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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—
Appeals against decision of Commission—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew Gerrard Wood
(Appellant)

and

National Mine Management Pty Ltd
(Respondent).

No 2218 of 1997.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

11 November 1998.

Reasons for Decision.

THE PRESIDENT: This is an appeal by the appellant employee, Mr Andrew Gerrard Wood, against the whole of the decision of the Commission at first instance, constituted by a single Commissioner, and properly brought under s.49 of the Industrial Relations Act 1979 (as amended) (hereinafter called "the Act").

By that decision, made on 7 November 1997, the Commission dismissed an application (No 1742 of 1996) by the appellant made under s.29 of the Act, whereby he alleged that he was unfairly dismissed on 3 December 1996, reinstatement not the alternative, and claimed compensation. It is against that decision that the appellant appeals on the following grounds—

GROUNDS OF APPEAL

"1. This schedule is to be read in conjunction with the Notice of Appeal to the Full Bench (Form 7).

2. The Appellant wishes to appeal the whole of the Decision of the Commissioner, in matter no. 1742 of 1996, handed down on the 7th day of November 1997.

3. The learned Commissioner has erred in law and in fact, based upon the weight of the evidence, when determining in this Reasons for Decision, that the Commission did not have jurisdiction to hear the claim for unfair dismissal. In particular, the learned Commissioner failed to take into consideration—

i) well established case law in fighting in the workplace, after taking into consideration that the then Applicant, was a victim of fighting in the workplace, not the perpetrator of the fight in the workplace.

ii) the information given in induction about a person provoking another person is equaly (sic) as guilty as what the person who throws the first punch is, is in conflict with the concept of fighting and case law in respect to the same.

iii) the term "provoke" is ambiguous, in the English language, and been misapplied by the learned Commissioner, when ruling that the then Applicant was not unfairly dismissed.

4. The learned Commissioner has erred in law when not considering the principles outlined by the Commission in Australian Workers Union –v- Western Mining Corporation, 5th July 1994, CRI 75/94, 74 WAIG 1975, in respect to—

i) An employer's obligation to protect employees against aggression;

ii) the employer being vicariously liable for causal negligence of servants towards another, with a management responsibility to safeguard employees from the reasonable wish in regard to fundamental conditions of employment.

iii) the employer must genuinely conduct a proper enquiry.

iv) have reasonable grounds for belief on the information available at the time that the employee is guilty of misconduct alleged (ie fighting in the workplace).

5. The learned Commissioner in his Reasons for Decision, based uopn (sic) the weight of the evidence, has erred in law, when not applying the principles outlined by the Commission in the Construction, Mining, & Energy Workers Union –v- Robe River Associates, No. 1557/91, 5th June 1992, 72 WAIG 1631-1635, in respect to the rights of the victim, in—

i) the cause of the fight (p.1631)

ii) whether established "company policy" applied to the victim of the fight.

iii) nature of injuries (p.1632)

iv) the nature of the attacker (p.1634)

v) the right of the Commission to intervene if the decision of the employer is unfair (p.1634).

vi) dismissal is not always a remedy (p.1635).

6. The learned Commissioner erred in law in failing to take into consideration material facts that—
   i) the employer failed in their duty of case by relying upon second hand accounts concerning the fight.
   ii) the accommodation of the then Applicant was withdrawn before a full and complete investigation had taken place.
   iii) the employer failed to properly enquire into the nature or extent of the then Applicant's injuries: the employer, according to the learned Commissioner's decision, had only "concluded" that there had been a "fight" and "injuries".
   iv) the Respondent's Mr MacLardy failed to fully investigate the matter.
7. The learned Commissioner erred in law, based upon the weight of the evidence, missapplying (sic) the principles of fighting outside working hours, outlined in the Australian Workers Union *v.* Argyle Diamond Mines Pty Ltd, 13th November 1992, No. CR561/1992, 72 WAIG 2860- in respect to—
   i) a fight outside working hours (p.2860)
   ii) inadequate company investigation (p.2861-62)
   iii) seventy or nature of argument (p.2862)
   iv) right to dismiss following a fight (p.2862)
   v) Cover up of specifics, to reinforce a certain position on the fight (p.2863).
8. The learned Commissioner based upon the weight of the evidence, has misapplied the principles of constructive dismissal, as outlined in Mohebutullah Mohazab *v.* Dick Smith Electronics Pty Ltd, No.2571/95, 28th November 1995 (Federal) in respect to—
   i) Page 4 of the Reasons for Decision, Mr Bosenberg raised the possibility of the then Applicant being required to take annual leave, or resign, or be re-deployed to another mine site.
   ii) The Respondent's Mr Lalich (page 4 of the Reasons for Decision) further reinforced the conversation in respect to taking annual leave, until such time as another possible position was found for the then Applicant.
   iii) not having regard to the actions of the employer after the fight.
9. The learned Commissioner based upon the weight of the evidence, has further erred in fact in respect to—
   a) the location of the mine site being 250km north-east of Kalgoorlie, whereas it should be 250km north-west of Kalgoorlie (page 1 Reasons for Decision)
   b) when he reasoned on page 8 of his Reasons for Decision, that the Applicant was returning to work on Tuesday 10th December 1996, and then proceeded on annual leave on Monday 16th December 1996, is in conflict with what he states on page 9 of his Reasons for Decision, when he reasoned that the Applicant was to take annual leave four working days after the incident."

The appeal is in fact an appeal against the Commission's finding at first instance that there was no jurisdiction in it to hear and determine the application because there had been no dismissal. Questions of merit did not have to be decided that because the Commission decided that there was no dismissal, that it, therefore, had no jurisdiction.

BACKGROUND

The respondent is a mining contracting company. At the time of these proceedings, the respondent employed some 350 employees, specialising in underground mining and management, but generally providing to mine owners any services necessary to the operation of a mine.

The appellant was employed by the respondent to work as a mill operator at the Mt Dimer Gold Mine, located approximately 250 kilometres by road north-West of Kalgoorlie. In the latter half of 1996, he was transferred to a position as Survey Assistant/Gold Room Attendant at the mine. He was employed on a two weeks on and one week off basis.

Annual leave accrued at the rate of 25 days per annum and payment during leave was calculated by reference to average weekly earnings.

Whilst on site, the appellant was housed in accommodation provided by the mine owner. However, the appellant maintained his residence in Perth where he resided when he was on his week off or on annual leave.

Before he commenced employment and during an induction session at the Mt Dimer site, the appellant was provided by the respondent with copies of Camp Site Regulations and a document entitled "The National Mine Management Pty Ltd Mt Dimer Project General Safety Induction" (see exhibit J2). That document was signed by the appellant as an acknowledgment by him that he had attended the company induction and fully understood the written procedures, that he had undertaken to further familiarise himself with any other safety procedures prescribed by the respondent and would abide by all safety rules and practices.

The appellant admitted that he had been provided with a copy of the documents (see exhibits J1 and J2) and that they had been discussed during the induction process. (The Commissioner described him as having been somewhat vague on this issue.)

The appellant signed the induction manual to signify that he had gone through the induction process and fully understood the written "procedures" and would abide by the rules, etc.

Exhibit J2 – Dot Point 7 identifies a provision relevant to this matter—

> "Gambling, horseplay, fighting, possession of firearms, pets, drugs and other illegal activities are not permitted in the Campsite. Any occupant conducting or participating in illegal activities shall have their accommodation withdrawn." (see page 22(AB))

This made it clear that accommodation would be withdrawn if there was fighting.

On 2 December 1996, the appellant was involved in an incident in the wet mess at the Mt Dimer mine site. Following the completion of his shift on that day, the appellant spent most of the evening in the wet mess or the TV room annexed to it. He drank three or four stubbies of alcoholic cider.

About 10.00 pm, a number of employees, including the appellant, were playing darts. One of the team of which the appellant was a member, a Mr Darby Warren, was called an "arsehole" by the appellant and then, according to the appellant, he was knocked from his chair by a punch and then further attacked while he was on the floor. They were separated by other employees. The incident was of very brief duration – a matter of seconds, according to the appellant.

The appellant also said that he had no opportunity to throw punches and his actions were defensive only. Mr Cockle, the appellant's leading hand, suggested that the appellant return to his quarters. He did so, remained there and went to bed. Before he went to bed, two underground miners visited him to ask how he was.

Next morning, 3 December 1996, the appellant was preparing to leave the site for his scheduled one week break. Mr Cockle told him that his presence was required at the site office in relation to the incident the night before. He went there. Present were Mr William John MacLardy, the Mine Foreman, the alternate Registered Mine Manager, Mr David McNally, the Underground Foreman, and Mr Warren. (Mr MacLardy gave evidence for the respondent, at first instance.)

Mr MacLardy questioned Mr Warren and, having heard what he had to say, concluded that there had been a fight. Mr Warren was then asked by Mr MacLardy, in accordance with the respondent's policy, to vacate his accommodation on the site.

Mr MacLardy then questioned the appellant as to his part and was told by him that he had called Mr Warren an "arsehole". Mr MacLardy then told the appellant that he had to vacate his accommodation on site.

Mr MacLardy told the Commission, in evidence, that all employees are told on induction that, if any fight occurs, both participants will have their accommodation withdrawn. Mr MacLardy also said that "anyone who provokes another person is equally as guilty in fighting as what the person who throws the first punch" (see page 77 of the transcript at first instance (hereinafter referred to as "TFI")).

The appellant had been a participant in an incident, previously, which involved fighting. He had not been dismissed because Mr MacLardy had to leave the site shortly after the incident was reported and was not able to deal with it for some time.

The appellant contested, at the time, the decision to withdraw his accommodation. (The evidence was that the closest accommodation off site was a Bullabully, 200 kilometres away.) He asked Mr MacLardy whether he had been "tramped". Mr MacLardy said that he had told the appellant the latter had not been "tramped", and also told him then and later that he (the appellant) could challenge the decision to withdraw his accommodation by raising the matter with the Registered Mine Manager, Mr Jeff Williams, when he returned to the site on the following Thursday. Mr Maclardy said in evidence that he told the appellant that his accommodation had been withdrawn, not that he had been dismissed. In evidence, the appellant asserted that he was not told that he had not been tramped, but said in cross-examination that he was stunned and dazed and could not remember what had been said. He did say in evidence that, because he could not work at the site because he could not live there, he regarded himself as dismissed. This was not disputed.

That day, the appellant flew to Perth. At Perth airport he saw the respondent's Senior Treatment Plant Supervisor, Mr Dennis Raymond Bosenberg, who was awaiting a flight back to Mt Dimer. (Mr Bosenberg also gave evidence for the respondent at first instance.) He told Mr Bosenberg that he had been tramped, not that his accommodation had been withdrawn (on his evidence) and Mr Bosenberg said that he would take the matter up when he returned to the site. Mr Bosenberg saw Mr MacLardy and Mr Cockle who told him what had occurred. Mr Bosenberg spoke by telephone to Mr Williams in Perth. Mr Williams supported Mr MacLardy's decision.

At about 7.00 pm that day, 3 December 1996, the appellant was informed of Mr Williams' decision by Mr Bosenberg, who also told him that his employment had not been terminated. Mr Bosenberg told the appellant that he had not been tramped. According to the appellant's evidence, Mr Bosenberg suggested that he resign. Mr Bosenberg said that he might have told him that. He did tell him that he should consider going on leave and they might find him another position. Mr Bosenberg told him to contact Mr Boris Mark Lalich, the Personnel Officer/Paymaster about an alternative position at another site.

Indeed, he suggested that the appellant could resign, go on leave or contact Boris (Mr Lalich about a job at Woody Woody). (See the appellant's evidence at page 34(TFI).) As it transpired, the Woody Woody project was not commencing operation until February 1997. Further, it was described by Mr Bosenberg as run by Australian Mine Management, an associate company of the respondent, something corroborated by Mr Lalich in evidence. Mr Moir, however, indicated in evidence that the respondent had some say over staffing there.

In addition, the appellant said in evidence (see page 36(TFI)) that Mr Lalich had told him that he could also resign, that he could apply elsewhere for work or go on leave. The appellant told Mr Lalich that he had no intention of resigning.

On 3 December 1996, the appellant filed in the Commission the application whereby the proceedings at first instance commenced. The declaration of service by the appellant on 4 December 1996 declared that service was effected by registered post. The answer and counter proposal was filed on 28 January 1997.

Mr Bosenberg contacted Mr Lalich the next day, 4 December 1996, and explained the matter to Mr Lalich, informing him that the appellant was a good worker and that he (the appellant) would contact Mr Lalich about a position at another site. (Mr Lalich was the respondent's personnel officer and paymaster and gave evidence.)

Mr Lalich corroborated this evidence. The appellant received a telephone call from Mr Lalich on 4 December 1996 in which the appellant told him that he had been "tramped". Mr Lalich said that he corrected the appellant on this point. A number of alternative positions were discussed. According to Mr Lalich, Mr Lalich suggested that the appellant take annual leave whilst an alternative position was found. The appellant agreed to consider so doing.

On 4 December 1996, Mr Lalich told the appellant that there was no work at Woody Woody. According to the appellant, Mr Lalich told him to resign. Mr Lalich denied so saying and said that he suggested that the appellant go on leave.

On 6 December 1996, Mr Lalich rang and left a message with the appellant's son that there was work with "another company" at Leonora, designated as "Acacia" (see page 99(TFI)). There was no work available when the appellant enquired.

Apart from discussions between Mr Lalich, a Mr Moir, the Financial Controller of the respondent, and a Mr Kale, one of the respondent's Operations Managers, nothing occurred until 13 December 1996. On that date, Mr Bradley Keith Moir, the respondent's Financial Controller, told Mr Lalich that the respondent had been served with an application to this Commission alleging unfair dismissal (9 days after service was effected). Mr Lalich then, on Mr Moir's instruction, ceased to look for an alternative position.

On or about 17 December 1996, the respondent paid $930.00 into the appellant's account, described as for work from 3 to 17 December 1996, when the appellant did not work. This was later said to have been paid in error by Mr Moir. In fact, no monies for holiday pay or annual leave were paid at the time because, according to Mr Lalich, the appellant had filed an application alleging unfair dismissal.

On 18 December 1996, Mr Lalich, according to his evidence, telephoned the appellant's home telephone number about the payment of his annual leave entitlements, because the appellant had commenced annual leave on 16 December 1996. A woman answered the telephone and told him that the appellant was in the eastern states on holiday and that she could not contact him. Mr Lalich left a message for the appellant to telephone him, but he did not do so until the end of January 1997 when he returned from leave. The appellant did not contact the respondent from 6 December 1996 to 30 January 1997. The appellant did not because he said that he was being given the runaround.

On 6 December 1996, Mr Lalich telephoned the appellant to discuss some work at Woody Woody. The appellant's son answered the telephone and Mr Lalich left a message asking that the appellant contact him on his return home. The appellant, however, said in evidence that a message was left for him to contact a Mr Banovich at the Acacia Mine. He attempted to do so, but was not successful. Mr Lalich, however, said that the suggestion to contact Mr Banovich was made in an earlier conversation. There was no contact by the appellant after that date.

As a matter of fact, there was no employment by or obtained through the agency for the appellant after 3 December 1996. In the interim, the appellant had found one day's casual work for an employer called Manpower.

At about 4.00 pm on 30 January 1997, Mr Lalich was telephoned by the Victoria Park office of the Department of Social Security. (The appellant had registered with the Department of Social Security.) In that telephone call, he was informed that the appellant had registered with that office seeking unemployment benefits and asked whether any annual leave entitlements were due. Mr Lalich told him that there were.

At about 5.00 pm that day, Mr Lalich was contacted by the appellant and asked why he had not been paid his annual leave (he had not been paid his annual leave). There was a heated discussion and Mr Lalich told him that it was because he was not able to be contacted. That was contrary to Mr Lalich's evidence that he had not been paid because of his claim. According to Mr Lalich, he questioned the appellant as to whether he required payment of the amount owing as termination pay or as annual leave. The appellant denied that he had resigned and wrote to confirm this next day. This question was said to have been raised in order to ensure that the appellant was taxed correctly on the payment. The appellant requested that the amount of the annual leave payment be made to him and the amount was forwarded to him by letter being the amount due

for annual leave payments, with the correctly paid amount of December 1996 deducted (see page 50(TFI)).

On 18 February 1997, the appellant commenced other employment on a casual basis. Mr Moir's evidence was that, from the date of a teleconference, namely 29 January 1997, the appellant was considered to be no longer an employee.

FINDINGS

The Commissioner found (and I summarise) as follows—

1. That he was not entirely satisfied that the evidence of either side could be found to be conclusive or reliable.
2. That, on the facts as he found them, the Commissioner was not convinced that either party genuinely sought to continue the employment relationship.
3. That on 30 January 1997, when the discussion occurred about annual leave, and the appellant was asked whether the amount of annual leave was to be paid as annual leave or termination pay, the respondent had not acted to terminate the employment.
4. That, whilst on leave, the appellant left no number where he could be contacted about alternative employment.
5. That there was a conference in the Commission on 31 January 1997 after which the parties remained in dispute.
6. That on 31 January 1997, the appellant wrote to the respondent confirming that he still considered himself to be in its employ.
7. On 18 February 1997, the appellant commenced employment with another employer on casual rates.
8. That, having regard to all of the material, the appellant was not dismissed constructively or otherwise.
9. That it was not unusual for accommodation at mine sites to be withdrawn, as was the case here.
10. An alternative position was not immediately available and "options to be identified" were discussed.
11. The appellant agreed to bring forward the option to go on leave as a proposal put to him on 4 December 1996.
12. The relationship continued until it was repudiated by the appellant when he accepted employment with a new employer on 18 February 1997.
13. That the respondent did not accept repudiation at an earlier date, although it could have.
14. There was no dismissal and the Commission had no jurisdiction in the matter.

ISSUES AND CONCLUSIONS

This was not a discretionary decision which was appealed against, but a decision, as a matter of law, that the Commission at first instance did not have jurisdiction to hear and determine the application before it.

Whether the Commission had jurisdiction depended, in this case, upon whether the appellant had been dismissed.

There is no definition of "dismiss" or its derivatives in the Act.

The Commissioner concluded that there was no jurisdiction to hear and determine the application because there was no dismissal of the appellant. Jurisdiction under s.29 of the Act depends on there being a dismissal. The finding that there was no jurisdiction depended on findings of fact and law which the Commissioner made.

For the Commissioner to have jurisdiction, he had to be satisfied that there had to be a dismissal, that is, that there was a termination of the services of the appellant employee brought about by an act of the respondent employer without the consent of the employee and effected for cause or otherwise (see Smith v Director-General of School Education 31 NSWLR 349 (ICFC) per Fisher CJ, Bower and Hungerford JJ).

That definition can be expanded, if necessary, to take account of a constructive dismissal where the employee does not freely consent to the termination. In Metropolitan (Perth) Passenger Transport Trust v Gersdorf 61 WAIG 611 at 616 (IAC) per Smith J, His Honour referred to dismissal as "to send away or remove from office employment or position" and referred to the Shorter Oxford Dictionary definition. He also applied the definition by Fair J in Auckland Transport Board v Nunes (1952) NZLR 412 at 410, where His Honour said—

> "The word "dismissal" may be used in a sense of a peremptory or arbitrary dismissal or a dismissal after due notice or payment under the terms of the contract of employment."

Accordingly, if the Commissioner were satisfied that the appellant had been terminated by his employer, whether for cause or not without his consent, then the Commissioner could be satisfied that he was dismissed.

I am of the opinion, too, that one can be assisted in saying, too, that the Commissioner was entitled to find that there was a dismissal if there was an act by the respondent employer which resulted directly or consequentially in the termination of the employment and the employment relationship was not voluntarily left by the employee; that is, if the Commissioner could find that, had the employer not taken the action which it did, the employee would have remained in the employment relationship (see Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200 at pages 203-204 (IRC of Aust)).

I think, too, that one has to be careful in applying the definition of "dismissal", used in an order in the former Industrial Relations Act 1986 (Cth)(as amended), without some consideration.

I have read and considered carefully all of the evidence and all of the relevant material, as well as the submissions. A number of facts and conflicts in evidence need to be considered.

1. On 3 December 1996, the appellant's right to use accommodation on the mine site was withdrawn and he left the mine site to go home. He was told to do so by his employees' representative and his employer invoked Camp Site Regulations which prescribed its right to withdraw accommodation.
2. As a matter of reality, because he could not be accommodated on the site, he had to return to Perth and his job at that site came to an end. He was not admitted back to the site.
3. The appellant regarded himself as "tramped", that is, dismissed.
4. It was the respondent's case and the evidence of its witnesses that the appellant was not dismissed, and that the appellant was informed to that effect. That was not the appellant's recollection, but he admitted that he was dazed by the events and could not remember what was said.
5. The appellant did tell Mr Bosenberg the same day that he had been "tramped".
6. After Mr Bosenberg made enquiries, he advised the appellant on 3 December 1996 that the latter could resign, that he could go on leave or that he could ring Boris (Mr Lalich) about a job at Woody Woody (another site) (see page 89(TFI)). Mr Bosenberg said that it was possible that he suggested resignation as an option.
7. That same day, the appellant had filed an application in the Commission alleging that he had been unfairly dismissed and effected service of it the next day, 4 December 1996, by letter.
8. It was not in dispute in evidence that, the next day, the appellant rang Mr Lalich, who also told him that he could resign, that he could apply for work elsewhere or that he could take his annual leave. Mr Lalich denied telling him to consider resigning. The appellant did not, at that time, indicate that he proposed to take the annual leave which was due to him and which he had proposed to take on 16 December 1996. The appellant's evidence was that he had no intention of resigning (see page 36(TFI)).
9. From 16 to 28 January 1997, the appellant took annual leave. In fact, he received a direct deposit of monies into his bank account from the respondent on or around 19 December 1996, which he assumed were his annual leave payments, but which were not.

10. In the meantime, on 13 December 1996, according to Mr Lalich, he was directed not to continue seeking other work for the appellant because the appellant had filed an application alleging unfair dismissal (see the evidence of Mr Lalich and Mr Moir at pages 105, 125-126, 130(TFI)). Further, apart from the monies mistakenly paid to him, the appellant received no wages or annual leave payment, except for a payment in February 1997, after 3 December 1996.

11. In late January 1997, the appellant applied for social security benefits and, as a result of that application, had a telephone conversation with Mr Lalich on 31 January 1997. I have outlined that in detail above.

12. On 31 January 1997, the appellant wrote to Mr Lalich referring to that telephone conversation and asked that annual leave pay be paid to him at the address. In that letter he wrote—

> "THIS IS NOT TERMINATION PAY, BUT ANNUAL LEAVE PAY OWING, AS I CONSIDER MYSELF STILL IN YOUR EMPLOY AND LOOK FORWARD TO RETURNING TO WORK AT MT DIMER AS SOON AS POSSIBLE."

13. He then was paid, on 31 January 1997, an amount of $2,105.46 (see page 21(AB)), described as annual leave, with an amount of $930.00, wrongly paid for wages in December 1996, deducted.

    However, the copy payslip exhibited does not accord with such a description. There is an amount for annual leave designated as $3,401.46. There is an amount of $1,296.00 designated as an overpayment as at 17 December 1996. There is a reference to a deduction of $42.00. That left a nett amount of $1,762.00, described as paid. The amount is described as pay ending 11 February 1997.

14. Mr Moir gave evidence that the appellant was no longer an employee of the respondent after 29 January 1997, the date of the teleconference.

15. On 18 February 1997, the appellant commenced employment with another employer on a casual basis.

It is necessary to consider the relevant facts in this matter. The appellant, on 3 December 1996, was ejected from the mine site. That was the effect of the withdrawal of his accommodation. As he himself said in evidence, and, as he told Mr Bosenberg, he believed that he was dismissed. The decision to eject him was confirmed by the appropriate officer, Mr Jeff Williams. Mr MacLardy told him that he was not dismissed. Mr Bosenberg might have told him to resign. Mr Lalich denied that he had.

As a matter of reality, since the nearest accommodation was 200 kilometres away, once the appellant was ejected (and unless he was allowed back, and he was not, and there was no suggestion that he would be), his employment as a Survey Assistant/Gold Room Attendant was terminated. The reality, no matter that it was denied that he had been dismissed, was that he was. There was a termination of his services at Mt Dimer effected by his ejection or deprivation of accommodation, effected without his consent. He did not view that he was invited to return to that site or that job. In other words, he was sent away or removed from his employment.

He was not told by anyone that he was being transferred to another job. As a matter of fact, he was not. The work at Woody Woody, if it were to exist, with an associated company to National Mine Management Pty Ltd or with National Mine Management Pty Ltd, depending on whether one accepted Mr Lalich's or Mr Moir's evidence, would not be available until early February 1997, months later. There was no evidence that it was the same work at the same pay. At Acacia's site, there was no work. As a matter of fact, he was not, nor could be, transferred to other work.

It would clearly not be the same job or the same contract of service. If it were, there was no evidence to that effect. It was not submitted either, or there was no evidence, even if it were the same employer and, on Mr Lalich's evidence it was not, there was no employment. It is fair to say that any contract would be a different one.

The fact that the appellant made a claim of unfair dismissal, of course, corroborated his evidence as to his state of mind that he had been dismissed. This was followed by a somewhat belated discontinuance of attempts to find work for the appellant, on Mr Lalich's evidence, after the filing of the application alleging unfair dismissal.

His removal from the site, as a matter of fact, required a change in duties with a new contract, albeit with the same employer, supplementary to the old contract. It is doubtful that this could be said to be a variation of the old contract.

Clearly, too, when an employer and employee agree to an alteration in the employee's responsibilities which is profound, a court should be more ready to hold (unless the original contract of employment provided for a contingency) that a new contract has replaced the old, or at least that the old contract was varied, contained terms objectively appropriate to the new relationship created. In this case, there was no contract offered and no job found to which one could apply those observations.

There was no evidence as to what new duties and responsibilities in any other job would be. There was no evidence that a new contract or its terms would be acceptable to either party. As a matter of fact, no job was found to be available.

There was no evidence that it was a term of his contract, express or implied, that he could be transferred by way of demotion or otherwise. There was, in fact, no new contract or no contract ever offered.

What really occurred was that this contract of employment was terminated and no new contract was offered. All that was offered was the possibility of a new contract at another site or the hope of one.

It matters not, of course, that Mr Lalich ceased to attempt to find other employment, the fact was that it was necessary to find other employment. There was no evidence that it would be on the same terms or that it would, as a matter of fact or law, constitute a transfer or a demotion, or an entirely new job.

The evidence, put at best, meant that a job, however different or similar, might come up at some time.

This bears out the inference that ejection from a site in a remote area is dismissal from employment, particularly, if no new job can be found elsewhere. In other words, his employment was at an end (see Quinn v Jack Chia (Australia) Ltd [1992] 1 VR 567).

In the absence of a new contract replacing the old, and there was no such contract, the contract of employment was terminated as at 3 December 1996, or at the conclusion of the appellant's leave.

As a matter of fact, the Commissioner should have found that a dismissal occurred because the act of ejection from the site effected the termination of his employment and constituted a dismissal.

The next consideration is whether the appellant's purportedly going on leave might be said to have effected an extension of his employment. It was not open to so find because there was a hiatus between his dismissal on 3 December 1996 and his purporting to go on leave on 16 December 1996.

A fair inference, too, is that the respondent did not accept that he was employed. I say that because no attempt was made to find work for the appellant after 13 December 1996, because of the filing of the claim for unfair dismissal. It is a fair inference from that that it was accepted by the employer that he was not employed. (The Full Bench would be entitled to draw such an inference and other inferences on the authority of Warren v Comombes and Another [1978-1979] 142 CLR 531.)

Further, the appellant was paid no monies by way of annual leave entitlements in advance of, but contemporaneously with his purporting to go on leave, but was erroneously paid an amount for working, when he was no longer on site. There was the evidence of Mr Lalich's enquiry about annual leave on 18 January 1997.

The fact was, however, that those monies which would normally have been paid in advance were not paid until 30 January 1997, and then the question was whether they were part of a payment on termination of employment. That was consistent

with Mr Moir's evidence that, at or about that time, the respondent considered that the appellant was no longer employed by the respondent.

The question was, of course, whether there was an agreed renewal or extension of the employment. There was not. Even if that view were wrong, then the appellant regarded the contract as still afoot as at 31 January 1997 (see page 20(AB), exhibit C3).

However, there is no evidence that there was an agreement to extend any existing or commence a new contract of employment, and, if so, on what terms. Any monies paid by way of annual leave payments were paid only at or about the same time as the contract was said to be terminated.

In my opinion, it was not open to find that any new contract or extension of the existing contract took effect after the dismissal of 3 December 1996.

This was acknowledged by the correct finding by the Commission that, on the evidence of either party, neither sought genuinely to continue the employer/employee relationship. In other words, there was no intent to enter the legal relationship of a contract of employment. Implicit in that finding is that there was a dismissal on 3 December 1996.

Further, the Commissioner should have found that the respondent did not, as at 30 January 1997, move to terminate the contract of employment (or rather give notice of termination) because the contract was, on the evidence of Mr Moir, already at an end. In that context, it was not significant that the appellant left no number where he could be contacted about "alternative employment", because no attempt was being made after 13 December 1996 to find any.

