the workplace, or a section of the workplace, may be up to 12 hours per day if the following conditions are met:
- (i) The employer, the relevant union(s), and the majority of employees in the workplace, or relevant section of the workplace, agree. Any such agreement shall be documented in writing and signed and dated by the relevant parties.

- (ii) The employer and the employees concerned are guided by the Code of Conduct on 12 Hour Shifts as set out in Appendix 3 of this Award.
 - (iii) The employer introduces and maintains proper health monitoring procedures to manage employee fatigue and mental health.
 - (iv) Suitable roster arrangements are made to accommodate the extended shift lengths.
 - (v) The employer provides proper supervision of its employees taking into account the increased risk to the employees' health and safety when working 12 hour shifts.
- (6) An employee's ordinary hours of work shall be consecutive and shall not be divided into split shifts.
- (7) Employees are entitled to a meal break not exceeding one hour. The meal break shall be provided for as follows:
- (a) An employee shall not be compelled to work for more than five (5) hours without a meal break except where an alternative arrangement is entered into as a result of discussions between the employer and the relevant employee.
 - (b) By arrangement between an employer and the majority of employees in the plant, section or sections concerned, an employee or employees may be required to work in excess of five (5) hours, but not more than six (6), at ordinary rates of pay without a meal break.
 - (c) The time of taking a scheduled meal break or rest break by one or more employees may be altered by the employer if it is necessary to do so in order to meet a requirement for continuity of operations.
 - (d) An employer may stagger the time of taking a meal or rest break to meet operational requirements.
 - (e) When an employee is required for duty during the employee's usual meal break and the meal break is thereby postponed for more than half an hour, the employee shall be paid at overtime rates until the employee gets the meal break.
- (7A) Employees are entitled to a seven minute rest break at a convenient time between the second and fourth hours of their shift. In relation to the rest break:
- (a) The rest period shall be paid at the employee's ordinary rate of pay.
 - (b) Refreshments may be taken by employees during the rest period.
 - (c) The period of seven minutes shall not be exceeded unless authorised by the employer.
- (7B) In addition to the rest break in clause 3.1.1(7A), where at least 30 minutes of overtime is worked, employees are entitled to a second seven minute rest break, in accordance with the conditions in clause 3.1.1(7A).

B. Delete clause 3.1.1(9) of clause 3.1.1.

C. Delete clause 3.1.2(3) of clause 3.1.2 and substitute:

- (3) An employee's ordinary hours of work on any given day shall be confined as follows:
- (a) The default position is that the ordinary working hours shall be no more than eight hours per day.
 - (b) If the employer and the majority of employees in the workplace, or section of the workplace, agree, then the maximum ordinary hours for that workplace, or section of the workplace, may be up to ten hours per day. Any such agreement shall be documented in writing and signed and dated by the relevant parties.
 - (c) The maximum ordinary hours for the workplace, or a section of the workplace, may be up to 12 hours per day if the following conditions are met:
 - (i) The employer, the relevant union(s), and the majority of employees in the workplace, or relevant section of the workplace, agree. Any such agreement shall be documented in writing and signed and dated by the relevant parties.
 - (ii) The employer and the employees concerned are guided by the Code of Conduct on 12 Hour Shifts as set out in Appendix 3 of this Award.
 - (iii) The employer introduces and maintains proper health monitoring procedures to manage employee fatigue and mental health.
 - (iv) Suitable roster arrangements are made to accommodate the extended shift lengths.
 - (v) The employer provides proper supervision of its employees taking into account the increased risk to the employees' health and safety when working 12 hour shifts.

7. CLAUSE 3.2 – OVERTIME

A. Delete clause 3.2.3(6) of clause 3.2.3 and substitute:

- (6) Subject to the provisions of 3.2.3(7), an employee required to work overtime for more than two (2) hours shall be supplied with a meal by the employer or be paid a meal allowance in the amount of the

allowance contained in clause 30.3(c)(ii) of the Modern Award as adjusted from time to time. Such allowance is payable for each period when, because of the amount of overtime worked, a second or subsequent meal is required.

8. CLAUSE 3.3 – SHIFT WORK

A. Delete clause 3.3.1 and substitute:

3.3.1 The provisions of this clause apply to shift work whether continuous or otherwise. For the purpose of this clause:

Afternoon shift means a shift where the majority of the hours during the shift fall between 2:00 pm and 8:00 pm on Monday to Friday inclusive.

Day shift means a shift where the majority of the hours during the shift fall between 6:00 am and 6:00 pm on Monday to Friday inclusive that is not an Afternoon shift or a Night shift.

Night shift means a shift where either:

- (a) At least half of the hours during the shift fall between 8:00 pm and 6:00 am on Monday to Friday inclusive; or
- (b) The shift starts sometime between 8:00 pm and 3:59 am on Monday to Friday inclusive.

9. CLAUSE 4.4 – JUNIOR EMPLOYEES

A. Delete clause 4.4 in its entirety.

10. CLAUSE 4.6 – PAYMENT OF WAGES

A. Delete clause 4.6 and substitute:

4.6 - PAYMENT OF WAGES

4.6.1 Each employee shall be paid the appropriate rate shown in Clause 4.8 - Wages of PART 1 - GENERAL or Clause 13. - Wages of PART 2 - CONSTRUCTION WORK of this Award. Subject to 4.6.2 payment shall be pro rata where less than the full week is worked.

4.6.2 Wages shall be paid as follows:-

(1) Actual ordinary hours

In the case of an employee who works the same number of ordinary hours each week, wages shall be paid weekly or fortnightly according to the actual ordinary hours worked each week or fortnight.

(2) Average of ordinary hours

Subject to 4.6.3 and 4.6.4, in the case of an employee who works an average of ordinary hours each week during a particular work cycle, wages shall be paid weekly or fortnightly according to a weekly average of ordinary hours worked even though more or less ordinary hours may be worked in any particular week of the work cycle.

Note: Appendix 4 reproduces earlier provisions of this clause explaining the method of averaging wages for a 38 hour week.

4.6.3 Alternative Method of Payment

An alternative method of paying wages to that prescribed by 4.6.2 may be agreed between the employer and the majority of the employees concerned.

4.6.4 Day Off Coinciding with Pay Day

In the event that an employee who is paid by cash is rostered off duty on their usual pay day, such employee shall be paid no later than the working day immediately following pay day. Provided that, where the employer is able to make suitable arrangements, wages may be paid on the working day preceding pay day.

4.6.5 Payment by Cash or Electronic Fund Transfer

An employee's wages may be paid by cash or direct transfer into the employee's bank (or other recognised financial institution) account.

4.6.6 Termination of Employment

An employee shall be paid all monies due at the termination of service with the employer.

Provided that in the case of an employee whose ordinary hours are arranged in accordance with 3.1.3(1)(c) or 3.1.3(1)(d) of Clause 3.1 - Hours of this Award and who is paid average pay and who has not taken time off due to the employee during the work cycle in which the employment is terminated, the wages due to that employee shall include a total of credits accrued during the work cycle.

Provided further, where the employee has taken time off during the work cycle in which the employment is terminated, the wages due to that employee shall be reduced by the total of credits which have not accrued during the work cycle.

4.6.7 Details of Payments to be Given

Employers must provide pay slips in accordance with section 49DA of the Act and provide an employee with access to records upon the employee's written request in accordance with section 49E of the Act.

4.6.8 Calculation of Hourly Rate

Except as provided in 4.6.3 the ordinary rate per hour shall be calculated by dividing the appropriate weekly rate by 38.

11. CLAUSE 4.7 – TIME AND WAGES RECORD**A. Delete clause 4.7 and substitute:****4.7 - TIME AND WAGES RECORD**

Employers must keep time and wages records in accordance with Part II, Division 2F Keeping of and access to employment records and pay slips of the Act, regulation 4 of the *Industrial Relations (General) Regulations 1997* (WA) and section 26 of the *Long Service Leave Act 1958* (WA).

12. CLAUSE 4.8 – WAGES AND SUPPLEMENTARY PAYMENTS**A. Delete the words “and supplementary payments” from the clause heading.****B. Delete clause 4.8.1 and substitute:**

4.8.1 The minimum award rate payable weekly to adult employees (other than apprentices) classified under a defined level specified in Clause 1.6 - Definitions and Classification Structure, shall be as follows:

Wage Group	Total Rate Per Week \$
Level C14	953.00
Level C13	953.00
Level C12	981.90
Level C11	1008.90
Level C10	1055.10
Level C9	1084.00
Level C8	1112.40
Level C7	1138.70
Level C6	1195.90
Level C5	1224.70

Note: The Total Rate Per Week contained in this clause includes components for supplementary payments and arbitrated safety net adjustments. Reference to the history and composition of the Total Rate Per Week can be found in the Western Australian Industrial Gazette at 70 WAIG 2597.

C. Delete clause 4.8.2(1) of clause 4.8.2 and substitute:

4.8.2 Leading Hands:

- (1) In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week the allowance prescribed by clause 30.2(a)(i) of the Modern Award, as adjusted from time to time.

D. Delete clause 4.8.5, 4.8.6, 4.8.7 and 4.8.8. of clause 4.8 substitute:

4.8.5 A casual employee shall be paid 25 per cent of the ordinary rate in addition to the ordinary rate for the calling in which they are employed.

4.8.6 Tool Allowance:

- (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance equal to the greater of \$24.00 per week or the allowance contained in clause 30.2(c)(ii) of the Modern Award, as adjusted from time to time for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

- (2) Any tool allowance paid pursuant to 4.8.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
 - (3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
 - (4) A tradesperson or apprentice shall replace or pay for any tool supplied by the employer if lost through the employee's negligence.
- 4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of \$38.25 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities, but an employee so employed for not more than three days shall be paid on a pro rata basis.

13. CLAUSE 4.9 – TRAINEESHIPS

A. Delete clause 4.9.5(1) of clause 4.9.5 and substitute:

- (1) A full time Trainee shall be engaged for the nominal duration of the traineeship, provided that a Trainee shall be subject to a satisfactory probation period of one month which may be reduced at the discretion of the employer. By agreement in writing, and with the consent of the Training Authority, the relevant employer and the Trainee may vary the duration of the Traineeship and the extent of approved training provided that any agreement to vary is in accordance with the relevant Traineeship Scheme. A part-time trainee shall be engaged in accordance with the provisions of 4.9.6(5).

B. Delete clause 4.9.6(4) of clause 4.9.6 and substitute:

- (4) AQFIV Traineeships
Trainees undertaking an AQF Level IV traineeship shall receive the relevant weekly wage rate for AQF Level III trainees at Skill/Industry Levels A, B and C as applicable with the addition of 3.8% of that wage rate.

C. Delete the words “and Supplementary Payments” in clause 4.9.6(6) of clause 4.9.6.

14. CLAUSE 5.2 - SPECIAL ALLOWANCES AND FACILITIES

A. Delete clause 5.2 and substitute:

5.2 – SPECIAL ALLOWANCES AND FACILITIES

- 5.2.1 Height Money: An employee shall be paid an allowance in the amount specified in clause 30.4(h) of the Modern Award as adjusted from time to time for each hour during which the employee works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to lines people nor to riggers and splicers on ships and buildings.
- 5.2.2 Dirt Money: An employee shall be paid an allowance in the amount specified in clause 30.4(g) of the Modern Award as adjusted from time to time for each hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
- 5.2.3 Grain Dust: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Commission determines that employees employed under this Award are unduly affected by that dust, the Commission may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding \$1.42 per hour.
- 5.2.4 Confined Space: An employee shall be paid an allowance in the amount specified in clause 30.4(f) of the Modern Award as adjusted from time to time for each hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.
- 5.2.5 Diesel Engine Ships: The provisions of 5.2.2 and 5.2.4 do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of \$1.42 per hour whilst so engaged.
- 5.2.6 Boiler Work: An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any allowance to which the employee may be entitled under 5.2.2 and 5.2.4.
- 5.2.7 Hot Work: An employee shall be paid the applicable allowance specified in clause 30.4(d) of the Modern Award as adjusted from time to time for each hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1° and 54.4° Celsius.
- 5.2.8 (1) Where in the opinion of the Commission, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Commission may –
 - (a) Fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

- (b) Fix the period (including a minimum period) during which any allowance so fixed is to be paid; and
 - (c) Prescribe such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Commission sees fit.
 - (2) The provisions of 5.2.8(1) do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.
 - (3) An allowance fixed pursuant to 5.2.8(1) includes any other allowance which would otherwise be payable under this clause.
- 5.2.9 Tarring Pipes: The provisions of 5.2.2 and 5.2.4 do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of \$1.38 per day whilst so engaged.
- 5.2.10 Percussion Tools: An employee shall be paid an allowance of 50 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.
- 5.2.11 Chemical, Artificial Manure and Cement Works: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of \$21.00 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.
- 5.2.12 Abattoirs and Tallow Rendering Works: An employee, employed in and about an abattoir or in a rendering section of tallow works, shall be paid an allowance in the amount specified in clause 30.4(l) of the Modern Award as adjusted from time to time. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this Clause.
- 5.2.13 An employee who is employed at a timber sawmill or is sent to work at a timber sawmill shall be paid for the time there engaged a disability allowance equivalent to what the majority of the employees at the mill receive under the appropriate award. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause with the exception of that prescribed in 5.2.1 - Height Money.
- 5.2.14 Phosphate Ships: An employee shall be paid an allowance of \$1.20 for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.
- 5.2.15 An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than they would be entitled to receive pursuant to the award which would apply if such employee was employed in the gold mine concerned.
- 5.2.16 An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.
- 5.2.17 The work of an electrical fitter shall not be tested by an employee of a lower grade.
- 5.2.18 Special Rates Not Cumulative: Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely – the highest for the disabilities prevailing. Provided that this subclause shall not apply to confined space, dirt money, height money, or hot work, the rates for which are cumulative.
- 5.2.19 Protective Equipment:
- (1) An employer shall have available a sufficient supply of protective equipment (as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by employees when engaged on work for which some protective equipment is reasonably necessary.
 - (2) An employee shall sign an acknowledgement when issued with any article of protective equipment and shall return that article to the employer when finished using it or on leaving employment.
 - (3) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.
 - (4) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.
- 5.2.20 (1) Subject to the provisions of this Clause, an employee whilst employed on foundry work shall be paid a disability allowance in the amount specified in clause 30.4(q) of the Modern Award as adjusted from time to time for each hour worked to compensate for all

disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces, and noise.

- (2) The foundry allowance herein prescribed shall also apply to apprentices and un-apprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to the employee shall be decreased proportionately.
- (3) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this Clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.
- (4) For the purpose of this subclause 'foundry work' shall mean -
 - (a) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and
 - (b) Where carried on as an incidental process in connection with and in the course of production to which 5.2.20(4)(a) applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -
 - (i) Non-ferrous die casting (including gravity and pressure)
 - (ii) Casting of billets and/or ingots in metal moulds;
 - (iii) Continuous casting of metal into billets;
 - (iv) Melting of metal for use in printing;
 - (v) Refining of metal.

5.2.21 An employee, holding a Provide First Aid certificate (HLTAID011) or equivalent, appointed by the employer to perform first aid duties, shall be paid in the amount specified in clause 30.3(b) of the Modern Award as adjusted from time to time per week in addition to the employee's ordinary rate.

5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current electrical licence (unrestricted) issued pursuant to the relevant Regulation in force under the *Electricity Act 1945* (WA), shall be paid an allowance of \$34.20 per week.

15. CLAUSE 5.3 - CAR ALLOWANCE

A. Delete clause 5.3 and substitute:

5.3 - CAR ALLOWANCE

5.3.1 Where an employee is required and authorised to use their own motor vehicle in the course of the employee's duties the employee shall be paid an allowance not less than that provided for in the table set out hereunder. Notwithstanding anything contained in this subclause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

PER KM RATES FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS				
AREA	MOTOR CAR	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
		RATE PER KILOMETRE (\$)		
	Motorcycle	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
Metropolitan Area		1.04	0.93	0.81
South West Land Division		1.06	0.95	0.83
North of 23.5° South Latitude		1.17	1.05	0.91
Rest of the State		1.10	0.98	0.86
All areas	0.36			

5.3.2 "Metropolitan Area" means that area within a radius of fifty kilometres from the Perth Railway Station.

"South West Land Division" means the South West Land Division as defined by Schedule 1 of the *Land Administration Act 1997* (WA) excluding the area contained within the Metropolitan Area.

5.3.3 Where an employee in the course of a journey travels through two (2) or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.

16. CLAUSE 5.5 - DISTANT WORK

A. Delete clauses 5.5.4 and 5.5.5 of clause 5.5 and substitute:

- 5.5.4 An employee, to whom the provisions of 5.5.1 apply, shall be paid an allowance of \$44.00 for any weekend the employee returns home from the job, but only if -
- (1) the employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;
 - (2) the employee is not required for work during that weekend;
 - (3) the employee returns to the job on the first working day following the weekend; and
 - (4) the employer does not provide, or offer to provide, suitable transport.
- 5.5.5 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$19.45 per day, provided that where the time actually spent in travelling either to or from the job exceeds twenty (20) minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

17. CLAUSE 6.1 - ANNUAL LEAVE

A. Delete clause 6.1.1(2)(a) of clause 6.1.1.

B. Delete the words "and Supplementary Payments" in clause 6.1.1(2)(b)(i).

C. Delete clause 6.1.2(2) of clause 6.1.2 and substitute:

- (2) The additional week of annual leave provided for in clause 6.1.2(1) shall accrue pro rata throughout the year at the rate of 1/52 of a week for each completed week the employee is continuously so engaged.

D. Delete clause 6.1.3 of clause 6.1.

18. CLAUSE 6.2 - SICK/CARERS LEAVE

A. Delete the words "Sick/carer's leave" wherever it appears in clause 6.2 and substitute "Personal leave."

B. Delete the words "his or her" in clause 6.2.2 and substitute "their."

C. Delete clause 6.2.5 and substitute:

- 6.2.5 Where a business has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with the *Long Service Leave Act 1958* (WA), the paid personal leave standing to the credit of the employee at the date of transfer from service with the transferor shall stand to the credit of the employee at the commencement of service with the transferee and may be claimed in accordance with the provisions of this clause.

19. CLAUSE 6.5 - PARENTAL LEAVE

A. Delete clause 6.5.1 of clause 6.5 and substitute:

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

20. NEW CLAUSE 6.6 - FAMILY AND DOMESTIC VIOLENCE LEAVE

A. Insert a new clause 6.6 as follows:

6.6 - FAMILY AND DOMESTIC VIOLENCE LEAVE

Family and Domestic Violence leave is as provided for in accordance with the National Employment Standards of the *Fair Work Act 2009* (Cth) and Part 4 Division 7 of the *Minimum Conditions of Employment Act 1993* (WA).

21. CLAUSE 6.7 - PUBLIC HOLIDAYS

A. Insert the words "Easter Sunday" after "Good Friday" in clause 6.7.1(1) of clause 6.7.1.

B. Insert the words "other than Easter Sunday" after the number 6.7.1(1) in clause 6.7.1(3).

C. Delete clause 6.7.2 and renumber clause 6.7.3 accordingly.

22. CLAUSE 8.2 - RIGHT OF ENTRY TO INVESTIGATE BREACHES

A. Delete clause 8.2 and substitute:

8.2 - RIGHT OF ENTRY TO INVESTIGATE BREACHES

Conditions regarding right of entry by authorised representatives of the union are dealt with in Part II, Division G – Right of entry and inspection by authorised representatives of the Act.

23. CLAUSE 8.3 - POSTING OF AWARD AND UNION NOTICES

A. Delete clause 8.3 and substitute:

8.3 - POSTING OF AWARD AND UNION NOTICES

The employer shall keep a copy of this Award in a convenient and accessible place in the workplace or provide a copy electronically, and the employer shall also provide a notice board for the posting of union notices.

24. **CLAUSE 9. – SUPERANNUATION**

A. Delete the words “(including supplementary payment)” in the definition of “Ordinary time earnings” in clause 9.2.

B. Delete clauses 9.3(2) and 9.3(3) of clause 9.3 and substitute:

(2) Employer contributions shall be paid in accordance with the superannuation legislation.

C. Delete clause 9.5 of clause 9 and substitute:

9.5 Subject to the Trust Deed to the Fund of which an employee is a member, the following provisions will apply:

(1) Work Related Injury or Illness

If an eligible employee's absence from work is due to work related injury or work related illness, contributions at the normal rate must continue for the period of the absence provided that:

(a) the member of the fund is receiving workers' compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements or the provisions of this Award;

(b) the person remains an employee of the employer.

D. Delete clause 9.6 of clause 9.

25. **CLAUSE 12.3 – REDUNDANCY**

A. Delete the heading to clause 12.3 and substitute the heading “Redundancy and Severance.”

B. Delete the words “respondent to this Award” in clause 12.3.1(a) of clause 12.3.1.

C. Delete the words “his or her” wherever they appear in clauses 12.3.2(1), 12.3.2(5), 12.3.2(6) and 12.3.3 of clause 12.3 and substitute “their.”

26. **CLAUSE 13. – WAGES**

A. Delete clause 13.1(2) of clause 13.1.

B. Delete the columns “Base Rate”, “Special Payment Adjustment” and “Arbitrated Safety Net” of clause 13.2(1).

C. Delete the words “and Supplementary Payments” in clause 13.3 and substitute “clause 4.1.10” for “Clause 13.8(10)” in the note to clause 13.3 of clause 13.

D. Delete clause 13.3, 13.4, 13.5, and 13.5A of clause 13 and substitute:

13.3 The ordinary weekly wage of an apprentice shall be calculated by applying the percentage applicable under 4.8.3 of Clause 4.8 - Wages of PART 1 – GENERAL of this Award to the rate prescribed for a "Tradesperson" in 13.2 for the construction work upon which they are engaged.

Note:

* *Adult apprentices aged 21 or more are entitled to receive the minimum adult apprentice wage, as set out in Clause 4.1.10 of this Award, or the relevant amount referred to above, whichever is the higher.*

* *The General Order on Wage structures for school-based and part-time apprentices applies to apprentices working under this Award.*

13.4 Construction Allowances

(1) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -

(a) \$76.20 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(b) \$68.60 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(c) \$40.20 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.

(2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Commission.

13.5 Leading Hands

In addition to the appropriate total wage prescribed in this clause a leading hand shall be paid an allowance in the relevant amount specified in clause 30.2(a) of the Modern Award as adjusted from time to time.

E. Delete clause 13.6 of clause 13 and substitute:

- 13.6 (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance equal to the greater of \$24.00 per week or the allowance contained in clause 30.2(c)(ii) of the Modern Award as adjusted from time to time. Any tool allowance paid pursuant to 13.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
- (2) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (3) A tradesperson or an apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

F. Delete clause 13.8.

27. CLAUSE 14.1 - REST PERIOD

A. Delete clause 14.1 of clause 14 and substitute:

14.1 - REST PERIOD

- 14.1.1 Employees are entitled to a seven minute rest break at a convenient time between the second and fourth hours of their shift. In relation to the rest break:
- (a) The rest period shall be paid at the employee's ordinary rate of pay.
- (b) Refreshments may be taken by employees during the rest period.
- (c) The period of seven minutes shall not be exceeded unless authorised by the employer.
- 14.1.2 In addition to the rest break in clause 14.1.1, where at least 30 minutes of overtime is worked, employees are entitled to a second seven minute rest break, in accordance with the conditions in clause 14.1.1.

28. CLAUSE 14.2 - SHIFT WORK

A. Delete the words "per shift for eight (8) hours" in clause 14.2.4.

29. CLAUSE 15.1 - SPECIAL ALLOWANCES AND PROVISIONS

A. Delete clauses 15.1.2 of clause 15.1 and substitute:

- 15.1.2 (1) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of an employee's tools when not in use and an employee's working clothes and where an employee is absent from work in accordance with the provisions of Clause 6.2 – Personal Leave of PART 1 - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during the employee's absence.
- (2) Subject to 15.1.3 where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under 15.1.2(1) the employer shall reimburse the employee for that loss but only up to a maximum of \$1,187.50.
- (3) The provisions of 15.1.2(2) shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four (24) hours before being lost by fire or theft and if the employee has reported any theft to the police.

B. Delete Clause 15.1.3 of Clause 15.1 and substitute:

- 15.1.3 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current electrical licence (unrestricted) issued pursuant to the relevant regulation in force under the *Electricity Act 1945* (WA), shall be paid an allowance of \$34.20 per week.

30. CLAUSE 15.2 - ALLOWANCE FOR TRAVELLING AND EMPLOYMENT IN CONSTRUCTION WORK

A. Delete clause 15.2.1 of clause 15.2 and substitute:

- 15.2.1 An employee, who on any day is required by the employer to report directly to the job, shall be paid an allowance in accordance with the provisions of this subclause to compensate for travel patterns and costs peculiar to the industry, which includes mobility requirements of employees, and the nature of employment in construction work covered by this Award –
- (1) On places within a radius of 50 kilometres from the General Post Office, Perth - \$21.90 per day.
- (2) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – \$1.15 per kilometre.

- (3) Subject to the provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of \$1.15 per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.
- (4) In respect of work carried out from an employer's depot situated outside a radius of 60 kilometres from the General Post Office, Perth the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.
- (5) Where transport to and from the job is supplied by the employer from and to the depot or such other place more convenient to the employee as is mutually agreed upon between the employer and the employee, half the above rates shall be paid, provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

31. CLAUSE 15.3 - DISTANT WORK

A. Delete clause 15.3.2 of clause 15.3 and substitute:

15.3.2 Notwithstanding the provisions of 15.3.1, an employer shall be under no obligation to pay for board or lodging for any period the employee is absent without reasonable excuse.

B. Delete clause 15.3.5 and substitute:

15.3.5 If an employee works north of the 26th parallel of South Latitude for at least 6 months or if the work ceases sooner, for so long as the work continues, the employer shall, on termination of the employee's engagement, pay the employee's fare from the place of work to the place of engagement on the employee's request.

C. Delete clause 15.3.6 and clause 15.3.7 of clause 15.3 and substitute:

15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of \$44.00 for any weekend that the employee returns home from the job, but only if -

- (1) The employee advises their employer or the employer's agent of their intention not later than the Tuesday immediately preceding the weekend in which they so return;
- (2) The employee is not required for work during that weekend;
- (3) The employee returns to the job on the first working day following the weekend; and
- (4) The employer does not provide, or offer to provide, suitable transport.

15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of \$19.45 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

D. Delete the words "his or her" wherever it appears in clause 15.3.8 and substitute "their."

E. Delete the words "Sick/Carer's" in clause 15.3.9 and substitute "Clause 6.2 - Personal Leave, Clause 6.4 - Bereavement Leave or Clause 6.6 - Family and Domestic Violence Leave"

32. CLAUSE 15.4 - SPECIAL PROVISION - WESTERN POWER

A. Delete clause 15.4.2, 15.4.3, 15.4.4 and 15.4.5 of clause 15.4 and substitute:

15.4.2 In addition to the wage otherwise payable to an employee pursuant to the provisions of PART 2 - CONSTRUCTION WORK of this Award, an employee (other than an apprentice) shall be paid -

- (1) \$3.40 per hour for each hour worked if employed at Muja;
- (2) \$1.94 per hour for each hour worked if employed at Kwinana;
- (3) A safety footwear allowance of twelve (12) cents per hour for each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee.

15.4.3 (1) An employee, to whom Clause 15.2 - Allowance for Travelling and Employment in Construction Work of this PART applies and who is engaged on construction work at Muja, shall be paid -

- (a) An allowance of \$21.50 per day if the employee resides within a radius of 50 kilometres from the Muja power station;
 - (b) An allowance of \$56.85 per day if the employee resides outside that radius.
- in lieu of the allowance prescribed in the said clause.

- (2) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be

paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

- 15.4.4 In addition to the allowance payable pursuant to 15.3.6 of Clause 15.3 – Distant Work of this PART, an employee to whom that clause applies shall be paid \$42.40 on each occasion upon which the employee returns home at the weekend, but only if -
- (1) The employee has completed three months' continuous service with the employer;
 - (2) The employee is not required for work during the weekend;
 - (3) The employee returns to the job on the first working day following the weekend;
 - (4) The employer does not provide, or offer to provide, suitable transport; and such payment shall be deemed to compensate for a periodical return home at the employer's expense.
- 15.4.5 An employee to whom Clause 15.3 - Distant Work of this PART applies and who proceeds to construction work at Muja from home where located within a radius of 50 kilometres from the General Post Office, Perth -
- (a) Shall be paid an amount of \$99.60 and for three hours at ordinary rates in lieu of expenses and payment prescribed in 15.3.3 of the said clause; and
 - (b) In lieu of the provisions of 15.3.4 of the said clause, shall be paid \$99.60 and for three (3) hours at ordinary rates when the employee's services terminate, if the employee has completed three (3) months' continuous service; and
 - (c) The provisions of 15.3.3 and 15.3.4 of Clause 15.3 - Distant Work of this PART shall not apply to such employee.

33. CLAUSE 17. - STRUCTURAL EFFICIENCY PRINCIPLE

- A. Delete clause 17 in its entirety.**

34. APPENDIX 3

- A. Delete Appendix 3 and substitute:**

APPENDIX 3

CODE OF CONDUCT ON TWELVE-HOUR SHIFTS

1. Principles

The following principles underpin this Code of Conduct:

- 1.1 Twelve-hour shifts can present both risks and opportunities. Those risks and opportunities must be properly and adequately considered and balanced on a case-by-case basis.
- 1.2 The short-term risks of twelve-hour shifts include disrupted sleep patterns, fatigue, changes in eating habits, social isolation, psychological strain, and the increased risk of making mistakes at work.
- 1.3 Whereas the long-term risk associated with twelve-hour shifts includes an increased risk of developing cardiovascular disease, digestive disorders, fatigue-related illnesses, depression and anxiety, mood changes, susceptibility to suicide and self-harm, as well as breakdowns of relationships and family units.
- 1.4 While day work does not involve the same disturbances to circadian rhythms as night work, twelve-hour day work still increases the likelihood of the above risks occurring.
- 1.5 Well-designed rosters and proper support measures can help reduce fatigue, improve work-life balance, and provide extended rest and recovery opportunities for workers who perform twelve-hour shifts. For twelve-hour shift work to be advantageous, the increased leisure time must be used for recuperation and recreation, rather than as an opportunity for additional employment.
- 1.6 All workplaces that utilise twelve-hour shifts must do so with the health, safety, and well-being of employees as the primary consideration.
- 1.7 When considering the introduction or maintenance of twelve-hour shift arrangements, employers should take into account the impact of twelve-hour shifts on all workers, taking into account factors such as an employee's caring responsibilities.

2. Introduction of Twelve-Hour Shifts

- 2.1 The introduction of twelve-hour shifts should only be introduced where:
 - (a) there is a continuous work process or genuine operational requirement;
 - (b) the workload is not excessive;
 - (c) on-going and regular health and safety risk assessments are conducted on an employee-by-employee basis to monitor the risks associated with twelve-hour shifts;
 - (d) affected employees are fully consulted and have given majority support (in conjunction with their union) to the working of twelve-hour shifts; and
 - (e) wherever possible, steps have been taken to reduce overall working hours.

- 2.2 The introduction of twelve-hour shifts should be on a trial basis for twelve months to allow workers to evaluate the changed shifts.

3. Control Measures

3.1 Risk Assessment

- 3.1.1 The likelihood of a risk of injury or harm resulting from twelve-hour shifts will vary from person to person, and from task to task, and may change over the course of a person's working life. As such, employers who have implemented twelve-hour shifts must constantly monitor the effects of twelve-hour shifts on the health and safety of each of their individual workers. The primary mechanism for doing so should be through regular and ongoing risk assessments.
- 3.1.2 Wherever it is reasonably practicable to do so, employers should consult with affected employees, medical professionals, and unions when assessing the risks associated with twelve-hour shifts.

3.2 Rosters

- 3.2.1 Rosters must be developed in consultation with employees through their unions, and provisions must be made for ongoing consultation and resolution of disputes about the rosters.
- 3.2.2 To reduce the hazards associated with night and shift work, rosters should be designed to:
- (a) have a maximum of two night shifts in succession;
 - (b) have at least a twelve-hour interval between shifts;
 - (c) have a short cycle period with regular rotations;
 - (d) have the day shift not start before 6:00 am;
 - (e) allow workers some flexibility about shift change times and shift length;
 - (f) provide, in addition to normal breaks, where practicable, an extended rest period during night shift;
 - (g) wherever possible, breaks should occur at the same time each night; and
 - (h) ensure that there is adequate employee coverage so workers are not required to work beyond 12 hours.
- 3.2.3 Overtime should not be worked in conjunction with twelve-hour shifts. In no circumstances should overtime work override the basic principles of roster design.
- 3.2.4 Where the work performed by employees is particularly hazardous or there is a higher risk of injury or death, those risks need to be accounted for in the development of rosters.

3.3 Additional **protections and support**

- 3.3.1 Persons under 18 should not be employed on twelve-hour night shifts.
- 3.3.2 Workers exposed to hazardous substances or circumstances (including noise and vibration) must not exceed safe exposure standards.
- 3.3.3 Where workers report adverse health effects or breakdowns in their personal circumstances that could be related to twelve-hour shifts, those reports must be adequately investigated and addressed by employers.
- 3.3.4 Employers must ensure that there is adequate health surveillance of workers engaged in twelve-hour shifts.
- 3.3.5 Employers should, as far as practicable, provide employees who work twelve-hour shifts with:
- (a) clear information on fatigue, health, rest, and nutrition;
 - (b) safe transport options from the workplace where an employee reports feeling fatigued at the end of a twelve-hour shift;
 - (c) appropriate rest and break areas in the workplace;
 - (d) supervisor training on managing shift work;
 - (e) flexible work options for workers with childcare and family responsibilities;
 - (f) periodic health assessments;
 - (g) health counselling and transfer options where required;
 - (h) confidentiality of medical results;
 - (i) suitable alternate duties without financial disadvantage where a worker is unable to continue on shift work for health reasons.

35. APPENDIX 4

A. Delete Appendix 4 and substitute:

APPENDIX 4 - Explanation of Averaging System

As provided in 4.6.2(2) an employee whose ordinary hours may be more or less than 38 in any particular week of a work cycle, is to be paid the wage on the basis of an average of 38 ordinary hours so as to avoid fluctuating wage payments each week. An explanation of the averaging system of paying wages is set out below:

- (a) Clause 3.1 - Hours in 3.1.3(1)(c) and 3.1.3(1)(d) provides that in implementing a 38 hour week the ordinary hours of an employee may be arranged so that the employee is entitled to a day off, on a fixed day or rostered day basis, during each work cycle. It is in these circumstances that the averaging system would apply.
- (b) If the 38 hour week is to be implemented so as to give an employee a day off in each work cycle this would be achieved if, during a work cycle of 28 consecutive days (that is, over four consecutive weeks) the employee's ordinary hours were arranged on the basis that for three of the four weeks the employee worked 40 ordinary hours each week and in the fourth week worked 32 ordinary hours. That is, the employee would work for 8 ordinary hours each day, Monday to Friday inclusive for three weeks and 8 ordinary hours on four days only in the fourth week - a total of 19 days during the work cycle.
- (c) In such a case the averaging system applies and the weekly wage rates for ordinary hours of work applicable to the employee shall be the average weekly wage rates set out for the employee's classification in Clause 4.8 – Wages of PART 1 - GENERAL or Clause 13 - Wages of PART 2 - CONSTRUCTION WORK of this Award, and shall be paid each week even though more or less than 38 ordinary hours are worked that week.

In effect, under the averaging system, the employee accrues a "credit" each day the employee works actual ordinary hours in excess of the daily average which would otherwise be 7 hours 36 minutes. This "credit" is carried forward so that in the week of the cycle that the employee works only four days, the actual pay would be for an average of 38 ordinary hours even though, that week, the employee works a total of 32 ordinary hours.

Consequently, for each day an employee works 8 ordinary hours the employee accrues a "credit" of 24 minutes (0.4 hours). The maximum "credit" the employee may accrue under this system is 0.4 hours on 19 days; that is, a total of 7 hours 36 minutes.

- (d) As provided in 4.6.3, an employee will not accrue a "credit" for each day the employee is absent from duty other than on paid leave.

4.6.3 Absences from Duty

- (1) An employee whose ordinary hours are arranged in accordance with 3.1.3(1)(c) or 3.1.3(1)(d) of Clause 3.1 - Hours of this Award and who is paid wages in accordance with 4.6.2(2) and is absent from duty (other than on paid leave) shall, for each day the employee is so absent, lose average pay for that day calculated by dividing the employee's average weekly wage rate by 5.

An employee who is so absent from duty for part of a day shall lose average pay for each hour the employee is absent by dividing the employee's average daily pay rate by 8.

- (2) Provided when such an employee is absent from duty (other than on paid leave) for a whole day the employee will not accrue a "credit" because the employee would not have worked ordinary hours that day in excess of 7 hours 36 minutes for which the employee would otherwise have been paid. Consequently, during the week of the work cycle the employee is to work less than 38 ordinary hours the employee will not be entitled to average pay for that week. In that week, the average pay will be reduced by the amount of the "credit" the employee does not accrue for each whole day during the work cycle the employee is absent (other than on paid leave).

The amount by which an employee's average weekly pay will be reduced when the employee is absent from duty (other than on paid leave) is to be calculated as follows:

$$\text{Total of 'credits' not accrued during cycle} \times \frac{\text{Average weekly pay}}{38}$$

Examples

1	Employee takes one day off without authorisation in first week of cycle
	<u>Week of Cycle</u>
	1st week = average weekly pay <u>less</u> one day's pay (i.e. 1/5 th)
	2nd & 3rd weeks = average weekly pay each week

- 4th Week = average pay less credit not accrued on day of absence
= average pay less 0.4 hours x (average weekly pay / 38)
2. Employee takes each of the 4 days off without authorisation in the 4th week.
- | | |
|----------------------|---|
| <u>Week of Cycle</u> | <u>Payment</u> |
| 1st, 2nd & 3rd weeks | = average pay each week |
| 4th week | = average pay <u>less</u> 4/5 ^{ths} of average pay for the four days absent <u>less</u> total of credits not accrued that week |
| | = 1/5 th average pay <u>less</u> 4 x 0.4 hours x (average weekly pay / 38) |
| | = 1/5 th average pay <u>less</u> 1.6 hours x (average weekly pay / 38) |

2026 WAIRC 00012

TOWN OF COTTESLOE INDUSTRIAL AGREEMENT 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TOWN OF COTTESLOE

APPLICANT

-v-

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

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

TUESDAY, 13 JANUARY 2026

FILE NO/S

APPL 1 OF 2026

CITATION NO.

2026 WAIRC 00012

Result

Agreement varied

Representation**Applicant**

Town of Cottesloe

Respondent

Western Australian Municipal, Administrative, Clerical and Services Union of Employees

Order

WHEREAS on 26 December 2025, the Town of Cottesloe filed an application seeking to vary the *Town of Cottesloe Industrial Agreement 2024* pursuant to Regulation 57 of the *Industrial Relations Commission Regulations 2005* (WA);

AND WHEREAS the application sought to replace clause 11.4 of the Agreement with a new clause which the parties agreed in order to resolve a dispute over a historical policy regarding superannuation and to replace Appendix 1 with a new appendix reflecting new pay rates;

AND WHEREAS on 12 January 2026, the respondent advised the Commission that it agreed to the variations proposed, and consented to the application to vary the Agreement;

AND WHEREAS the application complies with Regulation 55 and Regulation 57 of the Regulations;

AND WHEREAS the parties consent to this application for the variation of an industrial agreement being determined on the papers;

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

THAT the *Town of Cottesloe Industrial Agreement 2024* be varied by substituting the agreement attached hereto, with effect from the date of this order.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2025 WAIRC 01016

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2025 WAIRC 01016
CORAM : INDUSTRIAL MAGISTRATE C. TSANG
HEARD : MONDAY, 21 JULY 2025
DELIVERED : MONDAY, 22 DECEMBER 2025
FILE NO. : M 62 OF 2023
BETWEEN : PHILLIP ANTHONY GALANTY

CLAIMANT

AND
 AUSCOR PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – Application for the claimant to pay the respondent’s costs pursuant to s 570(2)(a) or (b) of the *Fair Work Act 2009* (Cth) – Whether claimant instituted the proceedings vexatiously or without reasonable cause where he claimed to be an employee entitled to leave and payment for absences on public holidays when his own business records record him being an independent contractor – Whether the claimant acted unreasonably in continuing the proceedings where his discovered documents record him being an independent contractor – Whether it was an unreasonable act or omission not to accept the respondent’s ‘walkaway’ offer – Whether the court should make a costs order where there has been no hearing on the merits – Whether the court should make an order for indemnity costs

Legislation : *Fair Work Act 2009* (Cth), s 570(1), s 570(2)(a), s 570(2)(b)

Cases referred to in reasons: : *Australian and International Pilots Association v Qantas Airways Ltd (No 3)* [2007] FCA 879
Buchanan v G&R Rossen Pty Ltd [2020] WAIRC 00388
Cheng v Western Pursuits Trust (No. 2) [2017] FCCA 659
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1
Kanan v Australian Postal and Telecommunications Union [1992] FCA 366
Nilsen v Loyal Orange Trust [1997] IRCA 267
ONE.TEL Ltd v Deputy Commissioner of Taxation [2000] FCA 270
Oshlack v Richmond River Council [1998] HCA 11
Re Minister for Immigration & Ethnic Affairs; Ex parte Lai Qin [1997] HCA 6
Rodwell v Hutchinson [2010] WASCA 197
Tweedie v Zenitas Healthcare Pty Ltd [2024] WAIRC 00351
ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2

Result : Costs awarded

Representation:

Claimant : In person
 Respondent : Mr E Young (of counsel) as instructed by McWilliams Davis Lawyers

REASONS FOR DECISION

- 1 These reasons concern an application for costs pursuant to s 570(2)(a) and (b) of the *Fair Work Act 2009* (Cth) (**Act**).
- 2 On 14 March 2025, the claimant (**Mr Galanty**) filed a Notice of Discontinuance, discontinuing his claim, commenced by Originating Claim on 26 April 2023, in which he sought the following orders:
 - (a) The First Respondent pay to [Mr Galanty] the amount of \$52,276.58 in accrued but unused annual leave.
 - (b) The First Respondent pay to [Mr Galanty] the amount of \$13,860.00 for his absences on public holidays.
 - (c) The First Respondent pay to [Mr Galanty] \$9,227.00 in annual leave loading.

- (d) The First Respondent pay to [Mr Galanty] \$11,310.66 in long service leave.
 - (e) The First Respondent pay [Mr Galanty] pre-judgement interest.
 - (f) The First Respondent contravened s 44 of the Act when it failed to pay [Mr Galanty] his accrued but unused annual leave and for his absences on public holidays.
 - (g) The First Respondent contravened s 44 of the Act when it breached clause 34.4 of the Award by not paying annual leave loading.
 - (h) The First Respondent contravened s 9(2A) of the [*Long Service Leave Act 1958* (WA) (**LSL Act**)].
 - (i) The Second Respondent was knowingly concerned in and party to the First Respondent's contraventions.
 - (j) The First Respondent pay a pecuniary penalty for its contraventions of the Act.
 - (k) The Second Respondent pay a pecuniary penalty for his contraventions of the Act.
 - (l) The pecuniary penalties imposed on the First and Second Respondents be paid to [Mr Galanty].
 - (m) Any other orders that the Court sees fit.
- 3 On 28 March 2025, the respondent (**Auscor**) filed an application (**Costs Application**), supported by an affidavit of Brendan Taylor (Auscor's solicitor with the day-to-day conduct of the matter since the commencement of the claim) (**Affidavit**), for Mr Galanty to pay:
- (a) Auscor's costs pursuant to s 570(2)(a), alternatively s 570(2)(b), on an indemnity basis from 26 April 2023, to be taxed if not agreed.
 - (b) Michael Edward McCoy's, the former second respondent's (**Mr McCoy's**), costs pursuant to s 570(2)(a), alternatively s 570(2)(b), on an indemnity basis from 26 April 2023 to 13 December 2023, to be taxed if not agreed.
 - (c) Auscor's costs on the Costs Application.
- 4 On 28 March 2025, the court issued orders for Auscor to serve the Costs Application and Affidavit on Mr Galanty. The orders required:
- (a) Mr Galanty, if he opposes the Costs Application, to file a Response to the Costs Application, and if he intended to rely on any evidence at the hearing of the Costs Application, to file witness statements, by 5 May 2025.
 - (b) Auscor to file any evidence responsive to the witness statements filed by Mr Galanty, and its written submissions, by 2 June 2025.
 - (c) Mr Galanty to file his written submissions by 30 June 2025.
- 5 The Costs Application was heard on 21 July 2025.