That is also evidence that there was no offering a new contract or extend the contract of employment.

Further, when the appellant wrote on 31 January 1997 that he still considered himself in the respondent's employ, the respondent did not acknowledge that he was. That was because, on Mr Moir's evidence, he was not. As a matter of law, he was not. Accordingly, the obtaining of work by the appellant on 18 February 1997 could not correctly be found to be a repudiation of any contract.

In any event, there was no contract of employment after the dismissal of 3 December 1996. This is acknowledged by the Commissioner's finding, which was open to him that there was no "alternative position" available to the appellant. Insofar as there was an onus on the appellant to establish that there was a dismissal, on the balance of probabilities, the Commissioner should have found that onus discharged. Further, the Commissioner should have found that, as a matter of law, there was a dismissal on the authorities to which I have referred above.

The Commissioner should have found, for all those reasons, that there was a dismissal on 3 December 1996. The Commissioner erred in not so finding.

There was no question of estoppel raised by either party at first instance and I doubt that the doctrine is applicable or would assist either party.

This case is an example of the unsatisfactory state of affairs occasioned by applying the contractual doctrines applying to 19th century commercial transactions to the complex and fluid relationship between employers and employees at the threshold of the 21st century.

I would uphold the appeal, for those reasons. I would suspend the decision to dismiss and remit the application back to the Commission at first instance to hear and determine according to law.

CHIEF COMMISSIONER W S COLEMAN: The appellant claims that in circumstances wherein his access to accommodation at an isolated mine site was withdrawn, that was tantamount to the termination of his employment.

Now it is argued that the Commission in the first instance erred in law and in fact in determining that there was no jurisdiction to hear an application under Section 29(1)(b)(i) of the Act in the absence of a finding that there had been a dismissal.

The Commission in first instance found that at no relevant time did the respondent consider that the appellant's services were terminated. Attempts were made to relocate him to another site. Indeed, it was understood that following the period of "rest and recreation" under the work cycle he had just completed that the appellant had proceeded on annual leave. However, the appellant considered that he was being given "the run around" and served notice of a claim alleging unfair dismissal.

On the facts presented the Commission in first instance was not convinced that either party genuinely sought to continue the employment relationship. However, on the material before it, the Commission concluded that the appellant had not been dismissed constructively or otherwise, and that the employment relationship continued until it was repudiated by the appellant.

The first issue is whether the respondent's action in withdrawing the appellant's accommodation on site had the effect of terminating the employment relationship. Any statements made by the respondent at the time which militate against that outcome could not change the fact of a termination. On the basis that what had happened had amounted to a termination of the appellant's employment, then what followed in discussion between the parties would have been no more than tentative attempts to explore the possibility of establishing a new contract of employment.

However, the finding made in the first instance was that within the terms set down by the respondent it was not unusual for accommodation at its mine sites to be withdrawn in the case of a misdemeanour and for the employee involved to be relocated to another site. The matter of employment and accommodation privileges were not linked and the contract of employment was not site specific. What followed then was an attempt to relocate the appellant without interfering with the employment relationship.

Nothing was presented by the appellant to establish that the Commission in the first instance erred in concluding that, in effect, employment with the respondent was not linked to the availability of accommodation. The cessation of the availability of accommodation in itself did not amount to a dismissal.

The next level at which the appeal was directed involved findings arising from the evidence of exchanges between the respondent's management personnel and the appellant on site and in Perth following the withdrawal of accommodation privileges and attempts to have the appellant relocated. In my view, on the evidence, it was open to the Commission to find that the respondent had not dismissed the appellant at the time he was informed that his accommodation was withdrawn. Indeed, it was made clear to him then that he had not been "tramped". This assurance was reiterated when he returned to Perth. What was made clear to him was that his challenge to the withdrawal of accommodation had not been successful. The appellant acknowledged that he had been less than diligent in pursuing initiatives taken by the respondent to organise his placement at another mine site. This he explained was conditioned by his belief that he was "getting the run-around". However, even after a period without contact with the respondent, and well after the date upon which he claimed to have been terminated from employment, he expressed the belief that he considered himself to still be employed by the respondent and to have been paid for annual leave for the period. (Exhibit 3). The expectation was that he would return to work.

The onus was on the Appellant to show that he had been dismissed when the application was filed with the Commission pursuant to section 29(1)(b)(i) the Act. In my view this has not been discharged and I would dismiss the appeal.

SENIOR COMMISSIONER G L FIELDING: The facts in the matter have already been set out in the Reasons prepared by the President.

The central issue in this appeal is whether the learned Commissioner erred in finding that the Appellant was not dismissed from his employment on 3 December 1996, contrary to the assertion of the Appellant. It seems clear on the evidence that, at the time he instituted the proceedings, the Appellant regarded his employment as having been terminated, or more particularly, regarded himself as having been dismissed from his employment by the Respondent. However, an employee is not to be taken to have been dismissed from his employment simply because he considers that to be the fact. Essentially, the question as to whether the employment has been terminated, more especially whether the employment has been terminated by dismissal of the employee is a question of fact to be

determined, having regard to all of the circumstances (see: *Attorney-General v. West Australian Prison Officers' Union of Workers (1995) 62 IR 225*; and see too: *Woods v. W.A. Car Services (Peterborough) Ltd [1982] IRLR 413*).

The Appellant was at pains to point out that at no time did he resign. Thus on this occasion it is necessary only to examine the words or actions of the Respondent to ascertain whether it could be said properly that the Respondent dismissed the Appellant from its employment. There is little or no evidence to suggest that the Respondent dismissed the Appellant directly. The credible evidence suggests that he was not told that his employment was terminated. On the contrary, he was told that it had not been terminated. Although he has no recollection of the conversation, the Commission found, and there is ample evidence to support the finding, that the Appellant was told that although his accommodation rights were removed, he was not being "tramped". He was told this not once, but on a number of occasions by at least three different persons in authority. He was told this when he left site, again later that day and on the following day. Furthermore, the Respondent acted consistently as if the Appellant had not been dismissed from his employment. As the Appellant admits, after he was informed of his loss of accommodation rights, he was, on various occasions, invited to resign, invited to take his holidays earlier than originally planned, and invited to contact the Respondent's head office in Kalgoorlie for alternative work. Indeed there is nothing to suggest that the Respondent treated the Appellant's employment as at an end. Even the manner and the time when he left the minesite gives little weight to the claim that he was dismissed. It is common ground that when he left the site on 3 December 1996 he was due to leave for rest and recreation leave and thus his departure was in no sense special. The evidence of the Respondent suggests that it expected him to report for work at the end of that leave period, albeit that he could not return to the previous site. It might well have been the case that when that time came the Respondent had no work for the Appellant to perform. In that event, the Respondent might then have been forced to make a decision as to whether or not his employment should be terminated. There is ample evidence to suggest that that position had not been reached on 3 December 1996 when the instant the Notice of Application was lodged. Moreover, in face of the express indication to the contrary on that date, it is difficult to see how the Appellant could have been under the impression that by the removal of his accommodation rights he had been dismissed from his employment.

The Appellant contends that the removal of the accommodation was, in itself, a sign of and sufficient indication that his employment was terminated by the Respondent. In face of direct evidence to the contrary, that proposition is somewhat dubious. In any event, the evidence regarding the significance of the removal of accommodation is at best equivocal. There was ample evidence to support the learned Commissioner's finding that it was not uncommon for accommodation to be removed and for the affected employee to continue in employment, albeit at a different site. Moreover, the Appellant himself acknowledged that it was still possible for him to be employed by the Respondent, albeit at another site, although the accommodation at one place had been removed. There was little or no evidence to suggest that accommodation and continued employment with the Respondent were inextricably linked, as the Appellant suggests. Such evidence, as there was, did not suggest that it automatically followed that because accommodation was removed at one place, continued employment with the Respondent became impossible. On the contrary, the Respondent's managers suggested that it was not impossible that his employment with the Respondent would continue. Furthermore, the Respondent's conduct on and after 3 December 1996 to some degree supports that argument. It made attempts to find alternative work through its officers for the Appellant, an arrangement in which initially at least he seems to have been a willing participant. Indeed, apart from instigating the proceedings in question, the Appellant acted as if he was still employed, even to the point of writing a letter to the Respondent on 31 January 1997 indicating that the moneys paid to him the previous December were not termination payments, but for annual leave and, moreover, that he considered himself "still in your employ and looked forward to returning to work at Mt Dimer as soon as possible". Consistent with this, the Appellant was, at the very least, equivocal when it was put to him in the course of the proceedings that he was still in the Respondent's employment on 4 December 1996 and that he was on leave until almost the end of January 1997, as originally planned.

The Appellant at all times carried the onus to show, on the balance of probabilities, that he had in fact been dismissed from his employment before lodging the Notice of Application. Unless and until that onus was discharged, the Commission was entitled to dismiss the application. On the face of the evidence adduced in these proceedings, in my assessment it was open to the learned Commissioner to find that the Appellant was not dismissed at the time when he lodged the application or, at least, that he was not satisfied that he had been so dismissed.

For the foregoing reasons I would dismiss the appeal.

THE PRESIDENT: For the those reasons, the appeal is dismissed.

Order accordingly

Appearances: Mr T C Crossley, as agent, on behalf of the appellant

Mr M E Jensen, as agent, on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew Gerrard Wood
(Appellant)

and

National Mine Management Pty Ltd
(Respondent).

No. 2218 of 1997.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

11 November 1998.

Order.

This matter having come on for hearing before the Full Bench on the 18th day of September 1998, and having heard Mr T C Crossley, as agent on behalf of the appellant and Mr M E Jensen, as agent, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 11th day of November 1998 wherein it was found that the appeal should be dismissed, it is this day, the 11th day of November 1998, ordered that appeal No 2218 of 1997 be and is hereby dismissed.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew Gerrard Wood
(Appellant)

and

National Mine Management Pty Ltd
(Respondent).

No. 2218 of 1997.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

18 September 1998.

Order.

This matter having come on for hearing before the Full Bench on the 18th day of September 1998, and having heard Mr T C

Crossley, as agent, on behalf of the appellant and Mr M E Jensen, as agent, on behalf of the respondent, and the Full Bench having made such orders as are necessary or expedient for the expeditious and just hearing and determination of the matter, it is this day, the 18th day of September 1998, ordered and directed as follows—

(1) THAT the grounds of appeal herein be and are hereby amended by deleting grounds 3 to 9 inclusive and substituting therefor the following ground—

"The Commission erred in failing to determine that it had jurisdiction to hear and determine the matter."

(2) THAT the abovementioned appeal is hereby adjourned sine die.

(3) THAT the appellant do file and serve full written submissions within 7 days of the date hereof.

(4) That the respondent do file and serve full written submissions within 7 days of the expiry of the period referred to in order (3) hereof.

(5) THAT at the expiry of the period referred to in order (4) hereof the appellant do file and serve any submissions in reply within 7 days.

(6) THAT there be liberty to apply upon the giving of 48 hours' notice.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew Gerrard Wood

(Appellant)

and

National Mine Management Pty Ltd

(Respondent).

No. 2218 of 1997.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

22 June 1998

Order.

This matter having come on for hearing before the Full Bench on the 22nd day of June 1998, and having heard Mr C Fayle, as agent, on behalf of the appellant and Mr M Jensen, as agent, on behalf of the respondent, and the Full Bench having made such an order as is necessary or expedient for the expeditious and just hearing and determination of the matter herein, it is this day, the 22nd day of June 1998, ordered by consent that the matter be and is hereby adjourned sine die.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

FULL BENCH—
Unions—Application for Alteration of Rules—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

In the matter of an application by the Real Estate Salespersons Association of Western Australia (Inc).

1273A of 1998.

ROBIN COLBERT LOVEGROVE
DEPUTY REGISTRAR.

26 October 1998.

Decision.

HAVING been directed by the Full Bench, I have this day registered an alteration to Rule 4—Constitution, of the registered rules of the applicant organisation, in terms of the order as given on the 26th day of October 1998.

R.C. LOVEGROVE,
Deputy Registrar.

COMMISSION IN COURT SESSION—
Matters dealt with—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

SECTION 14 OF THE MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993

CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER S.A. CAWLEY
COMMISSIONER S.J. KENNER.

28 May 1998.

Recommendation.

COMMISSION: This recommendation is made under Section 14 of the Minimum Conditions of Employment Act 1993 ("the Act"). It is noted that the determination which follows this recommendation cannot be made before 10 November 1998 and then only if the Minister determines a rate for a particular class of employee that is different from the rate for that class of employee in effect at the time (Section 15(1) and (4)).

Under the determination published pursuant to the Minimum Weekly Rates of Pay Order 1997 on 10 November 1997 the rate for employees 21 or more years of age is $335.00 (Government Gazette No. 197 Special, Monday, 10 November, 1997).

While this advice discharges the Commission's statutory duty to provide a recommendation within the timeframe set down in the Act, the time lag between its consideration and the earliest possible date on which a determination could issue detracts from it relevance. Obviously, the recommendation is made within the context of current economic projections. There may be significant alterations to these during the interim. Indeed, it is the degree of uncertainty which arises from the Asian economic crisis that causes the Chamber of Commerce and Industry of Western Australia ("the Chamber") to be cautious at this time.

Forecasts of National economic growth have been discounted for the Asian economic crisis from between half and one and a half points. Instead of 4.5% growth, Australia's GDP is projected to increase by 3.5% in 1998-99. The Western Australian economy is forecast to grow by 5% in real terms in the period, a moderation on the strong performance of an estimated 6.5% for 1997-98 (See State Budget Papers, chapter 2 "The Western Australian Economy").

However, the Chamber notes—

* Western Australia is reliant on exports to the rest of the world to support growth and is exporting more to that part of the world that is affected by the Asian economic crisis than the rest of Australia. Developments in South Korea and Japan are of particular concern. When these two countries are included with other South-East Asian markets, the region accounts for 50% of the State's exports.
* Western Australia's economy drives off the resource sector. The multiplier effect of the mining sector is in the order of three to one compared with the rest of the economy. Delays in investment arising from lower commodity prices and the Asian crisis could significantly reduce growth prospects for 1998-9.

  Consumer spending has been "patchy" over recent months. High real earnings growth and strong economic activity saw Western Australians spending more, well above the national average. The rate of increase cannot be expected to continue.

  With the dramatic fall in interest rates over the past five years, the level of mortgage debt nationally has doubled. The concern is that with any increase in inflation (although historically low) and with the higher debt level, households will be much more sensitive to changes in interest rates should there be increases towards the end of 1998 or early 1999.

  Any upward movement will have a significant impact on the retail sector. This would compound problems for youth employment.

  The Chamber is not as optimistic as the State Treasury about the prospects for strong consumer spending in 1998-9.
* "In Western Australia employment growth has been a little stronger than nationally, at 2.3 per cent over the year to December. But rising employment growth was not sustained consistently over the second half of the year and improvements in the unemployment rate which had proceeded fairly steadily over the first half of 1997 tapered out towards the end of the year.

  Although WA's unemployment rate fell less quickly than Australia's over the past six months it remains the lowest among the Australian States.

  The number of advertised vacancies in Western Australia rose by 18 per cent over the year to December, but this seasonally adjusted estimate was boosted by untypically high growth for the month of December. On a trend basis growth over the year was 12 per cent and, as was the case nationally, it seemed that the rate of growth in the number of advertisements slowed in the latter parts of the year.

  The key drivers for employment in Western Australia are changes in real unit labour costs, business investment and private consumption growth. The labour market tightened in late 1994 and through 1995, but through the course of 1996 the pace of employment growth stalled, with only around 3,200 jobs created in the year to the June quarter of 1996, compared to more than 40,000 jobs for the same period a year earlier.

  Employment is forecast to grow at a steady pace through 1998, possibly accelerating through 1999 but the year average growth will be of a similar magnitude. The unemployment rate is expected to drift sideways for a time but as investment and output accelerate, unemployment will gradually recede to below 7 per cent. Business investment is forecast to moderate both this and next financial year, the volume of imports should also moderate although the effects of the currency depreciation will increase the value of imports in some cases.

  Overall, the contribution to GSP growth from new exports both this year and next is forecast to be around 1 percentage point.

  Movements in population rate will have a significant impact on the unemployment rate and employment growth. If the increase in population falls below the estimated growth rate of around 2¼ per cent, then in the short term the labour market will be tighter and the unemployment rate may fall more sharply."

  (Exhibit 1: CCIWA: "Economic Submission to the State Minimum Wage Hearing, May 1998 p 8)
* "Australia's youth unemployment rate has fluctuated around 30 per cent for the past four years. Although overall unemployment fell in the second half of 1997, the youth unemployment rate edged upwards, to reach 28.1 per cent by December, 1997.

  In Western Australia the deterioration in the youth labour market over the second half of the 1997 has been much more pronounced, with seasonally adjusted youth unemployment rising from 14 per cent to 24 per cent between July and December 1997.

  Youth unemployment data for the smaller states should be interpreted with caution, as the small sample sizes mean that unemployment estimates are volatile and subject to relatively large statistical errors. On balance, it looks possible that the apparent deterioration occurred because the comparatively low youth unemployment rates recorded in WA over mid-1997 were anomalous.

  WA's youth unemployment rate in December 1997 was lower than it had been a year previously, and remains below the national average."

  (Exhibit 1: CCI of WA: "Economic Submission to the State Minimum Wage Hearing, May 1998 pp 8-9)

The Chamber notes that the difference between the weekly Minimum Wage determined under the Minimum Conditions of Employment Act ($335.00) and that recently awarded by the Australian Industrial Relations Commission as the Federal minimum wage ($373.40) (Safety Net Review—Wages, April, 1998, Print Q1998) represents $1.00 per hour on a 38 hour week. While not advocating a particular wage rate for the purposes of this recommendation the Chamber points out the two distinct and separate streams of wage fixing that operate in this State. First, is the award system which includes the statutory provision of Section 51 of the Industrial Relations Act to give effect to National Wage Decisions (of which the federal minimum wage is included) unless there is good reason not to do so. Second, is the award free and work place agreements areas which are regulated by the Minimum Conditions of Employment Act. However, at this time, given the legislative frameworks within which these wage fixing systems operate and policy considerations, they cannot be reconciled. The Chamber reminds the Commission what was said when the recommendation on the minimum weekly wage was formulated in 1997—

> "It matters not that employment is or is not regulated by an award or industrial agreement. A recommendation for the same class of employee under the Minimum Conditions of Employment Act should not be substantially different (76 WAIG 318)."

The requirements to develop a wage rate according to "equity, good conscience and the substantial merits of the case" having regard for "the interests of the persons immediately concerned ... for the interest of the community as a whole" and taking into account the state of the economy, the capacity of employer to pay as well as any change, in productivity that have occurred or are likely to occur (See Section 26 Industrial Relations Act, 1979) is not substantially different from addressing the issue to ensure that there is "fair treatment of employees and employers" and one that satisfies the "most fundamental equity considerations" including "protection of the weak against the strong" (Western Australia Parliamentary Debates (Hansard) Thursday, 8 July, 1993 at p 1456).

It is acknowledged that the premise upon which the wage rate is developed, to a significant degree, conditions the outcome. Whether it is the industrial relations model structured on the concept of work value relationships and adjusted for productivity outcomes or a "needs based" methodology in the end can best be judged on how it serves the individuals to whom the rate applies and the community as whole.

In documentation provided to the Commission in proceedings in 1997 State Wage Case (77 WAIG 3177) the number of

full time adult employees (FTAE) earning less than $340.00 per week in Western Australia was estimated to be 13 272 employees. Updated for the growth in full time employment between May 1996 and April, 1998 the number can now be estimated to be 13 736 employees.

Adjusting the existing "needs based" minimum weekly rate of $335.00 for CPI movements for 1997-8 and even allowing for movement in the September 1998 quarter, the increase may be small under that regime. CPI adjustments alone will see the position of these employees deteriorate in comparison with those enjoying increases based on productivity outcomes. The strong growth in productivity in Western Australia over recent years which has been translated into higher earnings will see the rates determined under the Minimum Weekly Rates of Pay Order fall further behind general community wage movements. Wages growth in Western Australia is expected to be 3.25% for 1998-9 (see State Treasury Budget Papers May 1998). It may be appropriate at this time to review the "needs based" model to establish another datum point from which to make adjustments. The review would involve a reassessment of needs having regard to contemporary standards. Once established direct productivity outcomes could form the basis of wage adjustments rather than the indirect link which has lower prices (and therefore lower CPI adjustments) reflecting general productivity growth.

The Trades and Labor Council ('the Council') submits that the minimum wage issued pursuant to the Minimum Conditions of Employment Act ought be increased to $378.32 per week. The grounds are—

"* such a rate would mirror the state minimum award wage issued in the most recent wage proceedings and adjusted by two hours to reflect the increase in weekly minimum hours pursuant to the *Minimum Conditions of Employment Act* from 38 hours to 40 hours;

* the rate ought henceforth reflect the minimum award wage as and when reflected by increases in the State Wage proceedings in particular, Application 757 of 1998 to be heard on 13th and 14th May, 1998;

* such a rate would reflect the need to provide a fair minimum rate of pay for employees in the context of living standards generally prevailing in the Western Australian community and in particular, the interests of the employees immediately concerned;

* the need to provide protection for low paid employees by raising minimum rates of pay and to recognise in such a rise the issue of equity between all workers;

* the relevant economic growth in Western Australia comparative to Australia is such that an increase as outlined can be sustained. Economic growth as a percentage per annum for the 1996/97 year for WA, equals 3.1% and for Australia equals 2.7%;

* employment growth in Western Australia has been far stronger than Australia. As a percentage per annum employment growth in WA in 1996/97 was 2.3% and in Australia was 1.1%;

* the minimum wage for workers on Australian Workplace Agreements and awards at the federal level as well as awards, orders and agreements at the state level is currently $359.40 for a 38 hour week. Western Australian workers minimum wage pursuant to the *Minimum Conditions of Employment Act 1993* is currently $335.00 lagging well behind the majority of employees in Australia. When balanced against the economic growth in this state such unfairness can not be sustained."

(TLC submission dated May 1998)

The Society of St. Vincent de Paul presented the following written submission for the Commission's consideration—

"... There must be a reasonable margin between the minimum weekly rates of pay and any Newstart or other Allowances/Pensions payable. If the allowance or pension plus other benefits available are equal, or nearly equal to, the minimum weekly rate of pay, then the incentive is not there to seek or maintain employment.

Junior rates of pay, i.e. 40% at 15, 50% at 16 etc. should be reviewed as should apprenticeship award rates. Young people lucky enough to find employment and developing a work ethic should not be put in the position where unemployment friends compare their pay rates and they become dissatisfied and resentful at having to work for the same money. It is important to protect and support young people at this age so that the "unemployed syndrome" does not become a culture and lifestyle for the future. They must not feel that they are being discriminated against but affirmed in their choice and understanding reinforced that their earning power will be far greater in the future once qualified—apprentices are only trainees and paid as such.

.... Minimum rates of pay must be established to enable a person to be able to support and maintain his/her family with the basic necessitates of life—food, clothing and accommodation and to be able to retain their dignity by not having to approach welfare agencies for emergency relief support. Built into this rate should be a provision for travelling to and from work. Has consideration been given to establishing a minimum rate of pay for different industries to reflect the level of skills and training required?

Rates can only be established from statistical information based on average prices of food, clothing, rent, transport, etc. gathered and applied to the "the average family" and reviewed on a regular basis.

(Society of St. Vincent de Paul submission—May 1998)

Amongst other things this submission highlights the interrelationship between the welfare and taxation systems and effective marginal tax rates when people move from unemployment to employment.

In considering matters relevant to this recommendation the Commission has access to the "Economic Submission to the State Wage Case Hearing (May 1998)" prepared by the Western Australian Department of Treasury. The following extracts complement the detailed economic analysis the Commission was pleased to receive from Mr D. Ingles, an economist with the Chamber.

"Conditions in the Western Australian labour market are expected to strengthen further in 1998-99 in response to the continuation of the strong domestic demand experienced throughout 1997-98.

Employment growth is forecast to accelerate to its strongest rate in 4 years, facilitating a continued reduction in the unemployment rate.

There have already been improvements in the labour market in Western Australia in 1997-98. Over the 9 months to March 1988 employment grew at an average monthly rate of 0.2% in trend terms, or 2.8% annualised. This compares with growth of 0.1% per month over 9 months to March 1997, or 2.0% annualised.

.... employment growth has been strongest in services industries, such as wholesale and retail trade, accommodation, cafes and restaurants, and recreational and personal services which have the highest proportion of workers under awards or with minimum rates of pay.

Significantly, a large proportion of growth in 1997-98 has been in full time employment which represents a significant strengthening in labour market conditions following the dominance of part time employment growth through the latter half of 1996.

... Employment is forecast to grow by 3.25% in 1998-99, following estimated growth of 2.5% in 1997-98. Continued strong growth in consumer spending and healthy growth in dwelling investment is expected to result in employment growth being strongest in the construction and wholesale/retail trade sectors. These industries account for around 30% of total employment.

As a result of this forecast employment growth, the unemployment rate is expected to fall to an average of 6.75 over 1998-99.

Wages

Against the backdrop of strong demand for labour and continued shortages of supply in some fields, increased

wages pressure is expected over 1998-99. This will add to the inflationary impetus more broadly with an expected increase in cost-push inflation arising from attempts to maintain wage relativities.

Wages pressures are expected to increase in 1998-99 reflecting the sustained strength in labour market conditions. Average weekly total earnings (AWE) are forecast to grow by 3.25%, slightly stronger than estimated growth of 2.75% in 1997-98).

There are a number of factors underpinning the anticipated lift in wages growth in 1997-98 and 1998-99. The latest available data indicate that the average annualised wage increases (AAWI) under federal wage agreements and agreements within the Western Australian public sector remain well above AWE growth in 1997.

As the table below shows, AWE growth (in annual average terms) in Western Australia is now increasing ahead of the cost of living, as measured by the CPI.

WAGE AND PRICE GROWTH

Annual Average Percentage Change

	Mar 97	Jun 97	Sep 97	Dec 97
Average Weekly Earnings	1.2	1.1	1.2	1.9
Consumer Price Index	1.9	1.3	0.6	-0.1

Wages pressures are expected to increase further in 1999-00. Average weekly earning growth is projected to accelerate to 3.75% in both 1999-00 and 2000-01. This is due to continued strength of the labour market enhancing the bargaining position of employees, and the coincident renewal of industrial agreements.

(WA Dept of Treasury Submission to State Wage Case, May 1998 pp 2-5)

As already mentioned, these submissions were presented to the Commission in the context of a State Wage Case heard on 14 and 15 May, 1998. Under the provisions of Section 51 of the Industrial Relations Act, the Commission is required to give effect to the National Wage Decision unless there are good reasons not to do so. That matter has not been determined at this time. The substance of the National Wage Decision includes the application of an arbitrated safety net adjustment of $14.00 per week for award employees on rates up to an including $550.00 per week. A $12.00 per week increase is to operate in award rates above $550.00 per week and up to an including $700.00 per week; and a $10.00 per week in award rates above $700.00 per week. The federal minimum adult wage (including the arbitrated safety net adjustment of $14.00 per week) is now $373.40 per week. Again in the May 1998 State Wage Case the Commission was informed that an estimated 110,000 employees will benefit from either the $14, $12 or $10 a week increase. Other employees covered by industrial agreements registered with the Commission are bound by the absorption requirements under the terms of the Wage Fixing Principles.

While it is acknowledged that it is difficult, if not impossible, to get verifiable data on the number of employees who would receive the wage increase under the arbitrated safety net adjustment if it is granted by the Commission, nevertheless, the Western Australian Department of Treasury considers that the direct impact will not significantly affect wages growth or inflation. Average weekly ordinary time earnings of full time employees (AWOTE) should remain within the 4—5% "comfort zone" identified by the Reserve Bank and the 2—3% inflation rate target.

An increase of $14.00 per week in the rate determined pursuant to the Minimum Conditions of Employment Act is likewise considered sustainable by the Commission given the state of the Western Australian economy. Under the terms of the Act this could not be implemented until November 1998 at the earliest. Aggregate wage outcome for 1997-98 would not be adversely affected given the estimated number of employees to whom the increase would have application.

In formulating this position, the Commission is mindful of the impact wage increases will have on youth employment. The following tables provide information on the youth labour market for Western Australia and Australia.

Table 1: Youth Total Employment

	June 94-95	June 95-96	June 96-97	April 97-98
Employment levels (000s)				
Western Australia	68.4	69.4	70.5	72.0
Australia	590.4	596.4	599.2	595.7
Growth (annual average)				
Western Australia	9.5%	1.4%	1.6%	1.8%
Australia	8.2%	1.0%	0.5%	-0.9%

Table 2: Full-Time Youth Unemployment Rates

	June 94-95	June 95-96	June 96-97	April 97-98
Unemployment rate (percent)				
Western Australia	19.2%	20.5%	21.5%	20.5%
Australia	27.6%	27.8%	28.2%	27.7%

Table 3: Youth Participation Rates

	June 94-95	June 95-96	June 96-97	April 97-98
Participation rates (percent)				
Western Australia	68.4	69.4	70.5	72.0
Australia	590.4	596.4	599.2	595.7
Growth (annual average)				
Western Australia	4.2	1.0	0.3	-1.8
Australia	5.4	0.8	-0.3	2.7

It should be noted that employment rates and participation rates are calculated using a 12 month moving average. All growth rates refer to average annual growth.