Auscor's contentions

- 6 By the Affidavit, Auscor contended that:
- (a) Mr Galanty commenced the proceedings by Originating Claim and statement of claim, which were deficient, embarrassing and susceptible to being struck out, as they did not coherently make out a claim that he was an employee.
 - (b) As the respondents could not sensibly respond to the claim, on 16 May 2023, they wrote to Mr Galanty outlining the deficiencies in his claim; including that there were inadequate particulars of facts central to his case, namely that he was an employee of Auscor.
 - (c) On 19 May 2023, Mr Galanty responded, and while he clarified some aspects of the claim, other aspects remained unclarified, and Mr Galanty refused to amend his claim; such conduct was unreasonable.
 - (d) On 26 May 2023, the respondents wrote to Mr Galanty, informing him that it remained their view 'that it would be desirable for all parties for you to amend your statement of claim to address our concerns, but acknowledge that your pleadings may have cleared the low bar set out in the Practice Direction [No. 1 of 2017].'
 - (e) As Mr Galanty refused to amend his claim, the respondents were required to spend more time than they should have in deciphering the claim and his letter dated 19 May 2023, in preparing the Response which was filed on 15 June 2023.
 - (f) On 6 September 2023, a pre-trial conference was held before the Clerk of the Court. The Clerk made orders for Mr Galanty to file further and better particulars of his claim, including of the nature of the alleged employment relationship between the parties and the identity and nature of any relevant statutory instrument that applied to the relationship (**First Discovery Order**).
 - (g) On 12 December 2023, the court made orders for Mr Galanty to give discovery on oath by 31 January 2024 of his tax returns and business activity statements (**BAS**) for the period 1 August 2012 to 30 September 2021, and of the invoices issued by him in the period 1 January 2012 to 1 October 2021.
 - (h) On 13 December 2023, Mr Galanty consented to discontinuing his claim against Mr McCoy. However, Mr Galanty had no basis for commencing a claim against Mr McCoy in the first place. The claim was brought against Mr McCoy without reasonable cause, and it was vexatious and unreasonable for Mr Galanty to bring and continue the claim against Mr McCoy.
 - (i) The date for Mr Galanty to give discovery under oath (31 January 2024) was extended by consent orders to 7 February 2024.

- (j) On 9 February 2024, Mr Galanty's then representative, Stephen James Farrell (**Mr Farrell**), filed an affidavit of discovery (**First Affidavit**), deposing to being duly authorised by Mr Galanty to swear the affidavit, and deposing that Mr Galanty had possession or control of the documents in Part 1 of the Schedule, but no longer had possession or control of those in Part 3:

Part 3 of Schedule – Documents not now in the possession of the claimant*/respondent*			
Description of document	Date last in possession or control	Manner in which documents ceased to be in possession or control	Identity and address of persons believed to be in possession or control of document
Individual Tax Return 2017–2018	Unknown	Lost	Unknown
Individual Tax Return 2018–2019	Unknown	Lost	Unknown
Individual Tax Return 2019–2020	Unknown	Lost	Unknown
Individual Tax Return 2020–2021	N/A	[Mr Galanty] has yet to file this tax return with the ATO.	
Business Activity Statements 2012–2013	Unknown	Lost	Unknown
Business Activity Statements 2013–2014	Unknown	Lost	Unknown
Business Activity Statements 2014–2015	Unknown	Lost	Unknown
Business Activity Statements 2015–2016	Unknown	Lost	Unknown
Business Activity Statements 2016–2017	Unknown	Lost	Unknown
Business Activity Statements July–September 2017	Unknown	Lost	Unknown
Business Activity Statements October–December 2017	Unknown	Lost	Unknown
Business Activity Statements October–December 2018	Unknown	Lost	Unknown
Business Activity Statements January–March 2019	Unknown	Lost	Unknown
Business Activity Statements January–March 2020	Unknown	Lost	Unknown
Business Activity Statements October–December 2020	Unknown	Lost	Unknown
Business Activity Statements April–June 2021	Unknown	Lost	Unknown
Business Activity Statements July–September 2021	Unknown	Lost	Unknown

- (k) Given Mr Galanty failed to discover all tax returns and BAS, and what he did produce proved the opposite of his claim that he was an employee (i.e. that he had worked and made tax deductions as a contractor), on 21 February 2024, Auscor filed an application for summary judgment based on Mr Galanty's case having no reasonable prospects of success, or based on his failure to comply with discovery orders (**First Application**).
- (l) On 28 February 2024, Mr Galanty consented to orders requiring him to give further discovery on oath by 12 March 2024, including calculations, schedules and workings that support the deductions on his tax returns

(Second Discovery Order).

- (m) On 11 March 2024, Mr Galanty filed two affidavits of discovery. The first, sworn on 1 March 2024 (**Second Affidavit**), deposed to the following at Part 3:

Part 3 of Schedule – Documents not now in the possession of the claimant*/respondent*			
Description of document	Date last in possession or control	Manner in which documents ceased to be in possession or control	Identity and address of persons believed to be in possession or control of document
Individual Tax Return 2012–2013	Unknown	Lost	Unknown
Individual Tax Return 2018–2019	N/A	[Mr Galanty] has yet to file this tax return with the ATO.	
Individual Tax Return 2019–2020	N/A	[Mr Galanty] has yet to file this tax return with the ATO.	
Individual Tax Return 2020–2021	N/A	[Mr Galanty] has yet to file this tax return with the ATO.	
Individual Tax Return 2021–2022	N/A	[Mr Galanty] has yet to file this tax return with the ATO.	
Business Activity Statements 2012–2013	Unknown	Lost	Unknown
Business Activity Statements 2013–2014	Unknown	Lost	Unknown
Business Activity Statements 2014–2015	Unknown	Lost	Unknown
Business Activity Statements 2015–2016	Unknown	Lost	Unknown
Business Activity Statements 2016–2017	Unknown	Lost	Unknown
Business Activity Statements July–September 2017	Unknown	Lost	Unknown
Business Activity Statements October–December 2017	Unknown	Lost	Unknown
Business Activity Statements October–December 2018	Unknown	Lost	Unknown
Business Activity Statements January–March 2019	Unknown	Lost	Unknown
Business Activity Statements January–March 2020	Unknown	Lost	Unknown
Business Activity Statements October–December 2020	Unknown	Lost	Unknown
Business Activity Statements April–June 2021	Unknown	Lost	Unknown
Business Activity Statements July–September 2021	Unknown	Lost	Unknown

- (n) In contradiction to the First Affidavit, Mr Galanty deposed in the Second Affidavit that the tax returns originally claimed to be ‘lost’ (save for the 2017/2018 return which was discovered), were in fact never filed with the

Australian Taxation Office (ATO). Mr Galanty did not depose to any facts to correct this contradiction.

- (o) The other affidavit filed on 11 March 2024, sworn by Mr Galanty on 6 March 2024 (**Third Affidavit**), deposed to the following at Part 3:

Part 3 of Schedule – Documents not now in the possession of the claimant			
Description of document	Date last in possession or control	Manner in which documents ceased to be in possession or control	Identity and address of persons believed to be in possession or control of document
Calculations, workings or schedules, supporting, explaining or containing derivatives of the tax deductions contained in the tax returns for the years: 2013–2014 2014–2015 2015–2016 2016–2017 2017–2018	Unknown	As these tax returns were filed more than 5 years ago, they were archived and no longer available	David Aylmore – Aylmore & Assoc

- (p) At the hearing of the First Application on 18 March 2024, the court made orders that Mr Galanty file a further affidavit setting out the efforts made by him to produce the documents listed as ‘lost’ in Part 3 of the Second Affidavit (**Third Discovery Order**).
- (q) On 21 March 2024, the Third Discovery Order was varied by consent orders, staying the proceedings until Mr Galanty files an affidavit confirming that he has filed tax returns for the financial years 2018–2019, 2019–2020, 2020–2021 and 2021–2022 with the ATO, and outlining the efforts made by him to produce the documents listed as ‘lost’ or ‘archived’ in the Third Affidavit.
- (r) It appeared to Auscor from the First Affidavit, Second Affidavit and Third Affidavit, that some of the documents listed as ‘lost’ were not lost because they had not been created or did not exist and had not been filed with the ATO at the time each affidavit was sworn. Therefore, on 14 June 2024, Auscor wrote to Mr Galanty informing him of its view that the statements regarding the ‘lost’ documents may have misled the court and invited him to comply with the Third Discovery Order by 21 June 2024.
- (s) On 24 June 2024, Auscor filed an application seeking orders that default judgment be given in favour of Auscor, or in the alternative, that if Mr Galanty does not comply with the Third Discovery Order within 7 days of an order requiring him to do so, that default judgment is automatically given in favour of Auscor (**Second Application**).
- (t) On the day of the hearing of the Second Application on 22 July 2024, Mr Galanty advised Auscor that he had filed all tax returns and would file an affidavit of discovery to that effect within a week. Accordingly, the court made an order that Mr Galanty file a further affidavit of discovery by 29 July 2024 (**Fourth Discovery Order**).
- (u) On 7 August 2024, Mr Galanty filed the further affidavit of discovery, sworn on 3 August 2024 (**Fourth Affidavit**), discovering all missing tax returns and BAS originally listed as ‘lost’ in the Second Affidavit. In contradiction to the First Affidavit, Mr Galanty deposed to the following:

March 11 Affidavit

- 9. As I work on a fly in fly out basis in remote Western Australia, I relied on my partner Kirsty Menzies to access the documentation ordered by the Court on 28 February 2024.
- 10. On 7 March 2024, Ms Menzies telephoned David Aylmore, and requested that he provide the documents listed in Order 2 of the Orders issued by the Court on 28 February 2024.
- 11. On 8 March Mr Aylmore sent an e-mail that he was unable to provide these documents.
- ...
- 15. ... At the time, I was aware that I had not filed my income tax returns for 2018/2019–2021/2022, however I was not aware of where the missing BAS statements were so I put them as lost.

- (v) The Fourth Affidavit directly contradicts the First Affidavit, and Mr Galanty has made no attempt to explain the contradiction.
- (w) Auscor discontinued the Second Application in light of Mr Galanty filing the Fourth Affidavit.
- (x) On [19] August 2024, the court made orders by consent, for David Aylmore (Mr Galanty’s accountant) (**Mr Aylmore**) to be summoned to produce the calculations, workings or schedules explaining the deductions claimed in Mr Galanty’s tax returns for 2013–2014, 2014–2015 and 2015–2016, and the calculations, workings or schedules explaining the expenses of \$16,604 and \$3,300 claimed in Mr Galanty’s 2017 tax return and the expenses of \$16,904 and \$3,300 claimed in Mr Galanty’s 2018 tax return.

- (y) On 9 September 2024, Mr Aylmore produced the calculations, workings and schedules in respect of the deductions on Mr Galanty's tax returns. These indicated to Auscor that the statements made by Mr Galanty in his Fourth Affidavit [10]–[11] were false. Mr Galanty has made no attempt to correct any statements in the various affidavits.
 - (z) The documents produced by Mr Aylmore revealed that Mr Galanty claimed tax deductions in the 2016–2017 and 2017–2018 financial years of \$15,000 attributed to 'Bookkeeping fees (KM)'.
 - (aa) On 12 September 2024, Auscor wrote to Mr Galanty informing him that it was of the view that the deductions were likely for his spouse, Kirsty Menzies, and requesting Mr Galanty's consent for orders to issue requiring Ms Menzies to produce documents and appear at trial.
 - (bb) Mr Galanty did not respond, and on 18 September 2024, Auscor filed an application for Mr Galanty to give discovery on oath of all invoices for bookkeeping for the period 1 August 2012 to 30 September 2021, and for Ms Menzies to be summoned to produce her tax returns and any invoices for bookkeeping issued to Mr Galanty or his associated entities in the period 1 August 2012 to 30 September 2021 (**Third Application**).
 - (cc) On 24 September 2024, the court made orders requiring Auscor to serve the Third Application on Mr Galanty, and requiring Mr Galanty, if he opposes the Third Application, to file a Response to the Third Application by 21 October 2024. Mr Galanty has not indicated whether he opposed the Third Application, nor has he filed a Response to the Third Application.
 - (dd) On 18 November 2024 and 4 December 2024, Auscor wrote to Mr Galanty seeking that he produce the documents the subject of the Third Application, or that he file a Response to the Third Application.
 - (ee) On 18 November 2024, Auscor wrote to Mr Galanty, offering to settle the proceedings on the basis that, if Mr Galanty discontinued his claim, then Auscor would not make an application for costs. The offer lapsed on 29 November 2024.
 - (ff) In summary, Mr Galanty's conduct from the commencement of his claim has been characterised by obfuscation, delay, repeated breaches of court orders, and contradictory statements across affidavits. This rendered Mr Galanty's claim vexatious or without reasonable cause, as it was contradicted by Mr Galanty's own business records indicating contractor status. This caused both Auscor and Mr McCoy to incur unnecessary costs.
- 7 On 30 May 2025, Auscor filed submissions, stating:
- (a) Mr Galanty's claim was hopeless from the very outset and was riddled with problems throughout its lengthy course in the court. Mr Galanty had no case; he had always worked for Auscor as a contractor, been paid as a contractor, made tax deductions as a contractor, and been taxed as a contractor.
 - (b) Mr Galanty's claim was vague, ambiguous and confusing, and was the subject of prompt complaint by Auscor (see letter dated 16 May 2023).
 - (c) Auscor's Response filed on 15 June 2023, did not include bare denials, but identified the key problems with Mr Galanty's claim, for example at [21]–[22]:
 - 21. [Mr Galanty] had no direct supervisor but was allocated work by the lead on whichever project, or projects he had become involved with.
 - 22. [Auscor] had no control over how [Mr Galanty] performed his work. Once allocated work, [Mr Galanty] was required to use his own initiative and skills to complete the task however he thought was correct and safe to arrive at the end result. The only stipulation was that [Mr Galanty] was required to perform his work to the high standards required by [Auscor's] clients.
 - (d) The affidavit in support of the First Application filed on 28 February 2024, is telling; it explains the repeated declarations made by Mr Galanty to the ATO that he is running his own business for personal services, the business expense tax deductions claimed by Mr Galanty over numerous years, and that his case, contradicted by his documents, had no reasonable prospect of succeeding.
 - (e) Contradicting statements made in the First Affidavit, Mr Galanty filed the Second Affidavit and the Third Affidavit, in which he:
 - (i) Falsely claimed that the 2012–2013 tax return (was lost, when it had in fact never been filed;
 - (ii) Admitted that certain tax returns had never been filed with the ATO;
 - (iii) Falsely claimed that various BAS had been lost when they had never been filed;
 - (iv) Falsely claimed that documents required to be discovered were 'archived and no longer available' (which was shown to be false as they were subsequently provided by Mr Galanty's accountant under subpoena).
 - (f) Contradicting earlier statements made under oath, Mr Galanty filed the Fourth Affidavit with the tax returns that had not been filed (including the 2012–2013 tax return he had previously claimed was lost), and the BAS he had previously claimed were lost.
 - (g) On 12 November 2024, Mr Galanty's agent ceased to act for him.¹
 - (h) On 18 November 2024, and despite all of the time and expense incurred by Auscor, Auscor offered to settle the matter with no order as to costs. The letter of offer took the trouble to explain to Mr Galanty the numerous insuperable problems in his case.
 - (i) Auscor accepts that costs do not follow as a matter of course, and that in this jurisdiction costs do not follow the event. However, in these proceedings:

- (i) Mr Galanty's case was legally hopeless from its very inception;
 - (ii) Mr Galanty knew at all times that he had only ever worked for Auscor as a contractor;
 - (iii) Mr Galanty consistently declared himself to the ATO to be a contractor and had extracted large tax deductions at taxpayer expense on the basis of being a contractor. Despite this, Mr Galanty filed a claim on the completely contradictory basis of being an employee;
 - (iv) Mr Galanty repeatedly failed to comply with court orders, and made false statements in affidavits, both via his industrial agent and also himself, regarding the status of documents he had been ordered to discover;
 - (v) It is not reasonably possible to infer that such falsehoods were inadvertent; they were made knowing that disclosure of the true position would be damaging to his case;
 - (vi) Mr Galanty ignored a reasonable offer of settlement.
- (j) Mr Galanty instituted his case vexatiously and/or without reasonable cause in light of his knowledge at all times of the true position of him only ever having worked for Auscor as a contractor and having consistently represented that to the ATO over many years.
- (k) Additionally, Mr Galanty's conduct of his case was redolent with unreasonable acts and omissions, particularly his repeated breaches of court orders, falsehoods contained in affidavits of discovery, and failure to provide adequate or sufficient discovery contrary to orders that he do so. These unreasonable acts and omissions significantly extended the time and costs incurred by Auscor in this case, even leading to the matter being stayed for a period of time.
- (l) Auscor accepts that costs are a matter of discretion; but submits it would be appropriate for the court to exercise its discretion in the circumstances of this matter.
- (m) An order for costs is compensatory and not punitive.²
- (n) It would be unfair to Auscor to be forced to incur considerable legal costs over a period of almost two years, with numerous and repeated instances of unreasonable conduct by Mr Galanty, who then belatedly discontinues his case, only to leave Auscor heavily out-of-pocket. It took Auscor considerable persistence, time, trouble, and costs to reveal Mr Galanty's attempts at dishonesty and deception in relation to his tax returns and BAS; all of which counted heavily against Mr Galanty's claim that he was an employee.
- (o) If all litigants brought and conducted their cases in the manner that Mr Galanty had, it would work considerable injustice in this court. Such cases, and the conduct of them in such manner, ought not be encouraged. This is a case where to do justice; it is appropriate that the court exercises its discretion to make an order for costs in favour of Auscor.

8 At the hearing, Auscor made the following further submissions:

- (a) Auscor's walkaway offer involves an element of compromise; it was made more than two years after the proceedings had commenced, in circumstances where there was a real prospect that Auscor might seek a costs order given the difficulties in Mr Galanty's case and that he was aware that Auscor was legally represented from the outset.
- (b) The court can assess a settlement offer and whether it is unreasonable for a party to have not accepted it even where a matter has concluded without a determination of the merits, where it is apparent that one party has effectively given up or capitulated in the face of overwhelming evidence against them.³
- (c) This is a textbook case of Mr Galanty capitulating, when it became obvious that his case had no basis either in fact or at law and could not possibly succeed.
- (d) It was readily apparent to Mr Galanty based on the hundreds of invoices he issued to Auscor, and the tax returns that he had filed, that his claim had no basis in fact or law.
- (e) Indemnity costs are sought because of Mr Galanty's knowledge from the outset of his own circumstances of being a contractor, having acted as a contractor for years prior, before he filed his case. An order for costs is not punitive but compensatory, and Auscor has had to respond to a case that Mr Galanty knew or ought to have known, with the benefit of the advice he would have received, did not have a proper basis, having regard to his own documents.
- (f) Mr Galanty contends that there is no evidence to suggest that he did not genuinely believe that he was an employee. That contention should be rejected, as, having regard to Mr Galanty's own documents that he filed with the ATO, it cannot be said that Mr Galanty held a genuine belief that he was an employee when he filed his claim. The court may infer from the objective documentary material that Mr Galanty filed the claim in an attempt to extract a financial benefit.
- (g) Given Mr Galanty had objectively conducted himself as a contractor, represented himself as a contractor to the ATO and claimed tax deductions for bookkeeping and expenses, and represented himself as a contractor to Auscor by issuing tax invoices over many years, but then filed a claim claiming to be an employee, supports Auscor's contention that at the point of filing the claim that Mr Galanty did so vexatiously.
- (h) Accordingly, Auscor seeks its costs on an indemnity basis from the commencement of the claim and seeks Mr McCoy's costs on an indemnity basis from the commencement of the claim until it was discontinued against him on 13 December 2023. Auscor does not seek to double-dip and accepts that the costs of Auscor were the costs of Mr McCoy (and vice versa) as there was a single legal representative acting for both during the period there were two respondents.
- (i) Should the court find that the evidence does not reach the threshold for an indemnity costs order, Auscor seeks that

ordinary costs be granted.

- (j) While Auscor's primary submission is that it was readily apparent to Mr Galanty from the outset that his claim was hopeless, it says that it would have become apparent very rapidly at the early stages of the proceedings that Mr Galanty should not have pursued the claim. Auscor says that at least from 9 February 2024 and the filing of the First Affidavit, it would have been readily apparent that Auscor was alive to the fact that Mr Galanty would need to establish that the objective circumstances would lead to a finding of Mr Galanty being an employee, which was impossible based on his own documents.
- (k) While the documents were discovered after Mr Galanty commenced his claim, they were documents that Mr Galanty knew of before he filed his claim. Therefore, this matter is one that falls at the more extreme end of circumstances relating to costs orders in this jurisdiction, because Mr Galanty knew from the outset that the documents provided with the First Affidavit illustrated that he had been operating as a contractor.
- (l) The court should not give any weight to the submission Mr Galanty belatedly made at the hearing that he discontinued the proceedings for financial reasons, given there is no evidence to support this submission. Mr Galanty had every opportunity to produce evidence to support this submission but did not produce any evidence.
- (m) The court should also disregard the assertion of sham contracting Mr Galanty belatedly made at the hearing. It was not a claim ever made, and it cannot be said that anyone forced Mr Galanty to issue tax invoices, nor claim the tax deductions, which he did for many years. Mr Galanty set up his business before entering into the engagement with Auscor and continued on his independent contracting business with Auscor. Mr Galanty has reaped the benefits of doing so, both in terms of getting paid a higher rate, but also in terms of receiving tax deductions at taxpayer expense.

Mr Galanty's contentions

9 On 6 May 2025, Mr Galanty filed a Response to the Costs Application, contending that:

- (a) The default position is that parties to matters under the Act bear their own costs.
- (b) The language of s 570(2)(a) makes it clear that it is at the time that the claim was instituted that the assessment must be made of whether the proceedings were instituted vexatiously or without reasonable cause.
- (c) The Cambridge dictionary defines 'vexatiously' as being 'in a way that has little chance of succeeding in law but is intended to annoy or cause problems for someone'.
- (d) Further, in *Nilsen v Loyal Orange Trust* [1997] IRCA 267 (*Nilsen*), North J stated:

The next question is whether the proceeding was instituted vexatiously. This looks to the motive of the applicant in instituting the proceeding. It is an alternative ground to the ground based on a lack of reasonable cause. It therefore may apply where there is a reasonable basis for instituting the proceeding. This context requires the concept to be narrowly construed. A proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain a collateral advantage.
- (e) He has been represented throughout the proceedings, and it can be inferred that prior to commencing the claim, that he received advice that his claim had chances of success.
- (f) While Auscor has argued that his claim had little chance of succeeding in law, there is no evidence that his motive in commencing the claim was anything other than having a genuine belief that his contract with Auscor was one of employment and that he was entitled to payment of his claimed entitlements. There is no evidence demonstrating otherwise.
- (g) It cannot be said that his claim was instituted without reasonable cause.
- (h) Firstly, his claim was not determined and dismissed by the court because he was engaged as a contractor; rather, he discontinued his claim.
- (i) In *Kanan v Australian Postal and Telecommunications Union* [1992] FCA 366 (*Kanan*), Wilcox J stated:

It seems to me that one way of testing whether a proceeding is instituted 'without reasonable cause' is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being 'without reasonable cause'. But where, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.
- (j) Secondly, there are a number of factors that indicate he had at least an arguable case:
 - (i) While the claim was filed after the High Court's decisions were handed down on 9 February 2022 in *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*Jamsek*) and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*), there was no written contract between the parties stating that he and Auscor had agreed to the arrangement between them being one of contracting.
 - (ii) The assessment of whether the claim was instituted without reasonable cause needs to be made at the time the claim was filed, and prior to these High Court decisions, the prevailing approach in Australia to resolving whether a person was an employee or a contractor was the multifactorial test arising from the High Court decisions of *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1 and *Hollis v Vabu Pty Ltd* [2001] HCA 44.

- (iii) He performed work for a long period of time for Auscor, in the whole he worked solely for Auscor, and Auscor exerted considerable control over his activities. This points to his claim at least having an arguable possibility of success.
- (iv) While Auscor has criticised the claim for being deficient, embarrassing and capable of being struck out, the claim was detailed in setting out what he was seeking and the reasons why.
- (v) In any event, he was represented by Mr Farrell, an industrial agent, and he left it to Mr Farrell to set out his claim and was not responsible for its content. Therefore, if the claim was deficient, which is not conceded, this was not his fault. Mr Farrell was not 'a party' to the proceedings, so Mr Farrell's failures, if any, are not relevant to the assessment of s 570(2)(b).
- (vi) Furthermore, the claim complies with the Court's Practice Direction 1 of 2017.
- (vii) There is no requirement for the claim to set out his arguments as to why he was an employee, as the purpose of the claim is to advise the court and the respondent of what the claim is about, not to contain evidence.

- (k) The court should be cautious in determining that he engaged in an unreasonable act by allowing Auscor's settlement offer to lapse. He relies on *Cheng v Western Pursuits Trust (No. 2)* [2017] FCCA 659 (*Cheng*), in which Driver J states:

Neither does Ms Cheng's rejection of the Calderbank offer constitute an unreasonable act or omission. As noted above, the Calderbank offer was a 'walkaway' offer. In my view, in the Fair Work jurisdiction which is, in principle, a no costs jurisdiction, the rejection of a 'walkaway' offer is not, of itself, unreasonable. Something more would need to be demonstrated in order to establish that the rejection of the offer was unreasonable in the circumstances of the particular case.

- (l) Furthermore, an assessment of his inaction needs to be made at the time the offer was made, and at that time, he was changing representatives.
- (m) Finally, s 570(2)(b) requires Auscor to have incurred costs as a result of any unreasonable act or omission, and Auscor has not provided any evidence that his acts caused it to incur costs. Many of what Auscor says were unreasonable acts did not require it to incur costs.
- (n) Many of Auscor's complaints regarding the discovered documents could have waited until trial before being adjudicated. While Auscor alleges the documents were deficient, the documents have not been adjudicated by the court as being deficient.

10 The orders (at [4] above) required Mr Galanty to file any evidence by 5 May 2025 and his written submission by 2 June 2025. Mr Galanty did not file any evidence, nor written submissions.

11 Prior to the hearing, the following *Form 27 – Notice of Cessation of Representation by Lawyer or Agent* and *Form 24 – Notice of Change of Lawyer or Agent* were filed:

- (a) On 20 November 2024, Mr Farrell gave notice that he ceased to represent Mr Galanty on and from 20 November 2024.
- (b) On 29 November 2024, MKI Legal gave notice that Mr Galanty is represented by MKI Legal from 29 November 2024 until further notice.
- (c) On 13 March 2025, MKI Legal gave notice that it ceased to represent Mr Galanty on and from 13 March 2025.

12 As outlined at [2] above, Mr Galanty filed a *Form 18 – Notice of Discontinuance – Whole of Claim* on 14 March 2025.

13 At the hearing on 21 July 2025, Mr Galanty was self-represented and made the following submissions:

- (a) He was a sham contractor because he performed work under the direction of Auscor, Auscor provided him with all his material, tools, uniforms and insurances. He had no direct control in what jobs he was working on, which you would do as a contractor.
- (b) The primary position on costs is that each party is responsible for their own costs. As there has not been a hearing or testing of the evidence, it is not apparent that his claim was hopeless. There was no written contract between the parties; there was no written evidence showing that he had been engaged as a contractor. As Auscor was the one making the agreement, it was incumbent on Auscor to ensure that an agreement was in place; it is 'their own fault that they were required to defend the claim. All they needed to do was put in place a contract. The claim has been withdrawn due to financial reasons, not the legitimacy of [his] case'.
- (c) The original intention of making the claim was to verify that Auscor was a sham contractor. He could not continue with his claim for financial reasons. It is unfair for Auscor to claim their costs against him for defending themselves being a sham contractor. He was treated as an employee in every definition of the word, but paid as a contractor, which meant he missed out on all his employee entitlements.

14 Mr Galanty was invited to address the court on the matters at paragraph 13 of Auscor's settlement offer letter, which outlines what Auscor says are the circumstances indicating that the relationship between Auscor and Mr Galanty was one of contracting and not employment:

- 13. In addition to the above, the circumstances surrounding the relationship between our respective clients have always been strongly suggestive of a contractor relationship. Those circumstances being:
 - a. Your client plainly agreed with our client that he would be a contractor;
 - b. Your client was registered as a sole trader and maintained an ABN and business name, and such

registrations pre-dated his relationship with our client;

- c. Throughout the engagement, your client provided approximately 450 invoices to our client;
- d. Your client invoiced our client at handsome rates, being almost double the relevant award rate;
- e. Your client charged our client GST;
- f. Your client did not accrue annual leave, sick leave or long service leave;
- g. Your client represented himself to the ATO as running a business and claimed significant deductions for business expenses;
- h. Your client enjoyed significant tax advantages from splitting his business income with his spouse.

15 In relation to the matters at [14] above, Mr Galanty said:

- (a) He does not agree that he agreed with Auscor that he would be a contractor.
- (b) He agrees he was registered as a sole trader, maintained an ABN and business name, and that his registration as a sole trader pre-dated his relationship with Auscor.
- (c) He agrees that throughout his engagement with Auscor that he issued Auscor 450 invoices.
- (d) He does not agree that the rate in the invoices he issued to Auscor was higher than the Award rate. He says that for electrical work, the invoiced rate is below the Award rate. He agrees that he has not made a claim for breach of the Award, and that his claim was for leave entitlements calculated at the rate he was paid. He says the Award rate for a labourer is very low, and that his claim did not mention his electrical qualifications and that he was employed as an electrician.⁴
- (e) He agrees that he charged Auscor GST.
- (f) He agrees that he did not accrue annual leave, sick leave and long service leave.

Consideration

16 Sections 570(1) and (2) of the Act, state:

570 Costs only if proceedings instituted vexatiously etc.

- (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.

- (2) The party may be ordered to pay the costs only if:
 - (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
 - (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs;

...

17 Auscor referred to *Tweedie v Zenitas Healthcare Pty Ltd* [2024] WAIRC 00351 (*Tweedie*) [5]–[13] as a recent decision outlining the principles relevant to a s 570 costs application: (citations truncated)

Principles

- 5 The law concerning orders for costs is settled. The limited power to award costs is found in s 570 of the [Act]. ...
- 6 Section 570 confers a discretion to order costs where a pre-condition of s 570(2) is met. This discretion must be exercised judicially according to the terms defining it. It must also be exercised with caution because of the exceptional nature of the power in an otherwise non-costs jurisdiction: *Australian Workers Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23 [(*AWU*)] per Dowsett, McKerracher and Katzmann JJ [8].
- 7 This means that the case for a costs order must be clearly demonstrated by the party seeking a costs order: *Saxena v PPF Asset Management Ltd* [2011] FCA 395 [6].
- 8 In relation to the precondition in s 570(2)(a), the relevant question is whether the proceedings had reasonable prospects of success at the time it was instituted, not whether it ultimately failed: [*AWU* [7]].
- 9 That can be tested by asking whether the party bringing the action, on the facts apparent to the party, properly advised, should have known the claim had no reasonable prospects of success: *Baker v Patrick Projects Pty Ltd (No2)* [2014] FCAFC 166 [9]–[10]. A distinction can be drawn between cases where success depends on resolution in the claimant's favour of one or more arguable points of law, and cases which are misconceived, unsupportable, incompetent or hopeless: *Australian [and] International Pilots Association v Qantas Airways Ltd (No 3)* [2007] FCA 879 [(*AIPA*) [36]]; *Construction, Forestry, Mining and Energy Union v Clarke* [2008] FCAFC 143 [29]. Pursuit of cases in the latter category can be characterised as unreasonable.
- 10 Whether a party has engaged in an 'unreasonable act or omission' for the purposes of s 570(2)(b) turns on the facts and circumstances of the case: *Sivwright v St Ives Group Pty Ltd* [2022] FCA 136 per Jackson J at [9].
- 11 Even if the Court is satisfied of a s 570(2) precondition, it retains a discretion not to order costs: *Construction, Forestry, Mining and Energy Union v Corinthian Industries (Australia) Pty Ltd (No 2)* [2014] FCA 351 per Pagone J [12].

- 12 Once the power to award costs is enlivened under s 570(2) of the [Act], the Court can make an order for costs to be paid on an indemnity basis, with the general law principles as to the award of such costs applied: *Shea v Energy Australia Services Pty Ltd (No 2)* [2015] FCAFC 14 [10].
- 13 The test as to whether indemnity costs should be awarded is whether the justice of the case might so require or, whether there exists some special or unusual feature of the case to justify the Court in departing from the ordinary practice: [*AIPA*].
- 18 The principles at [17] above, emphasise the exceptional nature of costs orders in this jurisdiction, requiring Auscor to clearly demonstrate its case for seeking a costs order.⁵
- 19 *Tweedie* [13] cites *AIPA*, for the test to be satisfied when deciding whether indemnity costs should be awarded. In *AIPA*, the respondent sought an order of costs in its favour, principally under s 824(2) of the *Workplace Relations Act 1996* (Cth) (**WR Act**):

824 Costs only where proceeding instituted vexatiously etc.

- (1) A party to a proceeding (including an appeal) in a matter arising under this Act ... must not be ordered to pay costs incurred by any other party to the proceeding unless the first mentioned party instituted the proceeding vexatiously or without reasonable cause.
- (2) Despite sub-section (1), if a court hearing a proceeding (including an appeal) in a matter arising under this Act ... is satisfied that a party to the proceeding has, by an unreasonable act or omission, caused another party to the proceeding to incur costs in connection with the proceeding, the court may order the first mentioned party to pay some or all of those costs.
- (3) In subsection (1) and (2):
- ‘Costs’ includes all legal and professional costs and disbursements and expenses of witnesses.

- 20 Tracey J said in *AIPA* [39]: (citations truncated)

Where costs are ordered by the Court they will ordinarily be paid on a party and party basis. Any departure from this usual practice, according to the authorities collected by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd* [1993] FCA 536, will only occur in a limited range of cases. The ‘tests’ used to identify such cases have been couched in general terms such as ‘when the justice of the case might so require’ or whether there exists ‘some special or unusual feature on the case to justify the Court in departing from the ordinary practice.’ These ‘tests’ have, for example, been found to have been met in cases in which unwarranted allegations of fraud have been made, proceedings have been prosecuted for some ulterior motive or in wilful disregard of known facts or clearly established law or where there has been an imprudent refusal of an offer of compromise.

Decisions that Mr Galanty relies upon

- 21 As outlined at [9(d), (i) and (k)] above, Mr Galanty relies upon the decisions of *Kanan*, *Nilsen* and *Cheng*.
- 22 *Kanan* is a Federal Court of Australia decision, delivered on 31 July 1992, involving a request for costs under s 347 of the *Industrial Relations Act 1988* (Cth) (**IR Act**) arising from the respondent succeeding in its motion for summary dismissal for want of jurisdiction. Section 347 of the IR Act states that a party to a proceeding in a matter ‘shall not be ordered to pay costs incurred by any other party to the proceeding’...‘unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.’
- 23 Wilcox J said in *Kanan*, 264–265:

I do not doubt that, in instituting this proceeding, Mr Kanan was motivated to obtain relief to which he considered himself entitled. There is no reason to believe that he was actuated by a desire to harass the respondent. To the extent that the word ‘vexatious’ imports considerations additional to the question whether there was a reasonable cause for the proceeding, I make no finding adverse to Mr Kanan. But, for the qualification of s 347 to operate, it is sufficient that the proceeding be instituted ‘without reasonable cause’. A proceeding is not to be classed as being launched ‘without reasonable cause’ simply because it fails. As Gibbs J said in *R v Moore; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1978) 140 CLR 470 [(*Moore*)] at 473, speaking of the *Conciliation and Arbitration Act* equivalent of s 357 (s 197A):

[a] party cannot be said to have commenced a proceeding ‘without reasonable cause’, within the meaning of that section, simply because his argument proves unsuccessful. In the present case the argument presented on behalf of the prosecutor was not unworthy of consideration and it found some support in the two decisions of this court to which I have referred. The fact that those decisions have been distinguished, and that the argument has failed, is no justification for ordering costs in the face of the prohibition contained in s 197A.

In *Standish v University of Tasmania* (1989) 28 IR 129 at 139 Lockhart J applied the qualification in ordering costs against an applicant whose case he thought ‘misconceived’, rather than simply unsuccessful. But, as the Full Court pointed out in *Thompson v Hodder* (1989) 29 IR 339 [(*Thompson*)] at 342, ‘there may be cases which could not be described properly as ‘misconceived’ but which would nevertheless be held to have been instituted without reasonable cause’.

It seems to me that one way of testing whether a proceeding is instituted ‘without reasonable cause’ is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant’s favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being ‘without reasonable cause’. But where, on the applicant’s own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.

That is the situation in the present case. The qualification of s 347 applies. The Court has power to order costs against the applicant.

I see no discretionary reason to withhold such an order. It is not a matter of the applicant's motives but, rather, that he has put the respondent to the expense of resisting a claim which was always doomed to failure. There is no question of punishing the applicant for his unreasonable course of action. The rationale for making a costs order is that a measure of indemnity should be conferred upon the respondent for the costs it has been obliged to incur in responding to the unreasonably instituted proceeding. I propose to order that the principal proceeding be dismissed with costs. The costs of the motion will be costs in the principal proceeding and so covered by that order.

- 24 *Nilsen* is an Industrial Relations Court of Australia decision, delivered on 11 September 1997, involving a costs application made under s 347(1) of the WR Act, following North J giving judgment in the proceedings and dismissing Ms Nilsen's claim that her dismissal was in breach of the WR Act. Section 347(1) of the WR Act states that a 'party to a proceeding (including an appeal) in a matter arising under this Act' 'shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.'

- 25 North J cited *Kanan*, 264–265 (at [23] above) and said in *Nilsen*, 2:

In *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257 at 274, Northrop J said, in relation to a predecessor of s 347:

Great care must be exercised to ensure that in finding that a party has instituted proceedings vexatiously or without reasonable cause, that party is not improperly deprived of his freedom from liability to pay costs to an opposing party. The test is a substantial one.

In [*Thompson*], at 470, the Full Court of the Federal Court said:

It is apparent from these authorities that an applicant who has the benefit of the protection of s 347 will only rarely be ordered to pay the costs of a proceeding in exceptional circumstances.

In relation to the meaning of 'without reasonable cause', in [*Moore*] Gibbs J said, at 473:

[a] party cannot be said to have commenced a proceeding 'without reasonable cause', within the meaning of that section, simply because his argument proves unsuccessful.

- 26 Applying the authorities at [25] above, North J found that while Ms Nilsen's case was dismissed because it was not maintainable, this does not mean that Ms Nilsen instituted proceedings 'without reasonable cause'. North J said in *Nilsen*, 3:

This was not a case in which the evidence to be called by the applicant could not have sustained the applicant's case. Rather, the applicant depended for her success on the Court drawing inferences favourable to her and accepting evidence called on her behalf. For instance, she depended on the Court inferring that her dismissal was linked to her expulsion from membership of the [Loyal Orange Institution of Victoria]. She depended on the Court accepting the evidence of Mr Simpson that the resolution of 25 November 1994 terminating her employment was pre-arranged. She was entitled to hope that the Court would draw inferences favourable to her and to accept the evidence of Mr Simpson. In the result, I did not draw those inferences and I did not accept Mr Simpson's evidence. These examples show that, when the review was instituted, the review was not utterly hopeless in the sense that it was doomed to failure. For the reasons expressed in my judgment, the applicant's case was weak, but the fact that it did not have a strong chance of success does not mean that it was instituted without reasonable cause. The evident policy behind s 347 is to allow an applicant, without the risk of paying the costs of the opposing party, to institute a weak case as long as it is not utterly hopeless.

The next question is whether the proceeding was instituted vexatiously. This looks to the motive of the applicant in instituting the proceeding. It is an alternative ground to the ground based on a lack of reasonable cause. It therefore may apply where there is a reasonable basis for instituting the proceeding. This context requires the concept to be narrowly construed. A proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain a collateral advantage: see *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491.

- 27 *Cheng* is a Federal Circuit Court of Australia decision, delivered on 13 April 2017, where the issue under consideration was whether Ms Cheng's rejection of the respondent's 'walkaway' Calderbank offer constituted an unreasonable act or omission under s 570(2)(b) of the Act.

- 28 In relation to settlement offers, Driver J said in *Cheng* [38]–[39]: (footnotes omitted)

38. Judge O'Sullivan went on to observe in *Govan* at [19] that 'usually a deliberate decision to refuse a reasonable offer of settlement is a factor which would weigh in favour of a finding of unreasonable action'.

39. In *Cugura* Tracey J made the following observation at [31] about a 'deliberate decision' to reject an offer of settlement:

A deliberate decision to refuse a reasonable offer of settlement is a factor which would normally weigh more heavily in favour of a finding of unreasonable action than would a mere failure to respond by an unrepresented litigant.

- 29 In relation to 'walkaway' offers, Driver J said in *Cheng* [42]–[46]: (footnotes omitted) (original emphasis)

42. It is established that a 'walkaway' offer will be treated as constituting a compromise where the offeror has a strong case and the compromise is found to be the offer to give up pursuing costs which would in likelihood be payable if the offeree continues. The stronger the merits of the offeror's case, the more compelling is the conclusion that the 'walkaway' offer constituted a true compromise. Such findings have been made in the context of applications pursuant to s.570(2)(b) of the [Act].

43. In *Trustee for The MTGI Trust*, their Honours Siopis, Collier and Katzmann JJ observed:

Further, we note that on 1 March 2016 Mr Laxon, the lawyer for Mr Johnston, wrote to applicant's Counsel, and placed MTGI on notice that Mr Johnston considered the application to be frivolous, vexatious and without merit. On 5 July 2016 Mr Laxon again wrote to MTGI's Counsel, materially in the following terms:

Offer

On a without prejudice basis, we invite your client to discontinue its Application within 21 days, with each party paying its own costs (Offer). The Offer is made pursuant to the principles in *Calderbank v Calderbank* [1975] 3 All ER 333, and will be relied upon in support of an application for indemnity costs.

...

It is well-established that a failure to accept a Calderbank offer may justify the exercise of the Court's discretion to award costs on an indemnity basis. Principles referable to Calderbank offers are well-known. As the Full Court explained in *Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd (No 2)* [2011] FCAFC 141:

[T]he purpose of the principles governing Calderbank offers and offers of compromise in accordance with court rules is to ensure that, when one party makes another an offer that contains a genuine element of compromise, the recipient of the offer is compelled to give real consideration to the costs and benefits of prosecuting its claim by reason of the prospect of suffering an indemnity costs order should its failure to accept the offer prove unreasonable.

In determining whether the Court should exercise its discretion and order indemnity costs in light of a rejection by the unsuccessful party of a Calderbank offer, a key question for consideration by the Court is whether the Calderbank offer was reasonable and proposed a genuine compromise of a case brought without a realistic prospect of success: *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 [(*Sagacious*)] [125].

In our view Mr Johnston's offer was reasonable, and did propose a genuine compromise of MTGI's case which, as we have found, had no realistic prospect of success at that time. The fact that Mr Johnston's offer envisaged both parties 'walking away' and bearing their own costs falls within the parameters of a reasonable offer: [*Sagacious*] [129]–[132]. ...

Further, we consider that the failure of MTGI to accept Mr Johnston's offer of 5 July 2016 was an unreasonable omission which caused Mr Johnston to incur costs in these proceedings, within the meaning of s 570(2)(b) of the [Act] (cf *Ashby v Slipper (No 2)* [2014] FCAFC 67 at [2]–[3]).