Sources: Australian Bureau of Statistics (ABS) PC-Ausstats Tables Labem5i, Labem9I, Labun9I, Labun5I, Labpr9c, Labpr5c.

Again from information made available in the May 1998 State Wage Case it is estimated from the Australian Bureau of Statistics data that 44.5% of employed youth work in the retail sector in this State. The Department of Treasury states—

"Given that this sector employs a significant proportion of people who are covered by awards, in particular youth, and that wage increases do affect employment to some degree, any negative employment effects that may arise from the State Wage Case could be felt disproportionately in that sector and may adversely affect the employment prospects of youth.

As mentioned earlier, a significant proportion of employment growth in Western Australia forecast for 1998-99 is underpinned by a projected pick-up in the wholesale and retail trade services sectors. While these sectors have been the State's major source of employment growth over the last six months, the maintenance of confidence and competitiveness within these industries is crucial to further employment generation.

In summary, the Government believes that a modest increase in award wages of employees who have not benefited from enterprise bargaining is economically justifiable. Evidence suggests, however, that the level at which youth wages are set, does impact to some degree on employer hiring decisions. The magnitude of the wage increase handed down, therefore, should be such that employees on awards (many of whom are youth) are not priced out of jobs or that employees on awards do not receive wage increases at the expense of the employment prospects of those who are unemployed."

(Economic Submission to the State Wage Case Hearing Prepared by the Dept of Treasury, May 1998)

The Commission has been mindful of these comments in formulating its recommendation for a $14.00 per week increase.

In forwarding this advice, the Commission reiterates its concern about the currency of the recommendation given the statutory limitation that applies before the determination pursuant to the Minimum Conditions of Employment Act can be made.

Developments in South-East Asia may necessitate further revisions to economic forecasts. Changes to the taxation system now being debated may impinge upon the "needs based" model which is presently being used as a point of reference in determining the wage rate under the Minimum Weekly Rates of Pay Order.

Finally, consistent with the objectives identified in "Productivity WA 2000—Rewards Through Productivity" adjustments for those employees coming within the scope of the Minimum Conditions of Employment Act should share directly in general community productivity outcomes and not indirectly through consumer price movements. The recommendation of an increase of $14.00 per week goes some way to addressing this objective.

By the Commission,

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

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

METAL TRADES (GENERAL) AWARD 1966.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering,

Printing and Kindred Industries Union of Workers

- Western Australian Branch

and

Anodisors WA and Others.

No. 885 of 1997.

Metal Trades (General) Award 1966.

No. 13 of 1965.

COMMISSION IN COURT SESSION
CHIEF COMMISSIONER W.S. COLEMAN
SENIOR COMMISSIONER G.L. FIELDING
COMMISSIONER S.J. KENNER

1 December 1998.

Order.

HAVING heard Ms S.M. Jackson as agent for The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch and for the Trades and Labor Council of Western Australia, Mr G.E. Bull for the Chamber of Commerce and Industry of Western Australia, Mr M.C. Borlase as agent for various Respondent members of the Chamber of Commerce and Industry of Western Australia and Mr L.H. Pilgrim as agent for those Respondent members of the Motor Trades Association of Western Australia Incorporated, the Commission in Court Session, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Metals Trades (General) Award 1966 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 1st December 1998.

BY THE COMMISSION IN COURT SESSION

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

PART I GENERAL

1. Clause 31 – Wages and Supplementary Payments: Subclause (6) – immediately after subparagraph (f)(ii) insert the following new subparagraph—

(iii) The Minimum Adult Wage in respect of ordinary hours of work prescribed by this Award, to be paid to an adult employee (21 years of age and over) engaged as an apprentice shall be equivalent to the rate prescribed for a third year apprentice on a four year term for the first three years of an apprenticeship. The rate applicable to a fourth year apprentice shall apply in the final year. In the case of a three and a half year term the rate shall be that applicable to two and a half years service for the entirety of the first two and a half years and then the rate applicable to a final year apprentice for the final year. In the case of a three year term the rate shall be that applicable to a second year apprentice for the first two years and then the rate applicable to a third year apprentice in the final year.

Where the said minimum rate of pay is applicable, the same rate shall be payable on holidays, during annual leave, sick leave, long service leave and any other leave prescribed by this Award. Where in this Award an additional rate is prescribed for any work as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of apprenticeship.

AWARDS/AGREEMENTS— Variation of—

BUILDING AND ENGINEERING TRADES (NICKEL MINING AND PROCESSING) AWARD, 1968.
No. 20 of 1968.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch AND OTHERS

and

Western Mining Corporation Resources Limited and Others.

No. 1421 of 1998.

Building and Engineering Trades (Nickel Mining and Processing) Award, 1968.
No. 20 of 1968.

CHIEF COMMISSIONER W.S. COLEMAN.

27 November 1998.

Order.

HAVING heard Mr C. Young on behalf of the Applicants and Mr R. Gifford and on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Building and Engineering Trades (Nickel Mining and Processing) Award, 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of October 1998.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clause 11.—Shift Work: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) A shift employee shall, in addition to the ordinary rate, be paid per shift of eight hours at the rate of $8.55 when on afternoon or night shift.

Liberty is reserved to either party to apply to amend this subclause in the event of any variation in shift loadings generally.

2. Clause 25.—First Aid: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) Any first aid period appointed by the employer to perform first aid duties shall be paid an allowance of $1.10 per shift in addition to his ordinary rate of pay.

The provisions of this subclause apply to employees employed at Kambalda Nickel Operations from 25 May 1990.

The provisions of this subclause apply to employees employed at Windarra Nickel Project from 27 June 1990.

3. Clause 30.—Special Rates and Provisions: Delete subclauses (1) and (2) of this clause and insert in lieu thereof the following—

(1) **Engineering Trades—**

(a) Height Money—

Tradespersons and welders engaged on the surface in the erection, repair and/or maintenance of steel frame buildings, smoke stacks, bridges or similar structures at a height of 15.5 metres or more above the nearest horizontal plane shall be paid at the rate of 95 cents per shift extra.

(b) (i) Goggles, glasses and gloves or other efficient substitutes therefore shall be available for the personal use of any employee engaged in welding.

(ii) Every employee shall sign an acknowledgement on receipt thereof and on leaving employment shall return same to the employer.

(iii) During the time the same are on issue to the employee, he/she shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(iv) No employee shall lend another employee the goggles, glasses or gloves or substitutes issued to such first mentioned employee, and if the same are lent, both the lender and the borrower shall be deemed guilty of wilful misconduct.

(v) Before goggles, glasses or gloves or any substitutes which have been used by an employee are re-issued by the employer to another employee, they shall be effectively sterilised.

(c) Dirt Money—

Employees employed on dirty work or in wet places, shall be paid 20 cents per hour extra.

(d) Employees in very wet places shall be provided with oilskin coats and rubber boots.

(e) Heat Money—

(i) Employees employed for more than one hour in the shade where the artificial temperature is between 46° and 55° Celsius shall be paid 20 cents per hour extra.

(ii) Employees employed for more than one hour where the artificial temperature exceeds 55° Celsius shall be paid 24 cents per hour extra. Where work continues for more than two hours in temperatures exceeding 55° Celsius employees shall be entitled to 20 minutes rest after every two hours, without deduction of pay.

(f) Confined Space—

Employees employed in confined spaces as hereinafter defined, shall be paid 26 cents per hour extra. "Confined space" means a working space the dimensions of which necessitate an employee working continuously in a stooped or otherwise cramped position, or without proper ventilation or where confinement within a limited space is productive of unusual discomfort.

(g) Fumes—

Employees engaged on repair work to the roasters, under circumstances subjecting them to serious inconvenience from fumes, shall be entitled to payment of 25 cents per hour extra, with a minimum of 27 cents while so engaged.

(h) Explosive Powered Tools—

An employee required to use an explosive powered tool shall be paid 12 cents per hour extra.

(i) 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 so prevailing. Provided that this subclause shall not apply to Confined Space, Dirt Money, Height Money, or Heat Money, the rates for which are cumulative.

(j) An Electrician—Special Class—

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 "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act, 1945 shall be paid an allowance of $13.00 per week.

(2) **Building Trades—**

(a) Wet and Dusty Places—

An employee employed in places where the atmosphere is excessively dust laden, or where water is continuously dripping so that the clothing or feet become wet, shall be paid 24 cents per hour in addition to the prescribed rate.

(b) Excessively Dirty Work—

An employee employed on excessively dirty work which is likely to render the employee or his/her clothes dirtier than on the normal run of work shall be paid 22 cents per hour in addition to the prescribed rate, but with a minimum payment as for four hours in any one day.

(c) Winder Drums and Head Frame Wheels—

An employee engaged in work on winder drums or head frame wheels shall be paid 24 cents per hour in addition to the prescribed rate, but with a minimum payment as for four hours in any one day.

(d) S.O.2. Towers—

An employee engaged on repair work to S.O.2 Towers shall be paid 24 cents per hour in addition to the prescribed rate, but with a minimum payment as for four hours in any one day.

(e) Boat Type and Swinging Scaffold—

An employee employed on a boat type or swinging scaffold shall be paid 24 cents per hour in addition to the prescribed rate. "Swinging Scaffold" means any scaffold suspended from the ground and which, by reason of the operations carried out on it or by reason of

wind force or vibration, is likely to swing or sway. The employer shall permit an apprentice who has served less than two years of apprenticeship to work on a boat type or swinging scaffold and no such apprentice shall work on such a scaffold.

(f) Heat Money—

(i) An employee required to work for more than one hour continuously in the shade in places where the temperature is raised by artificial means to between 46.1° Celsius and 51.6° Celsius shall be paid 24 cents per hour in addition to the prescribed rate.

(ii) (aa) An employee required to work for more than one hour continuously in the shade in places where the temperature is raised by artificial means to exceed 51.6° Celsius shall be paid 29 cents per hour in addition to the prescribed rate.

(bb) Where work continues for more than two hours in that temperature employees shall be entitled to 20 minutes rest every two hours without deduction of pay.

(g) Boiler Flue or Roaster Work: Where bricklayers are employed for more than one hour inside the gas or water spaces of any boiler, flue or roaster, then six hours shall constitute a shift's work, provided that this subclause shall not apply in addition to the provisions of subclause (f) of this clause.

(h) Grinding Time: The employer shall provide sandstone grindstones. Employees shall be allowed to maintain their tools in proper working condition in working hours.

When an employee who has been employed for five consecutive working days is discharged, he/she shall be allowed two hours for grinding tools or be paid two hours' pay in lieu thereof.

(i) (i) Lead Paint Surfaces: No surface painted with Lead paint shall be rubbed down or scraped by a dry process.

(ii) Width of Brushes: All paint brushes shall not exceed 127mm in width and no kalsomine brush shall be more than 175mm in width.

(iii) Meals not to be taken in Paint Shop: No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(j) Spray Painting (Painters)—

(i) Lead paint shall not be applied by a spray to the interior of any building.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of 63 cents per day.

(k) Water and Soap: Water and soap shall be provided in each shop or on each job by the employer for the use of painters.

(l) Electrical Sanding Machines: The use of electrical sanding machines for sanding down paint work shall be governed by the following provisions—

(i) The weight of each such machine shall not exceed 5.9kgs.

(ii) Every employer operating any such machine shall ensure that each such machine together with all electrical leads and associated equipment is kept in a safe condition and shall, if requested so to do by any employee, but not more often than once in any four weeks, cause the same to be inspected by a licensed electrical employee under the Electricity Act and the Regulations made thereunder.

(iii) Employers shall provide and supply respirators of a suitable type to each employee and shall maintain same in an effective and cleanly state at all times. Where respirators are used by more than one employee, each such respirator shall be sterilised and a new pad inserted after use by each such employee.

(iv) Employers shall also provide and supply goggles of a suitable type: Provided that goggles with celluloid lenses shall not be regarded as suitable.

(v) All employees shall use such protective equipment when using electrical sanding machines of any type.

(m) (i) Carpenters and Joiners: A secure and weatherproof place shall be provided by the employer where carpenters' and joiners' tools may be locked up apart from the employer's plant and material.

(ii) Other employees: The employer shall, where practicable, provide a place on each job for the safekeeping of the employees' tools when not in use.

(n) Attendants on Ladders: No employee shall work on a ladder at a height of over 7.6 metres from the ground when such ladder is standing in any street, way or lane, where traffic is passing to and fro without an assistant on the ground.

(o) Plumbers on Sewerage Work—

Plumbers employed on work involving the opening up of house drains or waste pipes for the purpose of cleaning blockages or for any other purpose, or on work involving the cleaning of septic tanks or dry wells, shall be paid $1.14 per day in addition to the prescribed rate.

(p) All work made up by plumbers shall be welded by those employees.

(q) Change Room: The employer shall provide on each job a proper change room where the employee may change his/her clothes, and such place shall not be used for any other purpose.

(r) Boiling Water: The employer shall provide boiling water on each job for the use of his/her employees.

(s) (i) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Construction Safety Act, 1972 an employee is required to wear such helmet.

(ii) Any helmet so supplied shall remain the property of the employer and during the time it is on issue, the employee shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(t) Toxic Substances—

(i) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(ii) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate Government Authority or in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the union and the employer.

(iii) An employee using toxic substances or materials of a like nature shall be paid 29 cents per hour extra. Employees working in close proximity to others so engaged shall be paid 11 cents per hour extra.

(iv) For the purpose of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(u) Special Rates Not Cumulative—

Where more than one of the disabilities entitling a employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely – the highest so prevailing. Provided that this subclause shall not apply to excessively dirty work or heat money, the rates for which are cumulative.

(3) Any dispute which may arise between the parties in relation to the application of any of the foregoing special rates and provisions may be determined by the Board of Reference.

4. Clause 44.—Rates of Pay and Classification Definitions : Delete subclauses (5) to (8) inclusively of this clause and insert in lieu thereof the following—

(5) Tool Allowance—

(a) Bricklayers, Carpenters and Joiners, Plumbers or Painters shall be paid the following tool allowance—

	$
Bricklayers	1.30
Carpenters and Joiners	2.40
Plumbers	1.80
Painters	0.55

This allowance includes an amount of five cents for the purpose of enabling employees to insure their tools against loss or damage by theft or fire and shall not be paid where the employer supplies employees with all necessary tools.

An employee in receipt of a tool allowance shall provide himself all necessary tools kept in suitable condition for the performance of the work.

An employee who fails to provide all such tools when required shall be guilty of a breach of this award and shall not be entitled to the tool allowance prescribed above until he/she complies with this provision.

(b) Metal Trades Employees—

Notwithstanding the previous provisions of this clause, a metal tradesperson, including an apprentice, to whom the employer does not supply all necessary tools, shall be paid an allowance of $9.00 per week.

A "tradesperson", for the purpose of this clause, shall be deemed to be an employee who is paid an equal rate of wage or higher than for the classification "Boilermaker".

(6) Leading Hands—

In addition to the appropriate wage prescribed in this clause, a Leading Hand shall be paid—

	$
(a) If placed in charge of not less than 3 and not more than 10 other employees	15.40
(b) If placed in charge of more than 10 and not more than 20 other employees	23.10
(c) If placed in charge of more than 20 other employees	30.10

(7) Disabilities Allowance—

An employee employed outside of his/her shop on construction work shall for the time so employed be paid a disabilities allowance at the rate of $1.07 per week in addition to the prescribed rate.

(8) Industry Allowance—

(a) Each employee shall be paid an allowance of $71.00 per week.

(b) The allowance recognises, and is in payment for, all aspects of work in the industry, including the location and nature of individual operations within it.

(c) The allowance shall be paid in addition to the rate of wage set out in this clause and shall be paid for all purposes of the award.

5. First Schedule – District Allowance : Delete this schedule and insert in lieu thereof the following:

Payment shall be paid in accordance with the provision of this schedule so far as applicable.

(1) In addition to the wages prescribed in Clause 5.—Rates of Wages of this award, the following allowances shall be paid for five days per week to workers employed in the districts which are hereinafter respectively described, with the exception of districts contained therein which are situated within a radius of ten miles of Kalgoorlie, Coolgardie and Southern Cross, viz—

(a) First District—

Lying south of Kalgoorlie and comprised within lines starting from Kalgoorlie, then W.S.W. to Woolgangie, thence S.E. to Dundas, thence N.E. to a point ten miles east of Karonie on the Trans-Australia line, and thence back to Kalgoorlie; at the rate of 56 cents per week extra for those mines within ten miles of the railway and 80 cents per week for those outside.

(b) Second District—

Starting from Kalgoorlie W.S.W. to Woolgangie, thence N.N.W. to the intersection of the 120E. meridian with the 30S parallel of latitude, thence N.E. by E. to Kookynie, thence back to the point ten miles east of Kookynie on the Trans-Australia line, and thence back to Kalgoorlie; at the rate of 75 cents per week extra for those mines within ten miles of the railways and 96 cents per week for those outside.

(c) Third District—

Starting from and including Kookynie, then N. by W. to Kurrajong, thence N.E. to Stone's Soak, thence S.E. to and including Burtville, thence S.W. through Pindinnie to Kookynie; at the rate of 75 cents per week extra for those mines within ten miles of the railways and 96 cents per week for those outside.

(d) Fourth District—

Surrounding Southern Cross within a radius of thirty miles; for those mines outside a radius of ten miles from Southern Cross,

including Westonia and Bullfinch, at the rate of 27 cents per week.

(e) Fifth District—

Comprising all mines not specifically defined in the foregoing boundaries but within the area comprised within the 24th and 26th parallels of latitude; at the rate of $1.28 per week.

(2) Notwithstanding anything herein contained, the following allowances shall be paid in the districts or mines mentioned hereunder—

Per Week	$
Ora Banda and Waverley Districts	0.75
Yalgoo District.	0.75
Meekatharra, Mt. Magnet and Cue Districts	0.91
Wiluna District	1.07
Youanmi District	1.07
Cox's Find Goldmine	0.96
Corduroy Goldmine and mines within ten miles' radius therefrom	1.28
Lallah Rooke Goldmine, Halley's Comet Goldmine, Prophecy Goldmine and mines within ten miles' radius therefrom	1.60
Mayfield District	0.75
Evanston District	1.07

With regard to the Meekatharra, Mt. Magnet, Cue, Yalgoo and Wiluna Districts, an additional allowance at the rate of 16 cents per week shall be paid to workers employed at mines situated five miles from a Government railway.

With regard to the Big Bell Goldmine, the Triton Goldmine and Cox's Find Goldmine, the sum of 16 cents per week may be deducted from the district allowance which would otherwise be paid.

(3) In the case of any mine or district within the area to which this award applies which is not dealt with under the provisions of this schedule, the Union may apply to the Western Australian Industrial Commission at any time for the purpose of having an allowance prescribed, upon serving upon the employer concerned fourteen days' notice thereof prior to the date of such application the service of such notice shall be made pursuant to the provisions relating thereto prescribed by the regulations under the Industrial Arbitration Act, 1979.

BUILDING TRADES (CONSTRUCTION) AWARD 1987

No. R 14 of 1978.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers and The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch

and

Adsigns Pty Ltd and Others

No. 2003 of 1997.

Building Trades (Construction) Award 1987, No. R 14 of 1978.

COMMISSIONER P E SCOTT.

27 November 1998.

Order.

HAVING heard Ms J Harrison on behalf of the Applicants and Mr K Dwyer on behalf of members of the Chamber of Commerce and Industry of Western Australia, Mr K Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers) and Mr S Varidel on behalf of The Master Painters', Decorators and Signwriters Association of Western Australia (Union of Employers) and The Master Plumbers' and Mechanical Services Association of Western Australia (Union of Employers), and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Building Trades (Construction) Award 1987 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 16th day of November 1998.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

Schedule.

1. Clause 50.—Superannuation: Delete paragraph (e) of subclause (1) of this clause and insert the following in lieu thereof—

(e) "Ordinary time earnings" (which, for the purposes of the Superannuation Guarantee (Administration) Act 1992, will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multistorey allowance, district/location allowance, piecework rates, underground allowance, award site allowances, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received for ordinary hours of work. All other allowances and payments are excluded.

EDUCATION DEPARTMENT OF WESTERN AUSTRALIA (EDUCATION ASSISTANTS—ALHMWU) ENTERPRISE BARGAINING AGREEMENT, 1996.
No. AG 296 of 1996.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch

and

Minister for Education.

No. 2077 of 1998.

Education Department of Western Australia (Education Assistants—ALHMWU) Enterprise Bargaining Agreement, 1996.
No. AG 296 of 1996.

CHIEF COMMISSIONER W.S. Coleman.

3 December 1998.

Order.

HAVING heard Ms S. Jackson on behalf of the Applicant and Ms Zadkovich and with her Mr D. Cloghan on behalf of the Respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Education Department of Western Australia (Education Assistants—ALHMWU) Enterprise Bargaining Agreement, 1996 be replaced with the following

consolidated variation to this agreement with effect on and from 26 November 1998.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

1.—TITLE

This Agreement shall be known as the Education Department of Western Australia (Education Assistants – ALHMWU) Enterprise Bargaining Agreement 1998.

2.—ARRANGEMENT

3.—SCOPE OF THE AGREEMENT

This Enterprise Agreement shall apply to persons employed as Education Assistants by the Minister for Education and who are members of or eligible to be members of the Union. This Agreement will cover 4 170 employees.

4.—PARTIES TO THE AGREEMENT

This Agreement is made between the Minister for Education (the Employer) and the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers Division, Western Australian branch (the Union).

5.—DEFINITIONS

1. "Agreement" the Education Department of Western Australia (Education Assistants ALHMWU) Enterprise Bargaining Agreement 1998

2. "Department" the Education Department of Western Australia

3. "Employee" as per Clause 3 of this Agreement

4. "Education Assistants" persons employed as Teacher Assistants, Home Economic Assistants, Aboriginal Education Workers or Child Care Worker

5. "Employer" the Minister for Education of Western Australia

6. "Government" the State Government of Western Australia

7. "Minister" the Minister or Ministers of the Crown responsible for the administration of the Department

8. "Union" the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers Division, Western Australian branch

9. "WAIRC" the Western Australian Industrial Relations Commission.

6.—DATE AND PERIOD OF OPERATION OF THE AGREEMENT

(1) This Agreement shall operate from the beginning of the first pay period commencing on or after 26 November 1998 and shall remain in force until 31 March 2000 provided that the salary increases specified in Clause 19—Salary Increases— of this Agreement come into effect in accordance with that clause.

(2) Subject to the continuation of the initiatives contained in this Agreement, the pay quantum achieved as a result of this Agreement will remain and form the new base pay rates for future agreements or continue to apply in the absence of a further Agreement.

(3) The parties will review this Agreement at least six months prior to the expiration of this Agreement to commence negotiations for a new Agreement.

(4) The parties will assess achievements in performance, productivity and efficiency during the term of the Agreement.

(5) The parties genuinely commit to ongoing consultation and bargaining in good faith during discussions and negotiations for the next Agreement.

7.—NO FURTHER CLAIMS

(1) The parties to this Agreement undertake that for the duration of the Agreement there shall be no further salary or wage increases sought or granted except for those provided under the terms of this Agreement.

(2) This Agreement shall not operate so as to cause an employee to suffer a reduction in ordinary time earnings.

(3) This Agreement settles all past productivity claims.

8.—RELATIONSHIP TO PARENT AWARDS

This Agreement shall be read in conjunction with the existing Awards that apply to the parties bound to this Agreement. In the case of any inconsistencies, this Agreement shall have precedence to the extent of the inconsistencies. The relevant Awards are—

- Teachers' Aides' Award 1979
- Cleaners and Caretakers (Government) Award 1975
- Miscellaneous government Conditions and Allowances Award No. A4 of 1992
- Child Care Workers (Education Department) Award; and
- ALHMWU Redeployment, Retraining and Redundancy (Interim) Award.

9.—SINGLE BARGAINING UNIT

(1) This Agreement has been negotiated through a Single Bargaining Unit (SBU).

(2) The SBU comprises representatives from the Education Department of Western Australia and the Union.

10.—AUDIT 4% SECOND TIER AND 1989 SEP

The parties agree that matters arising from previous industrial agreements or award changes emanating from the "Restructuring and Efficiency Principle" of 1987, and the Structural Efficiency Principles of the 1988 and 1989 National and State Wage Cases shall not be counted when considering the productivity benefits and salary improvements arising from this Agreement.

11.—OBJECTIVES AND PRINCIPLES

(1) The Education Department of Western Australia is committed to providing a sound, flexible and efficient education system aimed at providing students with the necessary skills, competencies and confidence to be able to successfully participate in, and contribute to, today's society. Essential to this commitment is the Department's obligation to constantly evaluate its performance, to establish initiatives, and to implement changes that take into account the changing needs of its students, the requirements and expectations of the community, and accountability at the school level.

(2) This Enterprise Agreement proposal reflects the Department's obligation to fulfil those commitments and is consistent

with the Government's policy of increasing effectiveness and efficiency through improved flexibility and productivity.

12.—PRODUCTIVITY IMPROVEMENT

(1) Objectives of Productivity Improvement

(a) The Education Department's mission is to ensure that students develop the understandings, skills and attitudes relevant to individual needs, thereby enabling them to fulfil their potential and contribute to the development of our society.

(b) All staff strive for excellence in learning and teaching and are committed to maximizing the educational achievements of all students and the maintenance of an appropriate learning and teaching environment.

(2) Strategies and Initiatives Developed to Achieve These Objectives—

(a) The parties are committed to the development and implementation of a broad agenda of initiatives designed to increase efficiency and effectiveness of program and service delivery of the Education Department.

(b) The parties are committed to the development and implementation of productivity improvements which include, but are not limited to—

- Customer focus
- Changes to work practices
- Continuous improvement
- Review of, and implementation of, flexible application of employment conditions
- Improvement of the management of staff performance
- Current staffing practices; and
- Application of new technology.

13.—CONSOLIDATION OF AWARDS

The parties also agree that it is desirable that all Education Assistants by way of—

- Teacher Aides (including Aboriginal Education Workers);
- Home Economic Assistants; and
- Child Care Workers

be employed under one award with common conditions where appropriate. Accordingly, during the life of this Agreement, the parties commit themselves to the necessary award amendments to achieve this objective. No employee will have his or her rate of pay reduced as a result of this consolidation.

14.—REFORM INITIATIVES

(1) The parties agree that change will be implemented through a gradual process which ensures that individual employees are not disadvantaged and is consistent with merit and equity principles.

(2) The parties acknowledge that Education Assistants employed in schools will be involved in school based decisions and will have access to appeal provisions that extend beyond the school site.

(3) The parties agree to progress these workplace reforms in accordance with the terms of this Agreement, which is expected to deliver significant enhancement to the efficiency and effectiveness of school operations in the medium to long term.

(4) The major initiatives are as follows—

Initiative 1—Flexible Working Hours

(1) Employees covered by this Agreement may agree to work flexible hours where these are implemented at the school site, and where;

- an improved curriculum can be offered as a result; or more effective and efficient use of resources occurs;
- consultation has occurred at a school level involving all stakeholders, including the Union, school decision making groups, parents, students and whole of school staff;
- issues such as duty of care, health, safety and welfare, equity and other legislative requirements have been allowed for;
- workload, career aspirations and family circumstances have been allowed for;
- individual circumstances have been fully and reasonably considered; and
- the distribution of hours is equitable.

(a) Specifically excluded from these arrangements are longer working hours, overtime and split shifts except where provided for in the relevant award.

(b) Arrangements for working of flexible hours as provided for in this clause shall be subject to the agreement of an employee. No employee shall be coerced into working flexible hours.

(c) Notwithstanding the above, where it is considered necessary to provide more economic operations, the Director-General may authorize the operation of alternative working arrangements in a school. The continuing operation of any alternative working arrangements, so approved, will depend on the Director-General being satisfied that the efficient functioning of the school is being enhanced by its operation.

(2) Remote Teaching Service

The parties agree that employees may, by agreement with all parties, to meet the needs of individual Remote Teaching Service schools, vary the school year and hours per day to take into account educational, cultural, climate and local factors. The Principal will negotiate school hours and days of attendance and the employees will be consulted and have a choice of undertaking these changes without being coerced into taking the changes. The total hours worked in any one year will still equal the total hours that would have been worked if the school year had not been varied by this agreement.

Initiative 2—School Staffing Profiles, Staffing Formula and Variation of Employment Levels

For the purpose of this initiative an employee who has been employed on a 'temporary' basis for a continuous period of two years shall receive the same benefits as a permanent employee.

(1) The parties agree to jointly review the employment status of Education Assistants who have been employed on 'temporary' or 'renewable' contracts. This will include employees whose employment is specifically linked to a particular requirement at school level, such as employment linked requirements of an individual student, specially funded initiatives and commonwealth funded special school projects.

(2) The parties agree to develop a fair Relocation/Transfer System for Education Assistants.