44. Similarly in Western Pursuits' submission, the 'walkaway' offer contained in the Calderbank letter constituted a genuine compromise of Ms Cheng's case, given her case had no realistic prospect of success as at the date of the Calderbank letter, being 28 July 2016, given her failure to particularise in any meaningful sense how there had been a 'dismissal' for the purposes of the meaning of adverse action in s.342, which had been made apparent not only in the terms of the Calderbank letter but also in Western Pursuits' response filed on 3 May 2016.
45. The timing of the Calderbank letter is also said to be relevant in this respect, given the parties had attended a mediation on 26 July 2016, had prepared and provided mediation papers and had to consider their respective positions in preparation for that mediation.
46. In *Rickard Constructions* McDougall J observed at [47]:

[I] have concluded that the offer was a genuine offer of compromise, and that it was a reasonable offer of compromise. The circumstances in which it was made, and the circumstances to which I have referred, demonstrate, in my view, that the rejection of the offer was unreasonable. At the time the offer was made, the parties must be taken to have been fully apprised of the strengths and weaknesses of their respective cases. This is so partly because of the advanced stage of preparation at the time when the offer was made, and partly because preparation for the mediation must have required each party to consider its own position both in the light of its own analysis of the relevant facts and circumstances and in the light of its analysis of the positions advanced by the opposing parties in their mediation position papers and at the mediation.

- 30 Driver J concluded in *Cheng* [49]–[50]:

49. As noted above, the case against Western Pursuits ultimately collapsed due to a near complete absence of supporting evidence. Ms Cheng had been given time to prepare affidavit evidence but virtually nothing material had been filed by the time of the trial. Western Pursuits, on the other hand, had filed and relied upon a significant body of evidence to support its version of the circumstances pertaining to the cessation of Ms Cheng's employment. Most of the costs of Western Pursuits would have been incurred in preparing for trial and attending the trial. Those steps were undertaken in accordance with procedural orders made by the Court. Ms Cheng's failure to prepare properly for the trial was unfortunate, not least for her, but I am unable to conclude that it was an unreasonable act or omission. The reality is that Ms Cheng was in no fit emotional state to prepare and run her case and she had been unable to obtain legal assistance. I had, on several occasions during the interlocutory stage of the proceedings, invited Ms Cheng to consider terminating the proceedings given her emotional state. She declined to do so. As I understand it, this was because she wanted her 'day in court'. Ultimately, she was unable to take advantage of that day in court but it was not unreasonable for her to make the attempt, however ineffectual it ultimately was. Her case failed, not because she was found to be untruthful or because her claim was found to be a sham but, rather, because she presented nothing to support it. It is impossible to say whether the outcome might have been any different if her case had been properly prepared and presented.

50. Neither does Ms Cheng's rejection of the Calderbank offer constitute an unreasonable act or omission. As noted above, the Calderbank offer was a 'walkaway' offer. In my view, in the Fair Work jurisdiction which is, in principle, a no costs jurisdiction, the rejection of a 'walkaway' offer is not, of itself, unreasonable. Something more would need to be demonstrated in order to establish that the rejection of the offer was unreasonable in the circumstances of the particular case. The case of *The MGTI Trust*, referred to above at [42], is the only Fair Work precedent I have been taken to. That was a truly exceptional case, involving an indemnity costs order against a non party in vexatious proceedings. The present case is distinguishable. In my view, the particular circumstances of this case, and the circumstances of the case overall, while unfortunate and expensive for Western Pursuits, do not point to any clear unreasonable act or omission by Ms Cheng, who is a vulnerable and troubled young woman.

Decisions that Auscor relies upon

- 31 As outlined at [8(b)] above, Auscor relies upon the decisions of *Lai Qin* and *ONE.TEL*.
- 32 *Lai Qin* is a High Court decision, delivered on 28 February 1997, concerning Order 71, r 39 of the *High Court Rules 1952* (Cth): 'When for any reason the further prosecution of a proceeding becomes unnecessary, except for the purpose of determining by whom the costs of the proceeding should be paid, any party may apply to the Court or a Justice to determine the question, and thereupon the Court or Justice may make such order as is just'.

- 33 McHugh J said in *Lai Qin*, 624–625: (footnotes omitted)

In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. ...

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried. This is perhaps the best explanation of the unreported decision of Pincus J in *The South East Queensland Electricity Board v Australian Telecommunications Commission* where his Honour ordered the respondent to pay 80 per cent of the applicant's taxed costs even though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.

The critical question in this case then is whether or not the prosecutrix acted reasonably in bringing these proceedings and whether the respondents acted so unreasonably in not informing the prosecutor that an application to review the decision to refuse a visa was being considered that it would be proper for the Minister to pay the whole or part of the cost of the proceedings. ...

- 34 *ONE.TEL* is a Federal Court of Australia decision, delivered on 13 March 2000, where the issue for consideration was whether the Deputy Commissioner of Taxation (DCT) should pay the applicants' costs, in circumstances where the applicants had applied to the court to set aside notices issued under s 108 of the *Sales Tax Assessment Act 1992* (Cth), and the DCT agreed to consent orders setting aside the notices.

- 35 Burchett J said in *ONE.TEL* [5]–[8]:

- 5 It is accepted that, in a case which terminates before there has been a hearing, the Court should not resolve the issue of costs by engaging in something in the nature of a hypothetical trial: *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194 [(*Aust-Home*)] at 201; [*Lai Qin*] at 624. But this does not mean that the Court can never make an order for costs. Often, it will be unable to do so; but in other cases an examination of the reasonableness of the conduct of the parties, respectively, may provide the basis of an order, or 'a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried', as McHugh J put it in [*Lai Qin*] at 625. His Honour added:

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings.

Although his Honour thought this would 'usually' be so, he made it clear that he was not laying down an invariable rule. At the beginning of his discussion of the applicable principles (at 624), he referred to the discretionary nature of the power to order costs, and to the 'general rule [that] the successful party is entitled to his or her costs', and he said:

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action.

As Sackville J pointed out in *Rizal v Minister for Immigration and Multicultural Affairs* [1999] FCA 334 [(*Rizal*)]

at para 16, the remarks made by McHugh J evince ‘a somewhat more flexible approach’ than that taken by the Court in *Gribbles Pathology Pty Ltd v Health Insurance Commission* (1997) 80 FCR 284 [(*Gribbles*)] at 287, when it suggested that ‘there will be very few cases where the issues will be sufficiently clear, in the absence of a hearing, for an order for costs to be made in favour of a party.’ What is well established is that frequently the determining factor will be the reasonableness of the conduct of the parties, a matter which was emphasized in each of the decisions I have cited, and also in *Reddy v Hughes* (1996) 37 IPR 413 [(*Reddy*)]; *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1999] FCA 119 [*Qui*]; and *Australian Securities Commission v Berona Investments Pty Ltd* (1995) 18 ACSR 772 [(*Berona*)]. In the last case, Cooper J commented (at 774), concerning the principles laid down in [*Aust-Home*]:

These propositions are of assistance in focusing attention upon some of the relevant circumstances which should be considered in the exercise of the discretion to award costs where proceedings do not proceed to a final hearing. However they are not the only circumstances; nor are they intended to limit the discretion.

- 6 In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the Court’s discretion otherwise than by an award of costs to the successful party. It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs. In [*Lai Qin*], McHugh J was careful to state (at 624) that the principles with which he was concerned were those that ‘govern an application for costs when a party elects not to pursue an action because he or she has achieved the relief sought in the action either by settlement or by extra-curial means’. As his Honour recounted the facts, the instant case was one where the applicant had challenged a decision of the Refugee Review Tribunal denying her status as a refugee but, during the pendency of her action in the High Court, the Minister had exercised his special discretion in her favour under s 417 of the *Migration Act 1958*. The question whether the Tribunal had or had not erred in law thus became moot. [*Qui*] was a similar case. Following the decision of the Full Court in *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, the Minister exercised his discretion under s 417, with the result that an outstanding proceeding in respect of one of several decisions of the Refugee Review Tribunal lost any significance for either party. Beaumont J followed [*Lai Qin*]. [*Gribbles*] was a variation on the theme. There, the Health Insurance Commission was sued by a pathologist because it declined to recognize particular services as eligible for the payment of Medicare benefits; but during the pendency of the proceeding, certain arrangements affecting the performance of the services were changed, with the result that the Commission reversed its decision. The original dispute thus ceased to have any significance, and the argument about the appropriate costs order had to take place in the absence of any determination of the merits. Again, in [*Aust-Home*] and in [*Berona*], as Cooper J put it in the latter case (at 777), ‘events had overtaken the proceedings’. The relief originally sought was no longer required, and the proceedings were terminated without any decision on the merits. Neither side had won or lost (see the former case at 202, and the latter at 777). [*Reddy*] and [*Rizal*] perhaps each turned even more clearly on an assessment of the reasonableness of a party’s behaviour. In [*Reddy*], the respondent had offered the applicant a substantially complete remedy before the institution of proceedings, and Branson J held (at 415) that her Honour was ‘not able to be satisfied that the applicant acted reasonably in commencing the proceeding’. In [*Rizal*], although the applicant achieved the result he sought by his proceeding in the Court, there was an ‘at least arguable’ objection to the Court’s jurisdiction to entertain the application, and a proposed amendment to overcome the jurisdictional problem would have required leave to file an application long out of time. That leave had not been granted when the proceeding became moot because of the Minister’s plainly reasonable decision to reconsider the request the previous rejection of which was the subject and *casus belli* of the litigation.
- 7 By contrast with the decisions I have been discussing, the present matter involves a clear winner. The applicants, by their proceeding, sought to challenge the validity of certain notices, and to have them set aside. The respondent, after initially defending those notices, encountered at least an evidentiary difficulty, and acknowledged that they were to be set aside. That means that the applicants have succeeded, just as the respondent succeeded in *Ahmetaj v Minister for Immigration and Multicultural Affairs* [1999] FCA 332, where a proceeding failed by reason of the occurrence of an event that was always liable to occur and to defeat the proceeding; in those circumstances, Sackville J, when the hearing did not proceed, distinguished [*Lai Qin*] and made a costs order. As in that case, so here, the result one party sought was achieved without a hearing, but not by a ‘settlement’ in the ordinary sense, or as McHugh J used the word, and certainly not by what his Honour called ‘extra-curial means’.
- 8 In any event, if, as the respondent contends, I should determine the question of costs by assessing whether, to borrow the language of McHugh J in [*Lai Qin*] (at 625), ‘both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation [came to an end by the respondent’s decision not to seek to uphold his notices]’, I would arrive at the same result. The respondent asserts that his decision to desist from defending the proceeding was reached ‘consistently with his obligation as an officer of the Commonwealth to act as a model litigant’. Since reliance upon clear proof, by secondary evidence, that an authorisation actually existed would be in no way inconsistent with the attitude of a model litigant, this can only mean that there was some degree of dubiety about the secondary evidence. Moreover, if a model litigant would not have maintained the validity of these notices as respondent to proceedings to set them aside, a fortiori a fair-minded officer of the Commonwealth would not have sought to enforce the same notices by criminal sanctions against an unsuspecting citizen or corporation – or even against a protesting one. On the [DCT’s] own stance now, his stance earlier must have been unreasonable, at least once he had ascertained the true position.

Yet that stance was maintained by opposition to the applicant's motion to amend, and by service of the notice to admit facts. It was only abandoned after the applicants defeated the attempt to obtain admissions.

Applying the principles from the decisions that the parties rely upon

- 36 Applying *Kanan*, Mr Galanty's claim may be considered as instituted without reasonable cause under s 570(2)(a), if:
- (a) The claim is not one where Mr Galanty's success depends upon the resolution in his favour of one or more arguable points of law; but where on his own version of facts, it is clear that the proceedings must fail.
 - (b) Upon the facts apparent to Mr Galanty at the time of instituting the proceedings, there was no substantial prospect of success.
 - (c) Mr Galanty's claim was 'always doomed to failure'.
- 37 Applying *Nilsen*, Mr Galanty's claim may be considered as instituted without reasonable cause under s 570(2)(a), if:
- (a) The claim is not one where Mr Galanty depended on his success on the court drawing inferences favourable to him and accepting evidence to be called on his behalf; but a case in which the evidence to be called by Mr Galanty could not have sustained his case.
 - (b) When the proceedings were instituted, it was utterly hopeless, in the sense that it was doomed to failure.
- 38 Applying *Nilsen*, Mr Galanty's claim may be considered as instituted vexatiously under s 570(2)(a), if the predominant purpose in instituting the proceedings was to harass or embarrass Auscor, or to gain a collateral advantage.
- 39 Applying *Cheng*, Mr Galanty's failure to accept Auscor's 'walkaway' offer would not, in itself, be unreasonable in this jurisdiction, which is, in principle, a no costs jurisdiction; 'something more' would need to be demonstrated in order to establish that the rejection of Auscor's offer is unreasonable in the circumstances of this case.
- 40 Applying *Lai Qin*, Mr Galanty may be ordered to pay Auscor's costs where the proceedings ended by way of his discontinuance and not by a hearing on the merits, if the court concludes that:
- (a) Mr Galanty acted so unreasonably that Auscor should obtain the costs of the action.
 - (b) Although both parties have acted reasonably, Auscor was almost certain to have succeeded if the matter had been fully tried.
- 41 Applying *ONE.TEL*, Mr Galanty may be ordered to pay Auscor's costs where the proceedings ended by way of his discontinuance and not by a hearing on the merits, if the court concludes that:
- (a) Mr Galanty, after litigating for some time, effectively surrendered to Auscor.
 - (b) Auscor was the 'clear winner'.

The parties' respective cases

- 42 As outlined at [9] and [13] above, Mr Galanty filed a Response to the Costs Application, self-represented at the hearing on 21 July 2025, and made oral submissions opposing the Costs Application. Mr Galanty's contentions may be summarised as follows:
- (a) His claim was brought based on his genuine belief that he was an employee of Auscor entitled to the benefits claimed under the Act and the LSL Act. The nature of his working relationship with Auscor bore the hallmarks of employment, including control over his work, provision of tools by Auscor, and a long term exclusive arrangement.
 - (b) As he has been represented throughout the proceedings, the court should infer that prior to instituting the claim, he 'received advice that his claim had chances of success'.
 - (c) Any deficiencies in his Originating Claim were minor or were the responsibility of his representative.
 - (d) He discontinued the proceedings due to financial reasons, rather than any admission that his claim lacked merit.
 - (e) An order for costs in the circumstances would be unjust.
- 43 As outlined at [7(i)(i)–(iii)] above, Auscor contends that given the representations Mr Galanty made over many years that he operated a business, to the ATO through his tax returns and BAS filings, and to Auscor through the issuance of tax invoices charging GST, by the mere act of Mr Galanty filing a claim contending the contradictory position that he was an employee of Auscor's, the court should be satisfied of each of the following:
- (a) That Mr Galanty instituted the proceedings vexatiously (s 570(2)(a)).
 - (b) That Mr Galanty instituted the proceedings without reasonable cause (s 570(2)(a)).
 - (c) That Mr Galanty engaged in an unreasonable act or omission and caused Auscor to incur costs (s 570(2)(b)).
- 44 As outlined at [7(i)(iv)–(vi)] above, Auscor also contends that Mr Galanty engaged in an unreasonable act or omission and caused Auscor to incur costs (s 570(2)(b)) by continuing to pursue the proceedings, and by failing to accept its 'walkaway' offer.

Did Mr Galanty institute the proceedings vexatiously or without reasonable cause?

- 45 On 26 April 2023, Mr Galanty filed the Originating Claim, claiming that in the period from 8 October 2012 to 9 September 2021, he was an employee of Auscor.
- 46 As outlined at [9(j)(i)–(ii)] above, Mr Galanty accepts that when he filed the Originating Claim on 26 April 2023, the law was settled by *Personnel Contracting* and *Jamsek*, decisions of the High Court of Australia handed down on 9 February 2022.
- 47 Prior to *Personnel Contracting* and *Jamsek*, the characterisation of the parties' relationship as one of employment or

contracting may have been determined by a multifactorial consideration of the totality of the relationship between the parties including the terms of the contract governing the relationship and the performance of the contract in practice.

48 However, *Personnel Contracting* and *Jamsek* clarified that:

- (a) The task of a court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require. Therefore, the characterisation of the parties' relationship as one of employment or contracting is determined by reference to the parties' rights and obligations under the contract governing their relationship.⁶
- (b) Consideration of the totality of the relationship between the parties is relevant only if it concerns the rights and duties established by the parties' contract; not if it concerns an aspect of how the parties' relationship has come to play out in practice but bearing no necessary connection to the contractual obligations of the parties.⁷
- (c) Where there is a written contract, the validity of which is not in dispute, the characterisation of the relationship as one of employment or contracting, proceeds by reference to the rights and obligations of the parties under that written contract, with the contract to be construed in accordance with the established principles governing contractual interpretation.⁸
- (d) Where there is no written contract, the characterisation of the relationship as one of employment or contracting, still proceeds by reference to the rights and obligations of the parties under that contract, but with the parties' subsequent conduct relevant to determining the terms of that contract. Any such inquiry of the parties' conduct is an objective one, the purpose of which is to ascertain the terms the parties can be taken to have agreed.⁹

49 Kiefel CJ, Keane and Edelman JJ said in *Personnel Contracting* [39]: (footnotes omitted) (emphasis added)

While the 'central question' is always whether or not a person is an employee, and while the '**own business/employer's business' dichotomy** may not be perfect so as to be of universal application for the reason that not all contractors are entrepreneurs, the dichotomy usefully focusses attention upon those aspects of the relationship generally defined by the contract which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an **independent enterprise**. In this way, one may discern a more cogent and coherent basis for the time-honoured distinction between a contract of service and a contract for services than merely forming an impressionistic and subjective judgment or engaging in the mechanistic counting of ticks on a multifactorial checklist.

50 Gordon J said in *Personnel Contracting* [183] (Steward J agreeing [203]): (footnotes omitted) (emphasis added)

The better question to ask is whether, by construction of the terms of the contract, the person is *contracted to work in the business or enterprise of* the purported employer. That question is focused on the contract, the nature of the relationship disclosed by the contract and, in this context, whether the contract discloses that the person is working in the business of the purported employer. It invites no inquiry into subsequent conduct. A consequence of a negative answer to that alternative question may be that the person is not an employee. Another consequence may be, but does not have to be, **that they have their own business**. As five judges of this Court said in *Hollis v Vabu Pty Ltd*, both employees and contractors can work 'for the benefit of' their employers and principals respectively, and so that, '*by itself*', cannot be a sufficient indication that a person is an employee (emphasis added). That does not detract from the fact that where the contract is oral, or partly oral and partly in writing, subsequent conduct may be admissible in specific circumstances for specific purposes – to objectively determine the point at which the contract was formed, the contractual terms that were agreed or whether the contract has been varied or discharged.

51 There is no dispute that there was no written contract between the parties, nor that Mr Galanty was engaged under an oral contract.¹⁰

52 Applying *Personnel Contracting* (at [48]–[50] above), requires consideration of the evidence of the parties' conduct to ascertain the terms of the contract between Auscor and Mr Galanty that can be taken to have been agreed, and whether those terms support Auscor's case that an express term of the contract included that Mr Galanty would provide services to Auscor as a sole trader contractor, using his existing ABN and business name.

53 In the Originating Claim, Mr Galanty confirms that the terms of his contract were not put in writing, and claims:

4. On or around August 2012, [Mr Galanty] responded to an advertisement placed in Seek by [Auscor] and applied for a position there. He then attended a panel interview, at which [Mr McCoy] also attended, where he was questioned as to his suitability to work for [Auscor]. Following this interview, he was offered the position and commenced work on 8 October 2012.
5. [Auscor] agreed to pay [Mr Galanty] \$36.50 for each hour of work and [Mr Galanty] worked on a full time basis.
6. The terms and conditions of the engagement between [Mr Galanty] and [Auscor] were not put in writing.
7. The work [Mr Galanty] performed was under [Auscor's] and [Mr McCoy's] direction and control.
8. As a result, the relationship between [Mr Galanty] and [Auscor] was one of employer and employee.

54 On 15 June 2023, Auscor filed a Response, stating:

3. The Respondents deny paragraph 1(c), and state that [Mr Galanty] was engaged by [Auscor] under a contract for services which contained the following express terms:
 - a. [Mr Galanty] would provide services as an Electrical Technician to [Auscor] as a contractor.
 - b. [Mr Galanty] would be a sole trader and provide services utilising his existing ABN and business name.

- c. [Mr Galanty] confirmed that he was familiar with what it meant to be a contractor because of previous arrangements with previous entities.
- d. [Mr Galanty] was to submit weekly tax invoices to [Auscor].
- e. [Mr Galanty] was to be responsible for his own tax.
- f. [Mr Galanty] would invoice for a flat hourly rate above the award and it would cover all entitlements
- g. [Mr Galanty's] hourly rate was an 'all in rate' inclusive of:
 - i. Annual leave;
 - ii. Sick leave;
 - iii. Payments for being absent on public holidays; and
 - iv. Long service leave.
- h. [Mr Galanty] would invoice at a rate of \$34.00 p/hr (which he later increased to \$36.50 p/hr on or about 15 January 2018 and again to \$38.50 p/hr on or about 1 July 2021).
- i. [Mr Galanty] would attend work on the basis of what had been arranged.
- j. From time to time, [Auscor] and [Mr Galanty] would arrange that [Mr Galanty] would perform project work which would often involve early starts, long hours and time away from home. In addition to the hourly rate, [Mr Galanty] would be able to charge a flat fee of \$100 for each night he was away from home.
- k. In addition to the project work, there would generally be work at the workshop from 8am each weekday if [Mr Galanty] chose to attend.
- l. As a contractor, if [Mr Galanty] worked for 2 hours he would be paid for 2 hours, if he worked for 10 hours he would be paid for 10 hours.

Particulars

The express terms of the contract were agreed orally in the course of 2 pre-contractual discussions between Mr Scott McCoy (Manager) and [Mr Galanty].

The first discussion occurred on or about October 2012 at a meeting at [Auscor's] premises (then) in Booragoon. Present at the meeting was Mr Scott McCoy and Mr Jonathan Wass (Procurement and Logistics Manager).

The second discussion occurred soon after the first discussion where Mr Scott McCoy telephoned [Mr Galanty] to inquire as to [Mr Galanty's] availability for work.

The express terms of the contract can also be inferred from the post contractual conduct of the parties.

- 55 Orders 2 and 3 of the Orders of the court made on 22 July 2024 state:
2. The Claim be listed for 3-day trial on a date to be determined by the Registry that is not before 1 February 2025 (**Trial**).
 3. **By 19 August 2024**, the parties to file a Statement of Agreed Facts, Issues and Contentions, and a Bundle of Agreed Documents of the common facts, issues and contentions, and documents, each attached to a *Form 29 – Multipurpose Form*, which they intend to rely upon at the Trial.
- 56 Despite the terms of Order 3 (at [55] above), on 21 August 2024, the parties filed a Statement of Agreed Facts, Issues and Contentions consisting of only four paragraphs:
1. The claimant replied to an advertisement placed on seek by the respondent.
 2. The claimant attended a meeting with representatives of the respondent.
 3. 16 October 2012 was the first occasion that the claimant's labour was supplied to the respondent.
 4. 16 September 2021 was the last occasion that the claimant's labour was supplied to the respondent.
- 57 The matter was discontinued by Mr Galanty prior to the parties filing witness statements in support of the matters asserted by them regarding the formation of, and terms of, the contract governing their relationship. This means that, beyond the parties' assertions at [53]–[54] and [56] above, there is no evidence before the court regarding the formation of, and terms of, the contract governing their relationship.
- 58 Evidence of Mr Galanty's subsequent conduct includes:
- (a) Mr Galanty's concessions at [15(b)–(c), (e)–(f)] above, including that prior to his relationship with Auscor, he was registered as a sole trader and maintained an ABN and business name.
 - (b) The publicly available information, which suggests that Mr Galanty registered as a sole trader with an ABN on 5 February 2004 and registered his business name on 10 February 2004.¹¹
 - (c) Mr Galanty's tax returns for 2012–2013, 2013–2014, 2014–2015 and 2015–2016, in which he reports amounts/information in the following categories:¹²
 - BPI Personal Services Income
 - o PSI Other
 - o Total amount of other deductions against PSI

- o Net PSI
 - Business name of main business: **PHILLINK**
 - Australian Business Number (ABN): **57845884610**
- In 2012–2013, 2013–2014 and 2014–2015:
- Description of main business or professional activity: **AIR CONDITIONING EQUIP | INSTALLATION EXC MOTOR VEHICLES**
- In 2015–2016:
- Description of main business or professional activity: **ELECTRICAL SERVICES | PIPELINE PROTECTIONS**
- (d) Mr Galanty's tax returns for 2016–2017 and 2017–2018, in which he reports amounts/information in the following categories:¹³
- Net income or loss from business
 - o Non-primary production-transferred from Z item P8
 - o Net small business income
 - Description of main business or professional activity: **Underground Electrical Cabling Service**
 - Business name of main business and ABN: **Phillink**
 - o ABN: **57 845 844 610**
 - Business income and expenses:
 - o Other business income – Non-primary production
 - o Expenses – Motor vehicle expenses
 - o Expenses – All other expenses
 - o Net income or loss from business this year
- (e) Mr Galanty's tax returns for 2018–2019, 2019–2020, 2020–2021, 2021–2022, in which he reports amounts/information in the following categories:¹⁴
- Net income or loss from business
 - o Non-primary production-transferred from Z item P8
 - o Net small business income
 - Description of main business or professional activity: **Underground Electrical Cabling Service**
 - Business name of main business and ABN: **Phillink**
 - o ABN: **57 845 844 610**
 - Business income and expenses:
 - o Other business income – Non-primary production
 - o Expenses – All other expenses
 - o Net income or loss from business this year
 - Small Business Entity – Eligibility Tests
 - o Question 1: Is the taxpayer carrying on a business? **Y**
 - o Question 2: Is the aggregated turnover of the business less than \$10 million? **Y**
 - Profession, trade or business income and deductions excluding primary production
 - o ATO ANZSIC code: **32320**
 - o Business activity: **Underground Electrical Cabling Service**
- (f) Mr Galanty's quarterly BAS filings, which are documents that are only filed with the ATO by persons engaged in business activity, for the periods July 2012 to March 2015 and July 2015 to September 2021.¹⁵

59 As outlined at [46] above, Mr Galanty accepted that at the time he filed the Originating Claim, the law was settled by *Personnel Contracting* and *Jamsek*, which meant the task of the court was to determine the terms of the contract governing the parties' relationship and whether they support a relationship of employment or contracting.

60 As outlined at [54] above, Mr Galanty was put on notice by Auscor's Response filed on 15 June 2023 that Auscor claimed that the express terms of the contract between Mr Galanty and Auscor included that Mr Galanty would provide services to Auscor as a sole trader contractor, using his existing ABN and business name.

61 Therefore, applying *Personnel Contracting* [177]–[179] (that where there is no written contract, the parties' subsequent conduct is relevant to ascertaining the terms the parties can be taken to have agreed to, at [48(d)] above), it is difficult to comprehend how Mr Galanty or his advisors, could have assessed the evidence at [58] above, and concluded that he had reasonable prospects of success of defeating the purported express term Auscor claims the parties can be taken to have agreed

- to, and reasonable prospects of success in establishing that the express terms of the contract that the parties can be taken to have agreed to included that Auscor would employ Mr Galanty as its employee.
- 62 The evidence at [58] above, demonstrates consistent business activities, including deductions for expenses (such as for motor vehicle and other expenses), which are hallmarks of an independent enterprise under the ‘own business/employer’s business’ dichotomy in *Personnel Contracting* [39] (at [49] above).
- 63 Therefore, applying *Personnel Contracting* [39] (regarding the useful focus of the own business/employer business dichotomy to the central question of whether a person is an employee, at [49] above), it is difficult to comprehend how Mr Galanty or his advisors, could have assessed the evidence at [58] above, and concluded that he had reasonable prospects of success in his claim that he was as employee. The evidence at [58] above wholly aligns with Mr Galanty operating his own business (Phillink), rather than subordination to Auscor’s business. The evidence at [58] above, aligns with Mr Galanty having conducted himself in a manner wholly consistent with him engaging in his **own business** for many years; the evidence demonstrates that Mr Galanty established his business structure and registered as a sole trader prior to commencing work for Auscor, and maintained this independent status throughout his relationship with Auscor.¹⁶ This pre-existing and continuous conduct is irreconcilable with Mr Galanty’s assertion that he was integrated into Auscor’s business as an employee.
- 64 In the context of the partnerships in *Jamsek*, Kiefel CJ, Keane and Edelman JJ noted in *Jamsek* [63] that the partnerships earned income, incurred expenses, and took advantage of the tax benefits of their structure, and said that it is not possible to square the respondents’ contention that they were not conducting a business of their own, with the circumstance that, for many years, they enjoyed the advantage of splitting the income generated by the business conducted by the partnerships with their fellow partners. This is apposite to the evidence at [58] above in relation to Mr Galanty’s business (Phillink).
- 65 The evidence at [58] above, constitutes ‘facts apparent to Mr Galanty at the time of instituting the proceeding’ and ‘the evidence to be called by Mr Galanty’.¹⁷
- 66 I am therefore satisfied that Auscor has established that Mr Galanty instituted the proceedings without reasonable cause, for the following reasons.
- 67 The core of Mr Galanty’s claim, that he was an employee entitled to employee entitlements, is fundamentally undermined by his own evidence. Mr Galanty’s business registration and the discovered tax returns and BAS filings (at [58] above), contradict his assertion of working as an employee in Auscor’s business as opposed to working in his own business (Phillink).
- 68 Mr Galanty’s own evidence (at [58] above), indicates that he consistently conducted himself as a sole trader contractor, and claimed substantial deductions for business expenses. These documents were in his possession or control (either directly or via his accountant) when he commenced the claim on 26 April 2023.
- 69 Applying *Kanan* and *Nilsen*, Mr Galanty’s case could not have been sustained on his own evidence, which was apparent to him at the time of instituting the proceedings. The evidence at [58] above, demonstrates Mr Galanty’s consistent self-representation as a contractor, through his ABN registration, tax deductions, BAS filings, and invoices, which contradict his claim of employment. As such, there was no substantial prospect of success from the outset, rendering the proceedings ‘doomed to failure’ and ‘utterly hopeless’. This satisfies the threshold in *Kanan* and *Nilsen* that Mr Galanty’s claim was instituted without reasonable cause under s 570(2)(a).
- 70 To reinforce this, the tax advantages claimed by Mr Galanty (such as the deductions for motor vehicle and other expenses at [58] above), align with the High Court’s observations in *Jamsek* [63] (at [64] above), that such tax benefits are irreconcilable with a contention of not conducting one’s own business. The simultaneous claim of employment status in this court, while maintaining a tax position of an independent enterprise with the ATO to secure financial advantages unavailable to employees, renders the institution of these proceedings unreasonable.
- 71 While *Lai Qin* and *ONE.TEL* caution against a court resolving the issue of costs by engaging in a hypothetical trial in proceedings that terminate before a hearing on the merits; *Lai Qin* and *ONE.TEL* provide that a costs order may be made where one party has acted so unreasonably such as to warrant the other party being awarded its costs, or alternatively, where both parties have acted reasonably but one party was almost certain to have succeeded if the matter had proceeded to a hearing on the merits.
- 72 Applying *Lai Qin*, Mr Galanty’s act of instituting the proceedings claiming to be an employee, in circumstances where his own evidence (at [58] above) demonstrates consistent self-representation as a sole trader contractor, constitutes an unreasonable act that warrants Auscor being awarded its costs.
- 73 Applying the alternative in *Lai Qin*, if the matter had proceeded to trial, Auscor was almost certain to have succeeded. Mr Galanty’s own evidence aligns with his relationship with Auscor being one of contracting and not of employment. Mr Galanty’s own evidence (at [58] above) indicates that he was a sole trader prior to engaging with Auscor, he provided his own ABN to Auscor, issued invoices to Auscor, incurred expenses and claimed substantial deductions inconsistent with employment, and did not receive typical employee benefits during the relationship.
- 74 While Mr Galanty asserted that he instituted the proceedings because he held a genuine belief in his employment status, this assertion is difficult to reconcile with Mr Galanty’s own evidence (at [58] above). As Mr Galanty concedes in his Response to the Costs Application, he was represented throughout the proceedings. As outlined at [61] above, it is difficult to comprehend how Mr Galanty or his advisors, fully cognisant of the evidence at [58] above, specifically the tax benefits claimed as a business, could conclude that Mr Galanty had reasonable prospects of success in running a claim that directly contradicted his own conduct at [58] above. Objectively, the hallmarks of an independent enterprise (pre-existing sole trader registration, the issuance of tax invoices charging GST, and substantial business deductions) overwhelmingly point to contractor status under the ‘own business/employer’s business’ dichotomy.¹⁸ Mr Galanty’s subjective assertion of a genuine belief in his employment status, carries little weight when weighed against the objective evidence at [58] above. Accordingly, I find that Mr Galanty’s asserted genuine belief in his employment status to carry little weight, when it simultaneously requires him to ignore his own

sworn declarations to the ATO that he was conducting a business.

- 75 Mr Galanty raised for the first time at the hearing that he considered his engagement with Auscor was one of sham contracting. As Mr Galanty was represented throughout the proceedings, and at no time during the proceedings (commenced by Originating Claim on 26 April 2023 and discontinued on 14 March 2025) was the suggestion of sham contracting raised, I accept the respondent's submission that Mr Galanty's assertion should be rejected.
- 76 Mr Galanty's assertion of sham contracting should also be rejected on the grounds that it is directly contradicted by his own conduct at [58] above. Mr Galanty's evidence (at [58] above) including pre-existing sole trader registration, issuance of invoices charging GST, and tax deductions for business expenses, demonstrate that he actively presented and benefited from the arrangement as a contracting relationship. The evidence indicates that Mr Galanty did not merely accept the label of contractor; rather, he utilised the contracting structure to his financial benefit including via the tax system. This contradicts Mr Galanty's assertion that Auscor unilaterally misrepresented the relationship, or that he was a victim to Auscor misrepresenting the contract as a contract for services when Auscor reasonably believed the contract to be a contract of employment.¹⁹
- 77 While Mr Galanty asserted at the hearing that he discontinued the proceedings due to financial reasons, no evidence was adduced to support this submission. In any event, the reason Mr Galanty discontinued the proceedings is irrelevant to the court's consideration of whether he instituted the proceedings without reasonable cause. As outlined at [69] above, I have found that he did.
- 78 Given the objective weaknesses in Mr Galanty's case, as demonstrated by his own evidence at [58] above, which Auscor placed Mr Galanty on notice of through the First Application, Second Application and Third Application (discussed further below at [86]–[105]), I am inclined to accept Auscor's submission that the timing of Mr Galanty's discontinuance (subsequent to the Third Application) supports the inference that Mr Galanty was aware of the weaknesses in his case and that his discontinuance amounted to an effective surrender to Auscor, as contemplated in *ONE.TEL*.
- 79 For the preceding reasons, I am satisfied that Mr Galanty instituted the proceedings without reasonable cause and should be ordered to pay Auscor's costs pursuant to s 570(2)(a) of the Act.
- 80 As outlined in *Nilsen*, 3 (at [26] above), whether the proceedings were instituted vexatiously looks to Mr Galanty's motive in instituting the proceedings, and is an alternative ground to the ground based on a lack of reasonable cause. In circumstances where I have found that Mr Galanty instituted the proceedings against Auscor without reasonable cause pursuant to s 570(2)(a) of the Act, I do not consider it necessary to determine whether he also instituted the proceedings vexatiously.

Did Mr Galanty's unreasonable act or omission cause Auscor to incur costs?

- 81 While Auscor contended that Mr Galanty instituting the proceedings claiming to be an employee when he had consistently conducted himself as a contractor including with the ATO, constituted conduct that satisfied both s 570(2)(a) and (b), Auscor conceded that s 570(2)(b) is almost always relied upon for conduct during the course of proceedings.²⁰
- 82 Auscor did not rely upon any authorities to support its contention that costs should be awarded under s 570(2)(b) for the institution of proceedings that are otherwise captured in s 570(2)(a).
- 83 In any event, where I have found that Mr Galanty should be ordered to pay Auscor's costs for instituting the proceedings without reasonable cause, I consider it unnecessary to consider whether the same act (of instituting the proceedings) also constitutes an unreasonable act warranting a costs order under s 570(2)(b).
- 84 In the alternative to a costs order under s 570(2)(a), Auscor sought a costs order under s 570(2)(b) on the basis that Mr Galanty's unreasonable acts/omissions during the course of the proceedings, caused it to incur costs.
- 85 As outlined at [79] above, I have found that Mr Galanty instituted the proceedings without reasonable cause and should be ordered to pay Auscor's costs pursuant to s 570(2)(a) of the Act. If I had not made this finding, I would have found in the alternative that Mr Galanty should be ordered to pay Auscor's costs pursuant to s 570(2)(b) of the Act, because his unreasonable acts/omissions during the course of the proceedings caused Auscor to incur costs, for the following reasons.
- 86 The First Affidavit was filed on 9 February 2024 as a result of the court order made on 12 December 2023 requiring Mr Galanty to provide discovery under oath, which order was subsequently varied by consent.
- 87 In the First Affidavit, which Mr Farrell deposed he was authorised by Mr Galanty to swear, Mr Galanty disclosed the following 14 documents:

Part 1 of Schedule – Documents in the control or possession of the claimant*/respondent*	
Document number	Description of document
Claimant Document 1	Individual Tax Return 2013–2014
Claimant Document 2	Individual Tax Return 2014–2015
Claimant Document 3	Individual Tax Return 2015–2016
Claimant Document 4	Individual Tax Return 2016–2017
Claimant Document 5	Invoices Issued to Auscor Pty Ltd July 2021 – October 2021
Claimant Document 6	Business Activity Statement January – March 2018
Claimant Document 7	Business Activity Statement April – June 2018
Claimant Document 8	Business Activity Statement July – September 2018
Claimant Document 9	Business Activity Statement April – June 2019

Claimant Document 10	Business Activity Statement July – September 2019
Claimant Document 11	Business Activity Statement October – December 2019
Claimant Document 12	Business Activity Statement April – June 2020
Claimant Document 13	Business Activity Statement July – September 2020
Claimant Document 14	Business Activity Statement January – March 2021

- 88 The affidavit filed in support of the First Application on 21 February 2024, refers to the content of Mr Galanty's tax returns for the 2013–2014, 2014–2015, 2015–2016 and 2016–2017 financial years, disclosed in the First Affidavit (at [87] above) as follows: (references omitted)
4. For the financial year 2013–2014, [Mr Galanty] declares that he is running a business with personal services income (PSI) of \$98,069 and 'total amount of other deductions against PSI' as \$7,644.
 5. For the financial year 2014–2015, [Mr Galanty] declares that he is running a business with personal services income of \$84,124 and 'total amount of other deductions against PSI' as \$7,685.
 6. For the financial year 2015–2016, [Mr Galanty] declares that he is running a business with personal services income of \$74,850 and 'total amount of other deductions against PSI' as \$8,479.
 7. For the financial year 2016–2017, [Mr Galanty] declares at Item P5 that he is running a business but declares that he is not receiving personal services income. Instead, he declares that he is receiving 'other business income' of \$77,946 and declares deductions of 'motor vehicle expenses' of \$3,300 and a further amount for 'all other expenses' of \$16,604. Total business expenses (and deductions) for that financial year were therefore \$19,904.
 8. It is submitted that [Mr Galanty's] representations to the ATO, that he is running a business, together with significant business expense deductions claimed in the 4 financial years above are at odds with his claim that he was employed by [Auscor].
 9. Particularly focusing on the 2016–2017 financial year. [Mr Galanty] makes deductions for business expenses of \$19,904 against income of \$77,946. The nature of the business expenses are presently unclear, but what is clear is that [Mr Galanty] has been using his business arrangement with [Auscor] (namely his contractor status) to gain tax advantages and that such behaviour is typical of a business operator.
 10. It would be uncommercial for any taxpayer (including [Mr Galanty]) to incur such large expenses (for example \$19,904 in the 2016–2017 financial year) and apply those expenses against their income generated unless they were operating a business. It would be common behaviour to incur such large expenses in business when the taxpayer/business person is either trying to establish themselves and or invest for the future by incurring larger expenses. This is unlikely to occur in an employment arrangement, where conversely, such expenses would be incurred by the employer.
 11. It makes no sense at all to say that in the 2016–2017 financial year, that [Mr Galanty] earned \$77,946 in wages but [then] incurred \$19,904 in business expenses. The only logical conclusion available to the Court is that the \$77,946 earned was business income, the \$19,904 deductions were business expenses, and that [Mr Galanty] was running a business. In fact, [Mr Galanty] declared exactly that to the ATO. It is submitted that [Mr Galanty] could not have been an employee, must have been running a business and must have been a contractor.
 12. [Mr Galanty], represents himself to the ATO as running a business in order to gain significant tax benefits. However, in an act of duplicity, [Mr Galanty], in filing his claim, represents himself to the Court as employee and seeks to claim significant benefits only available to an employee (long service leave, annual leave, annual leave loading, and public holiday payments). He is not entitled to any such amounts.
 13. There is no dispute in this matter that [Mr Galanty] was engaged under an oral contract. We refer to paragraph 9 of [Auscor's] outline of submissions 13.11.2023 (located on the Court file), where we submitted that in the case of an oral contract, the Court can look to the post contractual conduct of the parties to infer the terms of the oral contract.
 14. It is submitted that the Court can have no difficulty inferring that the oral contract between the parties contained terms specifying that [Mr Galanty] was a contractor. The post contractual conduct of the parties (and particularly [Mr Galanty] interactions with the ATO) was consistent with such terms.
 15. It follows that the claim has no reasonable prospect of succeeding.
 16. Furthermore, because of the operation of [s 570 of the Act], [Auscor] may have limited ability to recover its costs if the matter proceeds to hearing and is ultimately dismissed. It is submitted that [Auscor] should be spared the expense of having to continue with this matter to hearing. The Court's resources should also be saved.
- 89 It is evident from the affidavit at [88] above, that Auscor had placed Mr Galanty on notice of its concerns about his case. Specifically, that in the four financial years from 2013–2017, Mr Galanty had declared to the ATO that he is running a business. Furthermore, that based on Mr Galanty's own conduct, that Auscor would be seeking to argue that the oral contract between the parties contained terms specifying that Mr Galanty was a contractor. The affidavit stated that '[i]t follows that the claim has no reasonable prospect of succeeding.' Auscor also referred to a contemplation of its ability to recover its costs under s 570 of the Act.
- 90 The affidavit at [88] above, was served on Mr Galanty together with notice that the First Application was listed for hearing on 5 March 2024. The court file indicates that due to Mr Galanty's agent's unavailability on 5 March 2024, and taking into account Auscor's and the court's availability, that the hearing was re-listed on 18 March 2024.

91 Prior to the hearing on 18 March 2024, Mr Galanty filed the Second Affidavit and Third Affidavit, on 11 March 2024.

92 In the Second Affidavit, Mr Galanty disclosed the following 15 documents:

Part 1 of Schedule – Documents in the control or possession of the claimant*/respondent*	
Document number	Description of document
Claimant Document 1	Individual Tax Return 2013–2014
Claimant Document 2	Individual Tax Return 2014–2015
Claimant Document 3	Individual Tax Return 2015–2016
Claimant Document 4	Individual Tax Return 2016–2017
Claimant Document 5	Individual Tax Return 2017–2018
Claimant Document 6	Invoices Issued to Auscor Pty Ltd July 2021 – October 2021
Claimant Document 7	Business Activity Statement January – March 2018
Claimant Document 8	Business Activity Statement April – June 2018
Claimant Document 9	Business Activity Statement July – September 2018
Claimant Document 10	Business Activity Statement April – June 2019
Claimant Document 11	Business Activity Statement July – September 2019
Claimant Document 12	Business Activity Statement October – December 2019
Claimant Document 13	Business Activity Statement April – June 2020
Claimant Document 14	Business Activity Statement July – September 2020
Claimant Document 15	Business Activity Statement January – March 2021

93 The documents disclosed with the Second Affidavit were the same as those disclosed with the First Affidavit, with the addition of Mr Galanty’s tax return for the 2017–2018 financial year.

94 Accordingly, the issues raised in the affidavit (at [88] above), apply equally to the Second Affidavit as they do to the First Affidavit.

95 Relevantly, in the Second Affidavit, Mr Galanty swore to the truth of the statements of fact made in the affidavit, and swore to the documents listed in Part 1 of the Schedule (at [92] above), as having ‘been filed with this affidavit’.

96 I am persuaded by Auscor’s submissions that the apparently contradictory statements made in the First Affidavit and Second Affidavit, which Mr Galanty did not correct on the filing of the Second Affidavit and Third Affidavit on 11 March 2024, in circumstances where Mr Galanty was on notice in relation to the apparent contradictions between his case and the documents disclosed with the First Affidavit, had the potential to mislead the court and Auscor.

97 Mr Galanty bore the responsibility to depose to, and file, accurate affidavits. Therefore, I consider that Mr Galanty’s failure to depose to, and file, accurate affidavits, and his failure to explain the apparent contradictions in his affidavits, to be unreasonable.

98 Furthermore, I am satisfied that Mr Galanty’s unreasonable conduct in not ensuring the truth of the statements of fact made in the affidavits of discovery, and not explaining the apparently contradictory statements made in the affidavits of discovery, necessitated Auscor filing the First Application and the Second Application.

99 It was only in the Fourth Affidavit, filed following the Fourth Discovery Order, made at the hearing of the Second Application, that Mr Galanty produced his tax returns after filing them with the ATO, and produced his BAS filings. However, the Fourth Affidavit raised other apparently contradictory statements made under oath, which I am satisfied constituted an unreasonable act or omission, which necessitated Auscor filing the Third Application.

100 As the claimant, Mr Galanty bore the responsibility to actively prosecute his matter. However, his conduct included delayed compliance, or non-compliance, with court orders.

101 The court orders made on 24 September 2024 required Mr Galanty, if he opposed the Third Application, to lodge a response to the Third Application by 21 October 2024. Mr Galanty did not lodge a response to the Third Application by 21 October 2024, or at all.

102 The Third Application was listed for hearing on 12 November 2024. At the hearing, the court ordered the matter be listed for a pre-trial conference before the Clerk of the Court, which was ultimately held on 30 January 2025.

103 On 7 February 2025, the court wrote to Mr Galanty requesting him to confirm by 11 February 2025, whether he opposes the Third Application, and if so, to advise when a response to the Third Application could be expected.

104 On 11 February 2025, Mr Galanty’s solicitors (MKI Legal) advised the court that they were still seeking Mr Galanty’s instructions in relation to providing a response to the Third Application and were expecting to further advise the court within 21 days.

105 As outlined at [11]–[12] above, on 13 March 2025, MKI Legal notified the court that it ceased to represent Mr Galanty, and on 14 March 2025, Mr Galanty discontinued his claim.

106 For the reasons outlined at [86]–[105] above, I am satisfied that Mr Galanty’s unreasonable acts or omissions (non-compliance with court orders and apparently contradictory affidavits), necessitated Auscor filing multiple applications (including for

summary judgment and default judgment) and caused Auscor to incur the costs of these applications (the First Application, Second Application and Third Application).

- 107 Auscor's offer was made on 18 November 2024, within a week of the hearing of the Third Application on 12 November 2024, and before the pre-trial conference was held before the Clerk of the Court (as outlined at [102] above, this was held on 30 January 2025).
- 108 As outlined at [6(ee)] above, Auscor proffered a 'walkaway' offer, that was open for acceptance until 29 November 2024.
- 109 In all the circumstances of this matter, I find Mr Galanty's failure to accept Auscor's 'walkaway' offer to be unreasonable. Applying *Cheng*, I find Auscor's offer to be a reasonable one, particularly given the weaknesses in Mr Galanty's case, and the point in the proceedings when the offer was made. At the time the offer was made, Auscor had placed Mr Galanty on notice through the First Application, Second Application and Third Application, of the apparent contradictions in Mr Galanty's sworn evidence in his affidavits of discovery, and of the apparent contradictions between his discovered documents and his Originating Claim. Auscor had placed Mr Galanty on notice through the affidavit filed in support of the First Application on 21 February 2024, that based on Mr Galanty's discovered documents, it considered his claim as having no reasonable prospect of succeeding, and that it was contemplating its ability to recover its costs under s 570 of the Act.
- 110 Auscor's offer presented a genuine compromise; that Auscor would forego its right to pursue costs, in exchange for Mr Galanty discontinuing a claim in which it considered he had no reasonable prospect of success.
- 111 I consider Auscor's offer to have been reasonable, which means Mr Galanty's failure to accept it was an unreasonable omission, and that applying *Cheng*, Auscor has demonstrated the 'something more' in all the circumstances of this matter.

The costs orders to be issued

- 112 For the reasons at [45]–[79] above, I find that the proceedings were instituted without reasonable cause, and that Mr Galanty should be ordered to pay Auscor's costs pursuant to s 570(2)(a) of the Act.
- 113 The remaining issues are the period of time which the costs orders should cover and whether indemnity costs should be ordered.
- 114 In relation to the period of time, I am satisfied that Mr Galanty's own objective records and knowledge of his own business affairs (through his conduct at [58] above) from the outset, and his knowledge that when he instituted the Originating Claim that the law was settled by *Personnel Contracting* and *Jamsek*, warrant the issuance of an order for Mr Galanty to pay Auscor's costs pursuant to s 570(2)(a) from 26 April 2023, to be taxed if not agreed.
- 115 Auscor seeks a costs order under s 570(2)(b) in the alternative to a costs order under s 570(2)(a). Where I consider it appropriate for the order at [79] above to issue, it would be unnecessary to issue an order under the alternative provision (s 570(2)(b)).
- 116 If I was not persuaded to issue the order at [79] above, and it was necessary to consider the issuance of an order under s 570(2)(b), I would have issued an order for Mr Galanty to pay Auscor's costs pursuant to s 570(2)(b) from 9 February 2024 (the date the First Affidavit was filed). This is because I am persuaded by the respondent's submissions (at [8(j)] above), that upon preparing and filing the First Affidavit on 9 February 2024, producing Mr Galanty's tax returns for the financial years 2013–2017, it would have been readily apparent to Mr Galanty, and his advisors, that Mr Galanty's own evidence wholly aligns with him operating his own business (Phillink), and having conducted himself in a manner wholly consistent with him engaging in his own business for many years.
- 117 As outlined at [48] above, Mr Galanty accepts that when he filed the Originating Claim, the law was settled by *Personnel Contracting* and *Jamsek*. As outlined at [64] above, Kiefel CJ, Keane and Edelman JJ said in *Jamsek* [63] that the respondents incurring expenses and taking advantage of tax benefits available only to businesses, was irreconcilable with the contention that they were not conducting a business of their own.
- 118 At the hearing, Auscor conceded that Mr McCoy and Auscor had common legal representation, such that Mr McCoy's costs were Auscor's costs and vice versa during the period that Mr McCoy was the second respondent to these proceedings. Auscor acknowledged that Mr McCoy was the sole director of Auscor.²¹ In circumstances where Auscor's legal representatives would have needed to take instructions from Mr McCoy in relation to the claim against Auscor, it is difficult to see how the costs Mr McCoy incurred in defending the claim against him as the second respondent, would be different to the costs incurred by Auscor in defending the claim against it as the first respondent. Accordingly, I am not inclined to make an order that Mr Galanty pay Mr McCoy's costs.
- 119 However, I am inclined to issue an order for Mr Galanty to pay Auscor's costs on the Costs Application.
- 120 In relation to whether indemnity costs should be ordered, I am not satisfied that they should, for the reasons that follow.
- 121 As outlined at [18] above, it is for Auscor to clearly demonstrate its case for seeking the orders sought in its Costs Application (at [3] above): (emphasis added)

That the claimant pay the respondent's costs pursuant to section 570(2)(a) and alternatively 570(2)(b) of the *Fair Work Act 2009 on an indemnity basis* from 26 April 2023 (the commencement of the claim), **to be taxed if not agreed.**

- 122 While Auscor sought orders for Mr Galanty to pay its costs on an indemnity basis, to be taxed if not agreed, Auscor did not satisfy me of the following:
- (a) That the costs in this matter should not be subject to the *Legal Profession (Magistrates Court) (Civil) Determination 2022* and the *Legal Profession (Magistrates Court) (Civil) Determination 2024*.²²
 - (b) That *Rodwell v Hutchinson* [2010] WASCA 197 does not apply to limit this court's power to award indemnity costs.
- 123 As outlined at [8(i)] above, Auscor contended that if the court was not satisfied that an indemnity costs order should issue, then

in the alternative, an order for ‘ordinary costs’ should issue.

124 Accordingly, I will issue an order for Mr Galanty to pay Auscor’s costs pursuant to s 570(2)(a) of the Act, on a party and party basis, from 26 April 2023, to be taxed if not agreed.

Conclusion

125 For the preceding reasons, I find that Mr Galanty instituted the proceedings without reasonable cause.

126 Therefore, I consider that an order requiring Mr Galanty to pay Auscor’s costs in the proceedings, including its costs on the Costs Application, pursuant to s 570(2)(a) of the Act, from 26 April 2023, on a party and party basis, to be taxed if not agreed, should be issued.

127 I will list the matter for a Directions Hearing to hear from the parties on whether the parties should attend a conference before the Clerk of the Court to give them an opportunity to agree the costs, and on any other orders to be issued to give effect to these reasons.

C. TSANG

INDUSTRIAL MAGISTRATE

¹ On 20 November 2024, Mr Farrell filed a *Form 27 - Notice of Cessation of Representation by Lawyer or Agent*.

² *Oshlack v Richmond River Council* [1998] HCA 11 [67]–[68].

³ *Re Minister for Immigration & Ethnic Affairs; Ex parte Lai Qin* [1997] HCA 6 (*Lai Qin*); *ONE.TEL Ltd v Deputy Commissioner of Taxation* [2000] FCA 270 (*ONE.TEL*).

⁴ Mr Galanty’s *Form 8.1 – Case Outline/Further and Better Particulars of Case Outline* filed on 17 October 2023 states, ‘At all material times, the Claimant alleges that he was employed by the First Respondent as a Technician’; ‘The Claimant asserts that he was classified as C11 – Manufacturing Employee Level IV [of the *Manufacturing and Associated Industries and Occupations Award 2020*]’ or in the alternative ‘as an Electrical worker grade 4 [of the *Electrical, Electronic and Communications Contracting Award 2020*]’; ‘However ... other than the claim detailed in paragraphs 21–23 of the statement of claim (Annual Leave Loading), the Claimant **does not allege any breaches of either Award.**’: [3], [8]–[12].

⁵ *Tweedie* [6], [7].

⁶ *Personnel Contracting* [59] (Kiefel CJ, Keane and Edelman JJ); *Jamsek* [8] (Kiefel CJ, Keane and Edelman JJ).

⁷ *Personnel Contracting* [61] (Kiefel CJ, Keane and Edelman JJ).

⁸ *Personnel Contracting* [59]–[60] (Kiefel CJ, Keane and Edelman JJ).

⁹ *Personnel Contracting* [177]–[179] (Gordon J, Steward J agreeing [203]); *Personnel Contracting* [183] (Steward J agreeing [203]).

¹⁰ Originating Claim [6]; Affidavit filed in support of the First Application on 21 February 2024 [13] (at [88] of these reasons).

¹¹ Australian Business Register.

¹² First Affidavit filed on 9 February 2024, 6–20; Fourth Affidavit filed on 7 August 2024, 78–82.

¹³ First Affidavit filed on 9 February 2024, 21–25; Second Affidavit filed on 11 March 2024, 6–26; Fourth Affidavit filed on 7 August 2024, 83–88.

¹⁴ Fourth Affidavit filed on 7 August 2024, 89–129.

¹⁵ First Affidavit: Part 1 of Schedule; Fourth Affidavit [8].

¹⁶ Originating Claim [4]: Mr Galanty states that he commenced work with Auscor on 8 October 2012.

¹⁷ *Kanan* and *Nilsen* (at [36]–[37] of these reasons).

¹⁸ *Personnel Contracting* [39] (at [49] of these reasons).

¹⁹ Section 357 of the Act.

²⁰ ts 5.

²¹ ts 26.

²² *Buchanan v G&R Rossen Pty Ltd* [2020] WAIRC 00388.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2025 WAIRC 00990

UNFAIR DISMISSAL APPLICATIONWESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ANTHEA JACKSON**PARTIES****APPLICANT**

-v-

SPOTLIGHT COCKBURN

RESPONDENT**CORAM** COMMISSIONER T KUCERA
DATE MONDAY, 15 DECEMBER 2025
FILE NO/S U 99 OF 2025
CITATION NO. 2025 WAIRC 00990

Result Application dismissed
Representation
Applicant Ms Anthea Jackson
Respondent Ms Jennifer Jordan and with her Ms Angela Georgieska

Order

WHEREAS the applicant on 9 September 2025 filed a *Form 2 – Unfair Dismissal Application* under the *Industrial Relations Act 1979 (WA)* (**application**);

AND WHEREAS the respondent on 29 October 2025 filed a *Form 2A – Employer Response to Unfair Dismissal Application* (**response**);

AND WHEREAS it appeared from the response the Commission would not have jurisdiction to hear the claim because the applicant was employed by a ‘national system employer’ (**jurisdictional issue**);

AND WHEREAS the Commission on 29 October 2025 emailed the applicant and suggested she seek legal advice in relation to the jurisdictional issue;

AND WHEREAS on 18 November 2025 the applicant, by way of an email and in telephone conversation to Commission staff acknowledged that she had received this communication from the Commission;

AND WHEREAS the Commission on 19 November 2025 programmed the application for a show cause hearing to be held on 12 December 2025 (**show cause hearing**);

AND WHEREAS the Commission held the show cause hearing on 12 December 2025;

AND WHEREAS the Commission, after hearing from both parties, was satisfied that it does not have the jurisdiction to hear the application because the applicant was employed by a ‘national system employer’.

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

–
THAT the application be dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2025 WAIRC 01017

UNFAIR DISMISSAL APPLICATIONWESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THEO GUILLARD**PARTIES****APPLICANT**

-v-

THE TRUSTEE FOR PUGLISI FAMILY TRUST

RESPONDENT**CORAM** COMMISSIONER T KUCERA
DATE MONDAY, 22 DECEMBER 2025
FILE NO/S U 108 OF 2025
CITATION NO. 2025 WAIRC 01017

Result	Application Dismissed
Representation	
Applicant	Mr Theo Guillard
Respondent	Mr Ross Puglisi

Order

WHEREAS the applicant on 23 September 2025 filed a *Form 2 – Unfair Dismissal Application* under s 32 the *Industrial Relations Act 1979 (WA)* (**application**);

AND WHEREAS the respondent on 13 October 2025 filed a *Form 2A – Employer Response to Unfair Dismissal Application* (**response**);

AND WHEREAS the Commission on 22 October 2025 programmed the application for a conciliation conference to be held on 7 November 2025 (**conciliation conference**);

AND WHEREAS the parties during the conciliation conference, agreed to resolve the application pursuant to a signed Deed of Settlement (**Deed of Settlement**);

AND WHEREAS the Deed of Settlement required the applicant to file a *Form 1A – Multipurpose Form – Notice of Discontinuance (Form 1A)*;

AND WHEREAS the Commissioner based on advice received from the parties, is satisfied they have each complied with the terms of the Deed of Settlement, except the requirement for the applicant to file a Form 1A;

AND WHEREAS the applicant, despite confirming in correspondence to the Commission his preparedness to do so, has not filed a Form 1A, within a reasonable timeframe, following the parties' compliance with the Deed of Settlement;

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

–
 THAT the application be dismissed.

(Sgd.) T KUCERA,
 Commissioner.

[L.S.]

STOP BULLYING/SEXUAL HARASSMENT—

2025 WAIRC 00935

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DONNA BELLE PONGASE

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES, CASSANDRA SQUANCE, DAVID LESZENKO, KATIE HOLLINGSHEAD, TAYLA SUCKLING, MARINA MILOSAVLJEVIC MARINDOLAC

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE MONDAY, 24 NOVEMBER 2025

FILE NO. S 10 OF 2025, S 13 OF 2025, S 14 OF 2025

CITATION NO. 2025 WAIRC 00935

Result	Directions issued
Representation	
Applicant	Ms D Pongase on her own behalf
Principal	
Respondent	Mr M McIlwaine (of counsel) on behalf of the Department of Communities
First Individual	
Respondent	Ms C Squance on her own behalf
Second Individual	

Respondent Third Individual Respondent Fourth Individual Respondent Fifth Individual Respondent	Mr D Leszenko on his own behalf
	Ms K Hollingshead on her own behalf
	Ms T Suckling on her own behalf
	Ms M Marindolac on her own behalf

Direction

HAVING heard from Ms D Pongase, the applicant, and Mr McIlwaine (of counsel) on behalf of the principal respondent, the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT these proceedings (S 10 of 2025, S 13 of 2025, and S 14 of 2025) be stayed pending the determination of the applicant's application to challenge the dismissal decision;
- (2) THAT the programming directions issued on 3 November 2025 be vacated; and
- (3) THAT the directions hearing listed for 19 December 2025 be vacated.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.**2025 WAIRC 00907****STOP BULLYING ORDER**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
DONNA BELLE PONGASE

PARTIES**APPLICANT**

-v-

DEPARTMENT OF COMMUNITIES, CASSANDRA SQUANCE, DAVID LESZENKO, KATIE HOLLINGSHEAD, TAYLA SUCKLING, MARINA MILOSAVLJEVIC MARINDOLAC

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE THURSDAY, 6 NOVEMBER 2025
FILE NO. S 10 OF 2025, S 13 OF 2025, S 14 OF 2025
CITATION NO. 2025 WAIRC 00907

Result	Directions issued
Representation	
Applicant	Ms D Pongase on her own behalf
Principal	
Respondent	Mr M McIlwaine (of counsel) on behalf of the Department of Communities

Direction

THE Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) (**IR Act**), and by consent, hereby directs –

- (1) THAT the principal respondent file any documents and submissions it seeks to rely upon in support of its application for dismissal under s27(1)(a) of the IR Act by Tuesday, 11 November 2025;
- (2) THAT the applicant file any documents and submissions she seeks to rely upon to oppose the application by Tuesday, 18 November 2025; and
- (3) THAT the application be listed for hearing on 24 November 2025 at 10 a.m.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2025 WAIRC 00898

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DONNA BELLE PONGASE

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES, CASSANDRA SQUANCE, DAVID LESZENKO, KATIE HOLLINGSHEAD, TAYLA SUCKLING, MARINA MILOSAVLJEVIC MARINDOLAC

RESPONDENT**CORAM** SENIOR COMMISSIONER R COSENTINO**DATE** MONDAY, 3 NOVEMBER 2025**FILE NO.** S 10 OF 2025, S 13 OF 2025, S 14 OF 2025**CITATION NO.** 2025 WAIRC 00898

Result	Directions issued
Representation	
Applicant	Ms D Pongase on her own behalf
Employer	
Respondent	Mr M McIlwaine (of counsel) on behalf of the Department of Communities
First Individual Respondent	Ms C Squance on her own behalf
Second Individual Respondent	Mr D Leszenko on his own behalf
Third Individual Respondent	Ms K Hollingshead on her own behalf
Fourth Individual Respondent	Ms T Suckling on her own behalf
Fifth Individual Respondent	Ms M Marindolac on her own behalf

Direction

WHEREAS a directions hearing was convened following the filing of the following applications by the applicant:

- (a) Form 1A lodged on 31 July 2025 and filed on the same day in S 14 of 2025;
- (b) Form 1A lodged on 29 September 2025 and filed on 10 October 2025 in S 13 of 2025;
- (c) Form 1A lodged on 30 September 2025 and filed on 10 October 2025 in S 14 of 2025;
- (d) Form 1A lodged on 30 September 2025 and filed on 10 October 2025 in S 14 of 2025; and
- (e) Form 1A lodged on 30 September 2025 and filed on 10 October 2025 in S 13 of 2025;

AND HAVING heard from Ms D Pongase, the applicant, Mr McIlwaine (of counsel) on behalf of the employer respondent, Ms C Squance, the first individual respondent, Mr D Leszenko, the second individual respondent, Ms K Hollingshead, the third individual respondent, Ms T Suckling, the fourth individual respondent, and Ms M Marindolac, the fifth individual respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT the applicant is to file an outline of witness evidence for each witness whose evidence she will rely on at the final hearing of the consolidated matters, such outlines to comply with Practice Note 9 of 2021, by 14 November 2025;
- (2) THAT the respondents are to file an outline of witness evidence for each witness whose evidence that respondent will rely on at the final hearing of the consolidated applications, such outlines to comply with Practice Note 9 of 2021, by 5 December 2025;
- (3) THAT the consolidated matters be listed for a further directions hearing at 3:30 p.m. on 19 December 2025;

- (4) THAT any party who wishes to appear at the directions hearing by video or audio link must notify the Senior Commissioner's Chambers of their request by no later than 17 December 2025; and
- (5) THAT there be liberty to apply at short notice.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.**2025 WAIRC 00895****STOP BULLYING ORDER**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
DONNA BELLE PONGASE**PARTIES****APPLICANT**

-v-

DEPARTMENT OF COMMUNITIES, CASSANDRA SQUANCE

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE MONDAY, 3 NOVEMBER 2025
FILE NO/S S 10 OF 2025
CITATION NO. 2025 WAIRC 00895

Result	Orders issued
Representation	
Applicant	Ms D Pongase on her own behalf
Employer	
Respondent	Mr M McIlwaine (of counsel) on behalf of the Department of Communities
Individual	
Respondent	Ms C Squance on her own behalf

Order

WHEREAS on 31 July 2025, the applicant filed an application under this matter to merge or consolidate matters S 10 of 2025, S 13 of 2025 and S 14 of 2025;

AND HAVING heard from Ms D Pongase, applicant, Mr M McIlwaine on behalf of the Department of Communities, and Ms C Squance, individual respondent, the Commission, pursuant to the powers conferred the *Industrial Relations Act 1979* (WA), hereby orders –

THAT this matter be consolidated, heard and determined together with S 13 of 2025 and S 14 of 2025, and S 10 of 2025 be the lead matter

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.**2025 WAIRC 00896****STOP BULLYING ORDER**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
DONNA BELLE PONGASE**PARTIES****APPLICANT**

-v-

DEPARTMENT OF COMMUNITIES, DAVID LESZENKO

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE MONDAY, 3 NOVEMBER 2025
FILE NO/S S 13 OF 2025
CITATION NO. 2025 WAIRC 00896

Result	Orders issued
Representation	
Applicant	Ms D Pongase on her own behalf
Employer	
Respondent	Mr M McIlwaine (of counsel) on behalf of the Department of Communities
Individual	
Respondent	Mr D Leszenko on his own behalf

Order

HAVING heard from Ms D Pongase, applicant, Mr M McIlwaine on behalf of the employer respondent, and Mr D Leszenko, individual respondent, the Commission, pursuant to the powers conferred the *Industrial Relations Act 1979* (WA), hereby orders –
 THAT this matter be consolidated, heard and determined together with S 10 of 2025 and S 10 of 2025 be the lead matter.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2025 WAIRC 00893

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DONNA BELLE PONGASE

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES, HOUSING AND HOMELESSNESS (NOW DEPARTMENT OF HOUSING AND WORKS), KATIE HOLLINGSHEAD, TAYLA SUCKLING, MARINA MILOSAVLJEVIC MARINDOLAC

RESPONDENT

CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 3 NOVEMBER 2025
FILE NO/S	S 14 OF 2025
CITATION NO.	2025 WAIRC 00893

Result	Orders issued
Representation	
Applicant	Ms D Pongase on her own behalf
Employer	
Respondent	Mr M McIlwaine (of counsel) on behalf of the Department of Communities, Housing and Homelessness (Now Department of Housing and Works)
First Individual	
Respondent	Ms K Hollingshead on her own behalf
Second Individual	
Respondent	Ms T Suckling on her own behalf
Third Individual	
Respondent	Ms M Marindolac on her own behalf

Order

HAVING heard from Ms D Pongase, applicant, Mr M McIlwaine on behalf of the employer respondent, Ms K Hollingshead, first individual respondent, Ms T Suckling, second individual respondent, and Ms M Marindolac, third individual respondent, the Commission, pursuant to the powers conferred under s 27 of the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT the Form 1A applications filed on 31 July 2025 and 10 October 2025 for protective orders without a hearing be and are hereby dismissed; and
- (2) THAT this matter be consolidated, heard and determined together with S 10 of 2025 and S 10 of 2025 be the lead matter.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2025 WAIRC 00953

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JUAN DIEGO ARIZA MORENO

APPLICANT

-v-

LAWLEY'S BAKERY - CAFE, DAVID KATZIR

RESPONDENTS**CORAM**

COMMISSIONER T KUCERA

DATE

MONDAY, 1 DECEMBER 2025

FILE NO/S

S 18 OF 2025

CITATION NO.

2025 WAIRC 00953

Result

Application Dismissed

Representation**Applicant**

Juan Diego Ariza Moreno

Respondent

Sarah Thomas & David Katzir

Order

WHEREAS the applicant on 28 October 2025 filed a *Form 21 – Application for a Stop Bullying Order* under s 29(1)(e) of the *Industrial Relations Act 1979 (WA)* (**application**);

AND WHEREAS the respondent on 6 November 2025 filed a *Form 21A – Employer/Principal Response to an Application for a Stop Bullying Order* (**response**);

AND WHEREAS it appeared from the response the Commission would not have the jurisdiction to hear the claim because the applicant was employed by a ‘national system employer’ (**jurisdictional issue**);

AND WHEREAS the Commission on 11 November 2025 listed the application for mention / hearing for directions (**directions hearing**);

AND WHEREAS the directions hearing was adjourned for the applicant to seek legal advice in relation to the jurisdictional issue;

AND WHEREAS on 27 November 2025 the applicant, acknowledged in an email that he had received legal advice which confirmed that he was employed by a ‘national system employer’;

AND WHEREAS the Commission is satisfied that it does not have the jurisdiction to hear the application.

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

–

THAT the application be dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2025 WAIRC 00706

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LUCAS PORCARO

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA, DEBORAH HEGARTY,
STEVEN FISK**RESPONDENT****CORAM**

COMMISSIONER T KUCERA

DATE

FRIDAY, 15 AUGUST 2025

FILE NO/S

S 5 OF 2025

CITATION NO.

2025 WAIRC 00706

Result Application dismissed
Representation
Applicant Mr L Pocaro
Respondent Mr J Carroll of counsel

Order

WHEREAS the applicant on 30 April 2025 filed a *Form 21 – Application for a Stop Bullying Order* under s 29(1)(e) of the *Industrial Relations Act 1979* (**application**);

WHEREAS the respondent dismissed the applicant from his employment on Tuesday, 6 May 2025 (**applicant’s dismissal**);

AND WHEREAS the respondent on Wednesday, 7 May 2025 filed a *Form 1A – Application* requesting the Commission should, in view of the applicant’s dismissal, exercise a power under s 27(1) *the Industrial Relations Act 1979* to refrain from dealing with the application;

AND WHEREAS the Commissioner was advised the applicant had, in response to his dismissal commenced a ‘damaging action claim’ in the Industrial Magistrates Court under s 97A of *the Industrial Relations Act 1979*;

AND WHEREAS the Commission on Wednesday, 28 May and Monday, 4 August 2025 emailed the applicant to inquire on whether he intended to proceed with the application or to file a *Form 1A - Notice of Discontinuance* (**Commission’s emails**);

AND WHEREAS the applicant has not responded to the Commission’s emails;

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

THAT the application be dismissed.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

UNIONS—Matters dealt with under Section 66

2025 WAIRC 01015

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 01015
CORAM : CHIEF COMMISSIONER S J KENNER
HEARD : FRIDAY, 31 JANUARY 2025, MONDAY, 24 MARCH 2025, WEDNESDAY, 16 JULY 2025
DELIVERED : FRIDAY, 19 DECEMBER 2025
FILE NO. : PRES 1 OF 2025
BETWEEN : ADAM WOODAGE
Applicant
AND
ELECTRICAL TRADES UNION OF WORKERS OF AUSTRALIA (WESTERN AUSTRALIAN GOLDFIELDS' SUB-BRANCH), KALGOORLIE
Respondent
FILE NO. PRES 2 OF 2025
BETWEEN THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Applicant
AND
ELECTRICAL TRADES UNION OF WORKERS OF AUSTRALIA (WESTERN AUSTRALIAN GOLDFIELDS' SUB-BRANCH), KALGOORLIE
Respondent

Catchwords	:	Industrial Law (WA) - Application for orders pursuant to section 66 of the Act - Interim Executive Committee - Whether union Secretary validly appointed to casual vacancy - Composition of Committee - Scope of powers of Committee - Orders made
Legislation	:	<i>Industrial Relations Act 1979</i> s 6(f), s 27(1)(k), s 56(1)(a), s 66, s 66(1)(c), s 66(2), s 66(2)(a)(i), s 66(2)(ca), s 71
Result	:	Order issued

Representation:

Counsel:

PRES 1 of 2025

Counsel:

Applicant	:	Mr C Fogliani of counsel
Respondent	:	No appearance

Solicitors:

Applicant	:	Fogliani Lawyers
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PRES 2 of 2025

Counsel:

Applicant	:	Mr J Carroll of counsel
Respondent	:	No appearance

Solicitors:

Applicant	:	State Solicitor's Office
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Case(s) referred to in reasons:

Raschilla v Olson & Anor [2024] WAIRC 00887; (2024) 104 WAIG 2379

Amalgamated Engineering Union of Workers, Kalgoorlie Branch v The Electrical Trades Union of Workers of Australia (Western Australian Goldfields Sub-Branch), Kalgoorlie (1936) 15 WAIG 327

*Reasons for Decision***The applications**

- There are two applications before the Commission. The first is application PRES 1 of 2025 being an application by Mr Woodage under s 66 of the *Industrial Relations Act 1979* for orders in relation to the registered Rules of the Electrical Trades Union of Workers of Australia (Western Australian Goldfields Sub-Branch) (ETUG). The issue raised in the application is the status of a s 71 certificate issued to the Electrical Trades Union WA (ETUW), an organisation also registered under the *Act*. The ETUW has a current s 71 certificate, effective on 1 September 1995 ((1995) 75 WAIG 2693), which identified the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division as the counterpart federal body of the ETUW.
- Mr Woodage contended that by reason of r 35 of the ETUG's Rules, the relevant Rules of the ETUW are incorporated into the Rules of the ETUG, including the effect of the s 71 certificate. It was therefore contended that being subject to the s 71 certificate, the ETUG has not been required to hold elections for office holders under the currency of the present s 71 certificate applying to the ETUW.
- Application PRES 2 of 2025 is an application by the Registrar seeking the making of an order under s 66 of the *Act*, for the appointment of an Interim Executive Committee of the ETUG, on the basis that the Rules of the ETUG do not have the effect as contended by Mr Woodage. Accordingly, the Registrar contended that the ETUG has not held elections for office holders as required by its Rules, for many years. Furthermore, the Registrar maintained that those officers purporting to hold office in the ETUG, including Mr Woodage as the Secretary, do not validly hold office.
- By agreement between the parties, both applications were joined and were to be heard and determined together. Furthermore, as a result of conferral between the parties, the issue of whether an Interim Executive Committee should be established was no longer in contest. What remained in dispute was:
 - Whether Mr Woodage should be appointed to the Interim Executive Committee; and
 - Whether the powers of the Interim Executive Committee should be limited to making necessary alterations to the Rules of the ETUG to enable an election to be held for office holders.
- It was common ground that three persons who have volunteered to be on any Interim Executive Committee to be appointed, they being Messrs Barry, Hanson and Stafford, should be appointed as persons appropriately qualified.

Standing

- I am satisfied that the Registrar, under s 66(1)(c) of the *Act*, has standing of her own motion, to bring application PRES 2 of 2025. The standing of Mr Woodage, to both bring application PRES 1 of 2025, and to seek leave to intervene in application PRES 2 of 2025, is in dispute, on the footing that it was contended by the Registrar that Mr Woodage is not a person eligible to be a member of the ETUG.

Relevant background

- 7 The background to the current dispute is, in outline, as follows. Much of it is set out in the statutory declaration of the Registrar, Ms Susan Ivey Bastian, in support of application PRES 2 of 2025. The ETUG is an organisation registered under the *Act*, and which was first registered on 11 June 1935: (1935) 15 WAIG 133. An appeal against the organisation's registration was dismissed by a decision of the Court of Arbitration of Western Australia on 1 November 1935: *Amalgamated Engineering Union of Workers, Kalgoorlie Branch v The Electrical Trades Union of Workers of Australia (Western Australian Goldfields Sub-Branch), Kalgoorlie* (1936) 15 WAIG 327 per Dwyer P.
- 8 The history of the ETUG and its relationship to the ETUW is set out in some detail in Ms Bastian's statutory declaration. Given the agreed position of the parties, it is not necessary for me to narrate the full history of that relationship between the two organisations, save to say that the ETUG is a separately registered organisation to the ETUW, and its Rules, which have not been altered since in or about April 1975, make provision for separate elections of office holders in accordance with those Rules. In response to purported officer and membership returns lodged by the ETUG with the Registrar in January 2024, certain deficiencies were identified and notified to the ETUG.
- 9 In response to these queries by the Registrar, in relation to the purported returns, the ETUG contended that its Rules, by r 35, incorporated relevant rules of the ETUW which in turn, governed the operations of the ETUG. This included the application of the s 71 certificate held by the ETUW in respect of its counterpart federal body.
- 10 It is noted in the history, that substantial alterations have been made to the Rules of the ETUW in 2013 and 2022. In short, given the history of the ETUW and the ETUG, the Registrar was not satisfied that any sub-branch relationship in existence between them, relieved the ETUG of the obligation to conduct elections for office holders and to furnish the required returns to the Registrar under the *Act*, as a separately registered organisation. It is against this background, that the Registrar contended that the purported appointment of Mr Woodage as the Secretary of the ETUG at the ETUWA Biennial Conference on 30 September 2024, was not effective.

Evidence

- 11 Evidence as to the background leading to these proceedings, has been outlined above. Additionally, Mr Woodage filed an affidavit in application PRES 1 of 2025. He testified that on 30 September 2024 he was also appointed to the casual vacancy in the office of the Secretary of the federal counterpart body, by its full name known as the Divisional Branch Secretary of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical, Energy and Services Division, Western Australian Branch (the ETU federal Branch). At the same time, Mr Woodage was appointed to the casual vacancy as the Secretary of the ETUW and purportedly as the Secretary of the ETUG. Mr Woodage also referred to the other officials of the three bodies just mentioned, Ms Mason and Mr Fowlie, who are the President and Vice-President respectively of the ETUW, the ETU federal Branch and purportedly, the ETUG.
- 12 Mr Woodage testified that as far as he was aware, the ETUG Executive Committee has not appointed any Committeemen under its Rules, and the positions of Treasurer and Trustees remain vacant. In order to avoid disputation as to the validity of his appointment to the casual vacancy as the Secretary of the ETUG, and the validity of the appointment of other office holders of the ETUG, Mr Woodage has agreed to the establishment of an Interim Executive Committee.
- 13 In relation to membership, Mr Woodage gave evidence that there is overlapping coverage between the ETUG and the ETUW, with every member of the former being a member of the latter, as well as being a member of the ETU federal Branch. Despite separate registration under the *Act*, Mr Woodage said that as long as he has been aware, the ETUG was always regarded as a sub-branch of the ETUW and its membership was not seen as separate from the ETUW.
- 14 As to financial matters, Mr Woodage testified that members of the ETUW, the ETUG and the ETU federal Branch pay one set of union dues, which are deposited into a bank account held by the ETUW. Monies held in this bank account are then used to fund the operations of all three organisations. In terms of resourcing generally, the ETUG relies on the ETUW, as the former does not have its own resources such as premises, office equipment, staff or independent finances.
- 15 As to the coverage of the ETUG, Mr Woodage testified that it extends over a large area from Eucla in the south of the State, to the Goldfields region and further to the State's north. On this basis, Mr Woodage expressed the view that it would not be reasonable to expect the other three nominated members of the Interim Executive Committee, Messrs Stafford, Barry and Hanson, all of whom work full time for the Water Corporation, to have the time to attend to meetings of members of the ETUG, and to seek resources from the ETUW in order for the ETUG to continue to operate, and to progress steps such as alterations to its Rules. Mr Woodage expressed the view that if he was a member of the Interim Executive Committee, then his presence on it would facilitate these needs being met, given his position as the Secretary of the ETUW, and his capacity to direct resources to be provided as needed.
- 16 As to the question of the functions of the Interim Executive Committee, Mr Woodage testified that he did not consider it practical to limit its task to getting the Rules of the ETUG altered only for the purpose of holding an election, that being the preferred position of the Registrar. Whilst accepting it would be for the Interim Executive Committee to decide, Mr Woodage expressed the view that it would make sense to also explore the possibility of an amalgamation of the ETUG with the ETUW with the membership, given that the organisation will have to consult members about alterations to its Rules in any event. If an amalgamation was favoured, then in Mr Woodage's view, this could be expeditiously progressed, without the need to hold elections. According to Mr Woodage, adopting the Registrar's approach would lead to a delay in regularising the operations of the ETUG.
- 17 Mr Woodage also gave further oral evidence in the proceedings as to his working background and experience. Mr Woodage commenced work in the Pilbara in 2005 as an electrical and instrumentation apprentice. Thereafter, he worked at the Fremantle Port Authority, when he left the membership of the ETUW for a period, but rejoined it in about 2012. Mr Woodage

then worked on a variety of projects and locations in the State, including one or two periods working overseas. He remained a member of the ETUW throughout that time.

- 18 In 2018, Mr Woodage said that he was approached by the then Secretary of the ETUW about taking up a position as an employed organiser with the union. He took the position and remained employed until about July 2024, when as noted above, the former Secretary retired and Mr Woodage took up the position of Secretary in September 2024. The appointment as Secretary was to all three organisations, the ETUW, the ETUG and the ETU federal Branch. Mr Woodage has not worked as an electrician since he took up the position of an organiser.
- 19 In terms of the process leading to his appointment as the Secretary in September 2024, Mr Woodage accepted that at the meeting of members, members were present who were not members of the ETUG. Mr Woodage holds office until the next election for office holders, due in 2028.
- 20 In terms of the operation of the ETUW, Mr Woodage accepted that as the Secretary of the union, he is obliged to act in the best interests of the membership and be subject to the directions of the Council and the Executive. He accepted also, that it is better for the operations of the organisations, given that they operate mostly in the federal industrial relations jurisdiction, for finances to be kept in the ETUW. Having said that, Mr Woodage testified that monies are returned to the ETUG, in order to provide it with resources. His evidence was that the approach to resourcing is not Perth city centric. Mr Woodage also reiterated his view that it would be preferable for there to be an amalgamation between the ETUW and the ETUG. Even if he were not on the Interim Executive Committee, the ETUG would continue to receive funding for necessary expenditure.

Contentions of the parties

- 21 On behalf of Mr Woodage, it was submitted that as a practical matter, the only way of achieving the effective operation of an Interim Executive Committee is if Mr Woodage was a member of it. It was submitted that in reality, the ETUG, whilst a separate legal registered entity under the *Act*, has operated as a sub-branch of the ETUW. Furthermore, many if not most of the ETUG members are in the federal industrial relations system and rely upon the ETU federal Branch for industrial representation and services. Additionally, as noted above, the ETUG is completely reliant on the ETUW for resources and Mr Woodage, as the Secretary of the ETUW, is well placed to assist an Interim Executive Committee to undertake any necessary action.
- 22 As to the proposal that the powers of an Interim Executive Committee be limited, this was opposed by Mr Woodage. It was submitted that there should be no limitations on the powers of the Committee and the Committee ought be able to exercise any powers available under the Rules to regularise the operation of the union, including alterations to its Rules and consultation with members. In the alternative, if there is to be any restriction on the activity of the Committee, then Mr Woodage submitted that its first task ought be to consult the members as to whether there should be an amalgamation between the ETUG and the ETUW. If so, then steps should be taken to give effect to that course. On the other hand, if the answer to that question is no, then the Committee ought take steps to arrange for elections of office holders of the ETUG.
- 23 On behalf of the Registrar, a number of submissions were made. First, it was contended that on the evidence, it had not been established that Mr Woodage had standing to make the application in application PRES 1 of 2025, or to intervene and be heard in relation to application PRES 2 of 2025. In this respect, whilst Mr Woodage gave evidence in relation to his appointment to fill casual vacancies of Secretary in the organisations, there was no evidence before the Commission as to how that occurred and whether the Rules of the ETUG were complied with. Furthermore, it was submitted that there was no evidence before the Commission that Mr Woodage was eligible for membership of the ETUG at any material time.
- 24 Most importantly, the Registrar contended that in order to be eligible to be appointed as Secretary to fill a casual vacancy, there needs to be compliance with r 6(iii). This deals with a by-election to fill a vacant office in between triennial elections of office holders. This sub-rule requires that nominations be called in the 'E.T.U. News'. There needs to be a secret ballot of adult financial members present at a specially summoned general meeting, or a meeting of the Executive on the giving of seven clear days' notice.
- 25 Furthermore, by r 6B(c), the Registrar contended that no person shall hold the office of Secretary unless they have been financial members of the union for at least two years preceding their nomination. It was submitted that there is no evidence before the Commission to establish that Mr Woodage met this eligibility requirement and nor was the process contemplated by the Rules for an election to a casual vacancy, complied with. As to whether Mr Woodage was a 'financial member', the Registrar referred to my decision in *Raschilla v Olson & Anor* [2024] WAIRC 00887; (2024) 104 WAIG 2379 at [25]. It was accepted however, that, that case dealt with different union rules and is an interim decision.
- 26 Accordingly, the Registrar contended that based on the evidence, the conclusion ought be reached that Mr Woodage was not eligible for, and was not validly appointed to, the position of Secretary of the ETUG. Furthermore, on the evidence, Mr Woodage did not have standing to bring application PRES 1 of 2025 and nor is there any basis that he has a right to be heard in relation to application PRES 2 of 2025. On the basis of these contentions, and whilst no disrespect was intended as to Mr Woodage's experience and capacity as a union Secretary, the Registrar submitted that the evidence does not support any basis on which Mr Woodage's views as to the operation of an Interim Executive Committee of the ETUG should be given any weight.
- 27 A further point raised by the Registrar was that in any event, if Mr Woodage was appointed to an Interim Executive Committee, then given he is the Secretary of the ETUW, there would be a conflict of interest between that position and his membership of the Committee in terms of the control over funds, which should properly be funds of the ETUG.
- 28 The requirement that an Interim Executive Committee be appointed for the limited purpose of taking steps to enable an election for office holders to be held at the earliest opportunity, was submitted by the Registrar to be consistent with the objects of the *Act*, in particular ss 6(e) and 6(f), in promoting the democratic control of registered organisations. In this regard, it was further contended by the Registrar that given Mr Woodage's stated views of the benefits of an amalgamation between the

ETUG and the ETUW, then it is clear that this approach would be promoted if Mr Woodage was on the Interim Executive Committee. It was submitted this would not be consistent with the democratic control of the organisation. The best approach, according to the Registrar, is for the Committee to be established for the limited purpose of the conduct of an election, to get the organisation 'back on track', and then enable the elected office holders to decide the organisation's future, in accordance with the *Act* and its Rules.