(3) Schools will be staffed in accordance with their approved staffing formulae. Adjustments to staffing levels will be undertaken annually at the commencement of the school year for schools other than education support schools and bi-annually for education support schools. Where any excess in allocated Education Assistant school hours is identified, the excess hours will be maintained at the school until the next adjustment period.

(4) Where, as a result of an adjustment to the schools allocated staffing level, a permanent employees' hours at that worksite are to be changed, the following provisions will apply—

(a) the employee may elect to voluntarily reduce or increase their hours of employment; or

(b) the employee may be offered transfer by the employer to an suitable alternative position; or

(c) the employee may elect to take leave without pay for a period not exceeding 12 months; or

(d) the employee may elect to be relocated; or,

(e) the employee may elect to accept employment of a different nature.

The above steps may be applied in any order.

(5) Where the position or job of an employee is made redundant the parties agree that the prevailing employment conditions will apply.

(6) The outcomes of the Working Party shall be considered and where appropriate implemented by June 1999.

Initiative 3—Multiskilling

(1) The parties are committed to allowing employees to be deployed in a way that will best address the needs of the worksite. Employees agree to carry out such duties as are within the limits of the employee's skills, competencies and training. This could include the allocation of specific duties and/or temporary secondment to other positions in the worksite.

(2) The parties to this Agreement will develop worksite multiskilling for employees and such development will include the following—

- objective(s) and guidelines for the multiskilled position;
- boundaries of the position;
- rosters of work
- lines of accountability;
- adjustment, if any, to normal work; and
- carrying out higher duties for periods of less than 5 days.

(3) The multiskilling proposal should not compromise any duty of care or occupational health and safety standards or requirements.

Initiative 4—Professional and Career Development

(1) Professional and Career Development will be based on a focus on both current and future job needs, career path planning, recognition of each employee's prior learning and building on this through the acquisition of new skills. It is agreed that accredited training is important to the development of employee skills and that relevant training shall be accessible wherever practicable.

(2) Employees will be provided with opportunities for appropriate training and development during school hours.

(3) Each employee's prior learning will be recognized and built upon through the acquisition of new skills. Accredited training shall be used wherever possible.

(4) Principals will ensure that all employees party to this Agreement have equitable access to Professional Development through the provisions of the School Grant in any school year.

Initiative 5—Performance Management

(1) The parties agree to a performance management process which will involve all employees and which will confirm expectations between employees and their supervisors about professional responsibilities.

(2) Performance Management will be linked to worksite outcomes and the Department's Strategic Plan. The Performance Management Agreement will be in accordance with the provisions of the Department's Performance Management Policy. The details of the performance management process will be developed with the Union.

(3) The objective of the Performance Management Agreement is to—

- enhance the professional development of employees;
- assist all employees to understand the role, accountabilities and performance standards that are expected of them;
- provide all employees with feedback and constructive support to improve performance and enhance an atmosphere of mutual trust, loyalty and support; and
- provide employees with appropriate training and development to assist in the achievement of corporate business objectives.

(4) The parties agree that any training which is required to be taken by the employees under the Performance Management Agreement will be fully funded and resourced by the Department.

(5) The parties will ensure that training appropriate specifically to Education Assistants be developed by 1st July 1999, and implemented within the life of this agreement.

(6) Each worksite will undertake the following procedures in regard to the operation of Performance Management.

(a) That each worksite will be required to establish a plan to show the process and time line to implement Performance Management for all Education Assistants.

(b) That worksites will be required to provide adequate resourcing to ensure all Education Assistants have appropriate training to undertake performance management.

(c) Worksites will ensure ongoing support for the professional growth and development of Education Assistants.

(d) All staff will need to take part in school decision making and be part of the performance management and professional development process.

(e) Initial contact between the Worksite Manager and the Education Assistant be on a one-to-one basis with the option of brining in an independent representative when and if the need arises at any stage hereafter of the performance management process.

(f) Information regarding individual performance management should be current for a two year period only with the information being non-transferable upon commencement of a new position either internally or externally. The Education Assistant has the option to continue current performance management or undertake new performance management with the commencement of a new Worksite Manager.

(g) It is the responsibility of the Worksite Manager to provide accurate and concise written feedback to the Education Assistant after each meeting within five (5) working days.

Initiative 6—Reduction in Fraction and Minimum Hours

(1) Appointment to a fractional position of 0.2 or less shall be on a part time basis**.** Where the requirements of the position are reduced to 0.2 or less then the employee shall be deemed to be part time for the period that the position remains at that fraction, subject to the provisions of this initiative.

(2) The minimum period of engagement on any one day shall be 2 hours and the employee shall receive a minimum payment for two hours whether the two hours are worked or not.

(3) For the term of this Agreement, 32.5 hours per week shall considered as the hours for a full time position for an employee employed under the Teachers' Aides' Award, 1979.

Initiative 7—Staff Meetings

(1) Employees shall, if required, attend whole of staff meetings outside of student instructional time.

Such meetings shall be held on the following basis:

(a) there will be no suspension of the instructional program for the purpose of conducting whole of staff meetings;

(b) a minimum of two whole of staff meetings per term will be held, the length of these meetings will be on a needs basis;

(c) the agenda, venue and timing of meetings will be determined in full and proper consultation with all staff of a school. Equity considerations such as family responsibility, professional

and personal development commitments and flexible hours arrangements shall be considered in the decision making process. The final responsibility to ensure meetings occur rests with the Principal;

(d) whole of staff meetings may include discussion groups, workshops and sub-committee meetings;

(e) meetings that do not involve the whole of staff may be accommodated during instructional time, where they can be timetabled, and subject to a school's capacity to enable staff to attend, as long as the meeting does not infringe on the school's instructional program; and

(f) staff who do not work on the day of or the time of the staff meeting cannot be required to attend but may choose to do so.

Initiative 8—Classification Structure

(1) The parties agree that existing education assistants will be transferred from their current wage level into the new classification structure set out in Schedule A to this Agreement, on the nearest highest salary increment point within the appropriate salary level for their duties.

(2) In addition to the requirements of sub-clause (1) hereof, the following provisions will apply on transition to the new classification structure—

(a) Education Assistants who have been at the top of Levels 1 and 2 for five years or more shall move up one increment point on the salary scale.

(b) Education Assistants who have been at the top of Levels 1 and 2 for ten years or more shall move up two increment points on the salary scale.

(c) Education Assistants who have been at the top of Levels 1 and 2 for fifteen years or more shall move up three increment points on the salary scale.

(3) (a) Education Assistants employed in levels TA1-8 (Levels 1-2) under the previous structure of the 1996 EBA shall be transferred to the appropriate salary rate in Level 1 of the new classification structure.

(b) Education Assistants employed in levels TA9-18 (Levels 3, 4 and 5) under the previous structure of the 1996 EBA shall be transferred to the appropriate salary rate in Level 2 of the new classification structure.

(c) Education Assistants employed in levels TA 9-18 (Levels 3, 4 and 5) under the previous structure and employed in a SPER centre shall move to a salary rate of 3.1 in the new classification structure.

(4) All employees shall have an identical annual increment date of 1 January.

(5) Education Assistants who obtain a recognized qualification shall move to the next increment point in that level from the first pay period on or after obtaining that qualification.

15.—HIGHER DUTIES ALLOWANCE

An employee who is directed by the employer to act in an office which is classified higher than the officer's own substantive office and who performs the duties and accepts the full responsibility of the higher office for a continuous period of five (5) consecutive working days or more shall, be paid an allowance equal to the difference between the employee's own salary and the salary the officer would receive if the officer was permanently appointed to the office in which the officer is so directed to act.

16.—PARENTAL LEAVE

(1) Definitions

Agreement"includes full time, part time, permanent and fixed term contract employees

"Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.

(2) Eligibility for Parental Leave

(a) Subject to subclause (8) of this clause, an employee is entitled to a period of up to 52 weeks unpaid leave in respect of the birth of a child to the employee or the employee's spouse/partner.

(b) An application for parental leave shall be in the form approved by the Director-General and supported by a certificate of a registered medical practitioner stating the expected date of birth of the child.

(c) Where the employee applying for the leave is the partner of a pregnant spouse, one week's leave may be taken at the birth of the child concurrently with parental leave taken by the pregnant employee.

(d) An employee adopting a child under the age of five years shall be entitled to three weeks' parental leave at the placement of the child and a further period of parental leave up to a maximum of 52 weeks.

(e) An employee seeking to adopt a child shall be entitled to two days' unpaid leave for the employee to attend interviews or examination required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's leave. The employee may take any paidleave entitlement in lieu of this leave.

(f) Subject to this clause, where both partners are employed by EDWA, the leave shall not be taken concurrently except under special circumstances and with the approval of the Director-General.

(3) Other Leave Entitlements

(a) An employee proceeding on parental leave may elect to utilize any accrued annual leave or accrued long service leave for the whole or part of the period of parental leave or apply to extend the period of parental leave with such leave.

(b) An employee may extend the maximum period of parental leave with a period of leave without pay subject to the Director-General's approval.

(c) An employee on parental leave is not entitled to paid sick leave and other paid award absences.

(d) Where the pregnancy of an employee terminates other than by the birth of a living child then the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner.

(e) Where a pregnant employee not on parental leave suffers illness related to the employee's pregnancy is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or such further unpaid leave for a period certified as necessary by a registered medical practitioners.

Notice and Variation

(a) The employee shall give not less than ten weeks' notice in writing to EDWA of the date the employee proposes to commence parental leave stating the period of leave to be taken.

(b) An employee proceeding on parental leave may elect to take a shorter period of maternity leave and may at any time during that period of leave elect to reduce or extend the period stated in the original application provided four weeks' written notice is provided.

(4) Transfer to Safe Job

(a) Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position of the same classification until the commencement of maternity leave.

(b) If the transfer to a safe position is not practicable, the employee may take leave without pay for such period as is certified necessary by a registered medical practitioner.

(5) Replacement Employee

Prior to engaging a replacement employee EDWA shall inform the person of the temporary nature of the employment and the entitlements relating to return to work of the employee on parental leave.

(6) Return to Work

(a) An employee shall confirm the intention to return to work by notice in writing to EDWA not less than four weeks prior to the expiration of the period of parental leave;

(b) An employee on return from parental leave shall be entitled to the position which the employee occupied immediately prior to proceeding on parental leave. Where an employee was transferred to a safe job pursuant to subclause (5) of this clause, the employee is entitled to return to the position occupied immediately prior to the transfer.

(c) An employee may return on a part-time basis to the same position occupied prior to the commencement of leave or to a different position at the same classification level on a part-time basis in accordance with the part-time provisions of the relevant award.

(d) Where the position occupied by the employee no longer exists the employee shall be entitled to a position of the same classification level with duties similar to that of the abolished position.

Effect of Leave on Employment Contract

(a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(c) Continuous Service

Absence on parental leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose under the relevant award or this agreement.

(d) Termination of Employment

An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the relevant award.

17.—FAMILY CARERS LEAVE

Use of Sick Leave

(a) Employees covered by this agreement may with the consent of the Department use up to the equivalent of 5 days per year of accrued sick leave in accordance with this clause to provide care for another person subject to—

(i) the employee being responsible for the care of the person concerned; and

(ii) the person concerned being a member of their family.

(b) The definition of family shall be the definition contained in the WA Equal Opportunity Act 1984. That is, a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee.

(c) The employee shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone of such absence.

(d) The employee shall, if required, establish by production of a medical certificate or statutory declaration, the nature of the illness of the person concerned.

(3) Unpaid Leave for Family Purposes

An employee may elect with the consent of the Department to take unpaid leave for the purpose of providing care to a family member who is ill.

(4) Annual Leave

Notwithstanding the provisions of this clause, an employee may elect, with the consent of the employer, to take annual leave in single day periods not exceeding five days in any calendar year at a time or times agreed between them.

18.—CULTURAL LEAVE

(1) An employee shall be entitled to take accrued long service leave or leave without pay for tribal/ceremonial/cultural purposes.

(2) All such leave may be taken as whole or part days off.

(3) The employee shall give the employer reasonable notice prior to the absence of the intention to take such leave and the length of leave required.

19.—AWARD VARIATIONS

The parties agree that the In-Charge Allowance, Clause 14(2)(a) of the Teachers' Aides Award 1979 shall be removed in accordance with duty of care responsibilities.

20.—SALARY INCREASES

(1) In addition to the salary increases arising from the transition to and implementation of the new classification structure and in recognition of the achievement of initiatives contained in this agreement, all employees shall receive a salary increase of 3% payable from 1 July 1999. Employees shall not be disadvantaged if the initiatives are not achieved due to factors out of their control.

(2) A one-off payment of one thousand dollars or a pro-rata amount thereof for part time employees, shall be payable to all employees in lieu of retrospective implementation of the classification structure. This payment shall be made to all employees as soon as practicable after registration of this agreement.

21.—GRIEVANCE SETTLEMENT PROCEDURE

(1) The Department and Union recognize that they have different roles and responsibilities. In doing so they also accept the need for a grievance settlement procedure and commit themselves to following this procedure in order that disputes can be settled through consultation and negotiation whenever possible.

(2) Principles

(a) The objective of this procedure is to ensure that grievances raised by employees are resolved in a fair, equitable and prompt manner. The principles of natural justice will apply at all stages of the procedure. Confidentiality will be maintained. This procedure will be followed in accordance with legislative requirements that might otherwise apply.

(b) The grievance should be reported as soon as is practicable after the grievance has arisen so that a resolution can be obtained as close to the worksite and as soon as possible.

(c) The employee/s may request the presence or assistance of recognized union representatives or other person of their choice at any stage of the grievance resolution process.

(d) An employee will not be subject to any form of discrimination or retaliation because they have raised a grievance.

(e) Where the Union/employee believes that the grievance has system wide ramifications, the grievance may be referred directly to the Secretary of theUnion and the Director-General of the Department in accordance with clause 21 of this Agreement.

(3) Worksite/Work Area Grievances Procedure

(a) Level One (Direct Work Site/Work Area Level, i.e. School Level)

(i) The employee(s) concerned shall raise the matter with the person or persons who are the source of the complaint. If the matter cannot be resolved at this level then it is to be raised with the employee's line manager. If unable to resolve the matter the line manager shall, within two working days, refer the matter in writing to the most senior workplace officer

and the employee(s) shall be advised accordingly in writing.

(ii) The senior workplace officer shall provide a written response within five working days of the matter being referred. If the senior officer is unable to answer the matter they will refer the matter to the second level of resolution and advise the affected employee(s) in writing.

(iii) Where a grievance directly concerns the manager that would normally respond to the grievance the matter will immediately be referred to the next level supervisor.

(b) Level Two (Out of Direct Worksite)

The employer shall, as soon as practicable after consulting the matter before it, advise the employee(s) or, where necessary the Union of its decision. Provided that such advice shall be given within five days of the mater being originally referred out of the worksite.

(4) Nothing in this procedure shall preclude the parties reaching agreement to shorten or extend the period specified in paragraph (3)(a)(ii).

(5) If the matter remains in dispute after the above processes have been exhausted either party may refer the matter to Central Office Industrial Relations Directorate for direct resolution with the Union. If he matter remains unresolved either party may refer the matter to the Western Australian Industrial Relations Commission. Provided that all reasonable attempts to resolve questions, disputes or difficulties have been made before taking those matters to the Commission.

22.—DISPUTE SETTLEMENT PROCEDURES

Any questions, disputes or difficulties arising under this Agreement will be dealt with in accordance with the following procedures—

(1) For worksite/work area grievances the Union representative and/or employee(s) concerned shall utilize the process in Clause 21 of this Agreement.

(2) Where the Union or employee believes that the grievance has system wide ramifications, the grievance may be referred directly to the Secretary of the Union and the Director-General of the Department in accordance with clause 21 of this Agreement. If the matter remains unresolved then either party may refer the matter to the Western Australian Industrial Relations Commission provided that all reasonable attempts to resolve questions, disputes or difficulties have been made before taking those matters to the Commission.

(3) If a dispute relates to an alleged ambiguity or uncertainty in this Agreement either party may at any time apply for variation of the Agreement to eliminate the alleged uncertainty or ambiguity.

23.—SIGNATORIES TO AGREEMENT

MINISTER FOR EDUCATION
Colin Barnett
[Minister] [Signature of Witness]
[Date]

THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS' UNION, MISCELLANEOUS WORKERS DIVISION, WESTERN AUSTRALIAN BRANCH by—

_____ [Signature of Witness]
[Date]

SCHEDULE A.—CLASSIFICATION STRUCTURE

1. Skill Levels and Job Description

(1) Education Assistant – Level 1

Role Statement: Employees at this level work under direct supervision performing routine tasks which require a basic competency. Such competencies will be used within established routines, methods and procedures that are predictable. Employees may develop some autonomy relating to their level of competence, experience and knowledge.

Duties include—

Assists teacher in the delivery of planned education programs including the operation of computers.

Provides minor administrative support eg. Photocopying, collating, stapling and distribution of lesson materials.

Assists with the preparation and maintenance of the learning environment by—

Undertaking cleaning activities—

Maintaining equipment, materials and resources for use in classes, displays and demonstrations;

Assisting the teacher with clean and safe storage of items after classes and activities.

Under teacher direction, implements individual student or small group programs or demonstrations.

Assists the teacher with the care and supervision of students in out-of-class activities and on school excursions.

Assists the teacher with the general care and well being of students, including attending to sick students or students in needs of minor first aid.

Collects monies under the supervision of the teacher where appropriate.

Assists the teacher in the preparation and distribution of food for students morning tea in the pre-primary and pre-school areas.

Assists with arrival and departure of children travelling on buses.

Assists children undressing, bathing, dressing, toileting etc including cleaning up after accidents.

Assists with the management of resources by—

Maintaining and updating inventory list;

Monitoring stocklevels and requirements

Education Assistants working with children with special needs may be required to—

Assist with the arrival and departure of children, including vehicular access and egross.

Assist students with food preparation, eating and where necessary feeding of students.

Assist the teacher by moving students, and when required, by changing student from one piece of equipment to another.

Carry out toileting and, where necessary, cleaning of soiled clothing and areas.

Undertake bathing or showering of students.

Education Assistants employed as Aboriginal Indigenous Education Workers and Ethnic Assistants may be required to—

Assist the teacher to identify and represent educational needs of students.

Interpret and translates when there is a communication difficulty between the teacher, student or parent.

Consult with parents on issues affecting the education of the student.

Provide a point of contact within the school for the local Aboriginal or Ethnic community.

Provide information to parents on the education system and relevant school policies.

(2) Education Assistant – Level 2

Role Statement: Employees at this level work under general supervision and guidance performing tasks which require limited discretion and judgment in achieving clearly defined outcomes determined by the teacher. Employees will be able to apply techniques, skills and knowledge of relevant principles and practices acquired through previous experience, on the job learning or relevant qualification.

Duties include—

Any of the duties outlined in Level One however these shall be performed at the higher competency level denoted by this classification.

Assists teacher in classroom and other activities under general guidance.

Collects resources and administrative documents.

Manages the resource or storeroom.

Ensure safe and hygienic storage and handling of foodstuffs and food preparation utensils.

Education Assistants working with children with special needs may be required to—

Specialised duties as outlined in Level One.

Interprets for the teacher or therapist when there is communication difficulty between them and a student.

Under the direction, assists in the implementation of occupational and physiotherapy programs.

When required, provides feed-back on education and therapy programs and participates in the evaluation process relating to the achievement of goals in special education.

Education Assistants employed as Aboriginal Indigenous Education Workers and Ethnic Assistants may be required to—

Specialised duties as outlined in Level One.

Provide advise on the cultural needs of students.

Conduct interview or home liaison visits to discuss the academic progress and social development of students.

Provide orientation to staff in relation to the Aboriginal or Ethnic community.

Identifies opportunities and provides advise on program content relating to Aboriginal or Ethnic culture.

In consultation with teacher, provides instruction on Aboriginal or Ethnic culture to students.

Counsels students on matters affecting their education.

Facilitates community contribution to the formulation of school policies with regard to Aboriginal or ethnic culture.

Liaises with Agencies to further the educational welfare of Aboriginal and minority group students.

(3) Education Assistant – Level 3

Role Statement: Employees at this level work under limited supervision and may be expected to participate within a team situation offering advice and expertise relating to their relevant area. Education outcomes are determined by the teacher, or other professional, with the employee performing tasks which require discretion in problem solving, decision making and choosing methods and processes to achieve outcomes.

Employees will be able to apply techniques, skills and knowledge of relevant principles and practices acquired through previous experience, on the job learning or relevant qualification.

Employees at this level may be required to perform any relevant duties as outlined in levels one and two. However these shall be performed at the higher competency level denoted by this classification.

Indicative duties for advanced skill employees may include—

Provides support and advice to schools and teachers on the management program under supervision of the Psychologist in Charge or relevant professional.

Design and implement behaviour management plans in consultation with teachers, parents and Psychologist in Charge or relevant professional.

Maintains records regarding implementation of behaviour management plans.

Works with individual and small groups of students under the direction of the Psychologist in Charge or relevant professional.

Assists with training students in self management.

Assists the teacher to implement behaviour management plans.

Consults with parents independently or teacher, through under supervision of Psychologist in Charge or relevant professional.

Provides appropriate physical restraint and removal where appropriate.

Participates in residential programs as required.

2. Salaries

(1) The minimum wage payable to Education Assistants shall be as follows—

	Column A Hourly Rate (32.5 week)	Column B Hourly Rate (38 hr week)
Level One		
1st year of service	11.90	12.75
2nd year of service	12.25	13.12
3rd year of service	12.61	13.49
4th year of service	12.96	13.86
Level Two		
1st year of service	13.33	14.29
2nd year of service	13.73	14.58
3rd year of service	14.01	15.02
4th year of service	14.43	15.46
Level Three		
1st year of service	14.93	15.92
2nd year of service	15.31	16.34
3rd year of service	15.71	16.79
4th year of service	16.14	17.26

(2) The rates of pay set out in Column A shall apply to Education Assistants for whom full time employment is thirty two and a half hours per week. The rates of pay set out in Column B shall apply to Education Assistants for whom full time employment is thirty eight hours per week.

(3) The rates of pay for Child Care Workers employed by the Respondents shall be maintained at $16.58 per hour. Provided that on and from 1 July 1999 the rates of pay for Child Care Workers shall be maintained at $17.10 per hour.

(4) The minimum wage payable to Education Assistants on and from 1 July, 1999 shall be as follows—

	Column A Hourly Rate (32.5 week)	Column B Hourly Rate (38 hr week)
Level One		
1st year of service	12.26	13.13
2nd year of service	12.62	13.51
3rd year of service	12.99	13.90
4th year of service	13.35	14.28
Level Two		
1st year of service	13.73	14.72
2nd year of service	14.14	15.02
3rd year of service	14.43	15.47
4th year of service	14.86	15.92
Level Three		
1st year of service	15.38	16.40
2nd year of service	15.77	16.83
3rd year of service	16.18	17.29
4th year of service	16.62	17.78

The rates of pay set out in Column A shall apply to Education Assistants for whom full time employment is thirty two and a half hours per week. The rates of pay set out in Column B shall apply to Education Assistant for whom full time employment is thirty eight hours per week.

ENGINEERING TRADES AND ENGINE DRIVERS (NICKEL REFINING) AWARD, 1971.

No. 10 of 1971.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch AND OTHERS

and

Western Mining Corporation Resources Limited and Others

No. 1423 of 1998.

Engineering Trades and Engine Drivers (Nickel Refining) Award, 1971.

No. 10 of 1971.

CHIEF COMMISSIONER W.S. COLEMAN.

27 November 1998.

Order.

HAVING heard Mr C. Young on behalf of the Applicants and Mr R. Gifford on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Engineering Trades and Engine Drivers (Nickel Refining) Award, 1971 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of November 1998.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clause 9.—Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu thereof the following—

(1) Metal and Electrical Trades

(a) An employee employed in a workshop shall receive an allowance of $16.05 per week for all disabilities experienced.

(b) An employee employed in the plant shall receive an allowance of $20.44 per week for all disabilities experienced.

2. Clause 13. – Shift Work: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) A shift employee shall, in addition to his/her ordinary rate, be paid per shift of eight hours at the rate of $8.55 when on afternoon or night shift.

3. Clause 30.—Wages—

A. Delete subclauses (2) to (7) of this clause and insert in lieu thereof the following—

(2) Employees employed in the classifications prescribed in subclause (1) hereof shall, in addition to the prescribed award rate of pay, receive a weekly all purpose industry allowance of $71.00.

(3) Employees meeting the requirements of an Instrument Electrical Fitter Stage 1 as provided in Clause 6—Definitions of this award shall receive a weekly all purpose payment of $6.77 in addition to the wages rates set out in subclause (1) hereof for their classification.

(4) Employees meeting the requirements of Electrical/Instrument Tradesperson Level 2 or Engineering Tradesperson Level 2 as prescribed in Clause 6—Definitions of the award shall receive a weekly all purpose payment of $10.97 in addition to the wage rates set out in subclause (1) hereof for these classifications.

(5) Employees meeting the requirements of Electrical/Instrument Tradesperson Level 3 as prescribed in Clause 6—Definitions of the award shall receive a weekly all purpose payment of $21.94 in addition to the wage rates set out in subclause (1) hereof for these classifications.

(6) Employees employed in boiler cleaning inside the boiler or flues or combustion chamber shall be paid an additional rate of 29 cents per hour whilst so engaged.

(7) Leading Hands—In addition to the appropriate rate prescribed in subclause (1) of this clause a leading hand shall be paid—

	$
(a) if placed in charge of not less than three and not more than 10 other employees	15.40
(b) if placed in charge of more than 10 and not more than 20 other employees	23.10
(c) if placed in charge of more than 20 other employees	30.10

B. Delete subclause (12) of this clause and insert in lieu thereof the following—

(12) Tool Allowance—

A tradesperson to whom the employer does not supply all necessary tools shall be paid a tool allowance of $5.20 per week.

A tradesperson for the purpose of this clause shall be deemed to be an employee who is paid at equal rate of wage or higher than the classification Engineering Tradesperson or Electrical/Instrument Tradesperson.

ENGINEERING AND ENGINE DRIVERS' (NICKEL SMELTING) AWARD, 1973.
No. 4 of 1973.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch AND OTHERS

and

Western Mining Corporation Resources Limited and Others.

No. 1417 of 1998.

Engineering and Engine Drivers' (Nickel Smelting) Award, 1973.
No. 4 of 1973.

CHIEF COMMISSIONER W.S. COLEMAN.

27 November 1998.

Order.

HAVING heard Mr C. Young on behalf of the Applicants and Mr R. Gifford and on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Engineering and Engine Drivers' (Nickel Smelting) Award, 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of November 1998.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clause 2.–Arrangement: Delete the number and title as follows—

2A. State Wage Case Principles—June 1991

2. Clause 2A.—State Wage Case Principles—June 1991: Delete this title and clause.

3. Clause 9.—Shift Work: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) A shift employee, in addition to the ordinary rate, shall be paid $8.55 per shift of eight hours when on afternoon and night shift.

3. Clause 25.—Special Rates and Provisions—

A. Delete subclauses (1) to (5) inclusively of this clause and insert in lieu thereof the following—

(1) Height Money: An employee shall be paid an allowance of 95 cents for each day on which he/she works at a height of 50 feet or more above the nearest horizontal plane.

(2) An employee shall be paid an allowance of 19 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.

(3) Confined Space: An employee shall be paid 26 cents per hour extra when working in "confined space", which means a compartment or space the dimensions of which necessitate working in a stooped or otherwise cramped position, or without proper ventilation.

(4) When employed for more than one hour in the shade, an employee shall be paid—

(a) (i) in places where the temperature is raised by artificial means to between 46 and 55 degrees celsius—19 cents per hour extra;

(ii) in places where the temperature exceeds 55 degrees celsius—26 cents per hour extra;

(b) where the work continues for more than one hour in temperatures exceeding 55 degrees celsius, employees shall also be entitled to 10 minutes rest after each hour's work without deduction of pay.

(5) Breathing Apparatus: An employee shall be paid 9 cents per hour extra when he/she is required to wear self-contained breathing apparatus (other than dust masks).

B. Delete subclause (9) of this clause and insert in lieu thereof the following—

(9) 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 "A" or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945, shall be paid an allowance of $14.12 per week.

4. Clause 26.—Rates of Pay and Classification Definitions: Delete subclauses (9) and (10) of this clause and insert in lieu thereof the following—

(9) Tool Allowance—

A tradesperson to whom the employer does not supply all necessary tools shall be paid a tool allowance of $9.80 per week.

A "tradesperson", for the purpose of this clause, shall be deemed to be an employee who is paid an equal rate of wage or higher than the classification "fitter".

(10) Industry Allowance—

(a) Each employee shall be paid an allowance of $71.00 per week.

(b) The allowance recognises, and is in payment for, all aspects of work in the industry, including the location and nature of individual operations within it.

(c) The allowance shall be paid in addition to the rate of wage set out in this clause and shall be paid for all purposes of the award.

GOLD MINING ENGINEERING AND MAINTENANCE AWARD

No. 26 of 1947.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch AND ANOTHER

and

Western Mining Corporation Resources Limited and Others

No. 1407 of 1998.

Gold Mining Engineering and Maintenance Award

No. 26 of 1947.

CHIEF COMMISSIONER W.S. COLEMAN.

27 November 1998.

Order.

HAVING heard Mr C. Young on behalf of the Applicants and Mr R. Gifford and Ms J. Wesley on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Gold Mining Engineering and Maintenance Award be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of November 1998.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clause 5.—Classification Structure and Rates of Pay—

A. Delete subclauses (3) and (4) of this clause and insert in lieu thereof the following—

(3) Industry Allowance—

(a) Each employee shall be paid an allowance of $71.00 per week.

(b) The allowance recognises, and is in payment for, all aspects of work in the industry including the location and nature of individual operation within it.

(c) The allowance shall be paid in addition to the weekly wage rates contained in subclause (1) of this clause and shall be paid for all purposes of the award.

(4) Leading Hands—

In addition to the weekly wage prescribed for an employee's classification, a Leading Hand shall be paid the following—

	$
(a) If in charge of not less than three and not more than ten other employees	15.40

	$
(b) If in charge of more than ten and not more than 20 employees	23.10
(c) If in charge of more than 20 employees	30.10

B. Delete subclause (7) of this clause and insert in lieu thereof the following—

(7) Tool Allowance—

(a) 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—

(i) $9.30 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $9.30, being the percentage which appears against the year of apprenticeship in subclause (5) of this clause, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by his employer if lost through the employees negligence.

2. Clause 14.—Shifts: Delete subclauses (2) of this clause and insert in lieu thereof the following—

(2) In addition to his/her ordinary rate, a shift worker shall be paid per shift of eight hours at the rate of $8.55 when on afternoon or night shift.

3. Clause 19.—Special Rates and Provisions: Delete subclauses (1) to (11) inclusively of this clause and insert in lieu thereof the following—

(1) Height Money—

Tradespersons and welders engaged on the surface in the erection, repair and/or maintenance of steel frame buildings, smoke stacks, bridges or similar structures at a height of 15.5 metres or more above the nearest horizontal plane, shall be paid at the rate of $1.65 per shift extra.

(2) (a) Goggles, glasses and gloves or other efficient substitutes therefore shall be available for personal use of any worker engaged in welding.

(b) Every worker shall sign an acknowledgment on receipt thereof and on leaving employment shall return same to the employer.

(c) During the time the same are on issue to the worker, he shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(d) No worker shall lend another worker the goggles, glasses or gloves or substitutes issued to such first mentioned worker, and if the same are lent, both the lender and the borrower shall be deemed guilty of wilful misconduct.

(e) Before goggles, glasses or gloves or any substitutes which have been used by a worker are re-issued by the employer to another worker, they shall be effectively sterilised.

(3) Dirt Money—

Employees employed on dirty work or in wet places shall be paid 34 cents per hour extra.

(4) A fitter or other tradesperson, not specially employed as a welder, who, in addition to being employed in the employees classification is also required to do welding, shall be entitled to receive 26 cents per day extra whilst so engaged.

(5) Workers in very wet places shall be provided with oilskin coats and rubber boots.

(6) Heat Money—

(a) Employees employed for more than one hour in the shade where the artificial temperature is between 46.1° and 51.6° Celsius shall be paid 34 cents per hour extra.

(b) Employees employed for more than one hour where the artificial temperature exceeds 51.6° Celsius shall be paid 41 cents per hour extra. Where work continues for more than two hours in temperatures exceeding 51.6° Celsius, employees shall be entitled to 20 minutes rest after every two hours, without deduction of pay.

(7) Confined Space—

Employees employed in confined spaces as hereinafter defined shall be paid 41 cents per hour extra.

"Confined Space" means a working space, the dimensions of which necessitate working continuously in a stooped or otherwise cramped position, or without proper ventilation, or where confinement within a limited space is productive of unusual discomfort.

(8) Fumes—

Employees engaged on repair work to the roasters under circumstances subjecting them to serious inconvenience from fumes shall be entitled to payment of 21 cents per hour extra, with a minimum of 42 cents, while so engaged.

(9) Special Rates Not Cumulative—Where more than one of the disabilities entitling a worker to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely—the highest for the disabilities so prevailing. Provided that this subclause shall not apply to Confined Space, Dirt Money, Height Money or Hot Work, the rates for which are cumulative.

(10) Any person appointed by the employer to perform first aid duties shall be paid an allowance of $1.54 per day or shift (flat).

(11) A tradesperson who holds and, in the course of employment may be required to use a current "A" or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945, shall be paid an allowance of $14.13 per week.

4. Schedule I.—District Allowances: Delete the whole of this schedule and insert in lieu thereof the following—

SCHEDULE I.—DISTRICT ALLOWANCES

(1) In addition to the wages prescribed in clause 5.—Classification Structure and Rates of Pay of this award, the following allowances shall be paid for five days per week to workers employed in the districts which are hereinafter respectively described, with the exception of districts contained therein which are situated within a radius of ten miles of Kalgoorlie, Coolgardie and Southern Cross, viz—

(a) First District—

Lying south of Kalgoorlie and comprised within lines starting from Kalgoorlie, then West-South-West to Woolgangie, thence South-East to Dundas, thence North-East to a point ten miles east of Karonie on the Trans-Australian line, and thence back to Kalgoorlie,

at the rate of 57 cents per week extra for those mines within ten miles of the railway and 80 cents per week for those outside.

(b) Second District—

Starting from Kalgoorlie West-South-West to Woolgangie, thence North-Nor-West to the intersection of the 120 E. meridian with the 30 S. parallel of latitude, thence North-East by East to Kookynie, thence back to the point 10 miles East of Karonie on the Trans-Australian line, and thence back to Kalgoorlie; at the rate of 77 cents per week extra for those mines within ten miles of the railway and 90 cents per week for those outside.

(c) Third District—

Starting from and including Kookynie, then North by West to Kurrajong thence North-East to Stone's Soak, thence South-East to and including Burtville, thence South-West through Pindinnie to Kookynie, at the rate of 75 cents per week extra for those mines within ten miles of the railway and 92 cents per week for those outside.

(d) Fourth District—

Surrounding Southern Cross within a radius of thirty miles—for those mines outside a radius of ten miles from Southern Cross, including Westonia and Bullfinch, at the rate of 28 cents per week.

(e) Fifth District—

Comprising all mines not specifically defined in the foregoing boundaries, but within the area comprised within the 24th and 26th parallels of latitude at the rate of $1.32 per week.

(2) Notwithstanding anything herein contained, the following allowances shall be paid in the districts or mines mentioned hereunder—

	Per Week $
Ora Banda and Waverley Districts	0.77
Yalgoo District	0.77
Meekatharra, Mt. Magnet and Cue Districts	0.93
Wiluna District	1.10
Youanmi District	1.10
Cox's Find Gold Mine	0.98
Corduroy Gold Mine and Mines within ten miles radius therefrom	1.32
Lallah Rooke Gold Mine, Halley's Comet Gold Mine, Prophecy Gold Mine, and mines within ten miles radius therefrom	1.65
Mayfield District	0.77
Evanston District	1.10

With regard to the Meekatharra, Mt. Magnet, Cue, Yalgoo and Wiluna Districts, an additional allowances at the rate of 17 cents per week shall be paid to workers employed at mines situated five miles from a Government railway.

With regard to the Big Bell Gold Mine, the Triton Gold Mine, and Cox's Find Gold Mine, the sum of 17 cents per week may be deducted from the district allowance which would otherwise be paid.

(3) In the case of any mine or district within the area to which this award applies which is not dealt with under the provisions of this Schedule, the union may apply to the Court at any time for the purpose of having an allowance prescribed upon serving upon the employer concerned fourteen days' notice thereof prior to the date of such application, the service of such notice shall be made pursuant to the provisions relating thereto prescribed by the regulations under the Industrial Arbitration Act, 1979.

5. Appendix I.—Kalgoorlie Consolidated Gold Mines Pty Ltd—

A. Clause 6.—Allowances: Delete this clause and insert in lieu thereof the following—

6.—ALLOWANCES

In lieu of the allowances otherwise expressed in Clause 5.—Wages, Clause 8.—Overtime, Clause 9.—Continuous Shift Workers, Clause 14.—Shifts, Clause 20.—Special Rates and Provisions, the following allowances shall be paid—

Clause 5.—Wages:	$
Subclause (2) —Leading Hand Allowance	
(i)	15.40
(ii)	23.10
(iii)	30.10
Subclause (5)(a)—Tool Allowance	$
(i)	9.30
(ii)	9.30
Clause 8.—Overtime—	
Subclause (6)—Meal Allowance	5.24
Clause 9.—Continuous Shift Workers—	
Subclause (6)—Meal Allowance	5.24
Clause 14.—Shifts—	
Subclause (2)—Shift Allowance	8.55
Clause 20.—Special Rates and Provisions	
Subclause (1)—Height Money	1.65
Subclause (3)—Dirt Money	.34
Subclause (4)—Welding Money	.26
Subclause (6)—Heat Money	
(a)	.34
(b)	.41
Subclause (7)—Confined Space Money	.41
Subclause (8)—Fumes Money	.42

B. Clause 7.—Additional Payment: Delete this clause and insert in lieu thereof the following—

7.—ADDITIONAL PAYMENT

In addition to the wage rates set out in Clause 5 hereof, an amount of $71.00 per week shall be payable for all purposes of the award.

GOVERNMENT RAILWAYS LOCOMOTIVE ENGINEMEN'S AWARD 1973—1990.
No. 13 of 1973.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers

and

Western Australian Government Railways Commission.

No. 1775 of 1998.

Government Railways Locomotive Enginemen's Award 1973—1990.
No. 13 of 1973.

4 December 1998.

Order.

HAVING heard Ms J. Kaur on behalf of the applicant and Mr A. Hassell on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Railways Locomotive Enginemen's Award 1973—1990 be varied in accordance with the following schedule and that such variation shall

have effect commencing on and from the 26th day of November 1998.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

Schedule.

Clause 14.—Rates of Pay: Delete this clause and insert the following in lieu thereof—

14.—RATES OF PAY

Item No.	Grade or Designation	Arbitrated Safety Net Adjustments (3 x $8 + $14 or $12)	Total Rate per Week $
(1)	Trainee Engineman and Locomotive Trainee (unqualified)—		
	(a) A junior locomotive trainee (unqualified) shall be paid at the rate of the following percentages of the appropriate rate prescribed for item number 1(b)(i) herein.		
	(i) Under 18 years	60%	254.30
	(ii) 18 years and under 19 years	70%	296.70
	(iii) 19 years and under 20 years	80%	339.00
	(iv) 20 years and under 21 years	90%	381.40
	(b) 21 years and over—		
	(i) 1st year of adult service		423.80
	(ii) 2nd year of adult service		430.50
	(iii) Thereafter		437.40
	(c) Qualified to act as fireman or driver's assistant—		
	(i) 1st year of adult service		433.40
	(ii) 2nd year of adult service		439.90
	(iii) Thereafter		447.10
	(d) Locomotive Trainee (qualified) and when acting as a fireman or driver's assistant		
	(i) 1st year of adult service		438.30
	(ii) 2nd year of adult service		444.70
	(iii) Thereafter		452.20
(2)	Fireman or Driver's Assistant and Locomotive Trainee (appointed)—		
	(a) First Year		
	(i) Less than 1 year adult service		449.20
	(ii) Over 1 year's adult service but less than 2 years		455.50
	(iii) Over 2 years' adult service		462.70
	(b) Second year		
	(i) Less than 2 years' adult service		466.20
	(ii) Over 2 years' adult service		473.50
	(c) Third year		483.20
(3)	Fireman or Driver's Assistant qualified in driver's duties and Driver's Assistant (qualified)—		
	(a) (i) First year		505.80
	(ii) Second year		525.00
	(iii) Third year and thereafter		537.80
	(b) When acting as a driver		553.30
(4)	Shunting Fireman—		
	A fireman or driver's assistant who at the worker's own request or for health or disciplinary reasons is regressed to the grade of shunting fireman and is employed full-time on shunting duties, shall be paid as follows—		
	(a) First year		
	(i) Less than 1 year adult service		436.70
	(ii) Over 1 year adult service but less than 2 years		443.40
	(iii) Over 2 years' adult service		450.10
	(b) Second year		
	(i) Less than 2 years' adult service		446.90
	(ii) Over 2 years' adult service		453.80
	(c) Third year and thereafter		458.90
(5)	(a) Engine Driver (including Diesel Railcar Driver and Diesel Locomotive Driver)—		
	(i) First year		560.10
	(ii) Thereafter		562.90
	(iii) Special Class		568.60
	(b) Driver (so classified) not in receipt of the rate prescribed in (a)(iii) hereof, who in any week for the most part of the rostered week's work, drives a passenger train or freight train tabled at passenger speed 105 kilometres or more in one direction.		568.60
	(c) Provided that the senior twenty-five (25) per cent of all mainline drivers employed shall be paid at the rate prescribed in (a)(iii) hereof. Advancement to the higher rate will be arranged annually and will operate from the first pay period commencing on or after July 7.		
	The number of drivers to be advanced each year shall be determined by calculating the total number of all mainline drivers employed at July 1 and any driver in the senior twenty-five (25) per cent not previously in receipt of the higher rate shall be advanced in accordance with the foregoing provisions.		
	Where the number of mainline drivers previously advanced and in receipt of the higher rate is greater than twenty-five (25) per cent of all mainline drivers employed on July 1 no variation will be made.		
(6)	Shunting Driver—		
	An engineman who, at the worker's own request or for health or disciplinary reasons is regressed to the grade of shunting driver and is employed full-time on shunting duties shall be paid as follows—		
	(a) First year		490.90
	(b) Second year and thereafter		517.50
(7)	Driver in Charge—		
	A driver, while required to undertake the duties of a driver in charge of an out-depot, shall work through the roster for that depot and shall be paid the highest ordinary wage prescribed for locomotive drivers. In addition, the driver in charge shall be paid the following amounts—		
	(a) at an out-depot where six or more workers are stationed		12.00
	(b) at an out-depot where fewer than six workers are stationed		10.00
	provided that on relinquishing the duties of a driver-in-charge a driver will revert to the wage he would have received had the driver not acted as driver-in-charge.		
(8)	No driver shall be entitled to promotion from one class to another unless the driver satisfactorily passes any examination or test required by the head of the branch.		
(9)	A driver whilst acting as sub-foreman shall be paid in accordance with the current award of the Railways Classification Board; provided that the driver shall not be paid a less rate than that prescribed in this award for a driver in charge.		
(10)	Permanent Cleaner—		
	(a) First year of adult service		431.60
	(b) Second year of adult service		443.40
	(c) Thereafter		450.10
(11)	Kilowatt Allowance—		
	(a) A locomotive driver, fireman, driver's assistant or worker acting as such, who in any shift works a train hauled by one or more operating diesel electric or diesel locomotives with a total rated kilowatt for traction specified hereunder shall, in addition to the wages prescribed in this clause, be paid an allowance as follows—		
	(i) For a period of four hours or more—		
	Up to and including 976 kilowatts		nil
	Over 976 kilowatts but not exceeding 2760 kilowatts		15.60
	Over 2760 kilowatts		31.20
	(ii) For a period of less than four hours one eighth of the appropriate allowance prescribed in (i) hereof for each hour or part thereof worked, calculated to the nearest 10 cents, with any broken part of 10 cents not exceeding five cents being disregarded.		
	Provided that where a locomotive engineman commences a shift working a train entitling him to payment of a rate of allowance specified in this paragraph, the rate shall continue to apply throughout the shift irrespective of any variation in the locomotive kilowatt rating.		
	(b) The allowance shall stand alone and not be taken into consideration in the calculation of overtime, other penalty payments or guaranteed payment.		
	(c) The provisions of this subclause shall not apply to a locomotive engineman performing shunting duties at terminal depots.		
(12)	Suburban Electric Railcar Allowance—		
	(a) A worker qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as a driver on the suburban rail system shall, for the whole of that shift, be paid the following rate of allowance in addition to the appropriate rate of pay—		
	Engine Driver		
	(i) First year		26.20
	(ii) Thereafter		26.50
	(iii) Special Case		26.90
	This allowance shall form part of the total rate of pay.		
	(b) For the purpose of this subclause "driver" shall include "shed driver" provided that a shed driver in receipt of the above allowance shall be available and capable of being rostered for passenger operations.		

Item No.	Grade or Designation	Arbitrated Safety Net Adjustments (3 x $8 + $14 or $12)	Total Rate per Week $
(13)	(a) A fireman or driver's assistant working trains at Hampton and Redmine and being required to supervise and be responsible for the loading or unloading of a train shall be paid 80 cents per shift.		
	(b) A fireman or driver's assistant working trains at Western No. 2 Collie shall be paid 15 cents per hour with a minimum of two hours for each train worked.		
(14)	Minimum Wage		
	(a) Notwithstanding the provisions of this clause no adult worker shall be paid less than $373.40 per week as ordinary rates of pay in respect of the ordinary hours of work prescribed by this award.		
	(b) Where a minimum rate of pay as aforesaid is applicable to workers for work in ordinary hours, the same rate shall be applicable to the calculation of overtime and all other penalty rates, payment during the sick leave and annual leave and all other purposes of this award.		
(15)	Should the rates of pay provided in Clause 4 of Part (iii) of the Locomotive Enginemen's Award 1966 issued under the authority of the Commonwealth Conciliation and Arbitration Act and to which the Commissioners of Railways, Victoria, South Australia, Tasmania are respondents be varied, any variation to the rate per week in this clause which may result therefrom shall operate from the same date as the variations made to Clause 4 of the first mentioned award.		
(16)	The rates of pay in this award include the arbitrated safety net adjustments including the rates payable under the June 1998 State Wage Case Decision. This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wages rates prescribed in the award. Such above award payments include wage payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases made under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.		

INSTITUTION OFFICERS ALLOWANCES AND CONDITIONS AWARD 1977.
No. 3 of 1977.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Honourable Minister for Family and Children's Services and Another.

No. P 10 of 1998.

Institution Officers Allowances and Conditions Award 1977, No. 3 of 1977.

24 November 1998.

Order.

HAVING heard Mr D. Newman on behalf of the applicant and Mr F. Furey on behalf of the Attorney General and Ms T. Babaeff on behalf of the Honourable Minister for Family and Children's Services, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the Institution Officers Allowances and Conditions Award 1977, No. 3 of 1977 shall be further varied in accordance with the following schedule with effect on and from the 25th day of September 1998.

[L.S.]

(Sgd.) A.R. BEECH,
Commissioner,
Public Service Arbitrator.

Schedule.

Clause 2.—Arrangement: Immediately following "19. Parties to the Award" in this clause, insert the following—

20. Salary Packaging

Clause 3.—Scope: In this clause delete the words "Department for Community Development" and insert in lieu thereof the following—

Department of Family and Children's Services

Clause 19.—Parties to the Award: In this clause delete the words "Hon Minister for Community Development" and insert in lieu thereof the following—

Hon Minister for Family and Children's Services

Clause 19.—Parties to the Award: Immediately following this clause, insert a new clause as follows—

20.—SALARY PACKAGING

(1) For the purposes of this award "salary packaging" shall mean an arrangement whereby the wage or salary benefit arising under a contract of employment is reduced, with another or other benefits to the value of the replaced salary being substituted and to the employee.

(2) An employer and employee bound by this award may enter into a salary packaging arrangement subject to the following—

(a) The employer shall take all reasonable steps to ensure that any salary package complies with taxation and other relevant laws;

(b) (i) The employer shall record the arrangement at the time it is entered into, and provide a copy to the employee before the arrangement comes into effect;

(ii) The record shall include details of the employee's classification and salary level applying immediately prior to the salary packaging, coming into effect, and the details of the package;

(c) The value of any agreed salary package, viewed objectively, shall not be less than the value of the entitlements under this award which would otherwise apply;

(d) The value of any agreed salary package, viewed objectively, shall not be greater than the value of the contractual benefits which would otherwise be due to the employee;

(3) An employer shall not unreasonably withhold agreement to salary packaging on request from an employee.

(4) In the event of a dispute involving—

(a) refusal by an employer to discuss after having received a request for salary packaging; and/or

(b) a claim by an employee or the union party to this award that an employer is unreasonably refusing to enter into a salary packaging arrangement with its employee/s;

such dispute may be determined under the Industrial Relations Act, 1979 as amended.

MINERAL SANDS INDUSTRY AWARD 1991.
No. A 3 of 1991.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch AND OTHERS

and

Cable Sands (W.A.) Pty Ltd and Others.

No. 1415 of 1998.

Mineral Sands Industry Award 1991.
No. A 3 of 1991.

CHIEF COMMISSIONER W.S. COLEMAN.

27 November 1998.

Order.

HAVING heard Mr C. Young on behalf of the Applicants and Mr R. Gifford and Ms J. Wesley on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Mineral Sands Industry Award 1991 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of November 1998.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clause 8.—Overtime: Delete paragraph (e) of subclause (3) of this clause and insert in lieu thereof the following—

(e) An employee who without notification on the prior day or shift is required to work overtime shall be entitled to be supplied with a meal (or $6.42 in lieu) when that employee works more than six consecutive hours from the commencement of the overtime or from the previous meal break.

2. Clause 9.—Shift Work: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) A shift employee, in addition to the employee's ordinary rate, shall be paid an additional flat payment of 93 cents per rostered ordinary hour or part thereof worked when on rostered afternoon or night shift.

3. Clause 15.—Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu thereof the following—

(1) Special Rates

(a) Electrical Licence

(i) An employee who is required to hold, and in the course of the employee's duties may be required to use during the course of employment, current "A" or "B" Grade Electrical Workers' Licences issued pursuant to the relevant regulation in force under the Electricity Act 1945, shall be paid an allowance of $13.90 (flat) per week.

(ii) An electrical tradesperson who holds a licence as prescribed in subparagraph (i) where such licence is endorsed for both fitting and installing work shall, in addition to the allowance prescribed in subparagraph (i), be paid an additional allowance at the rate of $13.90 (flat) per week.

(b) Travel Allowance

(i) If transport to and from the job is not provided by the employer, a travelling allowance of $1.44 per day shall be paid when an employee's home is more than eight kilometres from the job by the shortest practicable route.

(ii) The allowance specified in this clause shall be paid to an employee to compensate for excess travelling expenses from the employee's home to the employee's place of work and return.

(c) Clothing Allowance

(i) (aa) Each full-time or part-time employee shall be paid an allowance of $1.79 per week for the purpose of purchasing and replacement of appropriate work clothing; or

(bb) Each full-time or part-time employee shall be provided with two sets of appropriate work clothing each year.

(ii) Working conditions vary from site to site and as a result the method and timing of provision of appropriate clothing will be determined at an enterprise level.

Provided that only one of the options specified in placitum (aa) or (bb) of subparagraph (i) shall be available.

(iii) The laundering and repairs of all clothing is the responsibility of the employee.

(iv) A casual employee shall be paid an allowance of $1.79 per week.

(d) Spray Painting—Painters

(i) Lead paint shall not be applied by spray to the interior of any building.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with overalls, head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of 54 cents per day.

(e) First Aid

(i) The employer shall at each main place of employment provide a suitable first aid outfit.

(ii) Each employee being the holder of a current St. John's First Aid Certificate shall be paid an allowance of $3.58 per week.

TRANSPORT WORKERS' (EASTERN GOLDFIELDS TRANSPORT BOARD) AWARD 1976.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

and

Eastern Goldfields Transport Board.

No. 1263 of 1998.

Transport Workers' (Eastern Goldfields Transport Board) Award 1976.

No. 23 of 1976.

CHIEF COMMISSIONER W.S. COLEMAN.

19 November 1998.

Order.

HAVING heard Mr G. Ferguson on behalf of the Applicant and Ms C. Holmes on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Transport Workers' (Eastern Goldfields Transport Board) Award 1976 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of November 1998.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clause 1B.—Minimum Adult Award Wage: Delete this clause and insert in lieu thereof the following—

1B.—MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $373.40 per week.

(3) The Minimum Adult Award Wage of $373.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions to June, 1998, including the increase in Matter No. 757 of 1998.

(4) Unless otherwise provided in this clause adults employed as casual or part time employees shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of $373.40 per week.

(6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskills placements, or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(7) Subject to this clause the Minimum Adult Award Wage shall—

(a) apply to all work in ordinary hours.

(b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and annual leave and for all other purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the June 1998 State Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the adult minimum wage.

2. Clause 34.—Wages: Delete subclauses (1), (2) and (3) of this clause and insert in lieu thereof the following—

(1) Adult Omnibus Driver —

	Base Rate $	Safety Net Adjustment $	Total Wage Per Week $
First year of service	441.37	48.00	489.37
Second year of service	446.18	48.00	494.18
Third year of service	452.74	48.00	500.74

(2) Leading hands shall be paid at a rate exceeding the highest rate of employees he/she supervises by an amount of $17.66 per week.

(3) The rates of pay in this award include three arbitrated safety net adjustments totalling $24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December 1993 State Wage Decision, the December 1994 State Wage Decision, the March 1996 State Wage Decision and the August 1996 State Wage Decision. The first, second and third $8.00 per week arbitrated safety net adjustments may be offset to the extent of any wage increase payable since 1 November, 1991 pursuant to enterprise agreements, or consent awards or award variations to give effect to enterprise agreements, insofar as that wage increase or part of it has not previously been used to offset an arbitrated safety net adjustment.

The rates of pay in this award include the $10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 14th day of November 1997. This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this award and which are above the wage rates prescribed in it, provided that the above award payments include wages payable under an enterprise agreement in which absorption is not contrary to the terms of the enterprise agreement.

Furthermore the rates of pay in this award include the arbitrated safety net adjustment payable under the June 1998 State Wage Case Decision. This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements are not to be used to offset arbitrated safety net adjustments.

TRANSPORT WORKERS (GOVERNMENT) AWARD, 1952.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

and

Hon Premier for the State of West Australia and Others.

No. 1265 of 1998.

Transport Workers (Government) Award, 1952.

No. 2A of 1952.

CHIEF COMMISSIONER W.S. COLEMAN.

19 November 1998.

Order.

HAVING heard Mr G. Ferguson on behalf of the Applicant and Ms C. Holmes on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Transport Workers (Government) Award, 1952 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of November 1998.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clause 1B.—Minimum Adult Award Wage: Delete this clause and insert in lieu thereof the following—

1B.—MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $373.40 per week.

(3) The Minimum Adult Award Wage of $373.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions to June, 1998, including the increase in Matter No. 757 of 1998.

(4) Unless otherwise provided in this clause adults employed as casual or part time employees shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of $373.40 per week.

(6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskills placements, or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(7) Subject to this clause the Minimum Adult Award Wage shall—

(a) apply to all work in ordinary hours.

(b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and annual leave and for all other purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the June 1998 State Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the adult minimum wage.

2. Clause 5.—Wages—

A. Delete subclause (1), (2) and (3) of this clause and insert in lieu thereof the following—

(1) Adult employees—

An adult employee shall be paid the following total weekly wage which is comprised of the components for base rate and supplementary payment. All components of the total weekly wage are payable for all purposes of this award.

	Total Weekly Wage	Base Rate	Safety Net Adjustment	Supplementary Payment	Special Payment
	$	$	$	$	$
Group 1					
Motor driver's assistant Loader Driver of mechanical horse with or without trailer	426.60	324.50	48.00	46.30	7.80
Group 2					
Driver rigid vehicle to 4.5 tonnes GVM (Gross Vehicle Mass) or GCM (Gross Combination Mass) Employee riding a motorcycle in the course of employment Driver of tow motor	445.90	327.80	48.00	46.80	23.30
Group 3					
Driver rigid vehicle 4.5 to 13.9 tonnes GVM or GCM Driver of fork lift up to and including 4500 kg lifting capacity Driver of tractor without power operated attachments	449.70	334.60	48.00	47.80	19.30

	Total Weekly Wage	Base Rate	Safety Net Adjustment	Supplementary Payment	Special Payment
	$	$	$	$	$
Group 4					
Driver rigid vehicle over 13.9 tonnes GVM or GCM Straddle carrier driver Driver of fork lift over 4500 kg and up to 9000 kg lifting capacity	461.10	344.60	48.00	49.20	19.30
Group 5					
Driver articulated vehicle up to 22.4 tonnes GCM Driver rigid vehicle and heavy trailer up to 22.4 tonnes GCM Driver rigid vehicle 4 axles over 13.9 tonnes GVM Driver of fork lift over 9000 kg lifting capacity	468.80	351.30	48.00	50.20	19.30
Group 6					
Driver low loader up to 43 tonnes GCM Driver articulated vehicle over 22.4 tonnes GCM Driver rigid vehicle and heavy trailer over 22.4 tonnes	498.00	358.90	48.00	51.20	39.90
Group 7					
Driver low loader over 43 tonnes GCM (for each additional complete tonne over 43 an extra 81 cents as part of the weekly wage rate of all purposes shall be payable)	511.60	364.70	48.00	52.10	46.80

(2) Service Increments: Adult employees shall be paid service increments for all purposes of the Award as follows—

after one year of service	$3.98 per year
after two years of service	$7.85 per year

(3) Leading Hands: A leading hand appointed as such by the employer and placed in charge of—

(a) not less than three and not more than 10 other employees, shall be paid $20.28 per week extra.