Consideration

- 29 Having regard to the arguments of the parties, I consider that there is considerable merit to the Registrar's submissions that Mr Woodage was not, on the grounds that she advances, validly elected to take up the casual vacancy of Secretary of the ETUG in or about September 2024. It would appear that the procedural requirements set out in the Rules of the ETUG concerning appointments to casual vacancies to the Executive of the union were not followed.
- 30 I consider that there are also quite compelling arguments to the effect that Mr Woodage was not, prior to his purported appointment to the casual vacancy of Secretary, eligible to be a member of the ETUG in accordance with r 3 – Constitution of the union. It was not in dispute that Mr Woodage has not worked as an electrician in the electrical industry since he took up a position as an employed organiser with the ETUW in 2018. It is difficult to see how Mr Woodage could, over the last seven years or so to date, and six years or so, up until his purported appointment as the Secretary of the ETUG in September 2024, be regarded as 'usually engaged' as an electrician, for the purposes of r 3.
- 31 In my view, without, for the reasons I set out below, the need to finally decide the matter, it appears to me that 'usually engaged' for the purposes of a union constitutional rule, is intended to refer to a circumstance in which a person is regularly employed in a relevant vocation or calling, but who may for various reasons, have intermittent periods where they are not working. For example, a person engaged in the construction industry, may have periods of not be employed on a construction site, in between projects. In my view, that is the circumstance to which this part of r 3 is directed.
- 32 Furthermore, it is also probable that Mr Woodage was not, immediately prior to his appointment to the casual vacancy as Secretary of the ETUG in September 2024, an 'appointed officer of the Union' as a category of member of the union in r 3. The evidence is Mr Woodage at, and prior to that time from 2018, was employed as an employee organiser of the union. An organiser is not an officer. It is plain from r 5 and r 6 of the ETUG Rules, and the heading 'Duties of Officers' in the Rules, that the appointed officers of the union are those specified in r 5.
- 33 As to the contention that Mr Woodage, being a qualified electrical inspector, is an 'employee whose calling is peculiar to the Electrical Industry', I have some doubts as to the correctness of this proposition. Irrespective as to whether Mr Woodage would be an employee of the ETUG, as opposed to an elected or appointed officeholder, and this is not clear by any means without evidence as to the issue, it is at least arguable that Mr Woodage, as Secretary of the ETUW, is engaged not in the electrical industry, but in the industry of trade unions, for the same preliminary reasons that I expressed in *Raschilla* at [67]. I accept however, that the Rules under consideration in *Raschilla*, and the circumstances of that case, are distinguishable from the present matter.
- 34 Despite these matters however, in my view, in order to put the ETUG 'back on track', requires a practical approach. There is no criticism of Mr Woodage by the Registrar, as I have noted above, in relation to his capacity and commitment as a Secretary of a union such as the ETUW and the ETU federal Branch. I note that it is proposed that Messrs Barry, Hansen and Stafford be appointed to any Interim Executive Committee that I order be established. I also note on the affidavit evidence which they have filed, they are all employed full time as electricians across large geographical areas of the State.
- 35 With full time jobs in the electrical industry, and the responsibilities which no doubt attach to their work, and the regions over which they are required to work, I have a significant concern about the practicality, and I say this with all due respect, of the three of them conducting the business of the ETUG. In particular to put in place steps to be taken to regularise the organisation's Rules, and its administration, and any other matters I require the Committee to attend to. This is not a small task. I have real reservations about placing that burden solely on Messrs Barry, Hansen and Stafford, given their other commitments.
- 36 It is not a requirement that I form the view that Mr Woodage was validly appointed to the casual vacancy as Secretary of the ETUG, as a precondition to him being a member of any Interim Executive Committee, that I determine should be formed. It is open to the Chief Commissioner, in exercising powers under s 66(2) of the *Act*, to make such orders and give such directions in relation to the rules of the organisation, as I consider appropriate. I must be guided in this respect, by what I consider to be the most efficacious means to enable an organisation that has gone off the tracks, to be put back on track.
- 37 In this case, Mr Woodage is an experienced union Secretary and has the capacity and resources available to enable funds to be dispersed to the ETUG from the ETUW, and to make other resources available to the ETUG, as may be required for the purposes of any Interim Executive Committee work. While in this regard the Registrar raised the issue of a conflict of interest, given the orders I propose to make, I do not consider this will be problematic. In any event, even if it becomes an issue, the matter can be brought back before me, on the liberty to apply I intend to include in my order.
- 38 Accordingly, I have reached the view that it is not necessary for me to finally decide the Registrar's contentions as to the validity of Mr Woodage's appointment to the casual vacancy of Secretary of the ETUG, for the purposes of the formation of an Interim Executive Committee, and the tasks that it will be required to undertake. Accordingly, I have decided that there ought be an Interim Executive Committee formed, and it should comprise Mr Woodage and Messrs Barry, Hansen and Stafford.
- 39 As to the standing issue, as the proceedings have transpired, in reality application PRES 1 of 2025 brought by Mr Woodage, has been overtaken by application PRES 2 of 2025, brought by the Registrar, seeking orders for the establishment of an Interim Executive Committee. Accordingly, I intend to dismiss application PRES 1 of 2025. Whilst it was not ruled on during the course of the hearing in these matters, I consider that given the issues arising, Mr Woodage has a sufficient interest in application PRES 2 of 2025, to grant him leave to intervene under s 27(1)(k) of the *Act*. For me to form the view that

Mr Woodage has a sufficient interest, does not require me to conclude that he was, at the material times, validly elected as Secretary of the ETUG.

- 40 As to the second issue to be determined, that being the powers of the Interim Executive Committee, I am persuaded by the Registrar's argument that the primary obligation imposed on the Committee should be to regularise the Rules of the ETUG to facilitate an election of office holders at the earliest opportunity. In my view, I see no impediment to an election being required to be held by no later than 31 July 2026. This will require the Committee to promptly make any necessary steps to alter the Rules of the ETUG in early 2026. Once any necessary alterations to the Rules have been made and certified by the Registrar, the conduct of an election ought be relatively straight forward.
- 41 Once an election is held, those persons who are elected to office within the ETUG, can determine, in conjunction with the views of the membership, what its future may hold, whether that be an amalgamation with the ETUW or not, or other matters. In my opinion, this course is most consistent with my obligations under s 66 of the *Act*, to apply its provisions in accordance with the objects of the *Act* in s 6(f) to encourage the democratic control of organisations and the full participation by members in its affairs, which I regard as of paramount importance in such matters.
- 42 I will arrange to relist application PRES 2 of 2025 for a report back hearing at the end of February 2026, to hear from the parties as to progress on these issues. Furthermore, as I have noted above, a liberty to apply will be included in the order I intend to make, to enable the parties to bring the application back before me, in the event that any issues arise as to the operation of my orders.
- 43 One final matter remains. Mr Woodage conceded that r 6A(1) of the ETUG Rules is in contravention of s 56(1)(a) of the *Act*, as it purports to appoint the Secretary of the union as the Returning Officer in elections for office holders in the union. In accordance with s 66(2)(a)(i) of the *Act*, I will disallow this sub-rule. From what was before me in the proceedings, it would appear unnecessary for me to take any steps under s 66(2)(ca) of the *Act*. However, if there is something I am not aware of that may impact this assessment, I request that the parties advise me as soon as possible.
- 44 Finally, I should note that regrettably, I have been unable to determine this matter until now, due to other very substantial and pressing matters listed before me. Minutes of proposed orders now issue.

2025 WAIRC 01027

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ADAM WOODAGE

APPLICANT

-v-

ELECTRICAL TRADES UNION OF WORKERS OF AUSTRALIA (WESTERN AUSTRALIAN GOLDFIELDS' SUB-BRANCH), KALGOORLIE

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE WEDNESDAY, 24 DECEMBER 2025
FILE NO/S PRES 1 OF 2025
CITATION NO. 2025 WAIRC 01027

Result Order issued
Appearances
Applicant Mr C Fogliani of counsel
Respondent No appearance

Order

This matter having come on for hearing before me on 16 July 2025, and having heard Mr C Fogliani of counsel on behalf of the applicant, and there being no appearance by the respondent, the Chief Commissioner pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
 Chief Commissioner.

2025 WAIRC 01028

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-v-

ELECTRICAL TRADES UNION OF WORKERS OF AUSTRALIA (WESTERN AUSTRALIAN
GOLDFIELDS' SUB-BRANCH), KALGOORLIE**RESPONDENT****CORAM** CHIEF COMMISSIONER S J KENNER**DATE** WEDNESDAY, 24 DECEMBER 2025**FILE NO/S** PRES 2 OF 2025**CITATION NO.** 2025 WAIRC 01028**Result** Order issued**Appearances****Applicant** Mr J Carroll of counsel**Respondent** No appearance*Order*

This matter having come on for hearing before me on 16 July 2025, and having heard Mr J Carroll of counsel on behalf of the applicant and Mr C Fogliani of counsel on behalf of the respondent, the Chief Commissioner pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT Mr Adam Woodage be and is hereby granted leave to intervene in the herein application.
- (2) THAT an Interim Executive Committee of the respondent is established, constituted by:
 - (a) Mr Adam Woodage;
 - (b) Mr Ben Stafford;
 - (c) Mr Dean Barry; and
 - (d) Mr Jeremy Hansen.
- (3) THAT Mr Adam Woodage is designated Secretary for the purposes of rules 5 and 11 of the respondent's Rules.
- (4) THAT rules 6, 6A, 6B, 6C, 6D, and 6E of the respondent's Rules have no operative effect.
- (5) THAT the Interim Executive Committee shall have the authority to exercise all of the powers, duties, and functions of the Executive Committee of the respondent and each of the members of the Interim Executive Committee shall have the authority to exercise all of the powers, duties and functions of the office of member of the Executive Committee held by each of them, but only for the purposes of:
 - (a) the conduct of the day to day business of the respondent;
 - (b) making any necessary alterations to the Rules of the respondent to enable an election to be held;
 - (c) facilitating the holding of an election for office holders of the respondent; and
 - (d) taking any steps and/or making any necessary arrangements for the purposes of (b) and (c) above.
- (6) THAT rule 6A(1) of the respondent's Rules be and is hereby disallowed.
- (7) THAT unless as otherwise varied, this order will operate until 31 August 2026.
- (8) THAT there be liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2025 WAIRC 01020

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TIM CLARKE

APPLICANT

-v-

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

RESPONDENT**CORAM**

CHIEF COMMISSIONER S J KENNER

DATE

MONDAY, 22 DECEMBER 2025

FILE NO/S

PRES 8 OF 2024

CITATION NO.

2025 WAIRC 01020

Result

Order issued

Representation**Applicant**

Mr T Borgeest of counsel

Respondent

Mr T Borgeest of counsel

Order

HAVING heard Mr T Borgeest of counsel on behalf of the applicant and the respondent, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT unless otherwise further varied, the order made on 22 August 2025 ([2025] WAIRC 00712) be and is hereby further extended to 31 March 2026.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.**PROCEDURAL DIRECTIONS AND ORDERS—**

2025 WAIRC 01026

CITY OF STIRLING OUTSIDE WORKFORCE AGREEMENT 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CITY OF STIRLING

APPLICANT

-v-

THE LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

FIRST RESPONDENT

AUSTRALIAN SERVICES UNION WESTERN AUSTRALIAN BRANCH

SECOND RESPONDENT

ELECTRICAL TRADES UNION WA

THIRD RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 24 DECEMBER 2025

FILE NO/S

AG 77 OF 2025

CITATION NO.

2025 WAIRC 01026

Result

Order issued

Representation**Applicant**

City of Stirling

First Respondent

The Local Government, Racing and Cemeteries Employees Union (WA)

Second Respondent Australian Services Union Western Australian Branch
Third Respondent Electrical Trades Union WA

Order

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

THAT the name of the second respondent ‘Australian Services Union Western Australian Branch’ listed in the Form 1 – General Application be deleted and substituted with ‘Western Australian Municipal, Administrative, Clerical and Services Union of Employees’.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2025 WAIRC 00996

APPEAL AGAINST THE DECISION OF COMMISSIONER TO TAKE REMOVAL ACTION ON 3 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRETT MORGAN PALMER

APPLICANT

-v-

COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO
 COMMISSIONER T B WALKINGTON
 COMMISSIONER C TSANG

DATE

WEDNESDAY, 17 DECEMBER 2025

FILE NO.

APPL 4 OF 2025

CITATION NO.

2025 WAIRC 00996

Result

Directions issued

Representation

Appellant

Mr D Weekley on behalf of Mr Brett Morgan Palmer

Respondent

Ms A Miller on behalf of the Commissioner of the Western Australian Police

Direction

The Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the time for the parties to make any application(s) under s 33R of the *Police Act 1892* (WA) be extended to 19 December 2025.
2. THAT the time for the parties to file documents pursuant to reg 92 of the *Industrial Relations Commission Regulations 2005* (WA) be extended to 19 December 2025.
3. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner,
By the Commission.

2025 WAIRC 01018

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TYLAH MORGAN

APPLICANT

-v-

VERTECH PTY LTD

RESPONDENT**CORAM**

COMMISSIONER T KUCERA

DATE

MONDAY, 22 DECEMBER 2025

FILE NO/S

B 85 OF 2025

CITATION NO.

2025 WAIRC 01018

Result

Orders issued

Representation**Applicant**

Ms Tylah Morgan

Respondent

Ms Leanne Hislop

Order

HAVING heard from Ms T Morgan on behalf of the applicant and Ms L Hislop on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders -

1. THAT the applicant is to file any witness statements in the manner required by Practice Note 9 of 2021, by Monday 19 January 2026.
2. THAT the respondent is to file any witness statements in the manner required by Practice Note 9 of 2021 by Monday, 16 February 2026.
3. THAT the applicant is to file an outline of written submissions in support of the application by Monday, 16 March 2026.
4. THAT the respondent is to file an outline of written submissions in opposition to the application by Monday, 30 March 2026.
5. THAT the matter is to be listed for a directions hearing not before Monday, 13 April 2026.
6. THAT there be liberty to apply.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2026 WAIRC 00013

**VARIATION OF MINIMUM CASUAL LOADING RATE FOR SPECIFIED AWARDS GENERAL ORDER 2025
WAIRC 00136**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNIONSWA INCORPORATED

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

COMMISSIONER T B WALKINGTON

DATE

TUESDAY, 13 JANUARY 2026

FILE NO.

CICS 13 OF 2025

CITATION NO.

2026 WAIRC 00013

Result

Directions issued

Representation

Applicant Mr G Hansen on behalf of UnionsWA Incorporated
Section 29B Party Ms L Reid and Ms R Carbone on behalf of the Government Sector Labour Relations Division of the Department of Local Government, Industry Regulation and Safety

Direction

HAVING heard from Mr G Hansen on behalf of UnionsWA Incorporated, Ms L Reid and Ms R Carbone on behalf of the Government Sector Labour Relations Division of the Department of Local Government, Industry Regulation and Safety, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT the matter be determined on the papers; and
- (2) THAT any written submissions in relation to the matter be filed by Tuesday, 20 January 2026

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

By the Commission In Court Session.

2026 WAIRC 00009

**APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE'S COURT IN THE MATTER NUMBER M
142 OF 2024 GIVEN ON 4 DECEMBER 2025**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PATRICIA ANGELICA ROJO DIAZ

PARTIES**APPELLANT**

-v-

TOWN OF CAMBRIDGE

RESPONDENT**CORAM**

FULL BENCH
CHIEF COMMISSIONER S J KENNER
COMMISSIONER T B WALKINGTON
COMMISSIONER T KUCERA

DATE

FRIDAY, 9 JANUARY 2026

FILE NO/S

FBA 1 OF 2026

CITATION NO.

2026 WAIRC 00009

Result Order issued**Representation****Appellant** In person**Respondent** No appearance*Order*

HAVING heard Ms P Diaz on her own behalf and there being no appearance on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the time for filing the appeal book in the herein appeal be and is hereby extended to 3 February 2026 and the appeal book is to be served on the respondent by 5 February 2026.

By the Full Bench

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2026 WAIRC 00014

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2025

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

GLENN ROBERT MACDONALD

APPELLANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT**CORAM**

MITCHELL J

DATE

WEDNESDAY, 14 JANUARY 2026

FILE NO/S

IAC 1 OF 2026

CITATION NO.

2026 WAIRC 00014

Result

Programming Order Issued

Order

1. The appellant file submissions and a list of legal authorities and serve a copy on the respondent by 4pm on 30 January 2026.
2. The respondents file submissions and a list of legal authorities and serve a copy on the appellant by 4pm on 27 February 2026.
3. The appellant file the appeal book and provide three hard copies and serve a copy on the respondents by 4pm on 20 March 2026.

[L.S.]

(Sgd.) S BASTIAN,
Clerk of the Court.

2025 WAIRC 00981

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 MARCH 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JORG ARNO NOTTLE

APPELLANT

-v-

DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD

COMMISSIONER T B WALKINGTON – CHAIRPERSON

MR BRUCE HAWKINS – BOARD MEMBER

MR MARK HAYMAN – BOARD MEMBER

DATE

THURSDAY, 11 DECEMBER 2025

FILE NO

PSAB 21 OF 2024

CITATION NO.

2025 WAIRC 00981

Result

Direction issued

Representation**Appellant**

Mr M Gutzinger (of counsel)

Respondent

Mr J Carroll (of counsel)

Direction

HAVING heard from Mr M Gutzinger on behalf of the applicant 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 the applicant is to file written submissions in support of its application for discovery by 23 January 2026.
2. THAT the respondent is to file written submissions in respect of the applicant’s application for discovery by 6 February 2026.
3. THAT the Board is to determine the application for discovery on the papers.
4. THAT the Directions Hearing listed for 18 December 2025 is vacated.
5. THAT the matter be listed for a Directions Hearing on a date to be fixed after the application for discovery is determined.
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 01021

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ANTONIO NICOLA MESSERE

PARTIES

APPLICANT

-v-

SHIRE OF MORAWA WESTERN AUSTRALIA

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE MONDAY, 22 DECEMBER 2025
FILE NO. U 45 OF 2025
CITATION NO. 2025 WAIRC 01021

Result	Directions issued
Representation	
Applicant	Mr A Messere on his own behalf
Respondent	Mr A Sinanovic (of counsel) on behalf of the Shire of Morawa

Direction

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

1. THAT Mr Messere’s email dated 2 December 2024 and Annexure A to the email be treated as an application under section 27(1)(o) of the Act requiring the respondent to:
 - a. prepare a list of discoverable documents in the categories listed in Annexure A, in an approved form; and
 - b. to file and serve the list of documents within a specified time; and
 - c. make the documents specified in the list available for inspection and copying
 and that regulation 20(4) of the *Industrial Relations Commission Regulations 2005* (WA) be dispensed with.
2. THAT the applicant file written submissions in support of the application together with affidavit evidence relied upon in support of the application by 12 January 2026.
3. THAT respondent file written submissions opposing the application or any part of it together with affidavit evidence relied upon by 26 January 2026.
4. THAT application for discovery be listed for hearing on a date to be fixed, not before 26 January 2026.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00006

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DARRELL CURNOW

APPLICANT

-v-

SHIRE OF COOROW

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 7 JANUARY 2026

FILE NO.

U 98 OF 2025

CITATION NO.

2026 WAIRC 00006

Result

Direction issued

Representation

Applicant

Mr D Curnow

Respondent

Mr A Sinanovic (of counsel) on behalf of the Shire of Coorow

Direction

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

- (1) THAT at the hearing listed for 29 January 2026 at 10:00 a.m., the applicant is to show cause why the application should not be dismissed for want of prosecution, pursuant to s 27(1)(a) of the Act.
- (2) THAT the applicant is to file an affidavit deposing to relevant facts for the purpose of showing cause why the applicant's application should not be dismissed by no later than 16 January 2026.
- (3) THAT the applicant is granted leave to appear at the hearing on 29 January 2026 by video link.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2025 WAIRC 00997

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELLI GOUGOULIS

APPLICANT

-v-

OFFICE OF THE AUDITOR GENERAL

RESPONDENT

CORAM

COMMISSIONER T KUCERA

DATE

WEDNESDAY, 17 DECEMBER 2025

FILE NO/S

U 115 OF 2025

CITATION NO.

2025 WAIRC 00997

Result

Order issued

Representation

Applicant

Mr S Pack (of counsel)

Respondent

Mr J Carroll (of counsel)

Programming Order

HAVING HEARD FROM Mr S Pack (of counsel) on behalf of the Applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers of the *Industrial Relations Act* 1979 (WA), hereby orders –

1. THAT the applicant is to file her witness outlines and any documents on which she intends to rely by 23 January 2026.

2. THAT the respondent is to file any witness outlines and documents on which it intends to rely by 13 February 2026.
3. THAT the applicant is to file her outline of submissions together with any witness outlines in reply by 27 February 2026.
4. THAT the respondent is to file its outline of submissions by 13 March 2026.
5. THAT the matter is listed for a one day hearing on Monday 30 March 2026.
6. THAT there be liberty to apply.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Canning Industrial Agreement 2025 AG 9/2025	12/01/2026	City of Canning	Western Australian Municipal, Clerical and Services Union (WASU), The Local Government Racing Cemeteries Employees Union (LGRCEU), The Construction, Forestry, Mining and Energy Union of Workers	Commissioner T Kucera	Agreement registered
City of Joondalup Inside Workforce Industrial Agreement 2025 AG 78/2025	19/12/2025	City of Joondalup	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Senior Commissioner R Cosentino	Agreement registered
City of Stirling Inside Workforce Agreement 2025 AG 76/2025	15/12/2025	City of Stirling	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Commissioner T B Walkington	Agreement Registered
City of Stirling Outside Workforce Agreement 2025 AG 77/2025	05/01/2026	City of Stirling	The Local Government, Racing and Cemeteries Employees Union (WA), Western Australian Municipal, Administrative, Clerical and Services Union (WASU), Electrical Trades Union WA	Senior Commissioner R Cosentino	Agreement registered
Shire of Corrigin Enterprise Agreement 2025 AG 75/2025	18/12/2025	Shire of Corrigin	The Western Australian Municipal, Administrative, Clerical and Services Union of Employees, The Local Government, Racing and Cemeteries Employees Union (WA)	Senior Commissioner R Cosentino	Agreement registered
Shire of Kojonup Team Member Enterprise Agreement 2025 AG 79/2025	12/01/2026	Shire of Kojonup	Western Australia Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Senior Commissioner R Cosentino	Agreement registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2025 WAIRC 00984

DISPUTE RE BARGAINING

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

DEPARTMENT OF FIRE AND EMERGENCY SERVICES

PARTIES

APPLICANT

-v-

UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 12 DECEMBER 2025

FILE NO/S

C 29 OF 2025

CITATION NO.

2025 WAIRC 00984

Result	Order issued
Representation	
Applicant	Mr T Bishop (of counsel)
Respondent	Mr C Fogliani (of counsel)

Order

WHEREAS on 23 October 2025, the applicant applied pursuant to s 42E of the *Industrial Relations Act 1979* (WA) to the Western Australian Industrial Relations Commission (**Commission**), seeking the Commission's assistance to facilitate good faith bargaining for a replacement Industrial Agreement, and to encourage the parties to exchange or divulge attitudes or information to prevent the deterioration of industrial relations;

AND WHEREAS in the Application, the applicant specified they were seeking orders for the respondent to provide the Second Offer for a replacement Industrial Agreement to its members in neutral terms;

AND WHEREAS on 24 October 2025, the respondent acknowledged they would provide the Second Offer in full to members in neutral terms on the same day;

AND WHEREAS on 30 October 2025, the applicant requested an urgent conference on the basis that:

- (a) the parties have reached an impasse in bargaining; and
- (b) there was a risk of continuing and escalating industrial action by the respondent;

AND WHEREAS several Conferences were held with the Commission on 31 October 2025, 10 November 2025, 13 November 2025 and 25 November 2025;

AND WHEREAS on and following the Conference held on 13 November 2025, the applicant indicated they were seeking Interim Orders for the respondent to direct its members to cease all forms of industrial action and bans;

AND WHEREAS on and following the Conference held on 13 November 2025, several without-prejudice proposals were put forth by both parties in an attempt to resolve matters through an agreed outcome;

AND WHEREAS following the urgent Conference held on 25 November 2025, the Commission issued a Direction ([2025] WAIRC 00944), directing the applicant to file and serve upon the respondent, an Amended Application specifying the Interim Orders sought, and the grounds in support of its Application for Interim Orders;

AND WHEREAS following the urgent Conference held on 25 November 2025, a Hearing was listed for 11 December 2025 to hear from the parties on the applicant's Amended Application for Interim Orders;

AND WHEREAS on 26 November 2025, the applicant filed and served upon the respondent an Amended Application in compliance with the Direction ([2025] WAIRC 00944). The Amended Application specified they were seeking Interim Orders for the respondent to direct its members to cease the industrial action and lift the 13 bans specified in Schedule A below;

AND WHEREAS the parties continued to engage in discussions with each other in an attempt to resolve matters by way of an agreed outcome;

AND WHEREAS at the commencement of the Hearing listed on 11 December 2025, the parties indicated they were willing to engage in a Conference discussion, for the purpose of resolving matters by conciliation;

AND WHEREAS at the Conference held on 11 December 2025, the parties reached an agreement by consent;

AND WHEREAS an agreement was reached to facilitate community safety through the high threat period, and promote ongoing bargaining in good faith while acknowledging the parties' statutory rights during the bargaining process;

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

1. THAT by 5pm on Friday, 12 December 2025, the respondent is to lift the 13 bans listed in the applicant's Amended Application lodged 26 November 2025 (Schedule A - below) effective until 9 June 2026.
2. THAT the respondent agrees not to take any new industrial action/bans in pursuit of bargaining before 9 June 2026.
3. THAT the respondent is to inform its members that, except for the remaining bans, conditions have returned to business as usual.
4. THAT the respondent is to inform its members that the bans were lifted by agreement and share the draft communications with the applicant before release.
5. THAT in exchange for the above, the applicant will make an administrative payment, comprising:
 - (a) 5% annual increase calculated from Friday, 12 December 2025.
 - (b) the annualised wage adjustment, which increases the penalty factor from 40.074% to 46.06%, calculated from Friday, 12 December 2025.
6. THAT the administrative payment in Order 5 above will offset any future wage increases that may be agreed to or arbitrated.
7. THAT the administrative payment in Order 6 above will be paid as soon as practicable and no later than 26 January 2026.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2025 WAIRC 01024

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 13 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 01024

CORAM : PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER C TSANG – CHAIR
 MR M FINNEGAN – BOARD MEMBER
 MS E HAMILTON – BOARD MEMBER

HEARD : WEDNESDAY, 13 AUGUST 2025,
 THURSDAY, 14 AUGUST 2025

DELIVERED : TUESDAY, 23 DECEMBER 2025

FILE NO. : PSAB 34 OF 2024

BETWEEN : STEPHEN BRUCE BURNS
 Appellant
 AND
 DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Whether the appellant’s access to documents in an electronic folder that he was not restricted from accessing amounts to a breach of discipline where the Code of Conduct only authorises access and use of official and confidential information for authorised purposes – Whether dismissal was a disproportionate response to the breach of discipline given the appellant’s 26 years of good service – Whether the appellant was treated unfairly on the grounds of disparate treatment vis-à-vis other employees who also accessed the electronic folder

Legislation : *Public Sector Management Act 1994* (WA)

Result : Appeal dismissed

Representation:

Appellant : Mr J Tebbutt (as agent)

Respondent : Mr J Carroll (of counsel)

Cases referred to in reasons:

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers –Western Australian Branch v John Holland Construction & Engineering Pty Ltd (1999) 79 WAIG 1302

Barnett v The Western Australian Education Department [2019] WAIRC 00028

Fagan v Minister for Corrective Services [2023] WAIRC 00324

Millward v North Metropolitan Health Services [2022] WAIRC 00776

Minister for Corrective Services v Fagan [2023] WAIRC 00984

Pantovic v Public Transport Authority of Western Australia [2011] WAIRC 00876

Portilla v BHP Billiton Iron Ore Pty Ltd [2005] WAIRC 02604

Sandland v Australian Capital Territory t/as Canberra Health Services [2023] FWC 3389

Tolmie v Director General, Department for Planning and Infrastructure [2006] WAIRC 03630

United Workers’ Union v Terminals Pty Ltd T/A Quantem Bulk Liquid Storage & Handling [2024] FWC 2209

Reasons for Decision

- 1 These reasons concern the appellant’s (**Mr Burns**) appeal of the respondent’s decision on 13 December 2024, to dismiss him from employment under the disciplinary provisions of the *Public Sector Management Act 1994* (WA) (**PSM Act**).
- 2 On 16 May 2025, the parties filed an Agreed statement of the issues to be determined, stating:

Agreed legal issues that are to be determined at hearing

A non-exhaustive list of the legal issues the Board will need to determine at hearing include:

- (a) Whether accessing TRIM folder F24/0067236 [(**TRIM Folder**)] amounted to a breach of discipline.

- (b) If so, whether dismissal was a disproportionate response to the breach of discipline in all of the circumstances.
- (c) Was [Mr Burns] treated unfairly on the grounds of disparate treatment, taking into account all of the circumstances?

The evidence

3 On 16 May 2025, the parties filed their Agreed Facts, stating:

The parties agree as follows:

1. [Mr Burns] was employed within the Department of Education as a Level 5 public service officer in the position of Consultant – Risk and Assurance, with the respondent being [Mr Burns'] employing authority.
2. A copy of the Job Description Form for [Mr Burns'] position is found at **Agreed Document 1**.
3. Following a disciplinary process conducted under Part 5 of the [PSM Act], on 13 December 2024 the respondent took disciplinary action by way of dismissal. [Mr Burns] was paid 5 weeks' salary in lieu of notice.

Disciplinary Process

4. The respondent issued [Mr Burns] a suspected breach of discipline letter on 17 September 2024: **Agreed Document 2**.
5. [Mr Burns], through the Civil Service Association (CSA), provided a response to the suspected breach of discipline letter on 2 October 2024: **Agreed Document 3**.
6. The respondent issued a proposed findings and proposed action letter on 26 November 2024: **Agreed Document 4**.
7. [Mr Burns], through the CSA, responded to this proposed finding and proposed action letter on 4 December 2024: **Agreed Document 5**.
8. The respondent gave the final outcome letter on 13 December 2024: **Agreed Document 6**.

Factual matters

9. In the course of his employment with the respondent, [Mr Burns] was able to access documents on the Department's document management system called TRIM.
10. On 15 May 2024, in accordance with Regulation 8 of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (**Regulations**), five staff in the Risk and Assurance Directorate within the Department, including [Mr Burns], were sent letters advising that as a result of a Form and Function review (**Review**), organisational restructure may occur that could include changes to roles and responsibilities, creation of new positions and abolishment of positions no longer required. A copy of the Regulation 8 letter sent to [Mr Burns] on 14 May 2024 is found at **Agreed Document 7**.
11. That letter was later rescinded and a new Regulation 8 letter was given to [Mr Burns] on around 4 September 2024: **Agreed Document 8**.
12. A meeting of all staff from the Risk and Assurance Directorate was held on 15 May 2024. [Mr Burns] attended that meeting. At the meeting, a formal presentation was provided to staff in attendance with respect to the progress of the Review, including intended next steps. Amongst other things staff were advised that future actions included preparing Job Description Forms (JDFs) for new positions, undertaking Classification Assessments, and seeking feedback from staff and unions on the revised or new JDFs. Copies of JDFs were not provided to staff at the meeting.
13. A copy of the powerpoint presentation presented to staff at the 15 May 2024 meeting is found at **Agreed Document 9**. A copy of this presentation was sent to [Mr Burns] on 15 May 2024.
14. On 2 July 2024 another meeting was held and presentation was delivered to staff. [Mr Burns] attended that meeting. At that meeting, staff were advised that JDFs for the proposed new positions were still being finalised and amendments were being made to current JDFs. Staff in attendance were also advised a handout of potential changes and Functional Responsibilities would be provided to them at the end of the meeting, in lieu of the JDFs themselves. Staff were informed that JDFs still needed to be endorsed by the Executive Director Professional Standards and Conduct [Mary Brown (**Ms Brown**)] and then reviewed by the Department's Classification Committee.
15. A copy of the powerpoint presentation presented to staff at the 2 July 2024 meeting is found at **Agreed Document 10**.
16. A copy of the two handouts provided to staff at the 2 July 2024 meeting is found at **Agreed Document 11 and 12**.
17. On 18 July 2024, [Mr Burns] accessed documents, related to the [Review], in [the TRIM Folder].
18. [The TRIM Folder] was titled 'Strategic management-Reviewing (other), Risk and Assurance Directorate Form and Function Review.'

Other documents

19. A copy of the respondent's Code of Conduct, current as at October 2023, is found at **Agreed Document 13**.

4 On 13 June 2025, the respondent filed their Bundle of Documents (**Respondent's Bundle**), which included the following record of the positions held by Mr Burns:

Date	Position	Location	FTE	Action
11/12/98	Info Syst Analyst	Info Systems Develop & Support	1.00	Transfer from other PS

				Agency
03/03/03	Information Technology Officer	Kimbyly Dist Educ Office Broome	1.00	Redeployment
14/06/05	Systems Support Officer	Financial Policy & Services	1.00	Redeployment
13/08/05	Systems Support Officer	Financial Policy & Services	1.00	Acting Higher Level
14/09/05	Information Technology Officer	Kimbyly Dist Educ Office Broome	1.00	Return from Temp Assignment
14/09/05	Systems Support Officer	Financial Policy & Services	1.00	Redeployment
17/02/14	Consultant Risk and Audit	Audit & Risk Management	1.00	Redeployment
05/10/20	Compliance Officer	Financial Services	1.00	Acting Same Level
01/01/21	Consultant Risk and Audit	Internal Audit and Assurance	1.00	Return from Temp Assignment
11/01/21	Ppl Cons Schl Finance Systems	Financial Services	1.00	Acting Same Level
01/01/23	Consultant Risk and Audit	Risk and Assurance	1.00	Return from Temp Assignment
23/01/23	Consultant Risk and Audit	Risk and Assurance	1.00	Restructure
03/04/23	Ppl Cons Schl Finance Systems	Financial Services	1.00	Acting Same Level
01/07/23	Consultant Risk and Audit	Risk and Assurance	1.00	Return from Temp Assignment
11/06/24	Finance Cons School Systems	Financial Services	1.00	Acting Same Level
22/06/24	Consultant Risk and Audit	Risk and Assurance	1.00	Return from Temp Assignment
15/12/24	Consultant Risk and Audit	Risk and Assurance	1.00	Dismiss with Notice

- 5 Page 39 of the Respondent's Bundle, 'Documents accessed by Stephen Burns on TRIM', (re-ordered by the Board so that the documents appear in chronological order of Mr Burns' access), states:

No.	Date/Time	Document title	Confidential/Sensitive	Comment
2	18/07/2024 at 10:39 AM 18/07/2024 at 10:51 AM 18/07/2024 at 10:39 AM 18/07/2024 at 10:51 AM	D24/0433787 Email to Tamara Findlay - Correspondence to Ms Rikki Hendon, CPSUCSA re: review of the Risk and Assurance directorate 18.09.23	Yes	Document viewed (x2) Document modified (x2)
3	18/07/2024 at 10:39 AM 18/07/2024 at 10:51 AM 18/07/2024 at 10:39 AM 18/07/2024 at 10:51 AM	D24/0433780 Email to Rikki Hendon, CPSUCSA re: review of the Risk and Assurance directorate 18.09.23	Yes	Document viewed (x2) Document modified (x2)
4	18/07/2024 at 10:41 AM 18/07/2024 at 10:41 AM	D24/0420266 DoE Acumen Alliance R D24/0433780review – Functional Responsibilities with Track Changes - Updated 11.5.24 - WITH FEEDBACK	Yes	Document viewed Document modified
5	18/07/2024 at 10:42 AM 18/07/2024 at 10:42 AM	D24/0470136 Department of Education - Risk and Assurance, Consultation Plan & Timeline as at 28 June 2024	Yes	Document viewed Document modified
6	18/07/2024 at 10:42 AM 18/07/2024 at 10:42 AM	D24/0441816 Agenda - Acumen Alliance Planning Meeting - 20 June 2024 <i>Meeting agenda that included information about: responsibilities of selected JDFs; information about the Executive Summary; information about contents of the presentation with Directorate staff.</i>	Yes	Document viewed Document modified
7	18/07/2024 at 10:44 AM 18/07/2024 at 10:44 AM	D24/0443016 Email from Rowena Williams - Audit and Compliance JDFs - review - Business Support Officer 20.06.24	Yes	Document viewed Document modified
8	18/07/2024 at 10:47 AM 18/07/2024 at 10:47 AM	D24/0443062 Email from Mary Brown to Stephen Burns - Private and Confidential	Yes	Document viewed Document modified

		19.06.24		
9	18/07/2024 at 10:49 AM 18/07/2024 at 10:55 AM 18/07/2024 at 10:49 AM 18/07/2024 at 10:55 AM	D24/0341113 Email from Mary Brown to Selina Aziz - Consultation on proposal for change attachments	Yes	Document viewed (x2) Document modified (x2)
10	18/07/2024 at 10:49 AM 18/07/2024 at 10:49 AM	D24/0341102 Email to Richard Lobb and Aaron Silver - Signed Reg 8 letters served on 15 May 2024	Yes	Document viewed Document modified
11	18/07/2024 at 10:49 AM 18/07/2024 at 10:49 AM	D24/0455907 Email from Brent Saraceni to Mary Brown - Org Charts - Risk and Assurance Directorate 24.06.24	Yes	Document viewed Document modified
12	18/07/2024 at 10:51 AM 18/07/2024 at 10:51 AM	D24/0438629 Email from Acumen Alliance - JDFs - Policy L4 and L5 18.06.24	Yes	Document viewed Document modified
13	18/07/2024 at 10:52 AM 18/07/2024 at 10:52 AM	D24/0421770 Email from Rhiannon Grosse/Warwick Claydon CPSU/CSA 12.06.24 - Response to Ms Mary Brown – Consultation Process, with attachments A, B & C 12.06.24	Yes	Document viewed Document modified
14	18/07/2024 at 10:52 AM 18/07/2024 at 10:52 AM	D24/0384832 Email from Tonya Lamatoa - Change Proposal Risk and Assurance Directorate 30.05.24	Yes	Document viewed Document modified
15	18/07/2024 at 10:54 AM 18/07/2024 at 10:54 AM	D24/0344184 Email from Zoe Johnston re: contact person and attached CSA Public Service Consultation on Proposed Change letter template 14.05.2024	Yes	Document viewed Document modified
16	18/07/2024 at 10:55 AM 18/07/2024 at 10:55 AM	D24/0340036 CSA Public Service Consultation on Proposed Change (CI 55 PSCA) - 15.05.24	Yes	Document viewed [Document modified]
1	18/07/2024 at 10:57 AM 18/07/2024 at 10:58 AM 18/07/2024 at 10:57 AM 18/07/2024 at 10:58 AM 18/07/2024 at 11:00 AM 18/07/2024 at 11:00 AM 18/07/2024 at 11:00 AM 18/07/2024 at 11:00 AM	D24/0438743 DoE_R A Business Support Officer, Audit and Analytics JDF 17.6.24	Yes	Document viewed (x2) Document modified (x4) Document extracted (x2)
17	18/07/2024 at 11:02 AM 18/07/2024 at 11:02 AM	D24/0438775 DoE Policy and Program Officer JDF L5 00035602 highlighted 18.6.24	Yes	Document viewed Document modified
18	18/07/2024 at 11:06 AM 18/07/2024 at 11:06 AM	D24/0438839 DoE R&A Functional Responsibilities - Updated 170524	Yes	Document viewed Document modified

6 Mr Burns gave evidence-in-chief that:

- (a) He is 62 years old and at the time of his dismissal he had been employed with the respondent for about 26 years.
- (b) He holds a Diploma in Computer Programming, a Graduate Diploma in Public Sector Management, and a Certificate of Internal Auditing.
- (c) He has not previously been the subject of any disciplinary matters.

- (d) After a restructure of the Financial Services team in 2014, his position (Systems Support Officer) was made redundant, and he commenced working for the Audit & Risk Management team as a Consultant Risk and Audit.
- (e) At the time, he had experience with IT projects working as a systems analyst under the IT branch, doing systems analysis and design. However, he had no experience undertaking risk assessments.
- (f) In the period from 2014, he was seconded to the Financial Services team several times on 6-monthly contracts.
- (g) As a Consultant Risk and Audit, he 'looked after the risk registers the principals would send in.' There was a mandatory first term report, and he was responsible for telephoning people and ensuring they provided the necessary documents. He was also involved in both the census and annual audit.
- (h) His tasks were largely administrative, such as collecting and adjusting spreadsheets. This involved telephoning or sending emails to collect data, recording the data received on the S drive and hyper-linking it to the software, until all responses were received, and then reaching a conclusion about each of the students.
- (i) When his manager, Eric Fleming (Mr Fleming), commenced, there was a push for documents to no longer be stored on the S drive, but on TRIM.
- (j) Various departments would send them a list of documents, which were stored in TRIM. The documents were in response to audit findings, so he would check the responses to ensure they addressed the audit findings.
- (k) In terms of TRIM, his job involved filing documents to TRIM and finding documents on TRIM. He found documents on TRIM by using the TRIM number, or by using search terms. If he received an email with an attachment, he would file the email and the attachment separately in TRIM, and within TRIM he would put a link in between the records so the email would have a 'contains' link which would link to the item that it contained, and a 'contained in' link that points back to the item filed.
- (l) If a document in TRIM or a TRIM folder was restricted, he would not have access to it; 'you wouldn't even see it existed. It wouldn't be there for you to look at.'
- (m) He found working in the Risk and Assurance Directorate 'a bit boring', as they 'didn't really have enough work to keep me busy.'
- (n) He does not believe the work he was doing matches his Job Description (**JDF**). The JDF says he is a Risk Consultant, but he was doing administrative tasks surrounding the work of the Audit Review Committee (**ARC**).
- (o) He was unhappy working in the Risk and Assurance Directorate and wanted to leave. The restructure of the Directorate commenced in 2022, and as part of the restructure he was told he would receive a regulation 9 redeployment letter.
- (p) He attended the Review meetings. In attendance were the Finance, Risk and Audit teams. The meetings were structured to discuss matters affecting the Finance team first, the Risk team second, and the Audit team last. Consequently, he found two-thirds of the meetings 'meaningless as far as I was concerned.'
- (q) At the meetings, there was a presentation by way of slideshow, and attendees were given an opportunity to ask questions which were answered.
- (r) He only remembers attending the last two meetings.
- (s) From the meetings, he felt hopeful that he was going to receive a regulation 9 letter, informing him that he was to be redeployed. He has previously been redeployed three times.
- (t) He recalls that following each meeting, he received an email attaching a copy of the presentation given at that meeting. He would drag the attachment out of the email 'to a folder and just stop and leave it there [for] looking at it when I had a moment.'
- (u) In terms of the restructure information and the process, while he missed the first two meetings, he was aware that 'someone had to approve [the] JDFs, and they were waiting for that.'
- (v) He was issued with a regulation 8 letter, which informed him that his position was going to be abolished.
- (w) He received a regulation 9 letter when he was on leave without pay.
- (x) He came across the TRIM Folder when he was doing a search through TRIM. He cannot recall what he was searching for, but a document came up in a list of documents. When he clicked on that document, it showed the cataloguing data for the document, which included the title of the document, its author, the person who deposited the document in TRIM, and the folder that the document was contained in. He clicked on the link in the cataloguing data that took him to the folder itself.
- (y) He does not remember why he opened the TRIM Folder. He said, 'I mean, it was there. I wondered what else was in it, I guess, [what] else was available that might be related to that document.'
- (z) He 'clicked the link that was on the screen in front of me. That opened the folder up in front of me, and then I just saw a number of documents there that looked like they'd update me on what was going on with the review.'
- (aa) When he opened the TRIM Folder, he saw a list of approximately two dozen files.
- (bb) When he was in the TRIM Folder, he 'just had a look at some of the documents.' '[O]ne of them looked like it was relevant to the new position they were creating, and I was working on the document to do a handover for that.' 'I just figured I'd use the role statement from that to decide what I needed to put in and leave out of that document.'
- (cc) He thought the handover document was saved to his desktop, but it was not found there. So, it could be in the S

drive, or it could be in a subfolder, or even in his mailbox.