(b) more than 10 and not more than 20 other employees, shall be paid $30.46 per week extra.

(c) more than 20 other employees, shall be paid $38.67 per week extra.

B. Delete subclause (6) of this clause and insert in lieu thereof the following—

(6) Self-loading Equipment—

An employee who, in the course of his/her employment, drives a vehicle equipped with self loading equipment which requires the possession of a certificate of competency shall be paid an extra $7.90 per week.

3. Clause 5A. – Special Payment and Safety Net Adjustment: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) The rates of pay in this award include three arbitrated safety net adjustments totalling $24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December 1993 State Wage Decision, the December 1994 State Wage Decision, the March 1996 State Wage Decision and the August 1996 State Wage Decision. The first, second and third $8.00 per week arbitrated safety net adjustments may be offset to the extent of any wage increase payable since 1 November, 1991 pursuant to enterprise agreements, or consent awards or award variations to give effect to enterprise agreements, insofar as that wage increase or part of it has not previously been used to offset an arbitrated safety net adjustment. Increases made under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

The rates of pay in this award include the $10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 14th day of November 1997. This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this award and which are above the wage rates prescribed in it, provided that the above award payments include wages payable under an enterprise agreement in which absorption is not contrary to the terms of the enterprise agreement.

Furthermore the rates of pay in this award include the arbitrated safety net adjustment payable under the June 1998 State Wage Case Decision. This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements are not to be used to offset arbitrated safety net adjustments.

4. Clause 6.—Extra Rates: Delete subclauses (1) to (10) inclusively of this clause and insert in lieu thereof the following—

(1) All persons carting and coming into personal contact with tarred road metal, hot bitumen, tarred blocks or spreading tar or hot bitumen shall be paid $1.49 per week extra, provided this shall not apply to any packaged goods from which the material does not leak or to any worker who is not required to handle any of the materials named.

(2) Offensive materials—workers carting any of the following offensive materials shall be paid $1.20 per week extra—bone dust, bones, blood manure, dead animals' offal including that which is carted from hotels and restaurants or other places in kerosene tins, green skins, raw hides, and sheep skins when fly-blown or maggoty, sausage skin casings (except when packed in non-leaky containers for consumption), spent oxide, hair and fleshings, soda ash, muriate of potash, sheep's trotters (known as "pie"), stable, cow or pig manure, meat meal, liver meal, blood meal, T.N.T. and any other material which the Board of Reference shall decide from time to time is

offensive material. The Board of Reference may delete any material from this definition.

(3) Dirty materials—workers carting any of the following dirty materials shall be paid 21 cents per hour extra when loaded or unloaded by the driver (except by tipping)—coal, coke, briquettes, plummage, graphite, ferro or iron manganese, lime, "comaidai" lime, tallite, limil, plaster, plaster of paris, red oxide, zinc oxide, superphosphate (in secondhand and/or farmer's own bags), dicalcic phosphate, yellow ochre, red ochre, charcoal, empty flour bags, supercel in jute bags, stone dust refuse and/or garbage from ships in port, street sweepings, when carted as a full load, and any material or a particular load thereof which the Board of Reference may decide to be dirty. The Board of Reference may delete any material from this definition. This allowance shall not apply to any packaged goods from which the material does not leak or seep or to any worker who is not required to handle any of the materials named.

(4) Drivers who handle money during any week or portion of a week as part of their duties and account for it shall be paid in addition to the rate of wage prescribed by Clause 5 as follows—

For any amount handled up to $20	77¢
For any amount handled over $20 but not exceeding $200	$1.49
For any amount handled over $200 but not exceeding $600	$2.69
For any amount handled over $600 but not exceeding $1000	$3.78
For any amount handled over $1000	$5.43

The term "money" used herein shall be deemed to include cheques.

(5) Workers carting carbon black, except when packed in sealed metal containers, shall be paid $1.00 per day or part thereof.

(6) Workers carting secondhand furniture, except to or from a dealer, auction mart or repairer, shall be paid $10.02 per week extra.

(7) Workers carting livestock (horses, cattle, sheep, pigs or goats) shall be paid $10.02 per week extra.

(8) A driver who is required to act as salesman of goods in his/her vehicle shall be paid $1.49 per week extra.

(9) Where two or more of the foregoing rates (other than those in subclauses (4) and (8) of this clause) have application, only the highest of such rates shall be payable.

(10) A worker required to work in a van or a chamber with a temperature of less than 0°C shall receive an additional 40 cents per hour or part thereof for all time so worked.

5. Clause 19.—Distant Work, Change of Depot: Delete subclause (2) and (3) of this clause and insert in lieu thereof the following—

(2) Except as provided for in subclause (3) of this clause, an employee engaged on work from which he/she is unable to return to his/her home at night shall be supplied with reasonable food and accommodation or shall be paid for such personal expenses as he/she reasonably incurs but shall be paid at least $12.72 per day in addition to payments set out in Clause 12.—Meals of this Award.

(3) An employee engaged on work which requires him/her to sleep in or about his/her truck whilst in the course of travelling from one point to another, or in the absence of suitable accommodation is obliged to live in a tent or hut shall in addition to the application of subclause (2) of this clause in respect of food, be paid an allowance in lieu of accommodation of $12.72 per night.

CANCELLATION OF ORDERS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

s.47

Deletion of Respondents

No. 76 of 1980, Part 206

Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972

Cleaners and Caretakers Award, 1969 No. 12 of 1969

Transport Workers (General) Award No. 10 of 1961

Metal Trades (General) Award No. 13 of 1965.

CHIEF COMMISSIONER W.S. COLEMAN.

2 December, 1998.

Order.

HAVING read and considered the documents relating to this matter and there being no party desiring to be heard in opposition thereto;

NOW THEREFORE, being satisfied that the requirements of the abovementioned Act have been complied with, I, the undersigned, Chief Commissioner of the Western Australian Industrial Relations Commission, acting on my own motion in pursuance of the powers contained in Section 47 of the abovementioned Act, do hereby order and declare—

THAT from the date of this order the employers set out in the Schedule attached hereto is struck out of the Schedule of Respondents to the relevant awards.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972 namely—
   A. T. Brine & Sons Pty Ltd, 22 St George's Terrace, Perth
2. Cleaners and Caretakers Award, 1969 No. 12 of 1969 namely—
   A T Brine & Co (formerly A T Brine & Sons Pty Ltd) 19 Southport Street, Leederville WA 6007
3. Metal Trades (General) Award No. 13 of 1965 namely—
   Brine, A.T. & Sons Pty Ltd
4. Transport Workers (General) Award No. 10 of 1961 namely—
   A. T. Brine & Sons Pty Ltd

FITTERS (CONTINUOUS PROCESS WORK) HOSPITALS AWARD 1972.
No. 20 of 1971.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

s.47

Cancellation of Award

No. 686 of 1977, Part 181

Fitters (Continuous Process Work) Hospitals Award 1972

No. 20 of 1971.

CHIEF COMMISSIONER W.S. COLEMAN.

2 December 1998.

Order.

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 28 day of October, 1998 of an intention to make an Order cancelling such award;

AND WHEREAS at the 30 day of November, 1998 there were no objections to the making of such an Order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled.

Fitters (Continuous Process Work) Hospitals Award 1972 No. 20 of 1971.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

MEAT INDUSTRY (GOVERNMENT) AWARD 1983.
No. A44 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

s.47

Cancellation of Award.

No. 686 of 1977, Part 169.

Meat Industry (Government) Award 1983

No. A44 of 1981.

CHIEF COMMISSIONER W.S. COLEMAN.

2 DECEMBER 1998.

Order.

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 28 day of October, 1998 of an intention to make an Order cancelling such award;

AND WHEREAS at the 30 day of November, 1998 there were no objections to the making of such an Order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled.

Meat Industry (Government) Award 1983 No. A44 of 1981.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

SECURITY OFFICERS' AWARD.
No. A25 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1979.

s.47

Deletion of Respondents

No. 76 of 1980, Parts 195 & 204.

Security Officers' Award No. A25 of 1981.

9 November 1998.

Order.

WHEREAS the Commission on its own motion pursuant to s.47 of the Industrial Relations Act 1979, gave notice of its intention to strike out respondents to the Security Officers' Award No. A25 of 1981, on the grounds that the respondents are no longer carrying on business in an industry to which the award applies (see [78 WAIG 1927]);

AND WHEREAS the Commission, being satisfied that subsection (3) of s.47 has been complied with, is of the opinion that the respondents set out in the Schedule attached hereto are no longer carrying on business in an industry to which the award applies;

NOW THEREFORE, I the undersigned, Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred on me under the Industrial Relations Act 1979, hereby order:—

THAT from the date of this order the following employers be struck out of the Schedule of Respondents to the Security Officers' Award No. A25 of 1981

namely—

Canine Security, Shop 16, Commercial Centre, Kewdale Road, Kewdale

Electro Guard Security, 95 Fairway Street, Nedlands

Metropolitan Security Service, 1 Price Street, Subiaco

Store Protection Agency of W.A., 556 Hay Street, East Perth

Wormalds Security, 27 Moore Street, East Perth

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

PUBLIC SERVICE ARBITRATOR— Matters Dealt With—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Department of Environmental Protection.

No. P 42 of 1998.

COMMISSIONER A.R. BEECH.

13 November 1998.

Reasons for Decision.

Clause 25.—Study Leave of the *Public Service Award 1992, No. PSA A4 of 1989* allows a Chief Executive Officer to grant an employee time off with pay for part-time study purposes. Mr Maling is an employee of the respondent. He has been granted study leave in accordance with the award since 1994 when he enrolled in a Bachelor of Arts course with majors in Sociology and Anthropology at Edith Cowan University. Each

semester since then, Mr Maling has submitted an application for study leave for the units in which he was then enrolled. He has been studying two units per semester and has been allowed five hours' study leave accordingly. In second semester 1998, however, he was granted only 2.5 hours per week even though he was enrolled in two units because one of those two units is an external studies unit provided by the University. It is agreed that his course of study is approved and that he has made satisfactory progress for the purposes of the clause. The issue between the parties is whether Mr Maling is entitled to study leave for the external unit.

Mr Maling is employed pursuant to the award and it is from the award that he derives his right to study leave. There is no study leave clause in the EBA between the parties (PSA AG 8 of 1996) and no suggestion that it is inconsistent with the award in this particular regard such that the terms of the EBA prevail over the award. Accordingly, it is necessary to consider the terms of the award. For convenience, they are now set out—

"25.—STUDY LEAVE

(1) Conditions for Granting Time Off

(a) An officer may be granted time off with pay for part-time study purposes at the discretion of the chief executive officer.

(b) Part-time officers are entitled to study leave on the same basis as full time officers.

(c) Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken, in remote locations lacking the required educational facilities.

(d) External students based in remote locations, who are obliged to attend educational institutions for compulsory sessions during vacation periods, may be granted time off with pay including travelling time up to the maximum annual amount allowed to an officer in the metropolitan area.

(e) Officers shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.

(f) In every case the approval of time off to attend lectures and tutorials will be subject to—

(i) departmental convenience;

(ii) the course being undertaken on a part-time basis;

(iii) officers undertaking an acceptable formal study load in their own time;

(iv) officers making satisfactory progress with their studies; and

(v) the course being relevant to the officer's career in the Service and being of value to the State.

(g) A service agreement or bond will not be required.

(2) Payment of Fees

(a) Departments are to meet the payment of higher education administrative charges for cadets and trainees who, as a condition of their employment, are required to undertake studies at a University or College of Advanced Education. Officers who of their own volition attend such institutions to gain higher qualifications will be responsible for the payment of fees.

(b) This assistance does not include the cost of text books or Guild and Society fees.

(c) An officer who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.

(3) Approved Courses

(a) (i) First degree courses at the University of Western Australia, Murdoch University and Curtin University of Technology.

(ii) First degree or Associate Diploma courses at a college of advanced education.

(iii) Diploma courses at Technical and Further Education (TAFE).

(iv) Two year full time Certificate courses at (TAFE).

(v) Courses recognised by the National Authority for the Accreditation of Translators and Interpreters (NAATI) in a language relevant to the needs of the Public Sector. Further information on levels of accreditation and language study options is contained in the Public Service Commission's "Public Sector Language Services Strategy" document.

(b) Except as outlined in paragraph (3)(d) of this clause, officers are not eligible for study assistance if they already possess one of the qualifications specified in subparagraphs (3)(a)(i) and (3)(a)(ii) of this clause.

(c) An officer who has completed a Diploma through TAFE is eligible for study assistance to undertake a degree course at any of the tertiary institutions listed in subparagraph (3)(a)(i) or (3)(a)(ii) of this clause. An officer who has completed a two year full time Certificate through TAFE is eligible for study assistance to undertake a Diploma course specified in subclause (3)(a)(iii)) or a degree or Associate Diploma course specified in subparagraph (3)(a)(i) or (3)(a)(ii) of this clause.

(d) Assistance towards additional qualifications including second or higher degrees may be granted in special cases such as a graduate embarking on a post-graduate Diploma in Administration or a Masters Degree in Business Administration or a higher degree in a specialist area of benefit to the Service as well as the officer.

(4) (a) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition with at least half of the total formal study commitment being undertaken in the officer's own time, except in special cases such as where the officer is in the final year of study and requires less time to complete the course, or the officer is undertaking the recommended part-time year or stage and this does not entail five hours formal study.

(b) A first degree or Associate Diploma course does not include the continuation of a degree or Associate Diploma towards a higher post graduate qualification.

(c) In cases where officers are studying subjects which require fortnightly classes the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.

(d) In departments which are operating on flexitime, time spent attending or travelling to or from formal classes for approved courses between 8.15 am and 4.30 pm, less the usual lunch break, and for which "time off" would usually be granted, is to be counted as credit time for the purpose of calculating total hours worked per week.

(e) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes,

compared with the time usually taken to travel home from the officer's normal place of work.

(f) An officer shall not be granted more than 5 hours time off with pay per week except in exceptional circumstances where the chief executive officer may decide otherwise.

(g) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.

(5) Subject to the provisions of subclause (6) of this clause, the chief executive officer may grant an officer full time study leave with pay to undertake—

(a) Post graduate degree studies at Australian or overseas tertiary education institutions; or

(b) Study tours involving observations and/or investigations; or

(c) A combination of post graduate studies and study tour.

(6) Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met—

(a) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of subclause (1) to (5) of this Clause and Clause 24.—Leave Without Pay of this Award.

(b) It must be a highly specialised course with direct relevance to the officer's profession.

(c) It must be highly relevant to the department's corporate strategies and goals.

(d) The expertise or specialisation offered by the course of study should not already be available through other officers employed within the department.

(e) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an officer is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.

(f) A temporary officer may not be granted study leave with pay for any period beyond that officer's approved period of engagement.

(7) Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.

(8) Where an outside award is granted and the studies to be undertaken are considered highly desirable by a department, financial assistance to the extent of the difference between the officer's normal salary and the value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria then part or full payment of salary may be approved at the discretion of the chief executive officer.

(9) The Commissioner supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.

(10) Where recipients are in receipt of a living allowance, this amount should be deducted from the officer's salary for that period.

(11) Where the chief executive officer approves full time study leave with pay the actual salary contribution forms part of the department's approved average staffing level funding allocation. Departments should bear this in mind if considering temporary relief.

(12) Where study leave with pay is approved and the department also supports the payment of transit costs and/or an accommodation allowance, approval for the transit and accommodation costs is required as follows—

Interstate—Ministerial approval

Overseas—Premier's approval

(13) Where officers travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the chief executive officer together with some local transit and accommodation expenses providing it meets the requirements of subclause (6) of this clause. Each case is to be considered on its merits.

(14) The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for officers under this Award."

The clause should be read as a whole. Subclause (1) prescribes the conditions which will apply to a grant of study leave if the discretion of the Chief Executive Officer is exercised in the employee's favour. The discretion is exercised having regard to the five conditions set out in subclause (1)(f). However, if those conditions are satisfied and the Chief Executive Officer's discretion is exercised in favour of granting the leave, the leave granted must be within the limits set by the clause. Therefore, the determination of this issue is twofold. First, the study leave sought must fit within the limits of Clause 25. Secondly, if it does fit within those limits but study leave is nevertheless refused, the exercise of the discretion of the Chief Executive Officer is to be examined to see whether it has been properly exercised.

Subclause (1)(c) is the provision with immediate relevance to Mr Maling's situation. It is, as Ms van den Herik observed, a provision which is not straightforward in its interpretation. It is quite clear that time off with pay may be granted up to a maximum of five hours per week including travelling time, but it is not clear from the construction of the sentence whether the reference to "remote locations lacking the required educational facilities" applies both where subjects of approved courses are available during normal working hours and where approved study by correspondence is undertaken. It does not, for example, make sense to read the clause so that the time off with pay is granted where subjects of approved courses are available during normal working hours in remote locations lacking the required educational facilities. In my view, the only sensible meaning of the clause is achieved if it is read such that time off with pay may be granted up to a maximum of five hours per week including travelling time—

(a) where subjects of approved courses are available during working time; or

(b) where approved study by correspondence is undertaken in remote locations lacking the required educational facilities.

Accordingly, the units for which study leave is available, other than where approved study by correspondence is undertaken in remote locations lacking the required educational facilities, are units which are available during normal working hours. A subject is available during normal working hours when the teaching of the subject occurs during normal working hours. An external subject cannot be said to be "available during normal working hours" for teaching purposes because there is no formal teaching as such. Rather, the study done for an external unit has the characteristics of study by correspondence. An external unit does not fall within (a) above. Part (b) above requires the approved study by correspondence to be undertaken in remote locations lacking the required educational facilities. Mr Maling is not resident in a remote location lacking the required educational facilities. He is resident in the metropolitan area and attends a campus of the University in the metropolitan area. Accordingly, his claim for study leave for an external unit does not fall within subclause (1)(c) at all.

And that is fatal to this application. It cannot be said that Mr Maling's circumstances fit within any other provision of the clause. He is not an external student based in a remote location as envisaged by subclause (1)(d). The balance of subclause (1), and the balance of the clause itself, is not relevant to Mr Maling's circumstances. Although the respondent did, in fact, grant study leave to Mr Maling on an earlier occasion when one of the units was external, I accept the respondent's

submission that it did not fully appreciate the circumstances at that time. Given the wording of 1(c), that earlier occasion cannot help Mr Maling's claim now.

The terms of the EBA to which the Commission has been referred do not override Clause 25. The EBA does refer to a review outcome which is expected to assist in the development of career paths for employees by the provision of appropriate study incentives (Clause 11(6)(d)). However, that reference cannot as a matter of construction be held to override the specific provision of study leave as set out in the Award, even if the review referred to has happened, and the expected outcome has been achieved.

Although it might be argued that the purpose of study leave is to allow the burden of career advancement to be shared by the employer and employee, the restriction within the clause for study leave to be available, other than in a remote location, only for subjects which are available during normal working hours suggests that the intention of study leave in the award is for the purpose of attending the formal lecture and tutorial sessions which occur during normal working hours. As this is not the case in the external unit being studied by Mr Maling, his application falls outside the terms of the clause and accordingly there has been no error on the part of the respondent in refusing him study leave for that unit of study. The application will therefore be dismissed.

Appearances: Ms J. van den Herik on behalf of the applicant.

Mr K.H. Bui on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Department of Environmental Protection.

No. P 42 of 1998.

13 November 1998.

Order.

HAVING HEARD Ms J. van den Herik on behalf of the applicant and Mr K.H. Bui on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be dismissed.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia (Incorporated)

and

Executive Director, Education Department of Western Australia.

No. PSA C82 of 1998.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT.

13 November 1998.

Recommendation.

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on the 12th and 13th days of November 1998 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference on the 13th day of November 1998 the Commission made the following recommendations;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby recommends that—

1. Where schools have elected, in accordance with the Director-General's memorandum of 20 June 1998, for 11 December 1998 or any other time prior to midday 16 December 1998, to be the last school day for both students and teaching staff, the same provisions shall apply to clerical and administrative officers;
2. Where schools have elected to finish earlier than midday on 16 December 1998 and due to the nearness of 11 December 1998, principals should consider previous out of hours work carried out by clerical and administrative officers as contributing towards flexitime. The judgement on the contribution of out of hours work of officers will rest with principals or their nominees;
3. Nothing in this Recommendation requires schools to close earlier than midday 16 December 1998. Closure of schools is a matter for the Education Department and in this case, local schools; and
4. These arrangements are for the end of school year 1998 only.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mario Aleixo

and

Acqua Holdings.

No. 627 of 1998.

COMMISSIONER J F GREGOR.

1 December 1998.

Reasons for Decision.

(Extempore)

On the 9 of April 1998, Mario Aleixo (the applicant) applied to the Commission for an order pursuant to s.29 of the Industrial Relations Act, 1979 (the Act) on the grounds that at the conclusion of a putative contract between himself and Acqua Holdings Pty Ltd t/a Astoria Bar Café, he was denied contractual benefits and was unfairly dismissed.

The applicant told the Commission of the circumstances where he entered into an arrangement to supply his services with the respondent. He said that the arrangement was a culmination of approaches that had been made to him over a period of time. In the run up to him being employed, he had discussed with the respondent the terms of an agreement which would cover this work at the respondent's premises.

The question the Commission has to determine as a preliminary point is whether the applicant worked as an employee of the respondent or whether he was an employee of a body known as Park Royal Hospitality, Catering and Cleaning (the applicant's business), a business name which was registered by him on the 10 February 1998. A business name extract gives details of the applicant's business (Exhibit A4). The nature of the business is recorded as catering and cleaning. The principal place of business is 8 Daglish Street, Hamilton Hill. The

persons carrying on the business are described Mario Aleixo and Inocencia Aleixo, both of the same address in White Gum Valley.

The certificate exhibited to the Commission has been prepared by the Ministry of Fair Trading, Business Names Branch. The name on the business names extract is the same as the name which appears on a document (Exhibit A1- the contract) which is purported to be a contract of employment between the respondent and the applicant's business.

In his evidence, the applicant said that it was his wish to have the contract (Exhibit A1) executed, but for reasons which were beyond his control, it never was. However, he clearly sees the document as containing the terms of a contract which underpins the arrangement which is under review. I have no difficulty in coming to that conclusion on his own evidence.

The applicant also told the Commission that he invoiced the respondent in this matter on two occasions; first, for $1,210.00 on the 6 March 1998 (Exhibit A2). He also billed the respondent $400.00 made up of a sum of $760.00, less a credit, less a sub of $300.00, making a payment of $400.00 (Exhibit A3). The invoices are also made out to Acqua Holdings from Park Royal Hospitality and Catering. The applicant admits and it is clear from the documents, there is no PAYE tax deducted from those monies by the respondent.

He also admits that he has submitted other invoices to another entity with whom his business had a contractual relationship prior to the issue of the two invoices that are before the Commission. On that basis it can be concluded that the applicant's business, on the applicants admission, had a contractual relationship with at least two business entities.

Before the Commission are a number of documents which the applicant admitted were not given to him when he commenced work at Astoria Bar Café. One of those was a staff training manual (Exhibit A5). A document (Exhibit A6) which appears to be a document addressed to employees which sets out requirements for the administration of the employment relationship; that is, an employment application form, a taxation declaration form, a staff training manual and a workplace agreement. All of these, the applicant says he did not receive. The applicant also was not obliged to use the staff time recording system; an example which was produced (Exhibit A7).

The Commission, through s.29 (1)(b)(i) of the Industrial Relations Act, has the power to deal with relief when an applicant alleges to have been harshly and oppressively or unfairly dismissed. Fundamental to the exercise of that jurisdiction is that there must have been an employment relationship; that is, a relationship of employer and employee and that the employee was dismissed from that employment relationship.

Section 29 of the Act, affords the opportunity for an employee to bring claims of unfair dismissal or denied contractual benefits to the Commission. Section 29(1)(b)(i) and (ii) provides that an industrial matter may be referred to the Commission in the case of an employee that has been harshly, oppressively or unfairly dismissed or that he has not been allowed a benefit. There are key words to consider when applying this section; first, there must be an industrial matter.

Section 7 of the Act defines "*an industrial matter*" and amongst other things, an industrial matter means—

> *"Any matter affecting or relating to the work privileges, rights or duties of employees or employers in any industry, or of any employee or employer therein"*

and without limiting the generality, includes a number of matters which I will not deal with. Second, fundamental to the definition is that there must be an employer and employee relationship and a person must be an employee before they can excite the jurisdiction in s.29 (1)(b)(i) or (ii).

The question to be answered to determine this preliminary matter is whether the applicant in these proceedings was in a relationship of employer and employee with the respondent. The indicia to be applied are set out *Australian Mutual Provident Society v. Chaplin (1978) 18 ALR 385 (PC) (*see also *Stevens v. Brodribb Sawmilling Co Pty Ltd 63 ALR 51).* An important indicator is the question of control that is, whether the ultimate authority over the employee in his performance resided with the employer. I asked the applicant about his hours of work and particularly whether he could leave or not on the day of the incident. His answer leads me to the conclusion that he had considerable flexibility within the hours of operation of the business to make his own decisions about when and how he worked.

The applicant has argued that Exhibit A1 expresses the contract as he knew it and asserts that it was orally made and I accept that assertion. However, this contract has all of the appearance of being a contract for services which covers issues other than those which would normally be covered in a contract of service. For instance, the applicant had a number of obligations. He was to focus on increasing gross turnover, and on the labour percentage to turnover average. He was to focus on customer service. He was responsible for achieving sales targets and ensuring that staff were aware of sales targets by implementing house promotional activities. He had a range of requirements in dealing with staff, the cash register, stock and staff training. The applicant says in the short term that he worked at the respondent's premises, he was unable to discharge any of these obligations.

The so called Contract of Employment does not appear as if it is drafted by a person who is legally qualified but it has most of the appearances of being a contract between the respondent and a bona-fide independent contractor, not a contract between the applicant and the respondent as an employee and employer.

As assistance to me in deciding his status, is the admission by the applicant that he has used the body Park Royal Hospitality and Catering as a vehicle for dealing with another and separate business entity to the respondent and has invoiced that entity for work.

The applicant in this matter has not established, as he must, that there was an employee and employer relationship between him and the respondent. For an individual to excite the jurisdiction under s.29, he must have the status of an employee. Mr Aleixo was not an employee of the respondent. Whether the construct of the arrangement was a sham or not to avoid taxation liabilities is not a matter for me. On the face of it, it is a contract between Acqua Holdings Pty Ltd and Park Royal Hospitality, Catering and Cleaning as independent contractors.

This is an illustration of the dangers, of entering into such arrangements and then seeking to sue in this jurisdiction. This tribunal is created to deal with matters between employers and employees and not to deal with matters between independent contractors, whether or not those contracts may involve ingredients which involve work and paying for work.

If there are breaches of such a contract, they should be pursued in a Court of competent jurisdiction. The applicant does not allege in any event there are wages unpaid. His focus is on unfair dismissal and achieving compensation.

I will add to my findings as follows: Even if I am wrong about the status of the applicant and even if he could then establish he was unfairly dismissed, he was only employed for a week and if one was to apply the criteria for the assessment of compensation, one would be drawn to the conclusion that he has been fully paid and any award of compensation would be negligible on the authorities to be applied (*Gilmore v. Cecil Bros (1996) 78 WAIG 443).*

To consolidate my findings I find the Commission is without jurisdiction to deal with this matter. The application will be dismissed for want of jurisdiction.

Appearances: Mr M Aleixo appeared on his own behalf.

Mr N Skinner appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mario Aleixo

and

Acqua Holdings.

No. 627 of 1998.

COMMISSIONER J F GREGOR.

1 December 1998.

Order.

HAVING heard the Applicant on his own behalf and Mr N Skinner on behalf of the Respondent, the Commission, pursuant to the powers vested in it by the Industrial Relations Act, 1979, the Commission hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Stephen Backman

and

Growers Market Butchers.

No. 792 of 1998.

COMMISSIONER J F GREGOR.

21 October 1998.

Reasons for Decision.
(Extempore)

THE COMMISSIONER: On the 6 of May 1998, Stephen Backman (the applicant), applied to the Commission for an order pursuant to s. 29 of the Industrial Relations Act, 1979, (the Act) claiming that he had been unfairly dismissed from employment with Growers Market Butchers (the respondent), which operates a mixed business in Pinjarra Road, Mandurah, part of which is a butcher shop in which the applicant, who is a butcher, was employed.

The applicant is not a newcomer to the butchering trade. He has been in it for 26 years. He did his apprenticeship in Victoria and worked for the one employer for 9 years. He then came to Western Australia were he worked for various employers, including 6 years with Newmart. He has also worked for Sterrett in Fremantle. He has worked in butchering in supermarkets, and as a butcher in a standard butcher shop where there is much face to face contact with customers and work that needs to be done to tailor the product to customer requirements.

In September 1997 the applicant commenced work with Better Value Meats which occupied the same premises as those in which the respondent in this case, is located. That came about because the respondent had entered into a lease arrangement with the previous operator of the business, to take over those premises. According to the evidence of Christopher Robin Brett who is a principal of the respondent, the lease is close to being renewed.