- (dd) The handover document was initially a process document for the Department listing the steps required for ARC and Audit Findings Register (AFR) reporting, which he edited to replace the references to storing documents on the S drive to storing documents on TRIM, including the TRIM folder names and numbers. The role statement for the new position was helpful for his handover document because the role statement outlined the role's main tasks, and 'I was just using the role [statement] to decide what I wanted to keep in and chuck out [of the handover document]. There was no point in me giving them instructions on tasks they wouldn't be performing.'
- (ee) He looked at the other documents in the TRIM Folder, because 'they were just there', and he was hoping he might find 'attachments I might have missed, [because] I didn't think I'd gone to all of the meetings. But beyond that, it was just looking at them, really. They're there. They were in front of me. I'm a systems analyst. I investigate things. It's just part of who I am.'
- (ff) He believes he was in the TRIM Folder for about 27 minutes.
- (gg) He only downloaded one document, twice, which was the JDF. The first time he downloaded the JDF, it went to a temporary folder that was 18 folders deep and he did not know it was there, so he re-downloaded the JDF to his desktop to make it easy to find.
- (hh) After having accessed the TRIM Folder, and downloaded the JDF twice, he did not think he had done anything wrong, because 'there were no locks on the folder. I wasn't trying to break into anything. It was just there in front of me. It was relevant to my day-to-day kind of stuff. They told us it was an open, accountable process. I didn't see any reason why it would need to be locked unless they were hiding something, so why would I expect it to be hidden?'
- (ii) The TRIM Folder was not restricted. 'I didn't see anything in there that [was] critical. I was a bit concerned they had the reg 8 letters in there. I only looked at mine. I didn't look at anybody else's.' 'I think from that point, I probably decided I probably shouldn't be continuing to rummage through it because it had documents in there that either should have been protected or shouldn't have been in that folder.'
- (jj) He did not raise the issue of the TRIM Folder being unrestricted because '20 minutes after I'd touched that folder, I'd completely forgotten about it. I just moved on.'
- (kk) His line manager, Mr Fleming has produced a document which refers to him telling Mr Fleming that he 'could access the JDFs', but he does not 'remember the meeting I had with Eric at all', 'I have no recollection what I spoke to [Mr Fleming] about. I don't remember that meeting at all.'
- (ll) He believes he completed the Accountable and Ethical Decision-making training (AEDM Training) more than a year before he accessed the TRIM Folder, and the Recordkeeping Awareness Training (RA Training) two years before he accessed the TRIM Folder.
- (mm) The disciplinary process began when someone from Standards and Integrity (SID) took him into an office and informed him that he would be investigated but would remain at work during the investigation. He is aware that others (Sean De Souza, Eric Fleming and Claude Benomi) accessed the TRIM Folder without authorisation because 'we were all basically told at the same time.' 'We were at work. They said, "You're having a meeting downstairs". [I] went first, [Eric] went next, I believe. Sean didn't get a meeting that day because he wasn't at work. He had a meeting when he came back. So when I got back to the office, I was talking to the other people in the office and asking [them] if they'd looked in the folder as well. Eric said he had, he'd seen a [file]. I heard about other people on other times.'
- (nn) Mr Benomi is a level 7 Risk Manager and has been in that position for 10 years. Mr De Souza is a level 6 Principal Auditor and has been in that position for some years. Compared to them, he has less experience in dealing with risk.
- (oo) Only him and Mr De Souza have been dismissed. Mr Benomi and Mr Fleming remain employed.
- (pp) The dismissal has had a devastating impact on him. While he is receiving a transition to retirement pension and it is a source of income, it is only a small amount of money each month. This has left him fairly housebound as he does not have the means to 'go out or do anything.' 'It's been depressing, obviously, without any work to do.' The dismissal has also 'hammered my self-esteem.'
- (qq) Getting another job is impossible because:
I'm 62 years old. My skills are generic, not specific. I don't have any up-to-date, like, programming language skills. I couldn't go back to programming. Ah, I haven't done any systems analysis in a long time, so it would be hard to get back into that. Ah, the Department has had me doing things like, um, just - just scratch work, where I'm just repairing spreadsheets for people and things like that, and effectively, ah, deskilled me to some degree.
- (rr) Given his dismissal, 'I'd be much more careful if I ever went near TRIM again.' 'At the time, I clicked the link that I looked at to get to the file on the spur of the moment. I'll never do that again after the trauma that that's caused me.'
- 7 Mr Burns gave evidence under cross-examination that:
- (a) Agreed Document 1 is the JDF that applied to his position (Level 5 Consultant in the Risk and Assurance Directorate) at the time of his dismissal. It states: (emphasis added)

Key responsibilities

- **Assist the Program Manager Audit in the development, application and monitoring of the Risk and Audit frameworks and strategies across the Department.**

- Provide operational support and input to research and the review and analysis of risk and business processes to ensure effectiveness and alignment with the Department's operational and strategic business objectives, policies and practices.
 - Provide advice and support to stakeholders to ensure their risk analysis and plan is developed and implemented in accordance with relevant legislation including the development of control strategies, structures and accountability mechanisms as they pertain to risk and audit.
 - Assist in the design, implementation, facilitation and delivery of targeted Statewide information sessions on key business issues pertaining to the Department's risk and audit strategies.
 - Provide input and support to the identification of professional development, training and education needs of individuals within the Department.
 - Quality assure and **maintain the data management system, reporting requirements and integrity for the collection of risk and audit data.**
- (b) He agrees that part of his job when Mr Fleming was his manager, involved him sending out requests to parts of the Department. They would provide returns, and he would enter the data into the system. However, he denies that this constitutes '[maintaining] the data management system.' He denies that this forms part of maintaining the 'reporting requirements' for the Department. He also denies that this constitutes assisting his manager 'in the development, application and monitoring of the Risk and Audit frameworks and strategies across the Department.' He said that he was assisting his manager by doing clerical duties, he was not assisting in the development, application or monitoring of the Risk and Audit frameworks or strategies.
- (c) He agrees that in his role, he assisted Mr Fleming with the AFR. If the Auditor General issued recommendations to the Department, they would be recorded in the AFR. He agrees that for the ARC, every three months, he would send out a list of their existing items. When they responded, he would file the responses and update the AFR.
- (d) He agrees that part of his role working under Mr Fleming, 'was to drill down to make sure that the relevant area's response answered what they were asked.' The relevant area would respond with a spreadsheet. He would review the spreadsheet to ensure that there was a response to each line item. If there was none, he would follow up for a response. He would also take the spreadsheet and save it in TRIM.
- (e) Every six months, the Department closes outstanding tasks. He would contact the relevant area to seek evidence, and he would review the evidence to ensure its veracity. The evidence would be sent to him as a soft copy, a TRIM reference or an IKON reference. If he was provided with a TRIM reference, he would type the reference number in to TRIM and call up the document. If he was unable to call up the document, he would contact the sender to advise.
- (f) He agrees that part of his job requires him accessing TRIM. He also agrees that part of his job involves him looking up a specific email that he had been asked to locate in TRIM.
- (g) He disagrees that it was a part of his job to interrogate departmental databases. While he wrote tools to help interrogate the asset manager system, to look for red flags which would identify high risk transactions, he disagrees that part of his job involves him writing the queries to interrogate the databases.
- (h) While he agrees that he has conducted audits, he disagrees the JDF (at [7(a)] above) relates to the duties he was performing when he was working with Mr Fleming.
- (i) He agrees that it was a requirement of his job to complete the AEDM Training, and that he completed it.
- (j) While he does not recall completing the AEDM Training more than once, he agrees that the most recent time he completed the AEDM Training was in June 2022. While he agrees the AEDM Training likely identifies the existence of the Code of Conduct, he does not recall the AEDM Training including training with respect to the Code of Conduct.
- (k) Despite the AEDM Training slides being Document 10 of the Appellant's Bundle of Documents filed on 8 August 2025 (**Appellant's Bundle**), he said that he did not look at them before the hearing. On being shown the slides, he said that he does not remember the slides at all, he does not remember the pictures, he does not remember the faces on the slides, and he does not remember the actual slides themselves.
- (l) The slide on page 118 of the Appellant's Bundle, states:
 Only access, or allow others to access, official records, information, data and systems for purposes related to our, or their, function.
- (m) While he does not recall seeing the content at [7(l)] above in the AEDM Training, he does not deny it was in the AEDM Training.
- (n) He recalls completing the RA Training in 2024 and agrees it was likely in February 2024.
- (o) The page from the RA Training on page 234 of the Appellant's Bundle contains the following 'banner':
 REMEMBER
 EVERYONE IS INDIVIDUALLY RESPONSIBLE FOR KEEPING GOOD RECORDS
- (p) He remembers this banner.
- (q) The section above the banner states:
Maintaining Confidentiality

The Department's Code of Conduct includes standards around the protection, security and dissemination of confidential information. We access and use official and confidential information only for authorised purposes. We must not share this information with others, without appropriate authority to do so.

- (r) While he does not recall seeing the content at [7(q)] above in the RA Training, he does not deny it was in the RA Training.
- (s) He agrees he was bound by the obligation in the Code of Conduct (Agreed Document 13), that:
- Protect official and confidential information**
- We access and use official and confidential information only for authorised purposes.
- (t) Page 5 of the Respondent's Bundle, 'Ms Brown's notes from 19 March 2024 meeting', states:
- Stephen – We are already co-sourcing so I'm not sure what the stakeholders are getting at.
- (u) The meeting held on 19 March 2024 was the first of the four Review meetings. He does not remember attending the meeting and does not recall asking the question at [7(t)] above.
- (v) Page 30 of the Appellant's Bundle, which is one of the slides presented at the 19 March 2024 meeting, states:
- 5. Next Steps**
- ...
- Prepare JDFs for new positions and undertake Classification Assessments as required.
 - Meet with the staff and unions to share revised and/or new JDFs and obtain feedback.
- (w) He does not recall seeing the slide at [7(v)] above at the meeting. He recalls receiving the information that the next steps in the Review will be preparing the JDFs. He remembers 'that they were going to prepare JDFs [and] get them classified.' He agrees that this meant that staff would not get the JDFs until after they were classified.
- (x) He does not recall attending the second of four meetings held on 24 April 2024. If there was an attendance record of the meeting indicating he attended the meeting, he would not disagree that he attended, but he has 'no recollection of the meeting whatsoever.'
- (y) Page 51 of the Appellant's Bundle, which is one of the slides presented at the 24 April 2024 meeting, states:
- 5. Next Steps**
- ...
- Prepare JDFs for new positions and undertake Classification Assessments as required.
 - Meet with the staff and unions to share revised and/or new JDFs and obtain feedback.
- (z) He does not recall seeing the slide at [7(y)] above. He agrees that his understanding from attending these meetings was that the JDFs would be classified first, and then staff would get access to the JDFs after the classification.
- (aa) He recalls attending the third meeting on 15 May 2024, and that a slideshow was presented. He agrees that he received emails enclosing the slideshows after the first and second meetings and expects that he received an email enclosing the slideshow presented at the third meeting following its conclusion.
- (bb) It was at the third meeting that he received his first regulation 8 letter. He later received correspondence from Ms Brown withdrawing the regulation 8 letter. He subsequently received another regulation 8 letter.
- (cc) The regulation 8 letter informed him that his position may be abolished, and he subsequently received a regulation 9 letter informing him that his position is abolished. He attended the fourth meeting on 2 July 2024, prior to receiving the regulation 9 letter.
- (dd) He recalls that during the fourth meeting, staff were told that they would be provided with JDFs once the JDFs have been signed off by the Classification Review Committee. He was aware that at that time, the JDFs had not been classified. He also remembers that at the fourth meeting, the staff were told that the full Acumen report would not be provided to them, however, an executive summary will be. He agrees a slideshow was shown at this meeting.
- (ee) He does not recall receiving an email from Ms Brown attaching the slideshow presentation following the fourth meeting, but he agrees that it would have happened. He also does not recall receiving a handout identifying the potential changes to the JDFs at the fourth meeting, nor receiving the handout in an email from Ms Brown following the meeting.
- (ff) Page 19 of the Respondent's Bundle, an email from Ms Brown to him and others, dated Tuesday, 2 July 2024, 2:50pm, states:
- Good afternoon all
- Thank you for your attendance at today's meeting. Please find the relevant documents as discussed.
- Your feedback would be appreciated by COB 17 July 2024. Please let me know if you require an extension beyond this date.
- (gg) He does not recall that the 'relevant documents' referred to in the email at [7(ff)] above, were handouts with potential changes to the JDFs; he also does not remember the email at [7(ff)] above at all.
- (hh) He agrees that his understanding from attending these meetings is that the JDFs would be classified first, and then the staff would get access to the JDFs after that classification.

- (ii) Page 43 of the Agreed Bundle, which is one of the slides presented at the 2 July 2024 meeting, states:
- PROGRESS UPDATE**
- Organisational structure
 - A draft organisational structure with indicative levels has been developed and will be presented at this meeting.
 - JDFs
 - JDFs for the proposed new positions are currently being finalised and amendments will be made to current JDFs as required.
 - A handout of potential changes will be provided at the end of this meeting.
 - Draft Report – Executive Summary
 - In response to staff requests, the Draft Report – Executive Summary will be provided to you following this meeting.
- (jj) He understood that, at that time, the JDFs were not finalised. He also understood that the Department would not be providing staff with the whole report; with staff only to be provided with an executive summary.
- (kk) Page 55 of the Agreed Bundle, the PowerPoint presentation from the 2 July 2024 meeting, states:
- Next steps:
- ...
- Finalise the JDFs and undertake classification assessments for new positions as required.
- (ll) At the time of this meeting, he understood that the JDFs had not been finalised. He understood, at that time, that the JDFs had not been classified, and that they would be classified before they were handed out to staff.
- (mm) While Agreed Document 11 commencing on page 57 of the Agreed Bundle is titled ‘Handout from 2 July 2024 meeting’, he does not remember the document at all and cannot say whether he received the handout by email.
- (nn) Page 26 of the Respondent’s Bundle, an email from Ms Brown to him and others, dated Tuesday, 16 July 2024, 4:15pm, states:
- To that end, the next steps include to;
- Have the relevant JDF’s reviewed and classified.
 - Endorse the final structure.
- (oo) He does not recall reading the email. However, if he read the email, he agrees he would have understood the email to say that the JDFs had not been classified at that time.
- (pp) He agrees that he accessed the TRIM Folder on 18 July 2024 between 10:39am and 11:06am. When asked whether he understood from the title of the TRIM Folder (Strategic management-Reviewing (other), Risk and Assurance Directorate Form and Function Review) that the folder related to the Review, he said that he did not really look at it; the folder was in front of him so he just clicked on it; ‘I didn’t read it.’
- 8 In relation to the documents in the TRIM Folder that were accessed (at [5] above), Mr Burns gave evidence under cross-examination that:
- (a) In relation to the title of **document 2**, he does not agree that he has no business opening a document that is correspondence which he is not a sender, recipient, or copied into. He said that all correspondence between the CSA and the Department would have been sent to him by the CSA. Looking at the title, he would not have been concerned with opening the document, because he would have already seen all the correspondence from the CSA in respect of the Review. When put to him, that if he had been provided with all correspondence from the CSA, he would not need to click on, and open, **document 2** to see what is happening with the Review, he said, ‘it’s right there in front of me. I just looked at it.’
- (b) In relation to **document 2**, he agrees that he was clicking on an email from his manager to the CSA. He said that he was ‘just looking for any attachments or anything that might be relevant to the progress and stuff that’s going on, or what they’re deciding to do. I did think I was missing some documents.’ While he agrees he received an email from Ms Brown two days prior updating him on the Review (at [7(nn)] above), he disagrees that he had all the information he needed regarding the Review and did not need to look in the TRIM Folder.
- (c) When taken to **document 2** (on page 45 of the Respondent’s Bundle) which is the **first document** that he opened, he said that he does not remember the document; he said, ‘I don’t remember the contents of most of these things. I only looked at them for a minute.’
- (d) When taken to **document 3** (on pages 47–48 of the Respondent’s Bundle) which is the **second document** that he opened, he said that he does not recall seeing the document; nor that he opened the document twice, once at 10:39am and once at 10:51am.
- (e) In relation to the title of **document 4**, he agrees that by looking at the title, that the document is a draft document. He agrees that he had no business looking at a draft document, either of Acumen’s or the Department’s, in relation to functional responsibilities, but disagrees that it would have been clear from looking at the title of the document. He said, ‘I didn’t bother to even think about that.’

- (f) When taken to **document 4** (on page 49 of the Respondent's Bundle) which is the **third document** that he opened, he said that he does not remember accessing the document. He does not remember seeing that the bottom lefthand corner on page 49 states 'CONFIDENTIAL – UPDATED 11.5.24'. He agrees that on the face of the document, that the document is confidential. He does not remember seeing that the rest of the document (such as page 54) was in tracked changes, and he does not 'remember any of this tracked changes stuff.'
- (g) In relation to **document 5**, he agrees that the title of the document indicates that it is a plan for consulting in respect of the Risk and Assurance Directorate. He does not agree that the consulting plan was developed by his superiors. He does not know who was running the consultation. While he agrees that Ms Brown is the Executive Director and that Ms Brown was sending him emails about the Review, he does not know whether Ms Brown was running the consultation or whether it was somebody else. He agrees that he has no business looking at Ms Brown's planning documents.
- (h) When taken to **document 5** (on page 57 of the Respondent's Bundle) which is the **fourth document** that he opened, he said, 'I just spent, like, a minute looking at this stuff.'
- (i) He disagrees that by the time he opened these four documents it would have been absolutely clear to him that he had no business accessing these documents.

(j) Page 57 states:

CONSULTATION PLAN & TIMELINE OF EVENTS – RISK AND ASSURANCE – ACUMEN ALLIANCE REVIEW

Effective Date: 18 September 2023 to current

STEP	WHEN	CONSULTATION REQUIREMENTS	ACTION	PURPOSE	HOW THE REQUIREMENTS WILL BE MET DURING CONSULTATION	RELEVANT CLAUSE OF THE AWARD OR AGREEMENT
1

- (k) When taken to page 57 and asked if he agrees he has no business accessing the document, he said, 'I don't know anything about this document.'; 'I don't understand anything about this. I don't remember anything about this document, and I probably shouldn't have looked at a document like this. It doesn't look like something I [would] have needed.' When put to him that it would have been obvious that he should not be looking at the document, he said, 'I don't remember this document.'; 'But it's entirely possible I opened it up, saw the first page and closed it again.'
- (l) In relation to **document 6**, he agrees that he would have seen the title to the document before opening it and agrees that he has no business opening a document that appears to be an agenda for a meeting with Acumen.
- (m) When taken to **document 6** (on page 67 of the Respondent's Bundle) which is the **fifth document** that he opened, he agrees that he opened it but does not remember the document. When asked if he agrees he has no business looking at the document, he said, 'I do now, yeah.' When put to him, that it would have been obvious when he opened the document that he had no business looking at the document, he said that it 'doesn't look important.' When it was put to him that if he has no business looking at a document that it does not matter if it is important, he said, 'Ah, yeah, I don't know.' When pressed further that **document 6** is the agenda of his Executive Director to meet with the contractor that he knew was engaged to conduct a review of the area he worked in, which he had no business looking at, he said that he agrees. When put to him that it would have been clear on the day when he opened the document that he had no business looking at the document, he said that he disagrees. He said, 'I didn't pay attention to a lot of this stuff. I was just clicking through it. I don't remember what even – what it was. I certainly don't remember ever even seeing this document.'
- (n) He disagrees that, by the time he opened the **fifth document**, it should have been clear to him that he had no business opening any documents from this folder. He also disagrees that by the time he opened the fifth document, that he should not have gone any further in opening documents in the folder.
- (o) In relation to **document 7**, he agrees that there is nothing in the title to suggest that he was a recipient of the email. At the time, the Director was Rowena Williams, who his manager (Eric Fleming) reported to. Prior to Mr Fleming's arrival, he reported to Ms Williams directly. At this time, he was aware that the JDFs had not been classified. While he agrees that one of the reasons he clicked on documents was to look at the JDFs, he 'didn't know they weren't classified, [because] they're available to me in front of me.' 'Why wouldn't they be locked up if they were [still] waiting to be classified?' When it was put to him that two days earlier he was sent an email that made it very clear that the JDFs had not been classified, he said, 'Okay. I didn't necessarily read it.' He agrees that he has no business opening an email from his manager where there is no basis for him to think he was a recipient of that email.
- (p) When taken to **document 7** (on page 68 of the Respondent's Bundle) which is the **sixth document** that he opened, an email between his Director and the Executive Director, attaching a JDF, he agrees that he opened the document at a time when he knew that the JDFs had not been classified, and he had not been given the JDFs. He agrees that he has no business accessing this document.
- (q) When taken to page 70 of the Respondent's Bundle, which is the JDF attachment in tracked changes to document 7, he said 'This is an attached document. I don't know whether I looked at it or not.' He agrees that the JDF is a draft document.

- (r) When asked if he agrees it is likely he looked at the JDF because one of his purported purposes for accessing the folder was to look at JDFs, he said:
- No, I didn't go there looking for JDFs. I was looking through the folder to see if there were any attachment documents that I would have missed from the emails that were distributed out to people. It was only when I got to the bottom and I saw the JDFs and opened them up - - -
- [I] understood from your evidence this morning that one of the various reasons you say you looked at the documents in this folder was so that you could - - -?---I looked at the JDFs in the folder to assist me with developing the handover notes.
- Yes?---But I didn't open up the folder for that purpose, and I - - -
- No?--- - - - wasn't going through the documents for that purpose.
- But - - -?---That was just something that evolved out of me finding the JDF.
- Okay. So that was ancillary thing which happened because you were looking at the documents, is that your evidence?---Yeah.
- But what I'm suggesting to you is it's likely that you would have opened up this JDF because of that ancillary purpose?---No, this isn't a document for - I wasn't an analytics officer.
- (s) He further said that the JDF on page 70, was for a Level 7 or 8 position, and he was only interested in the Level 5.
- (t) When taken to **document 8** (on page 73 of the Respondent's Bundle) which is the **seventh document** that he opened, he said that he does not remember this document.
- (u) In relation to **document 9**, he does not know who Selena Aziz is, nor did he know that Ms Aziz is Ms Brown's executive assistant. He agrees that there is nothing in the title to the document to suggest that he is the recipient of the email. He agrees that he has no business opening an email between his Executive Director and a person who he does not know who they are.
- (v) When taken to **document 9** (on page 75 of the Respondent's Bundle) which is the **eighth document** that he opened, he said that he does not remember this email. When taken to page 76, he said that he does not remember seeing this document nor does he recall opening attachments to the email.
- (w) When asked if he had seen the document on page 76 that he would have understood that he was not entitled to access the document, he said, 'I don't know what I would have understood at the time.' He agrees that from the face of the document that it does not look like a document he has any business accessing.
- (x) In relation to **document 10**, he does not know who Richard Lobb and Aaron Silver are. He agrees that there is nothing in the title to the document to suggest that he is the recipient of the email. When it was put to him that he has no business opening **document 10** when he did not know who Richard Lobb and Aaron Silver are, he said, 'Well, only in terms of quickly looking through what I said to find out what was going on and then move on.' When asked why he was opening up a document about regulation 8 letters, he said, 'I don't know. I don't remember half of this stuff.' When put to him that this document is not going to tell him what is happening with the Review, he said, 'I don't know. I don't remember even looking at half of this stuff.'
- (y) When taken to **document 10** (on page 107 of the Respondent's Bundle) which is the **ninth document** that he opened, he said that he does not remember accessing this document. He agrees it is an email with four regulation 8 letters attached but said that he does not remember looking at it. He said that if he did open up the regulation 8 letters, that he only opened up the one that was addressed to him. He said, 'I do know I saw my own reg 8 letter in the - in the emails as we were processing them, but I didn't look at anybody else's.' When put to him that it would have been clear to him from seeing what is listed as the attachments to the email, that he had no business accessing the email, he said, 'If I'd investigated them, that's probably true.' He said:
- - - I was coming down the screen, I clicked it open, didn't seem to have anything useful inside it, closed it, go to the next one, onto the next one. I didn't sit there and pick through the - the attachments on all of these things. I was there for 27 minutes, and there's how many documents did I open, 22 or something? It's about a minute a document. So to say, 'Oh, did you go through this and did you go through that', no, I didn't. I just glanced at it and moved on.
- In your evidence this morning, Mr Burns, you - you gave evidence to the effect that you kept looking through the documents because you thought you might find other things. You said you were a systems analyst. 'I investigate things'?---Yeah, I just tend to investigate stuff.
- And - - -?---Right.
- - - so isn't it the case, consistent with that evidence, that you weren't quickly looking through the documents. You were investigating to see if there's anything that's of assistance to you?---I was looking to see if there was anything of - any information about how the process was going, like, missing, um, handouts and stuff like that, but - but just a matter of bringing myself up to date - - -
- If that's what you were - - -?--- - - - without having to discuss it with humans.
- If that's what you were looking for, wouldn't you do a targeted look through documents that have a title that seem to say something about the progress of the form and function review?---I - no, not necessarily. I mean, I found the folder by accident.
- Okay?---And I had a quick look through it. I wasn't thinking about stuff like that. I wasn't going in there

deliberately to find that stuff in the first place. So - yeah.

- (z) In relation to **document 11**, he knows that Brent Saraceni is a manager from Ms Brown's area but does not know his exact position. He accepts that Mr Saraceni is the manager of the office of the Executive Director Professional Standards and Conduct and manages Ms Brown's office. He agrees there is nothing in the document which would suggest that he was a recipient to the email. When put to him that he had no business opening a document that was an email from Mr Saraceni to Ms Brown, he said, 'it said org charts. I was probably looking at those.' He agrees that he had no basis to think they were a finalised published organisation chart, because it was at a time where there was a functional review going on.
- (aa) When taken to **document 11** (on page 148 of the Respondent's Bundle) which is the **tenth document** that he opened, he said that he does not remember this document and does not recall opening any of the attachments to the email.
- (bb) When taken to the organisation chart on page 150, and the reference in the top lefthand corner that states 'PROPOSED FINAL 2024' and asked if looking at the face of the document that he agrees he has no business accessing this document, he said that he disagrees. He said:
- - - I don't see why I wouldn't have any business. It's proposed something that's going to affect my, ah, area where I'm working. Ultimately, I'm going to get moved out, so you could argue that I have no business looking at anything that's not mine anymore. But, ah, no, why wouldn't I.
- Aren't your superiors entitled to have the time and space to do their job without you stickybeaking in what they're doing?---There are systems in place to prevent me stickybeaking and they didn't bother to use them, so - mm.
- I'll ask the question again, Mr Burns, because it is important that you answer the questions that I ask?---Aren't your superiors entitled to have the time and space to do their job without you stickybeaking in their business?---I don't believe that me looking at this affected them doing their job in any fashion whatsoever. They were perfectly capable of doing their job whether I looked at a JDF or a - a hierarchy or not.
- And you still haven't answered the question that I asked, Mr Burns, so I'll ask it again?---Well, I can't say. I don't understand what you're trying to - - -
- Do you agree that your superiors are entitled to the time and space to do their job without you stickybeaking in their business?---Well, I - - -
- Don't look at Mr Tebbutt. He can't answer this question for you?---No, he can't. Well, I guess 'stickybeaking' is a term that you want to use, I - they had the right to not have me stickybeaking, I guess, yeah. But it's such a vague term.
- [Y]our view is that looking at communications from or to your executive director superior to which you're not copied into is not interfering or would not have the capacity to interfere with them doing their job?---No, I don't believe it would interfere - - -
- Okay?--- - - - with them doing their job. I'm just looking at a document. I'm not editing or converting anything. I'm not touching anything.
- (cc) In relation to **document 12**, he agrees that he saw the title to the document and was aware from reading the title that it was an email from the external company conducting the review, and that it was referring to the JDFs. He agrees that he clicked on the document at a time when he was aware the JDFs had not been classified and had not been provided to staff. He agrees that he had no business clicking on the document.
- (dd) When taken to **document 12** (on page 155 of the Respondent's Bundle) which is the **eleventh document** that he opened, an email from Robyn Davis to Ms Brown and Ms Williams, he said that he knows that Ms Davis is from Acumen. He agrees that the email refers to three attachments, two of which are highlighted JDFs. When taken to page 156, he agrees that the JDFs are not finalised. He does not recall opening this document. While he was looking at the Level 5 JDF, he does not remember looking at this document.
- (ee) When asked whether, looking at the document today, he agrees that given the highlights on the document, that he has no business accessing the document, he said:
- - - [N]o, the highlights are irrelevant.
- That this was at a time when you were aware the JDFs had not been classified, do you agree with that?---Yeah, but so what?
- And it was at a time when you were aware the JDFs would not be provided to staff until after they were classified. You agree with that?---Oh, didn't think about that.
- Now, can I turn - - -?---I'm not looking for a completed JDF. I'm just looking for a role statement.
- Well, I think your evidence earlier on, Mr Burns, was that you were looking at JDFs?---Well, I was originally. Ah, no, I didn't go into there to look for JDFs. I went into the folder to look for attachments that may have been handouts. I only discovered the JDFs when I was in there.
- Okay?---And at that stage, I just assumed they were part of the file, and therefore - - -
- So you were looking for attachments that could have been handouts?---Yeah, that's what I started off with.
- You would agree then that it's - it's likely that you opened up the attachments to the documents in the

folder?---Not all of them.

Not all of them?---I didn't have time.

But do you agree you would have opened up some of the attachments in the documents of the folder?---That's possible, yes.

Well, it's more than possible, isn't it. You were looking for attachments, isn't that right?---I was looking for attachments, yes.

So you would have opened up - - -?---But I didn't necessarily find them.

No, but you would have opened up attachments to some documents in the folder?---Oh, some of the attachments, I would have looked at. Um, so if there was, for example, a, um, PowerPoint presentation - - -

Okay?--- - - - I might have had a look in that.

- (ff) When taken to **document 13** (on page 162 of the Respondent's Bundle) which is the **twelfth document** that he opened, correspondence from the CSA to his Executive Director and the Director General, with consultation with respect of the restructure or proposed restructure, and put to him that he has no business looking at this document, he said that it is communication between the CSA that directly affects him, so the CSA probably sent him a copy themselves.
- (gg) When taken to **document 14** (on page 183 of the Respondent's Bundle) which is the **thirteenth document** that he opened, he said that he does not remember accessing this document. It is an email from Tonya Lamatoa, of the CSA, to Ms Brown and others. He does not recall seeing it, but if it is correspondence from the CSA, it is quite possible that he already has a copy.
- (hh) In relation to **document 15**, he does not know who Zoe Johnston is. He agrees that there is nothing in the title to the document that suggests that he was a sender or recipient to the email. He agrees that he has no business opening a document that was an email from a person he did not know who they were. He did not know that Ms Johnston is in the Labour Relations Directorate, and that she was providing industrial relations advice.
- (ii) When taken to **document 15** (on page 186 of the Respondent's Bundle) which is the **fourteenth document** that he opened, he said that he does not remember seeing this email. He agrees that, looking at the sender and the recipients of the email, that he has no business accessing this document. When put to him that it should have been obvious to him when he opened the TRIM Folder that he had no business accessing this email, he said that it was not. When pressed that it should have been obvious to him that an email from Labour Relations to his Executive Director, to which he was not copied in, and which has the subject line 'RE: CONFIDENTIAL – Reg 8 Letters', was not for his eyes, he said, 'Ah, I suppose. I would have closed it and moved on.'
- (jj) When taken to **document 16** (on page 201 of the Respondent's Bundle), which is the **fifteenth document** that he opened, which is a letter from Ms Brown to Rikki Hendon (General Secretary of the CSA), he said that he does not recall seeing this document.
- (kk) He was then taken to **document 1** (on page 42 of the Respondent's Bundle) which is the **sixteenth document** that he opened and the JDF that he extracted. The JDF states that the position reports to a Level 8, and the Classification 'Level TBD.' When asked if this was the document he extracted, he said that he does not remember. He agrees that from the document you cannot tell that the position is a Level 5. He said that on reading the document, he knows this was the position that the handout stated was going to be Level 5.
- (ll) He said that he knows this because, after the Director General contended that he was trying to sneak into a Level 7 position by downloading the JDF, he reviewed the documentation because he recalls the JDF was for a Level 5 position, and he found the 'PowerPoint presentation from the 2 July 2024 meeting' (on page 53 of the Agreed Bundle) of an organisation chart with the position of 'Business Support Officer (Level 5).' He said that while he did not locate the reference to the position being Level 5 until later, he recalled being informed at the meeting that the position was to be a Level 5 position.
- (mm) In relation to **document 17**, he agrees that he saw the title before he clicked on the document. He does not accept that it was clear from the word 'highlighted' in the title of the document that the JDF was not finalised. He said that 'doesn't mean anything to me. "Highlighted". Yeah, good luck.' When asked if he agrees that the reference to 'Policy and Program Officer JDF' means it has nothing to do with his stream within Risk and Assurance, he said, 'I don't remember.' He agrees he was not the Policy and Program Officer. When asked if he agrees that the Policy and Program Officer JDF has nothing to do with any of the functions of his role, he said that the role was taking over his. When it was put to him that no one was taking over his role as his role was being abolished, he said, 'somebody has to do the work. It wasn't going away. Somebody still has to update the AFR. Someone still needed to make sure that the people had things and stuff to do.' When put to him that he did not know what job was going to be taking over the tasks that he was doing, he said that his understanding from the handout he received at the third meeting with an organisation chart identifying a new Level 5 position, was that it would be the new Level 5 position. He said that there 'was only one level 5 position. They would have had to take taken over the work that I was doing. It couldn't have been ignored or they wouldn't have dragged me back to do it. I was doing all the AFR work. Somebody new that was coming in to replace – to do that and whatever else they needed done.'
- (nn) When taken to **document 17** (on page 203 of the Respondent's Bundle) which is the **seventeenth document** that he opened, he said that he does not remember this JDF. He said that he does not remember opening up a JDF that had yellow highlighting on it.
- (oo) When taken to **document 18** (on page 206 of the Respondent's Bundle) which is the **eighteenth document** that he

opened, he said that he does not remember opening this document.

9 In relation to the disciplinary process, Mr Burns gave evidence under cross-examination that:

- (a) When he was given the letter of allegations dated 17 September 2024 (**Agreed Document 2**), he went straightaway to the CSA, who assisted him with the response (**Agreed Document 3**).
- (b) When taken to the first page of Agreed Document 3 and his statement, 'I was probably checking to see if I had already been handed some of these documents' and it was put to him that he had been emailed the documents from each of the meetings after the meeting, he said that he does not remember. He said that he does not remember the first two meetings or getting emails from them. He remembers that he had some of the documents that were emailed to him following the meetings saved to his desktop. When put to him that he could have looked at the documents on his desktop if he wanted to look at them, he said that he did not know. He agrees that he does not typically delete the emails he receives. He said that he does not remember whether he had a folder in his emails related to the Review, but he might have done. He agrees that he could have looked through the emails to check what he had been sent but said that that would only have told him what he had received, it would not show him what he had not received. He said that his statement that he 'was checking to see if I had already been handed some of these documents' was misworded as he was checking to see if he had not been handed some of these documents.
- (c) He disagrees that if he had not been handed a document that it stands to reason that he was probably not entitled to it. When asked if he was worried he had missed something, why he did not check with his manager, Ms Brown, or with Ms Williams, he said that his manager was useless, Ms Brown was 'too far out of my league', and it 'never occurred to me that I would bother [Ms Williams] for something like that.'
- (d) When put to him that he instead went looking around in the TRIM Folder, he said:
It turned up by accident right in front of me. It was a kind of spur of the moment thing. I wasn't planning to go off and do it. I didn't plan on finding the folder.
- (e) When put to him that even if it was on the spur of the moment to find the folder that it was not on the spur of the moment to open 18 documents, he said:
Okay. Ah, no, I'm - when - I decided after I opened the folder that I wanted to see if there were any handouts in there that I'd missed. And I went through some of the documents to see if there was any information in them about how the process was going.
- (f) On page 2 of Agreed Document 3, he states:
My work-related purpose for viewing these documents is I am leaving this branch shortly and need to prepare handover documents for the people coming in. For some tasks I'm the only person available to document the environment.
- (g) He said that the above was not his purpose for first accessing the folder. The above was 'really just about saving the JDF.' He said, 'what I was saying was that the work-related purpose for saving the JDFs was that I was leaving the Department soon.' When put to him that the statement refers to his 'work-related purpose for **viewing** these documents', he said, 'It's worded poorly.'
- (h) When put to him that he did not have a work-related purpose to look at all the documents in the folder to create a handover document, he said:
I would have worded it differently. I would have said the work-related purpose I had for viewing those documents, um, was that I wanted to keep myself up to date with the, um, thing that was affecting my area.
- (i) He agrees that he was not told to produce a handover document. When put to him that the documents he accessed, including the JDF, were not relevant for any handover document, he said:
---The JDF was because they used the role statement to determine what steps needed to be, ah, included, what tasks needed to be included.
But your handover document, if you were making one, would simply be saying what you did and how you did it, wouldn't it?---It's a list of tasks and the steps you have to go through to complete them.
What relevance is a JDF to that?---Well, it has a role. It tells you what your tasks are. What's the role. You had to do this, this and this. So the JDF tells you, oh, these are the things they're going to be doing, and I can go, oh, well, I need to give them that bit and that bit and that bit.
So it was to identify who you needed to give your handover document to?---No. So I identified what I needed to put in my handover document.
I suggest that doesn't make any sense, Mr Burns?---Perhaps you - not to you. It did to me. I'm looking at a role that's got a list of things that the person's going to do and I've got a list of instructions in another document on how to do things. And I'm putting the two together so that I have a list of instructions for that person on the things that they appear to be going to do as the best of my ability. I - - -
I suggest that when you stated to the Department that your work-related purpose for viewing the documents was to prepare handover documents, I suggest that you lied to the Department, do you agree with that?---No.
I suggest you lied to the Department because you knew you had no legitimate purpose accessing the documents and you've tried to cover that up, do you agree?---No.
- (j) Further down on page 2 of Agreed Document 3, he states:

The title of the folder and the documents contained within it indicate it may contain information I need to prepare handover documents before I leave the branch.

- (k) He does not agree that that statement is a lie. He agrees that some of the documents he looked at were not relevant to writing a handover document and accepts that some of the documents were 'plainly not relevant.'
- (l) When taken back to the list of documents (page 39 of the Respondent's Bundle (at [5] above)) and asked to identify which ones he says based on the titles to the document suggest they are relevant to a handover, he said that he was not able to answer that question. He said:
 - Um, the handover came afterwards. I didn't decide to put stuff into the handover document until after I found the JDFs. I - I wasn't looking through this and going, 'Oh, that's relevant to a handover', and then opening it up.
- (m) He maintains that the JDFs were useful for a handover. He agrees that a handover would not have given him a basis to open any other document contained in the folder. He agrees the statement at [9(j)] above is misleading. He said, 'It's not well put. It's not well written, I agree.'
- (n) He agrees that in preparing for the hearing that he attempted to retrieve the handover document from his desktop. He was provided with a list of documents that were saved to his desktop (Exhibit R2), and he identified the document which he thought was the handover document. However, when produced, it was not the handover document and had nothing to do with the JDF. When put to him that because he was unable to find the handover document that it does not actually exist, he said that he disagrees. He said, 'I wrote it. It's there. It's somewhere. Maybe it's on the S drive. Maybe it's a subfolder.'
- (o) Exhibit R2 contains approximately 214 records. Approximately 12 documents are contained in a folder titled 'R and A Review'. He agrees the folder was on his desktop and the folder contained documents that he assumes were obtained from the TRIM Folder because they were not documents that were handed out, but he does not remember where the document comes from. He agrees that he had a lot of documents saved to the 'R and A Review' folder on his desktop and agrees that this desktop folder would be where he could go to get documents that he had been provided. He agrees that when he went looking in the TRIM Folder that he was looking for things that he had not been provided and that they could have been things that he was not entitled to.
- (p) Agreed Document 2 (the letter of allegations dated 17 September 2024) states:

Confidentiality

The Department maintains a high level of confidentiality to protect individuals and ensure integrity in the investigation process. You also have a responsibility to maintain confidentiality and to not engage in conduct that may affect the reputation of others or the Department. A failure to do so may result in further action.

- (q) He disagrees that this means he should not be talking about his disciplinary allegations with other employees in the Department. He said that after he was issued the allegations letter, he came back to the office and asked who else was involved. He said, 'I didn't discuss it much beyond [that] except with the Union.' He does not remember who informed him about the disciplinary outcomes for the other employees, but thinks it was probably one of the CSA's representatives.
- (r) He is not currently working and has not had a job since the dismissal. He has not applied for any jobs because he is seeking reinstatement. He has not earned any income since his dismissal but does receive a pension. If he is not reinstated he will retire. He was otherwise planning to retire in three or four years' time.

10 Mr Burns gave evidence in re-examination that:

- (a) When asked if he recalled what was going through his mind when he saw the JDFs in the TRIM Folder, he said, 'Well, I wanted to look at the JDFs. Yeah, I just wanted to see where they were up to with them and whether they had any relevance, I guess. It's a long time ago. I barely remember even doing this.' When he opened the JDFs, he thought:
 - Well, they're only JDFs. It's not like they're a - a - a job or a - you know, what can you do with it other than look at what it says the job's going to be? Um, I don't understand why they're confidential. Like, basically every - every, um, JDF that's an accessible job is stored on IKON. You can look them all up any time you want.
- (b) He does not think that Ms Brown said that the JDFs were confidential. He thinks that Ms Brown just said that the JDFs would be released when they were finalised. He said, 'I wasn't looking for JDFs to try and get a job out of it. It wouldn't have been any use at that point, [because] they would be subject to change.'
- (c) He said that he was not keeping up-to-date with the Review meetings and the emails because he was not in the office but was working in Finance.
- (d) He said that it did not occur to him that he was doing anything wrong by looking through a folder that he had access to, 'because typically, there are controls in place to make sure that you can't.'
- (e) He said that he opened up the TRIM Folder, despite having a folder on his desktop that contained documents about the Review, because 'it was presented in front of me'; 'it's all there'; so he just clicked through the documents 'looking for stuff. Didn't have to search through my inbox, my emails, things like that.'