However, it had not been February this year. As I understand the evidence from Mr Brett, he had negotiated with Andrew Parker for the partnership known as Growers Market Butchers to take over the operation. It was agreed with the vendor that all of the staff would be dismissed, including the applicant in these proceedings. The respondent took over the business on a Saturday, and the applicant was asked to come to work on the following Monday, and he did so.

The applicant says that he had a short conversation with the respondent. The only thing that passed between them was a discussion about his salary. He says that Mr Brett asked him how much he was getting paid by Andrew Parker. In reply he said, "I'm getting $741 a week." Mr Brett said, "That's okay," and the applicant worked on. In effect he did what he had been doing before. The shop was run as it had been before. Nothing was ever raised to him which would have led him to believe that he ought to run the shop in any other way. What he did try and do was get assistance from experts in the meat retailing business. He did this through Mr Mervyn Darcy from the National Meat Association.

Mr Darcy told the Commission that he is employed as the Human Resources Manager of the National Meat Association. His work covers a far greater scope of activity than human resources and industrial relations matters. He is involved in training, retailing, and advice to members of the Association about the business of meat retailing.

Mr Darcy has been in the industry for many years. He said that he had visited the shop on occasions on a professional basis when he gave advice about displays and the advertising of products by putting up posters which he supplied. He also said that in addition he had attended the shop as a customer. He had bought product from the shop and that the product had been satisfactory in his expert view. He had more than a passing exposure to the business.

It was against this background that in May 1998, the applicant said he was surprised and shocked when he was told that his services were no longer required. Apparently, he was told at the time that would bring a 3 month probationary period to an end. He knew nothing about a probationary period. Nothing had ever been raised with him about probation. He was surprised when he was asked to go. Nothing had been brought to his attention about the quality of the work or what he had been doing. He had tried his best to make the business operate effectively and profitably. He ran some 95 lines of product. To assist in the running of the shop he had his son work with him—after school according to Mr Brett. His son was paid by Mr Brett, and apparently his son did a good job. But there was nothing within the knowledge of the applicant which should have given rise to his dismissal, and that is why he filed this application when his job was brought to an end.

There was evidence before the Commission from Mervyn Darcy. I have previously described his background. He related that he knew the applicant not only as a butcher managing a single operation for Growers Market Butchers, he had known of him for some years arising from an employment related business operation of the National Meat Association which places butchers and other meat workers in the meat industry generally. Mr Darcy had known the applicant as a good operator and had arranged placements for him with Newmart, who, according to Mr Darcy, are a leading retailer of meat in Western Australia. Mr Darcy had contact with a principal of that firm and through that contact knew that the applicant had been very successful in that placement. Additionally, Mr Darcy had visited shops where the applicant was operating as a single butcher.

On the basis of successful placements, Mr Darcy recommended the applicant to a leading butcher in Fremantle, who provides stores to visiting ships and runs a high quality butchery near the Woolstores in Fremantle. Mr Darcy's knowledge of the applicant therefore relates not only to what he had seen and observed for himself at Mandurah. It relates also to an extensive work history.

Mr Darcy said that on a professional basis he observes the way butcher shops are run when he goes into them. He does that because part of the reason for him being there is to try and convince the operators of butcher shops to become members of his Association. Therefore he needs to observe what they do so he can decide what he can offer to assist them to improve their business. He said he observed the display cabinets at the Pinjarra Road premises. He thought they were well managed. The meat was of good quality. On occasions he had inspected the whole of the premises, and apart from one area that he was concerned about, the butchery as a business was well run.

The area he was concerned about was the floor in the cool room, which he raised with the applicant as being in need of repair for hygiene reasons. This later proved to be a sensible piece of advice, because the local health inspector issued a

work order to have the floor repaired. According to the evidence of Mr Brett, the work still has not been done. However, as far as Mr Darcy was concerned, the problem with the floor was the only major problem he saw in the butchery, he did not observe any problems with housekeeping.

As for the quality of the product on sale, Mr Darcy offered the opinion that cheap meat is available if you know where to buy it cheaply, but that does not necessarily mean the meat is not of good quality. The art of retailing meat is to buy it as cheap as possible—but it must be good quality—so that the customers will buy it. This makes a retail butcher competitive, and accentuates the profit margin.

The Commission also heard from Mr Brett, who gave the only evidence presented on behalf of the respondent. He had a different story about how the relationship began. He said that he did have a discussion with the applicant on the next working day after his partnership took over the business. They talked about what wages the applicant was receiving from Andrew Parker. Mr Brett agreed to continue paying the same amount. No other arrangements were made on that day.

However, Mr Brett says about three or four days later, he raised the question of probationary appointment with the applicant, and told him that he would be on three months probation, in which time he could, what was described in the evidence as 'up-market' the business. It does not seem as though, from Mr Brett's evidence, that he said much more at that stage about how the business was to be 'up-marketed'(sic), but that is what his intention was, and that is what he communicated to the applicant.

Later things started to go wrong. Mr Brett thought from what was said to him that the shop was not properly cleaned or tidy, and that it had unsavoury odours emitting from time to time. It was said by the respondent's advocate that a dead rat was found in the mincer. However in evidence in-chief Mr Brett clarified that statement to mean that there was some meat in the mincer which smelt as if it were a dead rat. In addition, Mr Brett said that there were also complaints about the quality and the freshness of the product. A person who had been a butcher told him this. I interpolate from the evidence that this person was also a customer.

Mr Brett also said that there was blood in parts of the operation where there should not have been; that is, around the work areas where the slicing and cutting took place. The smells did not come from the cool room. Nor did they come from the break-up of meat when the Cryovac packs were opened. Nor did they come from the process area where the sausage maker and the mincer were kept.

One can summarise the respondent's position as saying that during the alleged three months trial, from their point of view they were not convinced that the applicant was the right man for the job. There were problems arising for their business from customer feedback about his management, and his work practices, so they decided to terminate his employment. Mr Brett went to him on the 1 May 1998, and told him he had to leave. It so happens that the notice of termination was about three months from the day the applicant started working for the respondent.

Before I make my assessments of witness credibility, I need to discuss the law involved. The test for determining whether a dismissal is unfair or not is now well settled. The question is whether the respondent has acted harshly, unfairly or oppressively in its dismissal of the applicant. It is for the applicant to establish that the dismissal was in all of the circumstances unfair. The test for ascertaining whether a dismissal is harsh, oppressive or unfair is that outlined by the Industrial Appeal Court in *Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia (1985) 65 WAIG 385*. The question to be answered is whether the right of the employer to terminate the employment has been exercised so harshly, oppressively, or unfairly against the applicant as to amount to an abuse of the right. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair but if the employment has been terminated in a manner which is procedurally irregular that itself will not necessarily mean the dismissal is unfair. This last on the authority of the *Shire of Esperance v. Moritz (1991) 71WAIG 891* and also *Byrne v Australian Airlines (1995)61 IR 32*.

In *Shire of Esperance v. Moritz (ibid.)*, Kennedy J observed—

> *"Whether an employer in bringing about a dismissal adopted procedures which were unfair to the employee is but an element in determining whether the dismissal was harsh or unjust."*

An employee as far as practicable will not be dismissed without giving a warning as to the possibility of dismissal.

I need to discuss the remedies available if I do make a finding of unfair dismissal. Section 23A of the Act sets out the powers of the Commission on the claims of dismissal.

The two primary remedies available to a successful applicant in an unfair dismissal claim are;

(a) reinstatement; or

(b) compensation in lieu of reinstatement.

As recognised by Senior Commissioner Fielding in *Jaggard v. Tranbury Pty Ltd (1996) 76 WAIG 4720* the primary remedy is reinstatement, and only if the Commission is satisfied that that reinstatement is impracticable, or if the employer fails to comply with an order for reinstatement, can it make an order for reinstatement.

Accordingly, in the Senior Commissioner's view, the Act requires the Commission to make an evaluation of the practicalities of reinstatement based on common sense in the work place. As the Act is concerned with preventing and settling disputes in the work place it should not be interpreted as confining the inquiry to the physical impracticalities but should be taken as requiring an inquiry about the environment in the work place.

In *Jaggard's(ibid.)* case the Senior Commissioner found that the employment relationship had irretrievably broken down and it was impracticable to reinstate the applicant. In his decision in *Smith v. C.D.M. Australia Pty Ltd (1998 77 WAIG 307)*, Commissioner Beech found that the respondent's trust in the applicant's ability to manage the warehouse and to abide by the company's administrative procedure was damaged. Accordingly, the applicant's actions were destructive of the necessary confidence which needs to exist between an employer and employee in a management capacity which made reinstatement impracticable.

There are principles relevant to awarding compensation. The power to award compensation resides in section 23A(1)(b)(a) of the Act which grants to the Commission the power on a claim for harsh, oppressive or unfair dismissal to make orders—

> *…[that] the employer pay compensation to the claimant for loss or injury for the dismissal."*

It is relevant to recognise that this test is a different test to the old test contained in s 170C(E)(2) of the Work Place Relations Act (Commonwealth) (WPR Act) which provided that if reinstatement of an employee was impracticable, the court may—

> *"If the court considers it appropriate in all of the circumstances of the case, make an order requiring the employer to pay the employee compensation of such amount as the court thinks appropriate."*

The phrase "loss or injury" which is referred to in the Act but not in the WPR Act has a different meaning to compensation. What the applicant must do is show that the loss or injury suffered is in some way linked to the termination of employment.

The phrase "loss or injury" has not be subjected to extensive review in the Commission but the President has made some comments in *Gilmore v. Cecil Brothers F.D.R. Pty Ltd and Another (1996) 76 WAIG 4434*. There the His Honour wrote—

> *"The phrase 'loss or injury' means loss occasioned by the employee by the unfair dismissal. That is, actual salary, benefits or amounts that he or she would otherwise earn or which he or she would have been entitled had he or she not been dismissed including continuity for the purposes of long service leave and other entitlements.*
>
> *As to 'injury' that is a general word which embraces not only the loss but the actual harm done to the employee by the unfair dismissal. The word 'injuries' is generally a larger word and comprehends in itself all manners of wrongs according the injury includes humiliation and due to feelings being treated with callousness, for example.*

In his reasons, His Honour observed that in the *Cecil Brothers Case(ibid.)* he had no need to decide the interesting question of whether loss of reputation should constitute an injury. It is fair to say though, that he observed there seems to be nothing on the surface to suggest such a view would be erroneous.

These observations can be juxtaposed against the position of Senior Commissioner Fielding in *Jaggard(ibid.)* where he said—

> *"It's doubtful that the authority to compensate extends to compensation for disappointment, anguish, stress and the like, arising out of the dismissal, but principally is confined to economic loss. This view is premised on some common law cases which do not allow for claims for disappointment, stress associated with a breach of conduct except when there is physical injury or illness."*

I think the Senior Commissioner reached these conclusions because he has expressed the view that it ought to be not overlooked that the Commission is essentially an employment tribunal concerned with the repair of employment relationships rather than broad social relationships.

I will make a few more comments about compensation. It is well accepted that the process of assessing compensation in any particular case is not an exact science, although it is clear there must be some rational basis for the award. In *Smith v. C.D.M. Australia Pty Ltd(ibid)*, the Full Bench indicated that the correct approach to assessing the quantum of compensation is contained in the *Burswood Management Limited v. Federated Liquor and Allied Employees Union of Australia (1987) 67 WAIG 1529* which establishes that the primary rule is to ask what loss had been suffered by the employee as a consequence of his dismissal from employment and that answer will vary according to the nature of the employment.

The matters to be considered in assessing the amount of compensation are the nature of the employment, the period for which he has been employed, the period for which employment may be reasonably expected to continue, the length of time which may elapse before the employee may obtain other employment, the nature of that other employment, and any difference in the rate of pay which may be applicable before and after dismissal. The amount to be awarded must not be arbitrary but at the same time its necessary to adopt a fairly broad-brush approach. This must be done in accordance with the statutory limit imposed by s. 23A of the Act; that is, any award made is to be capped at the equivalent of 6 months' earnings.

I now need to give my findings concerning witness credibility. I have heard from the applicant and I have been able to observe him, as I have each of the witnesses who gave evidence today. Apart from the evidence on behalf of the applicant from himself, I heard evidence on his behalf from Mr Darcy. There is nothing in the applicant's evidence which would indicate to me that he has not told me what he considers to be the truth of the events.

He answered all of the questions put to him without equivocation. There did not seem to be any guile in his answers. His answers were indicative that he understood the questions and his responses were in simple, understandable language. There were no discernible differences between the answers he gave in-chief and those answers which he gave to Mr Crossley in cross-examination, which might lead one to draw the conclusion that there are likely to be some flaws in his evidence. I do not find any flaws and I cannot see that his evidence was not truthful.

I heard evidence from Mr Darcy. Mr Darcy, on the evidence before this Commission, is a man of considerable knowledge of the meat industry. Insofar as his observations relating directly to this case, he was clear about what he had heard and seen. He was certain about the basis upon which he reached conclusions. Nor was he shaken on any of his evidence by cross-examination. I accept his evidence as being truthful.

I heard evidence from Mr Brett. There are two major flaws with his evidence which give me cause for concern. I think that he is prone to exaggerate. He was prepared to have this Commission believe that there was a rat in the mincer. Mr Crossley told me that he had been briefed that way and he had put questions in chief on that basis and it was not until I pursued the matter that Mr Brett admitted that there was never a rat in the mincer. There was some meat that Mr Brett thought smelled like a rat.

The use of vivid language in giving evidence is quite dangerous. It can lead one to the conclusion that the person giving the evidence would like an adjudicator to get a different view of the facts than what really occurred. The story about the rat was not the only incident referred to during the evidence that Mr Brett showed the propensity to say things in a way that suited his version of events.

For instance, he first of all said that the shop smelt all the time. Then he recanted and said, "Well, from time to time it did smell." He said on another occasion that he saw the display cabinets every day and then he was unable to answer questions from Mr Chad about what they contained and he recanted his initial evidence on that as well.

He also said that a number of things that he said were evidence that had been told to him by others but no-one was called to corroborate what he said. All in all, I have doubts about the evidence of Mr Brett when I compare it with the evidence of the applicant which is corroborated by the evidence of Mr Darcy. I must make my assessments on the evidence on what I see and hear in this hearing. There is no corroboration for the points of view advanced by Mr Brett, either by viva voce evidence or in documentary form. I find that where the evidence of the respondent differs from that of the applicant I accept the evidence of the applicant.

Because I see the evidence in that way, I find that the applicant was not appointed on 3 months' probation. I have thought carefully about the matter because it might be suggested that there is more than a coincidence that when the applicant was dismissed and when he was appointed, is about 3 months apart. Mr Crossley made a submission to suggest there was coincidence. I was not convinced by that submission but I have considered and rejected it.

The way the submission was put means that one could pick almost any period of time and say, "If we gave him 3 weeks' notice and we dismissed him after 3 weeks, well, we gave him 3 weeks' probation." As it falls from the evidence, it is no more than a coincidence between the time of the dismissal and the end of the so-called probationary period. It is not exactly the end of the probationary period, in any event, but there are more significant reasons why the Commission will find, as it does.

The important things are these: the respondent says that he did not warn the applicant his employment was in jeopardy. He also says that he did not interfere and he did not counsel. The only matter he raised to do with the butcher shop was when he 'went crook' at the apprentice. So all in all, if the applicant was doing the wrong thing, on the evidence of Mr Brett himself, the applicant was never told about his employers concerns let alone that his continued employment was in jeopardy.

There is a difference between telling someone they are doing the wrong thing so that they know their job is in jeopardy and giving them day-to-day instructions about their work. Mr Brett may well have given the odd day-to-day instruction to the applicant but none of those instructions, on the evidence before me, were couched in terms such that the applicant would draw the conclusion that his job was in jeopardy. That Mr Brett did tackle the matter in that way may have been indicative of a pleasant personality, and he seems to be a person of that disposition. He has been in business a long time. He told the Commission that he had been a retailer for many years. He is alert to customer requirements. It may well be that because he is the person he is, he did not think he needed to be more precise about his complaints.

Mr Crossley mounted a twin argument, one relates to probation, which I have disposed of, while the other relates to the expectation that the employer is entitled to believe, that the applicant was possessed of the skills that he held himself out to possess when he was employed. Mr Crossley pointed me out substantial authority for that proposition. However, what happened when the applicant was employed? There was a short conversation, on the evidence. "Do you want to stay on? How much money are you getting? $741 a week," and a new contract was formed.

The respondent must bear the responsibility in that case of having satisfied himself that the applicant had the skills to do

the job. He did not ask him to demonstrate he had the skills. He did not ask him to produce any references, did not get him to do a skills test, did not make any inquiries at all about him. He accepted him on face value. He says that a couple of days later he put him on probation, but even that was not because there was a concern about his competence.

Mr Brett did not ask the applicant anything about his skills. I think for the authorities to operate, there has to be evidence that there has been an attempt to mislead. There was none in this case. The applicant was there ready and willing to do the job that he had been doing for 5 months, and the respondent, as it appears, accepted that he would continue to do the job.

The assertion that the applicant has somehow misled the respondent, that he was skilled when he was in fact not skilled, does not hold water. In any event, over the life of the arrangement nothing was raised with him about that area of his operations. There are many other differences between the evidence of the parties, and this involves the health inspectors, the odours, and all of those things. I cover that by saying that the best evidence that I accept is that provided by the applicant.

I find that the applicant in this case has been unfairly dismissed. The question is, what should happen? I dealt with the case law on the options the Commission has in this matter, because it is necessary in this case to consider these. It has been said that the first remedy should be reinstatement, and I cited *Smith v. CDM(ibid.)* where Beech found that reinstatement was impracticable because the confidence between the parties had been lost. Even though there has been some suggestion from the Bar table, that there could be reinstatement, I draw the conclusion from the evidence that Mr Brett is absolutely certain that he does not want the applicant in the butchery as a manager.

I am not sure that I can reinstate him as anything other than he was when he was dismissed. I do not think I can send him back as an ordinary employee, and if I were to send him back as a manager, that might cause disruption to Mr Brett's business. This might cause a lack of confidence because obviously Mr Brett has already decided that he has no trust in the applicant as a manager. I therefore find that there would be a lack of confidence in the ability of the applicant to manage the business and it is impracticable to reinstate him. I will therefore fix compensation.

I have heard from the applicant in this matter. I gave him the opportunity to put to me matters of economic loss, other than the loss of wages. I have not heard any submissions to that end which would cause me to reach the conclusion that I should add anything more to the assessment of the compensation, other than to recompense from the time that the employee was dismissed at his ordinary weekly wage until he achieves employment on the 19 October 1998 I require the applicant to give me a statutory declaration of the earnings that he has achieved in that time, which includes all social service payments and any earnings, and any earnings will be deducted from the total amount to be paid. The parties should confer about the total sum to be paid in accordance with my decision.

Mr Crossley made submissions that the respondent was financially unable to pay compensation in a lump sum. He sought an order for payment by instalments.

In principle, I will grant payment by instalments. The parties are directed to discuss an acceptable arrangement for payment by instalments. In the absence of agreement liberty is reserved for either of claim to apply to the Commission to fix the amount of compensation and the instalments by which payment is to be made.

Appearances: Mr C Chad appeared as agent on behalf of the applicant.

Mr T Crossley appeared as agent on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Stephen Backman

and

Growers Market Butchers.

No. 792 of 1998.

COMMISSIONER J F GREGOR.

26 November 1998.

Order.

WHEREAS on 21 October 1998, the Commission issued Reasons for Decision in this matter; and

WHEREAS the Commission found that the applicant had been unfairly dismissed and it was impracticable to reinstate him and therefore decided to fix compensation; and

WHEREAS Mr Crossley who appeared for the respondent, made submissions that the respondent was unable to pay compensation of a lump sum and sought an order for payment by instalments; and

WHEREAS the Commission decided that it would grant payment by instalments and directed the parties to discuss arrangements for such payment; and

WHEREAS the parties have advised the Commission that upon the finding of unfairness by the Commission they agree that the total sum of compensation should be fixed at $17,124.00; and

WHEREAS the Commission has decided that the compensation will be paid in six equal monthly instalments;

NOW THEREFORE, pursuant to the powers vested in it by the Industrial Relations Act, 1979, the Commission hereby orders—

1. THAT the applicant was unfairly dismissed.
2. THAT the applicant be paid compensation in the sum of $17,124.00 to be paid in six equal monthly instalments.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Beanham

and

Tutt Brayant Equipment Pty Ltd
t/a Tutts-Ta Hong.

No. 208 of 1998.

COMMISSIONER J.F. GREGOR.

10 November 1998.

Reasons for Decision.

THE COMMISSIONER: On 5 February 1998, David Beanham, (the applicant) applied to the Commission for an order pursuant to s.29 of the Industrial Relations Act, 1979, (the Act) on the grounds that he had been unfairly dismissed by Tutt Bryant Equipment Pty Ltd t/a Tutts-Ta Hong (the respondent) on 29 January 1998. The applicant seeks an order that he be reinstated and that the respondent pay lost wages from the date of termination to the date of reinstatement.

The applicant told the Commission that he had been invited to apply for a position with the respondent and he did so, following upon which he had interviews with representatives of the respondent. After those interviews he was offered a position. This was communicated to him in a letter dated 22 August

1997. Formal parts omitted. The offer of employment is as follows—

RE: SALES REPRESENTATIVE

Following your recent interviews, we have much pleasure in confirming our offer of employment in the above position for the territory "North of the River". Your sales area will be defined on your commencement of work on 1 September 1997.

Reporting directly to the Sales Manager you will be responsible for the sale of our Sumitomo, Kawasaki and Mitsubishi range of equipment, including evaluation and disposal of customer trade units.

Given your past experience, coupled with the fact that our company expansion has prompted this appointment, we look forward to a long and rewarding relationship.

Our terms and conditions of employment are attached and you should sign acceptance of same and return.

We look forward to you joining us shortly and in the meantime wish you every success.

Attached to the offer of employment was a document headed 'Terms of Employment' (Exhibit K1). This document has a number of clauses which inter alia set out the salary to be paid, give details of commission payable on sales, give recognition to an entitlement to telephone expenses and a motor vehicle. There is also reference to annual leave, sick leave and superannuation. There are provisions relating to termination, conflict of interest and some intellectual property obligations concerning inventions.

It is the evidence of the applicant that upon receiving the offer of employment he examined the document. He checked everything that had been discussed between him and respondent. For instance, the correct salary figure, references to motor vehicles and the telephone and conditions of employment. He signed the document and sent it back to the respondent. He then commenced work on 8 September 1997, and in doing so, he was taken to two offices operated by the respondent. During that time he received various documents for him to read and sign. His evidence is that he had little time to do so and he placed signatures on the documents which included taxation records and in particular a document headed 'Contract of Employment'. He assumed that the Contract of Employment contained the same information that had been put to him in the letter of offer.

This later became a matter of controversy between the parties because the Contract of Employment (Exhibit K2) on the first page in bold letters specifies a probationary employment period of 3 months. During this period either party can in writing, terminate the employment, without notice. The document goes on to record that the applicant's position as a permanent employee would be automatically confirmed after satisfactory completion of the qualifying period. The document also deals in more detail with commission. Commission was mentioned in the letter of employment but the document the applicant was asked to sign when he commenced contained more detail. It also refers to a performance bonus which is not mentioned in the initiating documentation. Entitlement relating to telephone expenses and annual leave and sick leave are similar. As is the entitlement to a motor vehicle. However, the arrangements concerning superannuation contain a number of alternatives or options which are not contained in the Terms of Employment attached to the letter of offer. The other provisions of the contract concerning conflict of interest and inventions and severability appear to be the same. The applicant signed the Contract of Employment. The document was also signed by Alan MacKenzie on behalf of the respondent.

According to the applicant there are two issues to be decided here. The respondent claims that the applicant was on probation at the time of dismissal. He denies this. In his contention, he was never on a probationary engagement at all and when after he had been employed for a period of about two months he received a letter from the respondent extending the term of probation, he took no notice of it as he referred to the original letter of appointment and there was no mention of probation. Therefore, because there was no mention in the original letter of offer, there could not be any extension of a probation period. He did not raise his conclusion with the respondent.

The second issue is an allegation by the respondent that the applicant's work performance was unsatisfactory. That is refuted by the applicant. Finally it was contented by the applicant that he was denied procedural fairness in that at no time was he given sufficient warning that his work performance was unsatisfactory. Neither was he given any opportunity to answer any claims that his performance was not up to an acceptable standard.

What the applicant alleges in essence is that he was employed for a total period of 21 weeks. Of that time he spent approximately 8 weeks doing tenders. He was trained for a period of 2 weeks, absent on holidays for another 2 weeks, 4 weeks he was travelling and for 1 week he was involved in demonstrations, leaving him only 4 weeks to call on customers, an essential part of establishing a customer base. In short, he says that he was not given a fair go during the 21 weeks to establish himself as a salesman because in meeting the respondent requirements to do tenders, and training and travel, he was denied the opportunity to establish the necessary customer base.

In his evidence in chief, much attention was given by the applicant to his need to deal with tenders. For instance, there was a large tender involving Co-operative Bulk Handling. It involved 7 machines. The applicant described the tender document as being an almost book like document consisting of hundreds of pages which needed scrutinising, reading and understanding. He spent two weeks dealing with that tender.

His basic complaint is that essentially all that was given to him to establish himself as a salesman was the yellow pages of the telephone book. He accepted that many salesmen used the yellow pages but that was insufficient in his opinion. He was also denied an opportunity to go to Kalgoorlie during a machinery expo, Kalgoorlie being a district which had been allocated to him. He also arranged introductions to a client which resulted in sales of skid steer equipment for which he received no recognition. His complaint is that the respondent did not provide him with sufficient material which would allow him to develop the necessary customer contact so that he could pay his way within the company. To dismiss him in those circumstances was unfair. The applicant claims that the dismissal was harsh, unjust and unfair because it was procedurally unfair and substantially unfair. It was done without notice or warnings. The claim of the respondent that the applicant's performance was unsatisfactory was disputed, because in reality the applicant was given no sufficient warning that his work performance was unsatisfactory and neither was he given an opportunity to answer claims that his performance was not up to a reasonable standard.

Through its witnesses, the respondent presents quite a different story to the Commission. The respondent says that the applicant was introduced to them by one of their salesman who explained that he may know a person who would have an interest in a position which had become vacant in the respondent's operation. The applicant visited the respondent's premises twice before actually applying for the position. He was interviewed then and offered a position as a sales representative for North of the river territory. According to Mr MacKenzie, the State Manager of the respondent who interviewed the applicant, it should have been clear to the applicant that he was offered the position on a probationary basis. This is because everyone employed by the respondent is placed on probation. This included Mr MacKenzie himself when he had been recently promoted to the position of State Manager. When that had occurred he had been placed on a probationary period. According to Mr MacKenzie, in his 30 years of experience it was normal practice in the industry to start sales people on probation. Even though he does not especially recall raising that requirement to the applicant during the interview, nevertheless, he was sure that he would have and that is why the requirement was included in the Contract of Employment (Exhibit K2).

It was standard practice that the initial letter sent to the applicant following his interview offered him a position (Exhibit K1). When the applicant attended for duty he was given a collection of papers to sign which included among other things, taxation documents and superannuation documents. The applicant was under no pressure to sign those documents immediately and he was able to take them away and read them.

Insofar as assistance was concerned the applicant was introduced to his territory. There was discussion about the area to be covered and a list of the customers in that territory. Mr MacKenzie had spent considerable time with him advising how to do over-trades, which is an evaluation of the used machinery costs. There were regular meetings by way of formal sales meetings. In these meeting issues such as sales year to date, comparisons, budgets and general sales activities were discussed. The respondent had a library of material available to its employees for them to gain information about possible markets. Mr MacKenzie said there were two particular occasions when he travelled with the applicant and had time to discuss with him and made clear that there were difficulties with his performance. Mr MacKenzie said that the then State Manager was concerned about the applicant's performance after he had been employed for around about 2 months. The 3 month period was looming and Mr MacKenzie was under pressure from the Operations Director suggesting that there was a view that the applicant's employment would not work and that Mr MacKenzie should be thinking of concluding his employment at the end of the first 3 months. Mr MacKenzie made interventions on behalf of the applicant and managed to get the senior management to extend the trial period to give the applicant a further opportunity. The applicant was advised personally in a meeting with Mr MacKenzie this would be done and thereafter in writing. The letter setting out this arrangement is concluded as follows—

Dear David

Under the terms of your Contract of Employment signed on 8th September 1997, your 3 months probationary period concludes in a few days' time.

We therefore write to confirm that at this time we propose to extend that period for a further 3 month term, through to 8th March 1998.

While the past quarter has proved to be a difficult trading period, we believe the groundwork you have prepared should provide results early in the new year and to that end wish you success.

Yours faithfully

TUTTS-TA-HONG

Notwithstanding this meeting and the confirming letter (Exhibit R6) there was still, according to Mr MacKenzie a total lack of sales activity. There was a meeting with senior management and it was concluded that the best course would be to conclude the relationship. This conversation about lack of performance included the applicant. It was conducted a few days prior to the termination. There had been a constant review of sales performance to date. The applicant had been specifically employed to sell large new equipment and to that time he had sold nothing. There was a formal meeting between Mr MacKenzie and Mr Stazzonelli and the applicant about the respondent's intention. This lead the applicant to ask if there were any other positions within the company that it could look at. There was a general review of the situation but there was nothing available. Mr MacKenzie made notes of the conversations and he referred to these during his evidence. What they show is that there was a confirmation that performance in December had been disappointing. There was an extension of the probation period for a further 3 months. There was an examination of sales of equipment which had been exactly made. There were two pieces of used equipment sold but no new sales. The applicant had alluded to a potential order that was in hand at the time and it was agreed if that was concluded he would be paid commission. In due course he was.