11 Ms Brown gave evidence-in-chief that:

- (a) She is the Executive Director of Professional Standards and Conduct and has been in the position since September

2022. She reports directly to the Director General and is responsible for five business units:

- (i) Risk and Assurance. The Director of Risk and Assurance reports to her. Inderbir Grewal is the current Director. Mr Fleming is the Manager of the audit team and reports to Mr Grewal.
 - (ii) Standards and Integrity, who are essentially responsible for the assessment and investigation of discipline or conduct matters.
 - (iii) Screening, who are responsible for criminal history screening checks.
 - (iv) Parent Liaison.
 - (v) Legal and Legislative Services.
- (b) Previously, she was an Executive member of the Corruption and Crime Commission, and before that, she served as a sworn police officer for about 30 years in the WA Police (rising to the rank of Detective Superintendent).
- (c) Agreed Document 1 is the JDF that applied to Mr Burns when he was employed, before his position (a Level 5 Risk and Audit position) was abolished.
- (d) Document 1 of the Respondent's Bundle are the training records for Mr Burns that she arranged to have extracted for the proceedings. These show that Mr Burns completed the RA Training (an OPL course, which stands for online professional learning) on 14 February 2024, and the AEDM Training (an OPL course) on 22 June 2022.
- (e) Document 2 of the Respondent's Bundle (at [4] above), is the statement of service prepared by payroll services, outlining the start and finish dates of the various positions Mr Burns has held during his employment.
- (f) Employees in the broader Department are required to undergo criminal history screening prior to commencement of employment, or if they have a break in service of more than six months. From about 2018, in recognition that employees within the Professional Standards and Conduct division hold positions of trust and privilege, all members of the division are required to undergo criminal history screening every three years.
- (g) The Review was a form and function review of the Risk and Assurance Directorate undertaken by independent consultants (**Acumen Alliance**). It arose after another area within the Department (System Response and Transformation) had undertaken a similar type of review, and as a result were taking some of the Risk and Assurance team which was being removed out of her Directorate. This presented an opportunity for her to undertake a form and function review to understand whether there was alignment between current Department business requirements against strategic objectives.
- (h) While Acumen were engaged in around September 2023, the review got underway in the early part of 2024, and was completed by the end of 2024.
- (i) Throughout the review, Mr Burns occupied the Consultant Risk and Audit position.
- (j) Document 3 of the Respondent's Bundle is an extract from her daybook (her handwritten notes of significance, made as contemporaneously as possible to when the incident occurred and before she moves onto the next task) from 23 July 2024 and 24 July 2024:
- | | |
|--------|---|
| 23/07 | R + A |
| | ... |
| @11:20 | Eric advised he had cause to speak with Stephen this morning. Stephen was very aggressive + refusing to do a task on the basis that it was outside his JDF. Stephen also mentioned he had seen the new L5 JDF? He then stated he wouldn't be applying for it. |
| 24/07 | Brent discovered TRIM file was not locked down. |
- (k) She was initially dismissive of the information from Mr Fleming because the JDFs had not been provided to staff and she believed them to be restricted to the external review team and three persons within the Department, being herself, her Executive Assistant (Ms Aziz), and Principal Consultant, Brent Saraceni.
- (l) The following day, Mr Saraceni informed her that the TRIM Folder had not been locked down as instructed. She had instructed Ms Aziz to restrict the TRIM Folder to her, Ms Aziz and Mr Saraceni. She subsequently discovered that instead of restricting the folder to the Professional Standards and Conduct workgroup (which would have limited access to herself, Ms Aziz and Mr Saraceni), Ms Aziz inadvertently restricted the folder to the Professional Standards and Conduct business unit, which included all of the subordinates in the business unit.
- (m) She had been asking Ms Aziz to save to the folder any documents associated with the Review including all the working documents, correspondence to and from the consultants and with the CSA, JDFs, PowerPoint presentations, functional responsibility documents, and drafts of documents.
- (n) Upon being informed that the folder had not been locked down, Mr Saraceni informed her that multiple people had accessed the folder and that they had accessed multiple documents within the folder. She instructed Mr Saraceni to report the matter to SID using the complaint notification form. Given SID reports to her, she explicitly instructed Mr Saraceni to make the notification and advised that she would be keeping at arm's length, so that she would continue to manage the Review, and SID would separately investigate the unauthorised access.
- (o) There were four Review meetings, facilitated by Acumen, with her assistance. She attended all four meetings.
- (p) Document 4 of the Respondent's Bundle are her handwritten notes from the first meeting on 19 March 2024. Her notes record the attendees (which includes Mr Burns) and the questions asked during the meeting (which includes a question asked by Mr Burns).

- (q) Document 5 of the Respondent's Bundle are her handwritten notes from the second meeting on 24 April 2024. Her notes record the attendees (which includes Mr Burns).
- (r) Document 6 of the Respondent's Bundle are her notes from the third meeting on 15 May 2024. Her notes record the attendees (which includes Mr Burns).
- (s) For each meeting, Acumen prepared a PowerPoint presentation, which they essentially worked through throughout each meeting.
- (t) The PowerPoint presentation for the third meeting on 15 May 2024, commences on page 20 of the Agreed Bundle. Towards the end of each meeting, Acumen provided a 'Next Steps' to inform the team what they could expect next. Page 31 of the Agreed Bundle, states:

5. Next Steps

...

- Prepare JDFs for new positions and undertake Classification Assessments as required.
- Meet with the staff and unions to share the revised and/or new JDFs and obtain feedback.

- (u) By these 'Next Steps', Acumen were informing the team that they were going to prepare JDFs for new positions identified, which JDFs would undergo a classification review process, and following that there was an intention to meet with the staff and the CSA to share the revised new JDFs and to seek feedback.
- (v) The staff within the Risk and Assurance Directorate were 'absolutely not' going to be given the JDFs before they were classified.
- (w) At the conclusion of this third meeting, staff were advised that they would be given copies of all relevant documents, which included the PowerPoint presentation. Document 7 of the Respondent's Bundle is her email dated 15 May 2024; 11:54am, sent within an hour of the meeting concluding to all staff within the Risk and Assurance Directorate containing, as the Subject to the email states (Acumen Alliance Review Meeting #3 PowerPoint Presentation and Associated documents), the documents from the meeting. The attachments to the email are:
- (i) DoE_Risk Assurance_Presentation – Meeting #3.pptx
 - (ii) DoE Acumen Alliance Review – Functional Responsibilities with Track Changes – Updated 11.5.24.docx
 - (iii) DoE Acumen Alliance Review – Response to Feedback provided on Functional responsibilities.docx
 - (iv) DoE Acumen Alliance Review – Response to feedback provided on Powerpoint presentation from Meeting # 2 – Updated 11.5.24.docx

- (x) Document 8 of the Respondent's Bundle are her notes from the fourth meeting on 2 July 2024. Her notes record the attendees (which includes Mr Burns). Pages 15 and 18 of the Respondent's Bundle indicates that she said the following verbatim at this meeting:

JDF's

The JDFs will be provided to staff once they have been signed off by CRC [Classification Review Committee], and the classification levels have been determined.

Today we will be providing you additional information outlining the functional areas the JDFs will represent; and showing the tasks undertaken to deliver each area and the connectivity to other areas. You will have the opportunity to provide feedback.

...

Conclusion

...

- 2. All draft JDF's will be progressed to Workforce Policy & Coordination. The Executive Director, Workforce has informed me that it is anticipated they will be presented to the **August** Classification Review Committee.
 - 3. As per previous meetings, at the conclusion, I will email you 5 documents which include:
 - a. Feedback received from meeting #3 with comments as outlined by Robyn
 - b. Potential changes to JDF's
 - c. Acumen Alliances 'Executive Summary'
 - d. Functional Responsibilities which has been amended following your feedback and
 - e. Today's presentation.
- (y) Paragraph 3.b. above states 'Potential changes to JDF's.' This is because, rather than providing the JDFs in their entirety, the staff were given a summary of what, at that point in time, some of the proposed changes were looking to be. Paragraph 2 above refers to 'August', however, the JDFs were ultimately classified in November 2024.
- (z) Document 9 of the Respondent's Bundle is her email dated 2 July 2024; 2:59pm, sent following the meeting to all staff within the Risk and Assurance Directorate, containing the documents from the meeting. The attachments to the email are:
- (i) DoE R & A Functional Responsibilities HAND OUT FINAL 2.7.24.docx

- (ii) DoE R & A Meeting #4 HANDOUT Changes to JDFs FINAL 1.7.24.docx
- (iii) DoE R & A Review Executive Summary 27.6.24 HAND OUT FINAL 1.7.24.docx
- (iv) DoE Risk & Assurance_Presentation 4.pptx
- (v) DoE R A Meeting 3 Feedback and Responses HAND OUT FINAL 1.7.24 (002).docx
- (aa) Document 10 of the Agreed Bundle is the PowerPoint presentation prepared by Acumen, for the fourth meeting on 2 July 2024. Page 43 of the Agreed Bundle (at [7(ii)] above), refers to Acumen informing the team that the JDFs were being progressed and that Acumen were hoping to have them finalised shortly, and that following the meeting the team would be provided a handout of the potential changes with respect to the JDFs.
- (bb) This is because the team had been asking for Acumen's final report, and were informed that they would not be provided the report in its entirety due to confidentiality reasons, particularly because a lot of people had participated in the review believing that their information would remain anonymous and confidential, so providing the full document was considered as potentially exposing people and their comments. Therefore, as a compromise, it was agreed that only an executive summary of the report would be provided to staff. Hence the reference to 'Executive Summary' on page 43 of the Agreed Bundle.
- (cc) Page 57 of the Agreed Bundle is the potential changes to the JDF document that was spoken about in the fourth meeting, and promised to the team, and ultimately provided to them via email. It outlines the various changes to the relevant JDFs.
- (dd) Prior to commencing the fourth meeting, John Rossi (union advocate/delegate) handed her a typed document with a series of questions. She did not have time to read it prior to the fourth meeting, so asked Mr Rossi to email the document to her. Document 10 of the Respondent's Bundle is Mr Rossi's email, dated 3 July 2024; 11:14am, and page 24 of the Respondent's Bundle is the document with question 5 stating:
5. Provide the date that the new and revised JDFs will be made available for feedback, given all JDFs, and most reporting lines, are affected by the proposed restructure.
- (ee) Document 11 of the Respondent's Bundle is her email to the Risk and Assurance Directorate, dated 16 July 2024; 4:15pm. The staff had not been given the JDFs at this stage. Towards the end of her email, she states:
- I intend to accept Acumen Alliance's Final Report in the week commencing 22 July 2024. I will use this information and your feedback to progress to the next stage.
- To that end, the next steps include to:
- Have the relevant JDF's reviewed and classified.
 - Endorse the final structure.
- (ff) Rhiannon Grosse is an Industrial Officer of the CSA who attended the fourth meeting. Document 12 of the Respondent's Bundle is Ms Grosse's email to her, dated 23 July 2024; 2:29pm, re-circulating the former questions submitted by Mr Rossi. The CSA, on behalf of their members, was asking the same question:
5. Provide the date that the new and revised JDFs will be made available for feedback, given all JDFs, and most reporting lines, are affected by the proposed restructure.
- (gg) As at the date of Ms Grosse's email (23 July 2024), the JDFs were still under review and had not been provided to staff.
- (hh) Document 13 of the Respondent's Bundle is her response to Ms Grosse's email, dated 2 August 2024. In answer to question 5, she states:
- Staff received the outline of significant changes to the JDFs as a hand-out on 2 July 2024, after being informed in the meeting that the JDFs were intended to be presented to the Classification Review Committee in August 2024. I consider that employees can and should provide feedback on the outlined content of the JDF changes in the interim and the finalised JDFs will be made available to staff post-classification determination. This may be during or post-consultation period.
- (ii) She had asked Mr Saraceni to prepare a simplified table depicting Mr Burns' access to the documents in the TRIM Folder. Page 39 of the Respondent's Bundle (at [5] above) is the document prepared by Mr Saraceni. In the 'Comments' column:
- (i) 'Document extracted' (in red font) refers to the document being removed from the TRIM system and put somewhere else; it refers to the document being extracted out of the system.
- (ii) 'Document modified' (in blue font) refers to an action taken against the record. It includes viewing the record. It is the record that is modified, and not necessarily the underlying document.
- (jj) The **first document** that Mr Burns accessed, is an email to Tamara Findlay. Ms Findlay is the former Director of Risk and Assurance. She resigned in September/October 2023. This was around the time she engaged Acumen but before the review got underway. The email attaches the letter she sent to the CSA's General Secretary, Rikki Hendon, informing Ms Hendon that she intended to undertake a strategic form and function review of Risk and Assurance.
- (kk) The **second document** that Mr Burns accessed, is the initial email with the same attachment as the first document that Mr Burns accessed.
- (ll) The **third document** that Mr Burns accessed, is a document prepared by Acumen, talking about the form and

function review and the Directorate functions. This particular document has been updated to May 2024 and is marked confidential. It is not a final document and is a 'work in progress.' This is evident from the tracked changes noting the formatting changes.

- (mm) The **fourth document** that Mr Burns accessed, is a document she prepared. It is her run sheet for keeping track of her correspondence and meetings with staff. It records anything of relevance, in a chronological order, for her to use as her reference point. She did not share this run sheet with anyone until right at the end of the review, when she provided a copy to the CSA. The version provided to the CSA may not be the document included in the Respondent's Bundle, as the version in the Respondent's Bundle looks like an ongoing version of her run sheet. At a point towards the end of the review, she finalised the run sheet before providing it to the CSA. The run sheet was her working document and she did not expect subordinates to be looking at her working documents if she had not given it to them.
- (nn) The **fifth document** that Mr Burns accessed, is the agenda she prepared ahead of a planning meeting with Acumen on 20 June 2024, ahead of the fourth meeting on 2 July 2024. The attendees are herself, Rowena Williams, Robyn Davis and Angela Flood. Ms Davis and Ms Flood are the Acumen independent consultants that worked on the review. The page contains redactions of information that is confidential between herself and Acumen.
- (oo) The **sixth document** that Mr Burns accessed, is an email that Rowena Williams sent to her, attaching the JDF that Ms Williams reviewed and marked up with track changes. Ms Williams was seconded into the Risk and Assurance Directorate as the Acting Director of the Risk and Assurance Directorate and was there for most of 2024 assisting her in the review process. Page 70 of the Respondent's Bundle is the JDF. There had been much debate about the title to the position, and there are multiple tracked changes throughout the document, indicating it is a working draft, that was going back and forth between her, the Director that sits below her (Ms Williams), and Acumen (the reviewers).
- (pp) The **seventh document** that Mr Burns accessed, is an email she sent to Mr Burns, dated 20 June 2024; 7:23am. At the conclusion of the third meeting on 15 May 2024, once the meeting had dispersed, she hand delivered a regulation 8 letter to four members of the Risk and Assurance team. The CSA subsequently brought to her attention that the employees did not consider that she had handed the letters to them in a considered and private way. So, she issued a personal apology to each of the four recipients, and this document is her apology to Mr Burns. She also retracted the regulation 8 letter, and re-issued it.
- (qq) The **eighth document** that Mr Burns accessed, is her email to Ms Aziz, requesting 'Can you please send the letter D24/0340036 with the attachments as attached and cc [Piers] McCarney.' She provided the TRIM reference number for Ms Aziz to access the letter and included with the email the attachments that are to accompany the letter. The attachments are:
- (i) At pages 76–93 of the Respondent's Bundle: the workforce composition data which depicts the Departmental positions currently held by staff on fixed term or casual contracts, which she is required pursuant to the industrial agreement to provide to the CSA when undertaking a change process that is likely to result in surplus employees. The data is specifically held by Workforce, and therefore, only available to certain people.
 - (ii) At pages 94–106 of the Respondent's Bundle: the PowerPoint presentation from the third meeting.
- (rr) The **ninth document** that Mr Burns accessed, is an email that Ms Aziz sent on her behalf to Richard Lobb and Aaron Silver. Mr Lobb and Mr Silver are from the Staff Recruitment and Employment Services team and manage the process that results from someone being issued with a regulation 8 letter. Pages 109–117 of the Respondent's Bundle is the regulation 8 letter issued to Mr Burns, signed by her, and dated 15 May 2024 and the attachment titled 'Redeployment & Redundancy Frequently Asked Questions'. Pages 119–127 of the Respondent's Bundle is the regulation 8 letter and attachment she issued to Sean De Souza. Pages 129–137 of the Respondent's Bundle is the regulation 8 letter and attachment she issued to Maria Buttsworth. Pages 139–147 of the Respondent's Bundle is the regulation 8 letter and attachment she issued to Peter Edwards.
- (ss) The **tenth document** that Mr Burns accessed, is an email from Brent Saraceni (her Principal Consultant) to her, attaching the running timeline of organisation charts that Mr Saraceni had prepared. Page 149 of the Respondent's Bundle is an approved organisation chart of the Risk and Assurance Directorate at a point in time (2023). Page 150 of the Respondent's Bundle is the 'PROPOSED FINAL 2024' organisation chart of what the organisation structure may look like. At that point in time, it was not finalised or endorsed and was still a work in progress. Pages 151–154 of the Respondent's Bundle are different iterations of what the organisation structure may look like. Page 151 is a working document of what the structure could be if there were 16 FTE (after some positions move to the System Response and Transformation team), and page 153 is another possible configuration if there were 13 FTE.
- (tt) The **eleventh document** that Mr Burns accessed, is an email that Ms Davis (the lead consultant from Acumen) sent to her and Ms Williams, with two draft JDFs. The JDFs contain multiple yellow highlighting, which indicates that they are not finalised.
- (uu) The **twelfth document** that Mr Burns accessed, is titled 'Email from Rhiannon Grosse/Warwick Claydon.' Like Ms Grosse, Mr Claydon is an employee of the CSA. The document is the CSA's response in respect of consultation about the change to the Risk and Assurance Directorate. The attachments to the email are:
- (i) 11062024 CPSUCSA Response Letter.pdf
 - (ii) Attachment A – Risk and Assurance Directorate Feedback 7th June 2024.pdf
 - (iii) Attachment B – Audit and Compliance WHS Psychosocial Risk Consultation and findings.pdf

- (iv) Attachment C – Consultation Plan.docx
- (vv) The **thirteenth document** that Mr Burns accessed, is an email from Tonya Lamatoa (CSA’s Member Support Officer), requesting an extension of time on behalf of her members to the feedback period that she had proposed in her letter to the CSA (attached to the email) to commence the consultation on the proposal for change.
- (ww) The **fourteenth document** that Mr Burns accessed, is an email from Zoe Johnston to her, copied to Piers McCarney. Ms Johnston is the Graduate Labour Relations Officer, assisting Mr McCarney, the Labour Relations Officer, who she regularly sought advice from with respect to labour relations matters throughout the review process. The email is in response to her request for advice, from the Labour Relations team, about confidential labour relation matters specific to the review.
- (xx) The **fifteenth document** that Mr Burns accessed, is her letter to Rikki Hendon of the CSA, on the consultation and proposal for change. The Department, when consulting with the CSA, would not send these documents to the staff who are affected by the change.
- (yy) The **sixteenth document** that Mr Burns accessed, is the JDF for the Business Support Officer, Audit and Analytics position. This is a draft JDF and has not been through the classification process because the Classification is stated as ‘Level TBD.’ She knows, having been part of the review, that the position was proposed to be a Level 5 position supporting the Audit team. At the time that Mr Burns accessed these documents on 18 July 2024, the JDF was a draft and had not been released to staff.
- (zz) The **seventeenth document** that Mr Burns accessed, is a JDF for a Level 5, Policy and Program Officer, which is a draft JDF, as indicated by the yellow highlighting.
- (aaa) The **eighteenth document** that Mr Burns accessed, is a document prepared by Acumen in relation to Directorate Functions in June 2024. It is marked ‘CONFIDENTIAL – UPDATED 11.5.24.’
- (bbb) Mr Burns did not have authority to access the documents in the folder. He could practically access the documents in the folder because they were not properly locked down. She did not give Mr Burns authority to access the documents in the folder and did not instruct Mr Burns to create a handover document.
- 12 Ms Brown gave evidence under cross-examination that:
- (a) The list of documents that Mr Burns accessed, does not record whether Mr Burns opened attachments to emails. Given Mr Burns told Mr Fleming that he had accessed the JDF and was not going to apply for the position, she knows that he opened at least one document that is an attachment to an email, being the JDF.
- (b) If Mr Burns had not disclosed to Mr Fleming that he had accessed the JDFs, she would not have known at that time that the TRIM Folder was not restricted.
- (c) She expects that if any one of the Department’s 60,000 employees came across a document or a TRIM Folder, because the responsibility is on the individual employee, to report to an appropriate person, such as a manager, that they have inadvertently come across something that they perhaps ought not to have access to.
- (d) She does not recall if the AEDM Training informs an employee how to work out if a TRIM Folder is supposed to be restricted or not. From her recollection, the AEDM Training does not go to that level of detail.
- (e) She does not recall if the RA Training would tell Mr Burns what to do if he came across a TRIM folder that was not restricted but was meant to be. She also does not recall what the RA Training says about how to identify whether or not a TRIM folder is supposed to be restricted or not.
- (f) As the Executive Director, an important part of her role is to ensure that confidential documents are kept confidential.
- (g) Given she had instructed (in May 2024) that the TRIM folder in which the documents were to be saved was to be restricted, she did not consider it necessary to mark each and every document subsequently saved to the folder as confidential.
- (h) The TRIM Folder was not marked confidential.
- (i) The TRIM Folder contained documents that had been sent to staff, PowerPoints that staff had seen, and emails that she had sent out to staff regarding the review, including the attachments to the emails she had sent.
- (j) She agrees that the TRIM Folder contained a mix of documents, some of which were already circulating amongst employees, and some of which were meant to be kept confidential.
- (k) As the Executive Director, it was her responsibility to ensure that the TRIM Folder was restricted. She had instructed her Executive Assistant to restrict the TRIM Folder to three persons only, herself, her Executive Assistant, and Mr Saraceni.
- (l) The TRIM Folder contained sensitive and confidential information, which was not intended to be shared with employees at that time.
- (m) She instructed her Executive Assistant to restrict the TRIM Folder. She did not place any documents in the folder herself but instructed her Executive Assistant to save the relevant documents to the folder.
- (n) She told the employees that the JDFs were in draft form and that they were still under review. She did not tell employees at any time that the draft JDFs were confidential, or that they were restricted; but she did tell employees on numerous occasions that the JDFs would not be made available until such time as they had been through the Classification Review Committee.

13 Ms Brown gave evidence in re-examination that:

- (a) Her daybook records that Mr Fleming had told her that Mr Burns had seen the new Level 5 JDF.
- (b) Page 118 of the Appellant's Bundle (at [7(l)] above), is a slide from the AEDM Training. It notes that the AEDM Training is based on the Department's Code of Conduct and informs staff that official information should only be accessed when they have a work related requirement to do so in their official capacity; which she thinks correlates with standard 6 of the Code of Conduct. The Code of Conduct is available on the Department's intranet (IKON).
- (c) Page 234 of the Appellant's Bundle (at [7(q)] above), is a slide from the RA Training. It makes the same point as the slide on page 118 of the Appellant's Bundle.

14 Mr Fleming gave evidence-in-chief that:

- (a) He is the Manager, Audit Assurance (Level 8) at the Department. He has held the position since March 2024 and has been with the Department of Education and Training since the merger in 2003, in various roles. He is a qualified accountant, holds a Bachelor of Business from Curtin University, and has a Graduate Certificate in Internal Audit through the Institute of Internal Auditors.
- (b) As the Manager, he is responsible for the formation and delivery of the internal audit plan, and reports to the Audit and Risk Committee on a quarterly basis. He reports to the Director, Risk and Assurance, who reports to the Executive Director of Professional Standards and Conduct (Ms Brown). As the Chief Audit Executive, he reports directly to the Audit and Risk Committee.
- (c) Currently, three Principal Consultants Level 7, and one Administrative Officer Level 5, report to him. Last year, he had one Level 6, and three Level 5, Officers report to him. One of the Level 5 Officers that reported to him was Mr Burns.
- (d) He has worked with Mr Burns in various roles since 2003.
- (e) While Mr Burns has stated that the JDF that he had been operating under did not align with the actual duties he was performing, he does not believe that to be true, because Mr Burns has been involved in developing a number of systems, and that involves a comprehensive or detailed risk assessment process and reporting that occurs as part of the system development. Mr Burns' main duties involved the AFR: actioning or remediating the review recommendations from the Office of the Auditor General or the Public Service Commission. When the report was issued by those review bodies, a recommendation would be tendered, and there would be a due date for an action. Mr Burns was involved in managing that whole process in terms of communicating with stakeholders within the Department, getting the responses, and collating the information for presentation to the Audit Committee. In the latter period, Mr Burns would drill down into the responses received and make an assessment on the adequacy of the evidence, making comments, or going back to the respective stakeholder concerned and asking them for more information. In performing this task, Mr Burns would not generally need to go searching for documents on TRIM, because the stakeholders would normally provide the TRIM reference. Mr Burns might go searching on TRIM to see whether he could access the document via the TRIM reference, but if he was not given access to the document, he would go back to the stakeholder concerned to ask them to either give him access or alternatively provide him with a local copy of the document. Mr Burns' duties did not involve him searching around TRIM for any other documents apart from specifically what he was tasked to do with regard to the AFR process.
- (f) He came onboard in March 2024, at which point the Review was underway. His understanding is that the Directorate was doing work which was operational and transactional, so the intention of the Review was to look at the function and see whether the Directorate could be more strategic and add more value to the Department, which involved reviewing the organisational structure for the best configuration of staffing to deliver on the new remit.
- (g) He was aware that the staff wanted to have access to the new JDFs. As part of the review, feedback was obtained from stakeholders around the Department of their perceptions about Audit and the people that worked in the Audit team, so he was aware that the staff were keen to get access to the documentation as they wanted to know who the reviewers had spoken to and what they had said. The messaging was that the staff were not entitled to anything that was not being provided through the chain of command (Ms Brown).
- (h) He attended the third meeting in May 2024, and the fourth meeting in July 2024. For one of the meetings, he was required to organise the meeting and have the documents ready to be presented. Ms Brown sent him the documents on the morning of the meeting, or on the previous afternoon, so he had the documents, but he would only release the documents under her authority.
- (i) In these meetings, it was indicated to the staff that the documents and the review were confidential, apart from what was provided to them. Various documents and briefings were provided to the staff. When feedback was obtained from the staff, indicating that they wanted further information, the request would be considered and Ms Brown would make a decision as to whether further information could be provided.
- (j) At some point in time, he became aware there was a TRIM Folder relating to the review. He was not authorised to access the folder, but he did access it. He cannot recall when he accessed it, or why he accessed it. He was subsequently the subject of a disciplinary process for accessing the folder.
- (k) He used to have weekly meetings with the team, where they would check in on welfare and wellbeing and any issues that they needed to deal with; they were regular meetings to get an update on work and tasks. In attendance at the meeting on 24 July 2024 was himself, Mr Burns and Sean De Souza (Senior Auditor, Level 6). At some stage, the issue of the JDFs was raised and Mr Burns indicated that he had already accessed the JDFs. He was taken aback

given his understanding of the confidentiality of the JDFs, so he made a filenote and recalls that Mr Burns specifically indicated that he had accessed all of the JDFs and that he had seen one in relation to the Level 5 equivalent position that he could potentially apply for, but Mr Burns had said that he thought the duties were very administrative in nature so he was not going to apply. Mr De Souza asked Mr Burns to send the JDFs his way, and he understands that that actually happened. He did not say anything when Mr Burns raised it, because he was taken aback by the comment.

- (l) On that afternoon, he told Ms Brown about Mr Burns' comment. Following this, the access controls to the TRIM Folder were corrected.

15 Mr Fleming gave evidence under cross-examination that:

- (a) He did not feel that Mr Burns really wanted to work in the Risk and Assurance Directorate.
- (b) Mr Burns undertook a number of secondments that took him out of the Risk and Assurance Directorate.
- (c) He agrees that Mr Burns did not really fit in with the Risk and Assurance Directorate.
- (d) Mr Burns comes from an IT background. He agrees that Mr Burns initially started in IT and then performed a whole number of different roles since then.
- (e) He agrees that he has more knowledge and experience in risk assessment and risk management than Mr Burns. He also agrees that Mr Benomi and Mr De Souza have more experience in risk assessment and risk management than Mr Burns.
- (f) He notified Ms Brown that Mr Burns had seen the JDF in the TRIM Folder on 24 July 2024. He notified Ms Brown of what Mr Burns told him during a team meeting, that he had accessed the TRIM Folder and the JDF.
- (g) When asked whether, as Mr Burns' manager, when Mr Burns told him he had accessed a folder that he was not supposed to access he considered it was his duty to counsel Mr Burns, he said, 'not necessarily, no.' He said:

---Well, as I said before, I was – I was just quite taken aback, so, ah, what I did as the first thing was I went to see Ms Brown and then from there, ah, it was my understanding that certain actions were – were going to be taken, which in my mind meant that I didn't need to speak to him further about it.

Okay. So you were taken aback?---I mean he shouldn't have had access to that folder. He shouldn't have been looking at that folder - - -

You knew that - - -?--- - - - and I was – I was - - -

You knew that when he told you at the meeting and so you would have known that then, Mr Fleming, when the other employee said 'Flick it my way' that he was asking – that it was likely to happen that there's documents you knew were confidential that shouldn't [*sic*] be restricted were going to be shared and you said nothing. That's correct, isn't it?---I – I said nothing at the time.

Okay. Because you were taken aback and surprised?---Yeah, that's correct.

- (h) He spoke with Ms Brown about the folder on 24 July 2024 because he first became aware that the folder might not be restricted from what Mr Burns told him at the meeting on 24 July 2024.
- (i) Prior to that meeting, he had accessed the folder. If the investigation report states he accessed the folder on 19 July 2024, he does not disagree with that date. When he accessed the folder, he had no reason to believe he was not authorised to do so because he was not restricted from the folder, and at the time, he was working with Ms Brown and the Director on the Review, had received documents from Ms Brown to distribute, and was the Manager and in a position of trust.
- (j) It was only when Mr Burns told him at the meeting that he had accessed the JDFs, and he knew that Mr Burns should not have had access to the folder or be looking at JDFs, that he passed on that information to Ms Brown.
- (k) He has completed the AEDM Training and the RA Training. He cannot recall what the AEDM Training tells him to do when he finds an unrestricted folder that is meant to be restricted, but he assumes it says to notify someone. He cannot recall what the AEDM Training tells him about how to identify whether or not a folder is meant to be restricted. He cannot recall what the RA Training tells him about what to do if he comes across information that is not restricted but ought to be restricted, but he thinks it would be to report it.
- (l) Page 33 of the Appellant's Further Bundle of Documents filed on 8 August 2025 (**Appellant's Further Bundle**) is the investigation report into his access to the folder. He agrees that the investigation related to his access to two documents in the folder on 19 July 2024 between 9:00am and 9:01am.
- (m) Page 43 of the Appellant's Further Bundle is his response to SID, stating:

I believe it was just a genuine mistake in that I accessed this folder as a part of a routine search and no harm has resulted. I do however recall about that time reviewing and searching for an external review of the Internal Audit function (a mandatory requirement every 5 years) in TRIM and that search may have taken me to that folder inadvertently.

You are probably aware that I have been supporting the Executive Director Professional Standards and Conduct (ED PSC) and Director Risk and assurance with the reform of the area over the past six months and if I really wanted to see the JDFs or other documents I would have simply asked to see them. Certainly, the ED PSC has on numerous occasions called on me to provide information in support of the reform and sent me confidential documents in advance of meeting with staff to have them available on the

day to present to staff. I have also been consulted at various stages about various aspects regarding the reform and am currently dealing with a confidential matter with one of the members of the audit team.

In mitigation I am cognisant of the Code of conduct and standard 6 and can confirm that I have not used any of this information for my personal benefit and have not shared this information with others. I have personally evaluated the extent of the breach and have assessed that there is no risk to student wellbeing, the Department's reputation, just mine.

I would like to say that I accessed the folder to expose wrongdoing after one of my staff members advised me that he had sourced the confidential new JDFs but I am not clear that this is the case. Having said that I did refer this matter to the ED PSC in a subsequent casual conversation.

- (n) In relation to the first paragraph (at [15(m)] above), he does not recall what he was searching for when he came across the folder. He agrees that he was doing a routine search on TRIM and the documents came up in front of him. He indicated in his response to SID what he might have been looking for, and that the search took him to the documents inadvertently. The search results 'had no relevance to me or importance to me, which is why I was only in there a very short period of time.'
- (o) In relation to the second paragraph (at [15(m)] above), he was referring to the position that he was in, and the role that he was performing, that if he needed to see the JDFs he could have just asked to see them; but there was no reason for him to see the JDFs.
- (p) In relation to the fourth paragraph (at [15(m)] above), he said that the statement is correct; after he received the investigation report from SID (on 26 November 2024), he realised that he did not access the folder after Mr Burns' disclosure of accessing confidential JDFs because the dates did not 'match up'.
- (q) Page 47 of the Appellant's Further Bundle is an attachment to the investigation report and is the record of his access to the folder on 19 July 2024:

Record Number	Record Title	Event Date and Time	Accessed
D24/0447528	Email from Rowena Williams to Acumen - Audit and Compliance draft JDFs - L8 and 3 Program Managers 20.06.24	19/07/2024 at 9:00 AM	ERIC FLEM
D24/0455838	Email from Rowena Williams - Feedback RE: Confidential - Draft Presentation 4 25.6.24	19/07/2024 at 9:01 AM	ERIC FLEM

- (r) He agrees the table (at [15(q)] above), records his access to the folder. He agrees the title of the first document refers to a Level 8 JDF but does not know if the JDF was attached to the email. He said that he did not open the second email; rather, he accessed the folder and could see the two record titles. He said that the reference to the column titled 'Accessed' means he accessed the folder, not the document. When asked if he only accessed the folder why his name appears twice, he said, 'because there's two documents in that folder. And when I open up [the] TRIM folder it's saying I've accessed those documents.'
- (s) Page 1 of the Appellant's Further Bundle is the audit report of Mr Burns' access to the folder:

Record Number	Record Title	Event Date and Time	Accessed By	Event Description
D24/0433787	Email to Tamara Findlay - Correspondence to Ms Rikki Hendon, CPSUCSA re: review of the Risk and ...	18/07/2024 at 10:39 AM	STEPHEN BURNS	Document Viewed
...
D24/0438839	DoE R&A Functional Responsibilities - Updated 170524	18/07/2024 at 11:06 AM	STEPHEN BURNS	Document Viewed

- (t) He agrees the column 'Accessed By' in the above table, is referring to the same thing as the column titled 'Accessed' (in the table at [15(q)] above). He agrees that 'Accessed By' and 'Accessed' in the two tables means the person named in the table has accessed the folder, not the documents; 'that's what this document shows.' The document shows that Mr Burns was in the TRIM Folder from 10:39am to 11:06am.
- (u) He believes the investigation concerned his access to the TRIM Folder, not his access to documents.
- (v) He recalls being called into a meeting with SID. He thinks it is correct that Mr Burns and Mr De Souza were also taken into a meeting with SID. He agrees that they were called into different meetings, and believes the meetings were on the same day. He does not know or remember who was taken into a meeting first. He believes the folder was accessed by himself, Mr Burns, Mr De Souza, Mr Benomi, and the former Manager of Risk and Policy (Brian Hlatywayo).
- (w) Mr Burns was aggrieved and agitated after meeting with SID, and spoke to him, and he thinks Mr Burns told him at that time that Mr Hlatywayo had accessed the folder. He told Mr Burns that he was not in a position to speak with him about the matter.
- (x) He thinks Mr De Souza told him that he had accessed the folder. He told Mr De Souza that he was not at liberty to speak with him about the matter.

- (y) Mr Burns and Mr De Souza were reporting to him, so he has responsibility for their welfare and wellbeing, but ‘with a matter of this nature [I’m] not going to speak to them about it’.
 - (z) Mr Benomi told him that he had accessed the folder. He told Mr Benomi the same thing he told the others.
 - (aa) He did not tell anyone else that employees subject to investigation into the access to the folder were disclosing details of the investigation to him, ‘because there was no need to.’
- 16 Mr Fleming gave evidence in re-examination that:
- (a) The column ‘Event Description’ and the entries ‘Document Viewed’ in the table on page 1 of the Appellant’s Further Bundle (at [15(s)] above), tells him that Mr Burns accessed and viewed the document.
 - (b) When he accessed the TRIM Folder on 19 July 2024, he would only be able to determine if his subordinates would also be able to access the folder if he had gone looking to see who had been provided access. The mere fact that he had been provided access, does not mean his subordinates would have access.

Mr Burns’ submissions

- 17 On 30 June 2025, Mr Burns filed an outline of written submissions, relying upon the following decisions: (footnotes omitted)
- (a) ***Portilla v BHP Billiton Iron Ore Pty Ltd*** [2005] WAIRC 02604 (*Portilla*):
Portilla is noteworthy here also. Like Mr Burns, Mr Portilla had worked for the employer for over 26 years before he was dismissed. Unlike Mr Burns, who self-disclosed his conduct, Mr Portilla was given a formal warning for related conduct before he was dismissed and was found to have lied to his employer on a number of occasions in an attempt to conceal what he had done. Nonetheless, the Full Bench unanimously upheld Mr Portilla’s appeal, declaring he had been harshly, oppressively or unfairly dismissed and ordered his reinstatement.
 - (b) ***Tolmie v Director General for Planning and Infrastructure*** [2006] WAIRC 03630 (*Tolmie*):
 In *Tolmie*, an appeal against dismissal before the Board, Ms Tolmie was found to have accessed confidential records about her former husband from the Department for Planning and Infrastructure’s TRELIS records system for the purposes of furthering property settlement proceedings that she would benefit from. She repeatedly breached her obligations over a significant period of time. The Board held [that] the employer’s complete breakdown in trust was unsustainable because the circumstances of Ms Tolmie at the time were unique and that Ms Tolmie ‘had otherwise been a trustworthy employee for a period in excess of 10 years’, with the Board giving most weight to Ms Tolmie’s record of service. In substituting dismissal with a reprimand, transfer and remuneration reduction, the Board said ‘we are satisfied that her circumstances provide at least some mitigation and need to be taken into account along with her otherwise unblemished record.’
 - (c) ***Sandland v Australian Capita Territory t/as Canberra Health Services*** [2023] FWC 3389 (*Sandland*):
 In the recent Fair Work Commission case of *Sandland*, Ms Sandland, an enrolled nurse, was dismissed for authorised dealings with and disclosure of high volumes of highly confidential patient records, which she sent to her personal email address and to her union. McKinnon C found her conduct to be unauthorised and unlawful, had occurred with respect to numerous instances over a significant period of time, and had the potential to cause significant reputational risk, including in the wider community. Unlike Mr Burns, Ms Sandland did not admit to the extent of their access, and being an experienced enrolled nurse, was well acquainted with the importance of confidentiality of the particular documents she accessed and disclosed.
 In finding Ms Sandland’s dismissal unfair, McKinnon C considered relevant the fact that her conduct occurred amidst a time of upheaval for staff, with extensive review processes, stakeholder meetings, receipts of submissions and comprehensive document reviews related to matters relevant to the records Ms Sandland disclosed. The failure of parties involved (including Ms Sandland’s union) to provide clear guidance to Ms Sandland and the employer’s inconsistent approach to the issue also weighed towards finding the dismissal unfair.
 - (d) ***United Worker’ Union v Terminals Pty Ltd T/A Quantem Bulk Liquid Storage & Handling*** [2024] FWC 2209 (*UWU*).
- 18 Mr Burns submitted that: (footnotes omitted)
- 68. [He] did not try to conceal his conduct like Mr Portilla and Ms Sandland. Nor did he repeatedly access or disclose information to third parties or use it to further his interest in personal matters like Ms Tolmie did.
 - 69. Unlike Mr Portilla, [he] did not have the benefit of a formal warning.
 - 70. Similar to the circumstances considered in *Sandland*, [he] and his colleagues were in the midst of an extensive review process, with information overload, mixed messages, and volleys of documents being sent around. The respondent failed to provide clear guidance, partly because it was at pains to emphasise the openness and transparency of the restructure process, and partly because it did not anticipate, and therefore could not forewarn, that confidential documents related to the restructure would be made available for all to see.
 - 71. This case has its own special circumstances, as set out above, and not least the respondent’s extraordinary error in making available troves of documents it meant to restrict.
 - 72. [He] otherwise has an unblemished record of 26 years, far in excess of Ms Tolmie’s.
 - 73. The respondent treated [him] disparately in dismissing him and it is ‘apples and apples’ like *Portilla*.

74. It is open to the Board to find [his] dismissal was harsh, oppressive or unfair.

- 19 Mr Burns relies upon *Minister for Corrective Services v Fagan* [2023] WAIRC 00984 [97], for the proposition that *Portilla* is the leading case regarding unfairness through inconsistent treatment in this jurisdiction. Looking at all the circumstances, Mr Burns was a more junior employee and had less experience in risk and risk management than Mr Fleming, Mr Benomi and Mr De Souza.
- 20 Mr Burns' agent submitted by way of closing submissions that:
- (a) While Mr Burns does not dispute accessing the documents, there is no evidence that he opened all of the attachments to the emails.
 - (b) It would not make sense for Mr Burns to direct the respondent to his desktop if the handover document was not saved there, as it would reflect badly on him when it was not found to be on his desktop.
 - (c) There is also no evidence that Mr Burns accessed the folder or looked at the documents for an advantage or to cause anyone a detriment.
 - (d) There are many cases involving employees accessing documents; this is because curiosity is something that everyone has.
 - (e) However, given Mr Burns' 26 years of good service, his dismissal is unfair in circumstances where, apart from curiosity, there is no evidence of him accessing the documents in order to obtain an advantage.
 - (f) Mr Fleming's evidence was that when an employee accesses documents that they should not, that they should inform their supervisor. Mr Burns informed Mr Fleming within three business days.
 - (g) Mr Burns' access should be understood in the context of his experience of the workplace; that he was bored in his job, and that he found it was an unpleasant place to work, with a problematic culture.
 - (h) Mr Burns' access should also be understood in the context of the example set by his supervisor, Mr Fleming. Mr Fleming did not counsel Mr Burns when Mr Burns disclosed his access. Furthermore, Mr Fleming accessed the documents not knowing they were restricted. Likewise, Mr Burns accessed the documents not knowing they were restricted.
 - (i) Contrary to the respondent's submission that Mr Burns lacks remorse, Mr Burns expressed strongly that he had learned from the ordeal and would be careful should the situation arise again.
 - (j) Mr Burns' conduct was a once-off event in his 26 years of good service. Mr Burns could be trained to ensure that there is no repeat of his misconduct.

The respondent's submissions

- 21 On 2 July 2025, the respondent filed an outline of written submissions, noting Mr Burns' reliance on *Tolmie*, *Sandland* and *UWU*, and submitting: (footnotes omitted)
36. [*Tolmie*] is of little relevance because the question of proportionality turns upon the facts and circumstances of each and every case. [*Tolmie*] is very different to the present case. In that case, the Board accepted that there were 'distressing circumstances' relating to her marriage breakdown and 'physical and emotional abuse' which was the context in which [Ms Tolmie] came to access information that she was not authorised to access. Other significant and serious personal circumstances affected her and her judgment at the time of the conduct. During the investigation, [Ms Tolmie] was honest and open in her responses she 'admitted her error and [was] contrite.'
 37. Those were significant mitigating features established a basis to think [Ms Tolmie] would be unlikely to engage in similar conduct again (due to the serious and unique circumstances arising at the time affecting her judgment and due to her insight and contrition).
 38. Even despite those significant mitigating circumstances, it is apparent from the face of the decision that the Board was only just satisfied that in those exceptional circumstances dismissal was harsh, given [the] serious nature of the wrongdoing.
 39. Another distinguishing feature of [*Tolmie*] is that [Ms Tolmie] was a much more junior officer than [Mr Burns], being a level 2 officer.
 40. Far from assisting [Mr Burns'] case, *Tolmie* supports the respondent's case that in the absence of such significant mitigating features, and in the absence of honesty, contrition and insight, dismissal follows for such conduct.
 41. As for the federal case relied upon by [Mr Burns], [*Sandland*], the starting point is the Fair Work Commission found that the unauthorised disclosures and storage of personal information and personal health information constituted a valid reason for dismissal. While the dismissal was ultimately found to be unfair, this was not because the conduct did not warrant dismissal, rather, the reason for finding unfairness is exclaimated at [170] and [171]:

But the dismissal was also marked by unnecessary haste. I accept that CHS was alleging serious misconduct on the part of Ms Sandland, and that it was not necessary in those circumstances for it to undertake a lengthy procedural inquiry. But at the time of dismissal, Ms Sandland had been employed for more than 6 years in a challenging and high-risk environment. Her relationship with her managers was strained. Many of her disclosures bore a connection to her roles as health and safety representative and union delegate, and it was important for CHS to understand, if possible, the extent to which this may have influenced or explained her decisions. In this context, it is difficult to understand why CHS did not complete its own preliminary inquiry into the facts of the matter before acting to dismiss Ms Sandland in reliance on only a select few emails. Together with the ANMF's failure to provide appropriate guidance to Ms Sandland about the sharing of

information without breaching patient privacy and the apparent inconsistency of approach on this issue within CHS, these matters weigh in favour of a finding of unfair dismissal.

The procedural deficiencies described above, and which for the most part could easily have been avoided, tip the balance in favour of a finding that the dismissal was unreasonable. It follows that I am satisfied that Ms Sandland has been unfairly dismissed.

42. Reinstatement was ultimately considered inappropriate on the basis that it was ‘difficult to see how [the employer] could have the necessary confidence in [Ms Sandland’s] commitment to patient privacy’ in accordance with her obligations in the future, which underscores the point that the conduct warranted dismissal, but there were procedural deficiencies in the way the employer proceeded with haste.
 43. Again, while accepting every case needs to be considered on its own merits, far from supporting [Mr Burns’] case, [*Sandland*] supports the respondent’s case that dismissal is fair and justified for conduct the subject of these proceedings.
 44. [Mr Burns] also identifies [*UWU*] as another case involving employees’ unauthorised dealings with confidential information. That decision involved an application for interim orders in the context of an application for a bargaining order under the *Fair Work Act*, and it does not speak to the question of whether dismissal for conduct the same or similar to that engaged in by [Mr Burns] could justify a fair dismissal.
 45. There are written submissions made to the effect of [Mr Burns] having reflected on his conduct and in hindsight regretting what he did, notwithstanding that he maintains he did not ‘at the time’ knowingly misconduct himself. There is no proposed evidence to that effect. It is therefore difficult to understand why it is a feature of the written submissions. In any event, the submission is inconsistent with the way [Mr Burns] responded to the disciplinary process and should not be accepted as a truthful reflection of [Mr Burns’ state] of mind at the time of the misconduct or now.
 46. The appeal should be dismissed.
22. The respondent relies upon their written submissions, except to submit in closing submissions that *UWU* is unhelpful as a precedence because it concerns an interlocutory injunction, heard urgently within four or five days after the application was filed, without reference to the evidence the parties would file at a final hearing. Furthermore, the orders made involved interim bargaining orders, such that the case does not involve a finding of unfairness in an unfair dismissal context. While the Deputy President in *UWU* [90] said that ‘In all the circumstances, Mr Hutchison’s and Mr Stolk’s action in sending the emails to the UWU does not justify termination of their employment’, the Deputy President also said in *UWU* [96] that ‘Further evidence may be adduced at the final hearing that causes me to cease to be satisfied as to these matters, which will determine whether final orders are made.’
 23. In relation to *Tolmie*, the respondent submits that it was not just Ms Tolmie’s prior good service; but the combination of Ms Tolmie’s prior good service, the exceptional circumstances for Ms Tolmie accessing the material that she should not have, and Ms Tolmie’s immediate honesty, contrition and insight, that cumulatively weighed against the suggestion that Ms Tolmie would engage in the misconduct again. By contrast, while Mr Burns has a longer period of good service, Mr Burns demonstrated no insight into his misconduct, and there are no exceptional circumstances which led to Mr Burns accessing the documents.
 24. The respondent submits that Mr Burns had no legitimate work-related purpose for accessing the TRIM Folder, for the reasons that follow.
 - (a) Firstly, the documents did not relate to the work that Mr Burns was required to do for the Department.
 - (b) Secondly, where Mr Burns asserts that he had a work-related purpose (of using the JDF to prepare a handover document), that assertion is contrived, for the reasons that follow.
 - (i) In cross-examination, Mr Burns accepted he was not tasked to prepare a handover document.
 - (ii) In evidence-in-chief, Mr Burns generally suggested that he did not do much work at all other than clerical or procedural work, so it is difficult to comprehend the purpose of preparing a handover document
 - (iii) The respondent’s proposed finding and proposed disciplinary action letter dated 26 November 2024 (page 9 of the Agreed Bundle), states: (emphasis added)

Proposed finding

I propose to find the allegation substantiated on the basis that between 10:39 am and 11:06 am on 18 July 2024, you accessed 22 documents in the TRIM file F24/0067236 and extracted a [JDF] relating to the position of Business Support Officer, Audit and Analytics. I also propose to find that you had no authority to access those documents and that you would have known that you did not have authority to access such documents, given the title of the TRIM file and the title and nature of the documents contained within the file.

I am not presently of the mind to accept your explanation, that you had a work-related purpose for accessing the documents. The nature of the documents, including emails between the [CSA] and the Department, relating to the [Review] and Regulation 8 letters for employees other than yourself, bore no relevance to your work. **To that end, your suggestion that you needed to access the documents to prepare handover material appears contrived.**

I currently consider the documents you accessed were plainly confidential and bore no relevance to your work.

- (iv) On 4 December 2024, Mr Burns responded to the respondent's proposed finding and actions letter (page 14 of the Agreed Bundle), stating: (emphasis added)

In 2023 I was brought back to Audit as all secondments were ended. I subsequently provided the new Director (Rowen Williams) and Manager (Eric Flemming) with support for the Audit Finding Register (AFR) and the Audit Review Committee. I cleaned up the AFR which contained hidden rows, broken rows and duplicates. I assisted the directors by obtaining updates for the AFR from responsible officers and applying their updates to the AFR. This is not my job description and I have no expectation to be retained in the branch. **I was preparing a handover document for that function which is on my desktop.** It's not finished but it exists and is not contrived.

- (v) Relevantly, the letter of 4 December 2024, was a couple of weeks after Mr Burns was suspended and when it was fresh in his mind that the handover document was on his desktop. However, despite Mr Burns having the chance to review the list of documents which were on his desktop prior to the hearing, no handover document has been found. This suggests no such document exists, and any suggestion Mr Burns made in the witness box that the document might have been saved somewhere else should be rejected.
- (vi) Finally, there is no logical reason for Mr Burns to be looking at a JDF for the purpose of creating a handover document. He can set out his tasks and his steps in performing them without looking at a JDF, particularly an un-finalised draft-form JDF.

- (c) Thirdly, Mr Burns' evidence was that looking at the JDF for the purpose of preparing a handover document was an ancillary or accidental thing that arose once he was already in the folder. It therefore follows that any asserted work-related purpose (of preparing a handover document), does not explain his access to the folder and the documents in the folder in the first instance, nor does it explain his access to the large number of documents in the folder which were not JDFs (which formed the majority of the documents that he accessed).

25 The respondent submits that Mr Burns had no business at all accessing the documents in the folder, for the following reasons.

- (a) Firstly, the table summarising the documents accessed by Mr Burns (at [5] above) sets out the titles of the documents accessed, and apart from document 8 (where he is identified as the recipient to an email), there is nothing that would suggest Mr Burns has any business opening the documents.
- (b) Secondly, it would have been very clear to Mr Burns from attending the Review meetings that staff were intentionally not given every document that had been created in respect of the Review, as is the employer's right. Mr Burns' suggestion in evidence that he was looking to see if there were any documents arising from the Review that he had not been given should be rejected. Where it was clear to him that the documents were intentionally not being given to staff, to then search for documents that have not been given to him, is to essentially search for documents that intentionally have not been given to him, or at least, creates a real possibility that his search would throw up documents that are intentionally not for his eyes.
- (c) Even if it is accepted that Mr Burns accidentally came across the folder not looking at the titles of the documents, after opening up the second or third document it should have been clear to him that he had no business opening those documents at all, and he ought to have stopped and told his superiors. Instead, Mr Burns continued opening documents. Mr Burns had no business purpose for accessing the documents, yet he knowingly accessed those documents.
- (d) Mr Burns had actual knowledge that the JDFs had not been classified yet and were not going to be released to staff until they were classified, and he knowingly accessed the JDFs in circumstances where he knew he should not be accessing them. Therefore, Mr Burns engaged in a knowing and intentional contravention in accessing and downloading the JDF.

26 In the above circumstances, the respondent submits that there are sufficient factual findings to establish that Mr Burns engaged in misconduct, and that dismissal is proportionate.

27 Firstly, the conduct is gravely serious in the public sector. The respondent relies upon the following key facts to demonstrate the very grave nature of the contraventions:

- (a) Mr Burns did not accidentally or mistakenly access one document. He continuously accessed more and more documents in the folder despite the fact it would have been plain it was none of his business to be there.
- (b) Mr Burns knew the JDFs were not available to him or to staff, yet he looked at the JDFs and even downloaded one JDF.
- (c) Mr Burns knew that the Department was deliberately not giving each staff member every document that was created during the Review, yet he searched the folder in any event.

28 The respondent submits, given these key facts, Mr Burns was acting intentionally and knowingly; arguably, dishonestly. Mr Burns was accessing documents he would have known he had no business accessing. That conduct in and of itself warrants dismissal.

29 In response to Mr Burns' submission that his accessing the folder for 27 minutes should be considered in light of his 26 years of prior good service, the respondent says, firstly, 27 minutes is a significant period of time, during which Mr Burns snooped around documents that were plainly not his business.

30 Secondly, Mr Burns' conduct was not a spur of the moment incident that was over in a flash, and which he did not have time to

- think about. It is not akin to a prison officer dealing with a difficult prisoner and in the spur of the moment potentially using more force than they should. Mr Burns' conduct was intentional, knowing conduct in the quiet of his workstation. Mr Burns had a number of chances to abandon his endeavour but continued to click on the documents.
- 31 Thirdly, and as observed by Matthews C (in *Barnett v The Western Australian Education Department* [2019] WAIRC 00028), employees are paid for good service. Good service does not assist Mr Burns when coupled with his serious and intentional wrongdoing for which he lacks insight and contrition even with retrospect and in hindsight.
- 32 While Mr Burns said in evidence-in-chief that he would not make the same mistake again, his evidence under cross-examination demonstrated that he lacks insight into why it was wrong to access the documents. He said that he was not concerned about looking at some of the documents, and that there was no harm caused by him looking at documents. When asked whether his superiors were entitled to have the space to do their jobs without subordinates sticky-beaking into their business, he did not think there was a problem.
- 33 Given Mr Burns' demonstrated lack of insight, the respondent was right to have lost trust and confidence in him. Given Mr Burns' 26 years in the public service, his lack of understanding that there are documents that, even though he might be able to physically access them, he has no authority to do so, works against him.
- 34 Mr Burns' submission that there was a lack of training about the required standards of conduct should also be rejected. The AEDM Training, RA Training and Code of Conduct make it clear that it is wrong to access documents without a proper business purpose.
- 35 It is immaterial whether Mr Burns obtained a benefit from his conduct. The gravamen of wrongdoing in improperly accessing documents is not the improper use of documents. While obtaining a benefit from looking at the documents would be an aggravating circumstance, the seriousness of the wrongdoing with improper access attaches to the mere access itself. This is because an employer can never be sure what an employee has done with the information they have improperly obtained. In any event, Mr Burns did, in fact, obtain a benefit in this particular case, which is also an aggravating circumstance. The benefit that Mr Burns obtained was the satiation of his curiosity, which he was not entitled to satiate. Mr Burns' evidence-in-chief was to the effect that once he was in the folder, because he is a systems analyst and what he does is investigate, he decided to go investigating around.
- 36 Finally, Mr Burns' dishonesty in his response to the disciplinary process would be sufficient to have warranted his dismissal in any event, particularly when taken together with the wrongdoing: *Pantovic v Public Transport Authority of Western Australia* [2011] WAIRC 00876 (*Pantovic*).
- 37 Mr Burns' dishonesty arises from his response to the allegation that: (emphasis added)
- 'My work-related purpose for viewing these **documents** is I am leaving this branch shortly and need to prepare handover documents for the people coming in.'
- 'The title of the folder and the **documents** contained within it indicate it may contain information I need to prepare handover documents before I leave the branch.'
- 38 At the hearing, Mr Burns' evidence was that it was only the JDF out of everything in the folder that was relevant to his handover document. Accordingly, Mr Burns' assertions in his response was materially misleading in giving the impression that his work-related purpose of preparing his handover document related to all of the documents he accessed. While Mr Burns' evidence under cross-examination was that this part of his response was poorly drafted, the respondent submits that Mr Burns' explanation cannot be accepted and the Board can be satisfied that he was dishonest for the following reasons:
- (a) Firstly, Mr Burns' assertion that his access to the **documents** being relevant to his handover document appears twice in his response.
 - (b) Secondly, in the response, Mr Burns refers to 'viewing these documents'; he does not refer to the one document (the JDF) that he extracted.
 - (c) Thirdly, in the response, Mr Burns refers to the 'title of the folder and the documents contained within it' indicated to him that the folder may contain information he needed to prepare handover documents. However, the title of the folder and the title of the documents within it cannot support his contention that he only intended to refer to the preparation of a handover document as the work-related purpose for accessing the JDF, not all of the documents.
 - (d) Mr Burns' intent was to attempt to convey that all of the documents, based on the title of the folder and the title of the documents, were relevant to a handover document that he was creating. Mr Burns gave a dishonest response to the allegation; he lied to the respondent in an attempt to cover up the fact that he had improperly accessed the documents.
- 39 The respondent relies upon the references to the authorities dealing with disparity in unfair dismissal matters in *Fagan v Minister for Corrective Services* [2023] WAIRC 00324 [70], [74]–[75]:
- 70 Inconsistent treatment of employees can render a dismissal unfair, even if dismissal might otherwise be justified or warranted. The dismissal of an employee may be unfair if another employee guilty of similar or the same misconduct, and without other mitigating features to differentiate, is not dismissed: *Portilla* at [166] citing *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* [2004] WAIRC 13424; *Sexton v Pacific National (ACT) Pty Ltd* [2003] AIRC 506 [(*Sexton*)] at [33].
- ...
- 74 Caution must be exercised in approaching claims of differential treatment. As Vice President Lawler said in *Sexton* at [36]:
- In my opinion the Commission should approach with caution claims of differential treatment in other cases

advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of s.170CE(1) or in determining whether there has been a 'fair go all round' within the meaning of s.170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing 'apples with apples'. There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. Obviously, where, as in *National Jet Systems*, there is differential treatment between persons involved in the same incident the Commission can more readily conclude that the cases are properly comparable. However, even then the Commission must approach the matter with caution. Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an allegedly comparable case. For example, a worker guilty of particular misconduct justifying termination might be shown leniency because of extreme need or stress arising from the serious illness of a close dependent. Another worker guilty of the same misconduct could not necessarily rely upon the leniency shown to the first worker as a basis for demonstrating that his or her termination was harsh, unjust or unreasonable. Many other examples could be constructed.

- 75 The Full Commission of the NSW Industrial Relations Commission has also described the need for care in deciding whether inconsistency in punishment is a matter that can be taken into account in determining if a dismissal is unfair:

The response to misconduct is a matter of discretion. The time, place and circumstance of one breach, the circumstances of the offender and the implications for adequate administration of an enterprise, will seldom coincide.

- 40 Mr Fleming who received improvement action, is not a comparative case. Unlike Mr Burns, Mr Fleming accessed two documents, over the course of one minute. Furthermore, Mr Fleming did not dispute his access, did not suggest he had authority to access the documents. Whilst Mr Fleming could not recall why he accessed the documents, he believed it was a genuine mistake and apologised for his conduct. In summary, Mr Fleming demonstrated insight and provided an indication that he is unlikely to repeat the misconduct.
- 41 Mr Benomi who received improvement action, is also not a comparative case. Unlike Mr Burns, Mr Benomi accessed three documents, over the course of three minutes. Relevantly, Mr Benomi was punished for different wrongdoing to Mr Burns. The substantiated allegation against Mr Benomi was that while he did not know his initial access was unauthorised, once he did access the documents, he should have known that he was not authorised and should have raised the issue with his superior.
- 42 Mr De Souza was dismissed for accessing and extracting four documents (JDFs), over the course of a few minutes. Unlike Mr Burns, Mr De Souza apologised for his conduct. Mr De Souza's response to the allegations was that he did not know he was not allowed to access the documents when he accessed them, and that he accessed the JDFs because he thought they would help him to decide if he wanted to apply for the Level 7 positions in the new structure. In any event, Mr Burns cannot claim disparity between him and Mr De Souza who was also dismissed for his unauthorised access to the JDFs.

Consideration

- 43 As outlined at [2] above, this appeal concerns whether Mr Burns committed a breach of discipline by accessing the TRIM Folder and the documents contained within it on 18 July 2024, and if so, whether dismissal was a proportionate response in all the circumstances. Furthermore, it must be determined whether Mr Burns was treated unfairly by reason of disparate treatment compared to other employees who had also accessed the TRIM Folder without authorisation.

Issue 1 – Whether Mr Burns committed a breach of discipline?

- 44 Section 80 of the PSM Act states:

80. Breaches of discipline, defined

An employee who –

- (a) disobeys or disregards a lawful order; or
- (b) contravenes –
 - (i) any provision of this Act applicable to that employee; or
 - (ii) any public sector standard or code of ethics; or
- (c) commits an act of misconduct; or
- (d) is negligent or careless in the performance of his or her functions; or
- (e) commits an act of victimisation within the meaning of section 15 of the *Public Interest Disclosure Act 2003*, commits a breach of discipline.

- 45 The Department's Code of Conduct (Agreed Document 13), which binds all employees, states:

Our Standards

The code provides a set of standards to guide us in our conduct as employees when making professional and personal decisions. Decisions made in the context of our private lives may also impact our professional standing.

It is our responsibility to understand and adhere to the standards and they should be read in conjunction with all relevant legislation, policies and procedures. In addition, we should exercise fairness, impartiality and timeliness in our decision-making.

46 Standard 6 of the Code of Conduct states:

Protect official and confidential information

We access and use official and confidential information only for authorised purposes.

- 47 Standard 6 is reinforced by the AEDM Training and RA Training, which Mr Burns completed in June 2022 and February 2024 respectively. The AEDM Training explicitly states ‘Only access, or allow others to access, official records, information, data and systems for purposes related to our, or their, function’, and the RA Training emphasises individual responsibility for maintaining confidentiality and accessing information only for authorised purposes: [7(j)–(s)] above.
- 48 Mr Burns does not dispute accessing the TRIM Folder, for about 27 minutes, and downloading one document (the JDF) twice: [6(ff)–(gg)] above.
- 49 Mr Burns’ evidence-in-chief was that he stumbled upon the TRIM Folder inadvertently while conducting a search in TRIM (the purpose of which he could not recall), clicked on the link to the TRIM Folder, and proceeded to browse through the folder because ‘it was there’ and he ‘wondered what else was in it’: [6(x)–(y)] above.
- 50 Mr Burns’ evidence was that when he opened the TRIM Folder, he saw a list of approximately two dozen files, which ‘looked like they’d update me on what was going on with the review’; he ‘just had a look at some of the documents’, and ‘one of them looked like it was relevant to the new position they were creating, and I was working on the document to do a handover for that’: [6(z)–(bb)] above.
- 51 Mr Burns’ evidence was that he looked at the other documents in the TRIM Folder because ‘they were just there’; he was just looking at them because ‘They’re there. They were in front of me. I’m a systems analyst. I investigate things. It’s just part of who I am’: [6(ee)] above.
- 52 Relevantly, Mr Burns’ evidence-in-chief was that he was concerned the TRIM Folder contained the regulation 8 letters, and while he only looked at the regulation 8 letter that was issued to him, his evidence was that ‘I think from that point, I probably decided I probably shouldn’t be continuing to rummage through it because it had documents in there that either should have been protected or shouldn’t have been in that folder’: [6(ii)] above.
- 53 This evidence is relevant because:
- (a) Mr Burns accessed document 10 (the email containing the regulation 8 letters) at 10:49am. The TRIM title of document 10 is: ‘Email to Richard Lobb and Aaron Silver – Signed Reg 8 letters served on 15 May 2024’.
 - (b) Document 10 states:

Good morning Richard and Aaron

Please find attached the signed copies of the Regulation 8 letters and attachment that were served to the recipients at this morning’s meeting at 11:06am.

Kind regards

Mary Brown

Executive Director
 - (c) Document 10 contains four attachments, one of which is titled ‘Reg 8 letter from ED to Stephen Burns – 15.05.24 (signed by ED PSC).PDF’, and the other three are addressed to other employees: [11(rr)] above.
 - (d) From the title of document 10, Mr Burns could not have known, without accessing the document, that it contained a regulation 8 letter issued to him.
 - (e) Mr Burns admitted opening one of the attachments to the email, namely the regulation 8 letter addressed to him.
 - (f) By his own admission, at the time of accessing this document (the **ninth document** that he accessed), he formed the view that the folder contained protected information that he should not be viewing.
 - (g) Despite this realisation, the table at [5] above indicates that Mr Burns continued to access a further nine documents over the subsequent 17 minutes.
 - (h) Pertinently, the sixteenth document that Mr Burns accessed (at [5] above), was the JDF, which he downloaded, and claimed he accessed because it was relevant to the handover document he was preparing.
 - (i) This demonstrates that Mr Burns’ conduct shifted from potential inadvertence or idle curiosity to wilful and knowing unauthorised access. He did not merely ‘rummage’; he persisted in accessing confidential records after explicitly recognising the impropriety of doing so. The distinction between inadvertent access and knowing, continued access is material to assessing the gravity of the breach.
 - (j) Furthermore, despite ‘deciding’ that the TRIM Folder contained documents that either should have been protected or should not have been in the folder, his evidence-in-chief was that he did not raise the issue of the TRIM Folder being unrestricted because ‘20 minutes after I’d touched that folder, I’d completely forgotten about it. I just moved on’: [6(jj)] above.
- 54 Under cross-examination, Mr Burns agreed that his understanding from attending the Review meetings was that the Department would not be providing the employees with Acumen’s report, and only an executive summary will be provided. He also understood from attending the Review meetings that the JDFs were to be classified before they were to be provided to the employees, and that as at 16 July 2024, 4:15pm (pertinently, one-and-a-half days prior to his accessing the TRIM Folder on 18 July 2024), that the JDFs had not been classified: [7(dd), (hh)–(oo)] above.
- 55 Under cross-examination, Mr Burns agreed that he was not tasked with preparing a handover document, could not locate any

such document despite directing the respondent to his desktop, and stated that his initial intent was not to seek JDFs but rather 'attachment documents that I would have missed from the emails that were distributed out to people' from Review meetings: [9(i), (n)] and [8(r)] above.

- 56 Mr Burns conceded under cross-examination that he had no business:
- (a) Looking at document 5: [8(g), (k)] above.
 - (b) Opening or looking at document 6: [8(l)–(m)] above.
 - (c) Opening or accessing document 7: [8(o)–(p)] above.
 - (d) Opening or accessing document 9: [8(u), (w)] above.
 - (e) Accessing document 10: [8(y)] above.
 - (f) Clicking on document 12: [8(cc)] above.
 - (g) Opening or accessing document 15: [8(hh)–(ii)] above.
- 57 The Board has closely reviewed the evidence, including the responses given by Mr Burns during the disciplinary proceedings and in the witness box, and does not accept Mr Burns' explanation of having a legitimate work-related purpose for accessing the documents.
- 58 The Board finds that Mr Burns' JDF (Agreed Document 1) required him to maintain the data management system and reporting requirements and integrity for the collection of risk and audit data. While this involved him accessing TRIM, his role involved him looking up a specific document that he has been tasked to locate in TRIM: [7(a)–(f)] above. The duties of his role did not extend to browsing through TRIM folders and accessing documents that were unrelated to his immediate duties.
- 59 Mr Burns' characterisation of his conduct as that of a 'systems analyst' who 'investigates things' misses the point. His role did not authorise him to investigate the internal workings of the Executive Director's Review.
- 60 The Board does not accept Mr Burns' assertion of accessing the documents for a legitimate work-related purpose of preparing a handover document, for the reasons that follow.
- (a) Mr Burns admitted under cross-examination that he was never tasked to prepare a handover document: [9(i)] above.
 - (b) No handover document was located on his desktop, despite his specific direction to the respondent to search his desktop for it. Mr Burns' subsequent suggestion that the document might exist on the S drive or in a subfolder is speculative and unsupported by any evidence.
 - (c) Mr Burns' written response to the allegations (Agreed Document 3) claimed that his 'work-related purpose for viewing these documents' related to preparing 'handover documents for the people coming in', and that 'the title of the folder and the documents contained within it' indicated they may contain information he needed for that purpose.
 - (d) Under cross-examination, Mr Burns conceded that some of the documents he accessed were not relevant to writing a handover document and that some were 'plainly not relevant': [9(k)] above.
 - (e) Mr Burns also conceded that, other than the JDFs which he maintained were useful for a handover, that a handover would not have given him a basis to open any other document in the TRIM Folder: [9(m)] above.
 - (f) Mr Burns conceded under cross-examination that the statements made at [60(c)] above, were 'misleading': [9(m)] above.
 - (g) The JDF that Mr Burns downloaded was the sixteenth document that he accessed. His evidence that he accessed the folder to find 'attachments' or 'handouts' he may have missed from Review meetings is inconsistent with his assertion that his purpose was to locate a JDF for a handover document.
 - (h) As outlined at [53(f)–(h)] above, by the time Mr Burns accessed document 10, he had recognised that the TRIM Folder contained protected material he should not access. Having formed this view, a reasonable employee (even one self-motivated to prepare a handover), would not continue to access documents in the TRIM Folder.
 - (i) If Mr Burns had refrained from continuing to access documents in the TRIM Folder, he would not have accessed and downloaded the JDF (the sixteenth document accessed). In which case, he could not claim to have a work-related purpose of accessing the documents in order to create a handover document.
 - (j) The vast majority of the documents accessed by Mr Burns (correspondence between Ms Brown and the CSA, Ms Brown and Acumen, and Ms Brown and Labour Relations, Acumen agendas, and regulation 8 letters issued to other employees) have no conceivable relevance to any handover.
 - (k) Accordingly, the Board accepts the respondent's submissions that Mr Burns' assertion of using the JDF to prepare a handover document as being his work-related purpose for accessing the documents, to be contrived. The Board considers Mr Burns' explanation, of a work-related purpose of preparing a handover document, to be a post-event rationalisation that lacks credibility.
- 61 The Board accepts that Mr Burns may have stumbled across the TRIM Folder.
- 62 It is not in dispute that the TRIM Folder was intended to be restricted to Ms Brown, her executive assistant (Ms Aziz) and Mr Saraceni, pursuant to Ms Brown's instructions, but due to an administrative error, it was not properly secured. Therefore, the Board also considers that Mr Burns could be excused for his initial access to the TRIM Folder, particularly if, as he contends, he 'did not really look' at the TRIM Folder title before accessing the documents in the folder: [7(pp)] above.
- 63 However, by Mr Burns' own admission (at [56] above), he had no business accessing documents 5, 6, 7, 9, 10, 12 and 15, which were the fourth, fifth, sixth, eighth, ninth, eleventh and fourteenth documents that he accessed.

- 64 By Mr Burns' own admission (at [6(ii)] above), by the time he accessed the regulation 8 letters (document 10, the ninth document accessed), it was clear to him that the TRIM Folder contained documents that should have been, but were not, protected.
- 65 Mr Burns disagrees that by the time he opened document 5, the fourth document accessed, that it should have been clear to him that he had no business accessing the documents (at [8(i)] above), and disagrees that by the time he opened document 6, the fifth document accessed, that it should have been clear that he had no business opening the documents (at [8(n)] above).
- 66 Despite Mr Burns' denials, given his concessions at [63] above, the Board considers that it should have been clear to him by the time he opened document 5, the fourth document accessed (Ms Brown's run sheet: [11(mm)] above) that the TRIM Folder contained documents that he should not be accessing.
- 67 Accordingly, the Board accepts the respondent's submissions that Mr Burns had no legitimate work purpose for accessing the documents; rather, the purpose of Mr Burns' access was his personal curiosity.
- 68 The Board also accepts that this is not an authorised purpose under the Code of Conduct, as reinforced by the AEDM Training and the RA Training, which Mr Burns recalled completing (albeit vaguely), which imposes a positive obligation on him to only access documents for purposes related to his job function.
- 69 By his own admission, Mr Burns knew from the 2 July 2024 meeting (Agreed Documents 10, 11, 12) and Ms Brown's email of 16 July 2024 (Respondent's Bundle, page 26) that draft JDFs were unclassified and therefore not finalised, and would not be released until endorsed by the Classification Committee. Despite this, Mr Burns accessed and downloaded a draft JDF marked 'Level TBD', knowing staff were not entitled to them.
- 70 Mr Burns' evidence (at [6(hh)] above) that 'there were no locks on the folder' and 'they told us it was an open, accountable process' mischaracterises the Review communications, which repeatedly emphasised staged, and limited, disclosure: [7(w), (z), (dd), (hh), (jj), (ll), (oo)] and [11(u), (x)-(y), (aa)-(bb)] above.
- 71 The absence of a 'lock' does not constitute authorisation for Mr Burns to access the documents in the TRIM Folder.
- 72 A reasonable employee with 26 years of experience would understand that an 'unlocked' folder containing documents that, on his own evidence should have been 'locked', does not constitute an invitation to rummage through confidential files for nearly half an hour.
- 73 The seriousness of the breach is further compounded by Mr Burns' subsequent conduct.
- 74 Firstly, despite Mr Burns accessing the TRIM Folder on 18 July 2024 and realising that it contained documents that should have been restricted but were not restricted, he did not mention this to anyone until 24 July 2024, when he mentioned his access to the JDFs to Mr Fleming and Mr De Souza during their weekly team meeting.
- 75 In relation to the date of this meeting, the Board notes a minor discrepancy in Ms Brown's daybook (at [11(j)] above), which records the conversation with Mr Fleming as occurring at 11:20am under the heading '23/07', immediately followed by the heading '24/07' and the entry: 'Brent discovered TRIM file was not locked down.'
- 76 However, the following evidence supports a finding that the meeting between Mr Burns, Mr Fleming and Mr De Souza occurred on 24 July 2024:
- (a) Mr Fleming gave unequivocal evidence that he had a weekly meeting with Mr Burns and Mr De Souza on 24 July 2024, and that he informed Ms Brown 'on that afternoon': [14(k)-(l)] and [15(f), (h)] above.
 - (b) SID's Assessment Report dated 13 August 2024 (Appellant's Further Bundle, page 13) records the following: (emphasis added)

On 5 August 2024, Ms Mary Brown, Executive Director, PSCD stated:

'On or about 15 May 2024, I requested Selina Aziz, my Executive Assistant to create a TRIM Folder for all documents relating to the Acumen Alliance Form and Function Review of the Risk & Assurance Directorate. The team had repeatedly asked to be provided with the Acumen Alliances Report detailing the findings of the Review, however, to protect the stakeholder feedback and for reasons of confidentiality, the teams requests were consistently denied. For this reason, and to protect the integrity of the Review (which is still underway), I asked Selina to restrict access to the folder to myself, Brent Saraceni and herself (Selina).

On the afternoon of 24 July 2024, Eric Fleming (Manager Risk & Assurance), advised Brent and myself that Stephen Burns had disclosed to him that he had 'seen his JDF and that he wasn't going to be applying for the position as it was largely admin related'.

At that time, I did not know how Stephen could have accessed the JDF on the basis that the relevant TRIM folder was restricted and that staff had been explicitly told on more than one occasion, that the JDF's would not be made available until after the Review Classification Committee (CRC) Meeting scheduled late August 2024. And further, the only persons who (were entitled to and) had viewed the JDF's for review and editing purposes were Acumen Alliance, myself and Rowena Williams as the Director, Risk & Assurance.

I became aware **on 24 or 25 July 2024** that several members of staff had accessed various documents they were not entitled to view after being provided confirmation from Brent Saraceni. One of the documents accessed was the JDF Stephen Burns referred to.'
 - (c) The letter of allegations issued to Mr De Souza dated 17 September 2024 (Appellant's Further Bundle, page 95), states: (emphasis added)

It is alleged **on 24 July 2024 between 9.36am and 9.38am** you accessed 4 documents related to the Risk and Assurance Directorate Form and Function Review.

- (d) Mr De Souza's response to the letter of allegation dated 30 September 2024 (Appellant's Further Bundle, page 99), states: (emphasis added)

We had an Audit and Compliance team meeting on Wed 24th July 2024 from 9.00am to 9.30am that was attended by Eric Fleming – the acting manager Audit and Compliance, Stephen Burns – Audit Consultant and me. In the course of the team meeting the restructure was discussed and the potential to consider applying for the new jobs in the new proposed structure. During that discussion we were advised by one of the team members that the new draft JDFs were on TRIM and were available for everyone to view. Nothing was mentioned at the meeting that the folder is confidential or should not be accessed.

Following the meeting on 24th July around 9.36 am I accessed the Trim folder – F24/0067236 titled 'Strategic Management – Reviewing (Other), Risk and Assurance Directorate Form and Function Review.' I only had a brief look (for a few minutes) at the 4 documents that were in that folder – the 3 Level 7's Job Descriptions and the Reg 8 letter that Mary Brown provided to me. The only reason I accessed the 4 documents because they directly related to me, the restructure and the workplace change management that would affect my job situation and position.

- 77 Accordingly, the Board is satisfied that the reference to '23/07' in Ms Brown's daybook is likely a simple clerical error, and that the meeting occurred on 24 July 2024.
- 78 In relation to Mr Burns' conduct during this meeting:
- (a) Mr Burns evidence is that he does not remember this meeting at all: [6(kk)] above.
- (b) Mr Fleming's evidence concerning this meeting is that Mr Burns stated that he had accessed all of the JDFs, including a Level 5 JDF that he could potentially apply for, but given the duties were largely administrative in nature that he was not going to apply: [14(k)] above.
- (c) Mr De Souza states, in his letter dated 30 September 2024 (at [76(d)] above), that during this meeting Mr Burns stated that 'the new draft JDFs were on TRIM and were available for everyone to view'.
- (d) Ms Brown's daybook records that Mr Fleming informed her that during the meeting, Mr Burns had mentioned that he had seen the new Level 5 JDF and stated that he would not be applying for the role.
- 79 Secondly, in Mr Burns' response to the allegations letter (Agreed Document 3), Mr Burns asserted a broad work-related purpose tied to 'these documents' and the 'title of the folder and the documents contained within it', implying all 18 accesses related to handover preparation.
- 80 As outlined at [60(e)] above, Mr Burns admitted under cross-examination that only the JDF was relevant (if at all), rendering his response materially misleading.
- 81 As observed in *Pantovic* [91]–[92], dishonesty in responding to disciplinary allegations erodes trust and confidence. Furthermore, conduct in the investigation process, in attempting to mislead and obfuscate, of itself, is sufficient to justify dismissal.
- 82 The Board considers Mr Burns' purported reasons for accessing the Trim Folder to constitute an attempt by him to minimise his culpability by misleading the respondent.
- 83 For the reasons outlined at [44]–[82] above, the Board is satisfied that Mr Burns' access to the Trim Folder amounted to a serious breach of discipline. His access was unauthorised, prolonged, knowing (after the initial documents), and involved misleading conduct in the form of his responses during the disciplinary process.

Issue 2 – Whether dismissal was a proportionate response in all of the circumstances?

- 84 The proportionality of dismissal is assessed in light of all circumstances, including the reason for the dismissal and the consequence of the dismissal overall: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v John Holland Construction & Engineering Pty Ltd* (1999) 79 WAIG 1302 (*John Holland*), 1311.
- 85 Every case must be judged on its own facts, and the question whether a dismissal is harsh, unjust or unreasonable is determined having regard to the circumstances at the time of dismissal. Regard is to be had to all the relevant circumstances relating to the particular employee, including matters specifically relating to the employee's work record, whether the employee will be able to find alternative employment, and the financial and social consequences of dismissal: *John Holland*, 1312.
- 86 Mr Burns had 26 years' unblemished service, commencing in IT and transitioning to risk and audit roles, with no prior discipline. He was 62 years old at the time of his dismissal and was facing redeployment amid a restructure of a workplace he found 'boring' and culturally unsatisfying. The dismissal has caused him financial and emotional hardship. These factors weigh in his favour.
- 87 However, Mr Burns' breach occurred in a high-trust public sector context, where, in recognition that employees within the Professional Standards and Conduct division hold such positions of trust and privilege that they are required to undergo criminal history screening every three years: [11(f)] above.
- 88 Mr Burns' access across 27 minutes, was not a 'spur of the moment' error, but deliberate persistence despite the red flags raised in his own mind about his access while he was accessing the documents: [52]–[53] above.
- 89 As observed in *Millward v North Metropolitan Health Services* [2022] WAIRC 00776 [289], a public sector employee's insistence that their conduct is in good faith and without fault may cause a Public Service Appeal Board to have real concerns about the employee's lack of insight and awareness about why their conduct is serious and problematic, and to raise concerns about the officer's suitability for continued employment:

- 90 Mr Burns' characterisation of his conduct as that of a 'systems analyst' who 'investigates things' reveals a troubling attitude towards information security and his obligations under the Code of Conduct. It suggests a belief that his personal curiosity or professional habits override the respondent's protocols regarding confidential information.
- 91 In a compliance-focused role within the Risk and Assurance Directorate, such an attitude is untenable. His evidence that he was 'just looking' and 'not touching anything' ignores the fundamental principle that unauthorised access itself is the breach under Standard 6 of the Code of Conduct, regardless of whether the data is subsequently altered or disseminated.
- 92 Mr Burns' lack of insight was demonstrated during cross-examination, where he minimised the wrongfulness ('it was there', 'I'm just looking at a document'), and evaded questions on superiors' entitlement to privacy ('stickybeaking' is 'vague'; 'I don't believe it would interfere with them doing their job. I'm just looking at a document. I'm not editing or converting anything. I'm not touching anything').
- 93 This contrasts markedly with cases such as *Tolmie*, where Ms Tolmie expressed immediate contrition for her access: *Tolmie* [8], [12].
- 94 In *UWU*, Mr Hutchinson forwarded an email sent to him by the WA Terminal Manager containing a Month End Report to a bargaining representative to obtain guidance on how to read and interpret the information in the report. In response to a show cause notice, Mr Hutchinson expressed regret for sending the email and stated that he was genuinely surprised to learn the report was confidential: *UWU* [41].
- 95 Mr Burns expressed regret only prospectively ('I'd be much more careful if I ever went near TRIM again'). In his response to the proposed finding and proposed disciplinary action letter (Agreed Document 5), Mr Burns stated:
- I really feel badly treated by the department. I am 61 years old and on the brink of retirement. I joined the Department on 11 December 1998, so almost 25 years ago. I have not been subjected to a breach of discipline before.
- Sacking me is an excessive response to simply viewing a few documents that they were responsible for protecting.
- 96 The Board considers that in the public sector, breaches eroding trust in information handling justify dismissal where insight is absent as the potential for repetition risks reputational harm.
- 97 Mr Burns' dishonesty in the disciplinary response further justifies the dismissal: *Pantovic* [91].
- 98 While Mr Burns' length of good service and his personal circumstances at the time of dismissal weigh in his favour, these circumstances do not insulate him from the disciplinary consequences of a breach of discipline in all the circumstances outlined above.
- 99 In all the circumstances, the Board considers that any loss of confidence in Mr Burns to be reasonably held, and that dismissal is not a disproportionate response to Mr Burns' breach of discipline.

Issue 3 – Whether the dismissal was unfair on the grounds of disparate treatment?

- 100 Mr Burns relies on *Portilla*, for the test of disparate treatment, and contends that his dismissal was unfair when compared to the treatment of Mr Fleming and Mr Benomi, who received improvement actions, and argues his conduct was less severe than Mr De Souza, who was also dismissed.
- 101 The Board does not accept this contention.
- 102 As Vice President Lawler observed in *Sexton* [36] cited with approval in *Portilla* [231] and *Fagan* (at [39] above), the Board must be satisfied that cases advanced as comparable are in truth properly comparable, and must be conscious that there may be considerations subjective to the circumstances of an individual that cause an employer to take a more lenient approach in an allegedly comparable case. The Board must ensure that it is comparing 'apples with apples'.
- 103 The Board finds that the circumstances of Mr Fleming are materially different and do not support a claim of disparate treatment.
- 104 Mr Fleming (Level 8 Manager) was actively assisting Ms Brown with the Review. He was part of the leadership team to whom Review documents were being legitimately distributed for the purpose of facilitating meetings with staff. While Mr Fleming's access to the TRIM Folder was technically unauthorised due to the permissions Ms Brown intended to place on the folder, Mr Fleming possessed a functional connection to the subject matter of the Review that Mr Burns did not. Furthermore, Mr Fleming accessed only two documents for a total of one minute and did not extract any documents. Critically, Mr Fleming immediately acknowledged his error as a 'genuine mistake', apologised, and demonstrated insight: Appellant's Further Bundle, page 43.
- 105 This stands in stark contrast to Mr Burns who had no functional role in the Review, accessed 18 documents over 27 minutes, extracted a document, and attempted to justify his conduct with a contrived explanation; all of which are material distinguishing features.
- 106 Mr Benomi (Level 7) accessed three documents for three minutes. He was sanctioned for failing to report the access once he became aware it was unauthorised, but he too showed remorse.
- 107 Importantly, the substantiated allegation against Mr Benomi was different in character: it was that while he did not know his initial access was unauthorised, once he did access the documents, he should have known that he was not authorised and should have raised the issue with his superior. This is a qualitatively different breach to that of Mr Burns, who knowingly continued to access documents after forming the view that the folder contained protected material.
- 108 Furthermore, unlike Mr Fleming or Mr Benomi, Mr Burns provided a misleading response during the disciplinary investigation regarding the 'handover document', attempting to legitimise his access with a misleading statement.
- 109 The closest comparator is Mr De Souza (Level 6), who was dismissed. Mr De Souza accessed and extracted four JDFs over the

course of a few minutes.

110 In contrast, Mr Burns accessed 18 documents over 27 minutes, including JDFs, and sensitive correspondence. This was not a fleeting error but a sustained interrogation of files he knew, or ought to have known, and on his own admission by the ninth document accessed did know, were confidential. He downloaded a document (the JDF) and then shared the ability to access the JDFs with Mr De Souza.

111 Mr Burns’ conduct was objectively more serious than Mr De Souza’s in terms of the volume of material accessed, the duration of the access, and the nature of the documents viewed.

112 Additionally, Mr Burns’ dishonesty during the investigation, in providing a misleading justification for his access, distinguishes his case further.

113 In circumstances where Mr De Souza was dismissed for his conduct, Mr Burns cannot establish disparate treatment when his own conduct was more egregious. Indeed, the comparison with Mr De Souza supports the respondent’s position that dismissal was an appropriate and proportionate response.

114 Overall, Mr Burns’ relatively more junior status (Level 5) and longer service do not equate to his colleagues’ brevity in access to the TRIM Folder, candour during the investigation, and insight into their conduct.

115 Consequently, the Board finds that there is no unfair disparate treatment.

116 Given these findings, the Board does not consider that the decision to dismiss Mr Burns on 13 December 2024 was harsh, oppressive or unjust.

Conclusion

117 For the preceding reasons, the Board finds that Mr Burns has not discharged the onus on him to satisfy the Board that the decision to dismiss him should be adjusted.

118 Accordingly, the Board will order that PSAB 34 of 2024 be dismissed.

2025 WAIRC 01025

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 13 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STEPHEN BRUCE BURNS

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR M FINNEGAN – BOARD MEMBER
MS E HAMILTON – BOARD MEMBER

DATE

TUESDAY, 23 DECEMBER 2025

FILE NO

PSAB 34 OF 2024

CITATION NO.

2025 WAIRC 01025

Result Order issued

Representation

Appellant Mr J Tebbutt (as agent)

Respondent Mr J Carroll (of counsel)

Order

HAVING heard from Mr J Tebbutt (as agent) on behalf of the applicant, and Mr J Carroll (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 23 December 2025, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT this appeal be, and by this order is, dismissed.

(Sgd.) C TSANG,

Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

NOTICES—Union Matters—

2026 WAIRC 00002

NOTICE

CICS 14 of 2025

NOTICE is given of application CICS 14 of 2025 by Western Australian Municipal, Administrative, Clerical and Services Union of Employees to the Commission in Court Session of the Western Australian Industrial Relations Commission for an alteration to the following registered rules:

- Rule 3 – DEFINITIONS
- Rule 5 – ELIGIBILITY FOR MEMBERSHIP
- Rule 14 – OFFICERS OF THE UNION
- Rule 28 – PROCEDURE AT ELECTIONS

The proposed rule alterations are available to be viewed at the Commission's Registry on Level 17, 111 St Georges Terrace Perth WA or alternatively accessed on the Notices page of the Commission's website.

This matter will be listed for hearing before the Commission in Court Session on a date to be fixed.

Any person who satisfies the Commission in Court Session that they have a sufficient interest or desires to object to the application may, having given notice of that objection within the time and in the manner prescribed, appear and be heard in objection to the application.

Pursuant to regulation 77A(3) of the *Industrial Relations Commission Regulations 2005* (WA) a notice of an objection in the approved form (*Form 1A – Multipurpose Form*) must be filed within 21 days of this notice. A *Form 1A – Multipurpose Form* is available on the WAIRC website at www.wairc.wa.gov.au under Applications & Forms.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

17 December 2025