The respondent addressed issues concerning the tendering work. It was Mr MacKenzie's conclusion that the applicant placed some emphasis on tendering but he was spending too much time on the task. Mr MacKenzie thought he did so because it was a comfort zone for him to be in the office. Mr MacKenzie suggested that his time would be best spent in the territory trying to conclude deals on a one to one basis with clients rather than tendering. Tendering is only seasonal and it is difficult to gain direct sales from it. In Mr MacKenzie's view it was a lottery. The applicant was assisted on occasions that he requested it and references made to a deal concerning a client called Carratti.

The Commission also heard evidence from Mr Don Rhodes, who had introduced the applicant to the respondent. He was subject to detailed cross-examination by Mr Kucera.

The applicant's position is that he did not receive any assistance. He could not determine who were or who were not his customers within the 3 month period. What should have taken place on employment was a review made of all the potential customers with the applicant. This resulted in the applicant being caught by surprise by the actions of the respondent. There was no agreement and there was an extended probationary period. The applicant had no opportunity to see the dismissal coming. He was told that he should be out on the road but it was impossible for him to do so because he had to prepare tenders for a significant period of the time that he was employed with the respondent. These tenders were not small, they were significant. The applicant was told to regard them as important and it was reasonable for him to be in the office. Notwithstanding that instruction, the applicant was on the road for an average of 5,000kms per month. He was attempting to canvas and achieve sales. There has been insignificant recognition of his attempts to serve the employer and therefore what happened to him was unfair.

According to Mr Randles, of Counsel, who appeared for the applicant, there are two live issues. The first was whether the applicant was on probation or not and second whether there were valid reasons for the termination. The respondent did not accept that there was a defined tender season. The respondent did not hunt out the applicant. He had been introduced to the company and he underwent an interview process. He had received the usual documentation on engagement. The applicant conceded in cross-examination that he was not forced to sign the documents on the day he started as he first contended. He had signed some and taken others home. It was common practice to appoint people on 3 months probation and that is the standard period. There is no reason why the applicant would have concluded that he was not on probation. That was clear from the front page of Exhibit K2. It is the very first point which appears in the introduction to the document. If the applicant did not see that, Mr Randles says that he has himself to blame.

The Contract of Employment the applicant signed contains all the terms and conditions of employment and differs materially from the previous contract only in adding the probationary clause to it. All that the applicant had produced was the 2 weeks that he spent on the CBH tender which was a 1 page letter and he conceded that to be the case.

There were doubts in Mr Randles' mind about the reliability of the evidence of the applicant concerning both the mileage and his allegations about lack of support. The reality was that he did go to Kalgoorlie and had every opportunity to develop clientele in the area. The applicant was provided with assistance not only from the State Manager but also from Mr Rhodes and other staff members of the respondent. The respondent has a strongly vested interest in ensuring that it's employees succeed. The fact of the matter is that the applicant did not have very much product knowledge and he did not have a great deal of expertise. The applicant knew that there were sales targets. He conceded that there were sales meetings and the targets were discussed. He also conceded that he had involvement in preparing budgets and sales targets.

At the end of the day he was employed for 5 months and during that time he did not sell one piece of new machinery. There was some suggestion that he sold machines for which he had not received credit however, the evidence does not support the contention. He was paid commission for sales which were concluded. The applicant's responses to the extension of his probationary period were most unsatisfactory. He indicated that he thought that the respondent had made a mistake and probation did not apply to him but he did not raise it with them. That is a self-serving answer according to Mr Randles. If there was an extension of probation period that should have put the applicant on notice that his position was at threat and one would have thought that he would have been demanding to know, as soon as possible, why the letter had been sent to him. Particularly, if he thought that there was no probation period at all.

According to Mr Randles, for the applicant to assert that he spent 10 weeks on tenders is exaggerated. There was no need

to spend that much time to exclusion of his real duties which to sell heavy earthmoving machinery. He admitted there was never an extreme amount of importance placed on tenders because it was a lottery system.

Ultimately, the applicant lost his position because he was unable to develop relationships. That was the thrust of the sales work in the heavy earthmoving field. If there is no personal relationship to build on then a sales person is not able to sell machines. In his conversations with Mr Rhodes the applicant had indicated that he found selling difficult. It was different to what he expected it to be. Mr Rhodes had suggested to the applicant that he spend more time on the road and try and develop relationships.

The basis of the respondent's case is consistent according to Mr Randles. The applicant's is not. He had a propensity to 'guild the lilly' to exaggerated problems, remembering things that suited him and not disclosing events as they had exactly occurred.

Before I deal with the question of witness credibility, I need to deal with the law to be applied. The question of probationary employment loomed in large in these proceedings. The concept that is applied in this jurisdiction is best set out in the writing of the Senior Commission in his decision in *Charles William Westheafer v. Marriage Guidance Counsel of Western Australia (*1995) 65 WAG 2311—

> *The concept of probationary employment is well know and well understood in employment law. It is that an employer by engaging someone on probation throughout the period of probation retains a right to see whether he wants the employee or not in his employment as if the employee was still at the first interview. Hence there is no obligation on the employer to even objectively consider whether or not he should re-engage an employee at the end of the probationary period. The principles associated with probationary employment are now so well established that it is sufficient to refer in passing to in re: Alchin and South Newcastle Leagues Club Limited (1977) AR (NSW) 236, a case with many features in common with this one and also to the New South Wales Teachers Federation and the Education Commission of New South Wages (sic) (NSW Industrial Commission Application No. 969 of 1984; 13 September 1984), where it was pointed out that probationary employment is but a step in the selection process and should be distinguished from permanent employment [see too: Ex parte Wurthcase (supra)].*

If the applicant was not dismissed while on probation, the Commission would have to apply the test which is set out by the Industrial Appeal Court in *Undercliffe Nursing Home v. Federated Miscellaneous Worker's Union of Australian* (1985) 65 WAG 385. The question to be answered is whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant has to amount to an abuse of the right. The dismissal for a valid reason within the meaning of the Act, may still be unfair if for example; that if it is effect in a manner which is unfair. But if the employment is to be terminated in a manner which is procedurally regular that will not of itself necessarily mean that the dismissal is unfair. (see *Shire of Esperance v. Mouritz (*1991) 71 WAIG 891 and also *Byrne v. Australia Airlines* (1995) 65 IR 32.

The Commission heard from 3 witnesses. First the applicant himself. I find it hard to accept the applicant's proposition that he knew nothing about a probationary period. He says that he received a letter of offer which appeared to him to be a full recitation of the arrangements between the parties and that caused him not to read the documentation that was presented to him when he appeared on the first day of work at the respondent's office. He tried, in examination in chief, to create the impression that he was given a pile of documentation and was under some pressure to sign it and did so. In cross examination he was prepared to admit that he was not under the pressure that he had the Commission believe that he was and he had time to read the documentation.

It is clear from even the most casual reading of Exhibit K2 that the provisions that relate to probationary appointment loom large as it were. It is therefore hard to understand how could they be missed by the applicant given his admission that he had time to read the document. There were other difficulties with his evidence. The applicant would have the Commission believe that he was thrown into the sales activities of the respondent without any assistance whatsoever. But in his cross-examination he admitted that there was a range of documents, information and help available to him.

For these reasons it seems that it is more likely than not that the applicant only gave information to the Commission that served his case and he was only prepared to clarify what he said under pressure in cross-examination. That is not the case with either of the witnesses from the respondent. Mr Kucera of Counsel examined both of them vigorously and at length. He was unable to disturb them from their stories that they gave in their evidence in chief.

It is my conclusion that on balance of probabilities the story offered by the respondent is more likely to be true than that offered by the applicant and for that reason where there is a difference between the accounts given by the witnesses on behalf of the respondent and the applicant, I accept that given by the witnesses for the respondent.

In my analysis with the matter I will deal first with the question of probationary employment. The intention of probationary employment is that the employer when engaging an employee on probation retains the right to see whether he wants the employee or not during that probationary period. There is no obligation on the employer to re-engage the employee at the end of the probationary period. In this case, if there was a probationary period offered in the first instance and I would prefer the evidence of the respondent in this respect, then the respondent exercised a right to re-engage the employee at the end of the initial probationary period. But it did not do so on the basis that permanent employment would follow. It decided that there was more time needed to assess the applicant's ability to do the work required of him and it told him so. The respondent was not happy that the applicant had not performed to the standard required. He had not sold any equipment at all during the extended period. There was a potential for sales for some second hand equipment but he was not employed to sell second hand equipment. That was a bonus if it happened. The respondent was not deficient in any of the assistance that it gave the applicant during the probationary period.

It is open to find and I do, that the applicant was on probation. He did not perform during the period to the expectation of the employer. Mr Mackenzie arranged an extension with the then State Manager. This was granted. The applicant knew about the extension both in the terms of verbal advice and a confirmation in writing. I find it hard to accept that after both of those events that he can allege that he was not on probation. Nevertheless he did. This does not change the fact that he was nevertheless on probation. He did not improve his performance and the employer exercised the right to decide if he wanted the employee or not in his employment. The respondent did not and it brought the arrangement to an end. In my view, as a matter of law the respondent was entitled to do so and in doing so, there was no unfairness. However, if I am wrong, concerning whether there was a probationary period or not. I will deal with the question of unfairness as if there was no probation.

The applicant says that he was engaged for a period of 21 weeks and for all but a small portion of that time he was engaged in duties that restricted him from acting as a salesmen. He says that he spent 8 weeks on tenders, 2 weeks training, 2 weeks on holidays, 4 weeks travelling and the balance of the time could be said he time spent in the actual process of selling. After carefully considering the evidence I conclude that is a quite jaundiced view of the opportunity that the respondent gave the applicant to sell new equipment, the purpose for which he was employed.

I accept the evidence of Mr MacKenzie that the applicant was continuously assisted. Far from there being no aides to identification of customers as the applicant alleged, there was more than adequate material supplied to him. It seems to me that the respondent was well and truly organised to pursue the sales of its products. For the applicant's allegations to be correct the opposite would be the case.

I accept the evidence of Mr MacKenzie in preference to that of the applicant concerning the assistance that was given to him. It cannot be said that the respondent did not try to assist the applicant to achieve sales results, nor can it be said that he

did not know that there were concerns about his performance. The fact of the matter is the applicant was unable to sell the goods that the respondent offered for sale. He was told about the difficulties that his was creating for the respondent. He should have had no doubt that his job was at risk if he did not perform the function for which he was employed and in due course after properly bringing the applicant's deficiencies to his attention, the respondent decided to terminate the applicant's services. In doing so there was no unfairness on the test described in the *Undercliffe (ibid)* case or in the *Shire or Esperance v. Mouritz (ibid)*. For those reasons I conclude that there was no unfairness.

I consolidate my findings as follows—

> I conclude that the applicant was on probation and that his employment was properly brought to an end by the employer within a probationary period for failure to meet the employer's expectations. If I am wrong concerning the existence of a probationary period, there has been no unfairness in the dismissal in any event. The application will be dismissed.

Appearances: Mr T Kuccra, of Counsel, appeared on behalf of the applicant.

Mr A Randles, of Counsel, appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Beanham

and

Tutt Brayant Equipment Pty Ltd
t/a Tutts-Ta Hong.

No. 208 of 1998.

COMMISSIONER J.F. GREGOR.

10 November 1998.

Order.

HAVING heard Mr T Kuccra, of Counsel, on behalf of the applicant and Mr A Randles, of Counsel, on behalf of the respondent, the Commission pursuant to the powers vested in it by the Industrial Relations Act, 1979, the Commission hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Jeffrey Thomas Burnham

and

Western Desert Puntukurnuparna
Aboriginal Corporation.

No. 556 of 1998.

25 November 1998.

Reasons for Decision
(extempore)

SENIOR COMMISSIONER: It is common ground that the Applicant was employed by the Respondent corporation from on or about 11 November 1997 until or about 11 March 1998. On 11 March 1998 his employment was apparently terminated with two weeks' pay in lieu of notice.

The Applicant, as is common ground, was employed as an accountant for the Respondent. He was employed under the terms of a written offer contained in a letter of 2 October 1997 and, moreover, contained in a document entitled "Contract of Employment" which was signed by representatives of the Respondent, but not by the Applicant. The Applicant, however, acknowledges that that document effectively constituted his contract of employment, save in respect of the question of relocation costs, to which I shall refer later since that matter formed a key issue during the course of these proceedings.

The Applicant complains that he was unfairly dismissed from his employment. As I understand it, amongst other things, he complains that the proper procedures outlined in the contract of employment were not followed. The Respondent now challenges the jurisdiction of the Commission to entertain that aspect of the Respondent's application. In short, the Respondent says that the Applicant's employment was governed by a Federal Award known as the Aboriginal Communities and Organisations (Western Australia) Award 1996. The Respondent points out that the Award outlaws unfair dismissals and, moreover, provides a detailed procedure for resolving disputes which arise out of the operation of the Award, which procedure ultimately expressly leads to recourse before the Australian Industrial Relations Commission. In consequence, counsel for the Respondent argues that there is a clear conflict between the provisions of that Award and the statutory provisions of section 29(1)(b)(i) of the Industrial Relations Act 1979.

In my view, the Respondent's argument in this respect are well founded. The Commonwealth Workplace Relations Act 1996, by section 152, and more particularly section 152(1A), attempts to save the State unfair dismissal jurisdiction in respect of federally covered employees. However, it does so expressly on the condition that the provisions of the State legislation "are able to operate concurrently" with the Federal Award. It is clear in this case that the provisions of the State Act cannot operate concurrently with, in particular, the provisions of Clause 12 of the Federal Award which provide for a detailed dispute settling procedure. Indeed those provisions expressly state that in the first instance the employee shall be dealt with in the manner prescribed in the Award. Clearly, if the process is bypassed by the aggrieved employees coming before the State Commission without following that procedure, the dispute settling procedures in the Award are effectively rendered nugatory. Thus, in my view, because the provisions of the Federal Award conflict with the provisions of the State Act, there is no jurisdiction in the State Commission to deal with the claim for unfair dismissal instituted by way of these proceedings. Accordingly that aspect of the application must be dismissed.

The Applicant, by these proceedings, also seeks to recover benefits which he said are due to him under his contract of employment with the Respondent but which have been denied to him by the Respondent. This is not a matter over which it is suggested the Commission does not have jurisdiction. By the amended claim those benefits are said to constitute a base salary, pro rata annual leave and superannuation for the period immediately following the termination of the Applicant's employment until the date on which he became employed elsewhere. Together, these benefits are said to amount to approximately $13,545. In addition, the Applicant seeks to recover legal costs in the order of $2,000. Furthermore, a sum of slightly more than $12,000 is claimed for unpaid overtime and the sum of $5,000 is claimed for relocation expenses.

Insofar as the claim for unpaid salary, pro rata annual leave and superannuation is concerned, that claim must fairly fail. As the Applicant has acknowledged, the claim for these benefits covers a period after his employment was terminated. There is simply nothing in his contract of employment which entitles him to recover payment for anything which occurred after his employment ceased. Those claims might form the basis of some compensatory award in the appropriate tribunal, if it is found that his dismissal was unfair, but they cannot form the basis of a contractual benefit of the nature required to enliven the jurisdiction of the Commission in this respect. Likewise, there is absolutely nothing in the contract, as the Applicant properly concedes, to enable him to recover legal costs of any amount. This aspect of the claim must also fail.

Insofar as the claim for overtime is concerned, it is quite clear from the document, which it is common ground governed the Applicant's employment, that the entitlement to recompense for overtime is strictly limited. Clause 7 of the Contract of Employment makes provision for overtime to be

recompensed by way of time in lieu and only time in lieu. Further, Clause 8 provides that time in lieu can be accumulated up to 38 hours. Moreover, by Clause 8 the contract provides quite clearly that "(w)here an employee has accrued 38 hours time in lieu no further overtime shall be worked until that time in lieu is taken in whole or in part". The Applicant's claim on this occasion is in the order of over 14 weeks, which obviously exceeds that 38 hour limit. He says in answer to that hurdle that he discussed the matter with a Mr Rae, who was his immediate supervisor. He says that Mr Rae, either expressly or impliedly, agreed that he should work overtime, notwithstanding the 38 hour accrual limit because overtime work was necessary in order to put the Respondent's books in order so that they could be audited. Mr Rae has testified that he did not give the Applicant any such indication. On the contrary, he says that he expressly indicated to him that any overtime worked was to be strictly on the basis of the provision in the contract.

I have not the slightest doubt, having heard both the Applicant and Mr Rae testifying in the course of these proceedings, in accepting Mr Rae's evidence. He impressed me with the spontaneity and clarity of his answers to questions put to him. He was firm and forthright. Moreover, he impressed me by his readiness to acknowledge errors in his evidence when drawn to his attention. On the other hand, in contrast, the Applicant did not impress me. He was reluctant to admit even the most obvious. Where his evidence conflicts with that of Mr Rae, I have not the slightest doubt the evidence of Mr Rae should be preferred and I indeed do prefer it.

I accept therefore and find that the Applicant was always told that any entitlement to be paid for overtime was to be governed by the contract of employment and that contract only. Not only did Mr Rae testify that that was what he said, but what he said is to some degree supported by a memorandum which he says he gave to the Applicant shortly after the Applicant raised with him the prospect of being paid some 102 hours' overtime for work done in early November and December. I accept that memorandum to be an accurate record of the position and that it was given to the Applicant in the circumstances in which Mr Rae says it was given to him.

It is clear on the evidence that upon termination the Applicant was paid for overtime up to the 38 hour limit subject to a deduction of an amount in the order of $575. Much has been said about that deduction in the course of these proceedings. The deduction appears to relate to expenses incurred when the Applicant and others went on a journey away from Port Hedland which the Applicant says was work related and authorised by the Respondent. Again I am quite satisfied and find that Mr Rae discussed with the Applicant before he and others embarked on the journey that it was at least unwise, if not inappropriate, for him to undertake the journey. Moreover, I accept the position to be that that journey was not authorised by Mr Rae or the Chairman of the Respondent. I accept Mr Rae's evidence that, insofar as the Applicant's actions were concerned, they were the only persons able to authorise the trip. I accept, too, that the Applicant knew, or ought to have known, that if he incurred expenses without proper authorisation they would be deducted from his contractual benefits or he would otherwise be held to account for them. The uncontradicted evidence is that he was party to a memorandum to staff in those terms. Thus I consider it is quite unjust, if not improper, that the Applicant should now be heard to say that he had been short changed by $575 or some such sum as a consequence of this journey. In my view, on the basis of the information that I have heard in the course of these proceedings, whether or not there is a written authorisation by the Applicant for the deduction, it would be neither just nor equitable for him in the circumstances to be permitted to recover that sum from the Respondent. Thus I would exercise the discretion, which in my view flows from section 26 of the Act, to refrain from ordering that he be paid that sum deduction from the payment overtime, assuming that sum to be otherwise due to him.

The remaining aspect of the claim relates to relocation costs. Again the uncontradicted evidence is that the Applicant has not incurred any expense in transferring goods from Queensland to Port Hedland or indeed from anywhere else to the residence he occupied or taking up his job in Port Hedland. In my view therefore he has no entitlement to claim the benefit he seeks on this occasion. As I read the letter of 2 October 1997, it covers the payment of relocation "costs". On the evidence adduced in these proceedings there are and were no such costs. If the "Contract of Employment" document applies rather that the letter, as I am inclined to think is the better view, it likewise refers to relocation and removal "expenses". On the evidence, indeed as the Applicant admitted, no such expense was incurred during the time of his employment. It was not until after his employment ceased that he transferred or relocated any goods to incur expense of this nature. In all the circumstances the Applicant simply has not made out this aspect of the claim.

For these reasons I order that the application be dismissed in toto.

Appearances: The Applicant appeared in person.

Mr D.H. Schapper of counsel on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Jeffrey Thomas Burnham

and

Western Desert Puntukurnuparna
Aboriginal Corporation.

No. 556 of 1998.

25 November 1998.

Order.

HAVING heard the Applicant in person and Mr D. H. Schapper of counsel on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gavin Anthony Chapman

and

JL and MN Rossiter trading as Arunine Painting Services.

No. 356 of 1998.

COMMISSIONER S.J. KENNER.

4 August 1998.

Reasons for Decision.

THE COMMISSIONER: By this application pursuant to s 29 of the Industrial Relations Act 1979 ("the Act") Gavin Anthony Chapman ("the applicant") alleges that he was unfairly dismissed by JL and MN Rossiter T/A Arunine Painting Services ("the respondent") and seeks compensation for the unfairness of the dismissal. The notice of application as filed, also seeks an amount of money in respect of payment in lieu of notice pursuant to the Building Trades (Construction) Award 1987 ("the Award"). The applicant does not seek reinstatement.

At the outset of the proceedings the agent for the applicant applied to amend the application to also bring a claim in respect of an entitlement to annual leave pursuant to either the Award, alternatively the Minimum Conditions of Employment Act 1993 ("MCEA"). The agent for the respondent did not object to the application to amend and the claim was amended accordingly. The respondent did however, contest the Commission's jurisdiction to entertain the claims in respect of

payments in lieu of notice and annual leave under either the Award or the MCEA.

Background

The applicant says that he was in effect, summarily dismissed and he was denied natural justice in not being given any opportunity to respond to allegations of poor performance and conduct. The applicant further says that the respondent has breached s 170 CM of the Workplace Relations Act 1996 (Cth) in terms of notice of termination of employment and s 114(1) of the Act, by contracting out of its award obligations.

The respondent denies the applicant's claim. In essence, the respondent says the applicant was engaged by the respondent as a casual employee. It is said that he voluntarily left the employ of the respondent and there was no dismissal in order to confer jurisdiction on the Commission under the Act. The agent for the respondent in effect says that the applicant abandoned his employment with the respondent.

It is common ground between the parties that the respondent is a painting contractor based at Port Denison and the applicant was engaged by the respondent as a painter to be based primarily in Leeman. It is agreed that the applicant commenced work on 7 January 1998, and the last day of employment was 31 January 1998, and that the employment of the applicant was subject to the terms of the Award. At all material times the applicant was paid an amount of $17.50 per hour.

The Evidence

The only evidence adduced on behalf of the applicant was from the applicant himself. He said that following a telephone conversation with Mr Rossiter of the respondent, the timing of which was not clear on the evidence, Mr Rossiter offered the applicant a position as a painter. The applicant said that he was to be employed on a full time basis in the Leeman area. The applicant said in his evidence that he was told that there was plenty of work with the respondent and the respondent had enough work to provide ongoing employment for the applicant for about two years.

The applicant denied there were any rates of pay or hours of work discussed in the telephone call leading to his employment with the respondent. The applicant further gave evidence that he worked consistently for the respondent about eight and a half hours a day normally between 7.30am and 5.00pm each day with one hour for lunch. The work performed by the applicant involved the painting of the outside of a school, the inside of three classrooms at Mingenew, a house in Leeman, the inside of a further house and a recreation room in Eneabba. The applicant testified that on occasions he worked with Mr Rossiter and according to the applicant, there were never any complaints as to the standard of his workmanship.

On or about 22 January 1998, the applicant said that on the occasion of returning to Leeman from Mingenew, where the applicant was attending a job with Mr Rossiter, Mr Rossiter told the applicant that the respondent had caught up with all of its work and invited the applicant, if he wished to, to take some time off. The applicant further testified that the subject of taking time off came up again on or about 31 January 1998, when he raised with Mr Rossiter the prospect of taking a couple of days off to attend to some business in his home town of Esperance. The applicant's evidence was that Mr Rossiter told him that he could take a week off if he wanted to and there was no urgency to return back to the job. The applicant's evidence was that this day was a Saturday and that he was working that day to make up time for the Friday before, on which he had not attended work for the full day because of a birthday celebration the evening before with a co-employee, Mr Jevon Back. He said that he had gone in to work on the Saturday morning, to make up the time that he had missed the day before.

The applicant gave evidence that he made arrangements to travel to Esperance by bus on the next Sunday and was planning to leave at 3.00am in the morning. He said that because of a misunderstanding as to the pick up point for the bus, he did not catch that bus but however, made arrangements to book on a bus leaving later that Sunday at 12.30pm. The applicant's evidence was that his plans were consistent with Mr Rossiter previously indicating that he could have some time off if he wished to.

The applicant said that later that day, whilst waiting at the Shell Roadhouse for the 12.30pm bus, Mr Rossiter arrived at the Roadhouse and had a brief conversation with the applicant. In the applicant's evidence, that conversation was as follows—

> *"Right, Okay. What happened then? Later on in the day what happened then?…. Before I got on the bus, I got to the Shell Roadhouse and Mr Rossiter turned up and he said, "have you got all your gear?" and I said, "Yeah", and he says "Well, you're not coming back." I said, "What was that?" and he said, "You're not coming back", and I said, "Why?" and he said, "Well, I don't want you back". I said, "What's happening?" He said, "You're sacked". I said, "For what reason?" and he said, "Drinking on the job", and I did try to explain to him, have a talk to him about it but he jumped in his car and took off again. He didn't even give me a chance to defend myself. That was the last time I spoke to him."* (transcript p.14)

The applicant further confirmed in his evidence that was the extent of the conversation between he and Mr Rossiter. However, the applicant said that Mr Rossiter rang a person who he described as his landlord, in Esperance, on 1 February 1998, to say that the applicant had been dismissed. In his evidence-in-chief and in cross-examination, the applicant denied that he drank on the job whilst employed by the respondent. He further denied that he intended to leave the respondent's employment on the basis that he had either arranged, or was arranging alternative employment.

Evidence on behalf of the respondent was adduced from Mr Rossiter, who is a partner with his wife in the business of the respondent, and Mr Jevon Back, an employee of the respondent.

Mr Rossiter's evidence was that he was contacted by the applicant regarding work and reached an agreement, over the telephone, that the applicant work for the respondent on the basis of an "*all up*" rate of $17.50 per hour. The respondent was to provide accommodation and food to the applicant whilst located in Leeman. Mr Rossiter appeared to have the view that he engaged the applicant on a subcontract or casual basis. I should observe however, that the agent for the respondent did not contend that the applicant was not an employee for the purposes of the Commission's jurisdiction to deal with the claim.

Mr Rossiter further testified that in respect of work performed by the applicant on 9 January and 30 January 1998, the applicant had worked less hours than were claimed on his time sheets for those days. This was based on what he was told by his other employee, Mr Back. Mr Rossiter's evidence was however, that overall, the applicant's performance was adequate except perhaps, for the issue of his ability to use a spray gun.

In relation to the issue of taking leave, Mr Rossiter confirmed in his evidence that he told the applicant that he could have time off whenever the applicant needed it. Mr Rossiter recalled that the applicant had mentioned to him that he may need to return to Esperance but did not specify the reasons for needing to go there. Mr Rossiter also testified that when he became aware of the applicant's plans to take some time off to go to Esperance, that did not concern him. This was consistent with Mr Rossiter's suggestion to the applicant previously and also consistent with occasional time off taken by Mr Back. However, I pause to observe that later in his evidence-in-chief, Mr Rossiter changed his evidence somewhat to suggest that from what he had been told by Mr Back he had a belief that the applicant was not going to return to the job. This was never however, the subject of any direct discussion between the applicant and Mr Rossiter.

Mr Rossiter further testified that on Friday, 30 January 1998, both he and his apprentice arrived in Eneabba and decided to go to the mess where he thought that both the applicant and Mr Back would be having lunch. They did not see them there. He decided to go back to the respondent's house to look for both the applicant and Mr Back. He testified that on going into the house he saw the applicant asleep and there was no sign of Mr Back. There was also no sign of Mr Back on the job to be done that day in Eneabba. Mr Rossiter said that later that day, shortly after 5.00pm, he saw Mr Back in the street in Dongara and had a short conversation with him to the effect that the applicant was leaving for Esperance a short time later.

Mr Back also apparently informed Mr Rossiter that Mr Back had seen the applicant consuming alcohol on the job but Mr Rossiter conceded in cross-examination, that he had never himself witnessed this occur. This had apparently taken place on the morning of Friday, 30 January 1998, following the evening on which the applicant and Mr Back had celebrated the applicant's birthday.

Mr Rossiter said that on Saturday, 31 January, he drove to the Eneabba job where both the applicant and Mr Back had been working the previous day. He said that he got there at about 10 o'clock in the morning and found the applicant working. His evidence was that the applicant told him that he had a few hours off the previous day and he was making it up. I pause to note that this is consistent with the applicant's evidence on this point. Mr Rossiter said that he was told by the applicant that he was on the bus at 3.00am the next morning. Notably, Mr Rossiter did not mention anything about the allegation that the applicant had consumed alcohol on the job the previous morning.

Mr Rossiter further testified that on the morning of 1 February 1998, he rang the applicant's Esperance phone number to speak with whom he thought was the applicant's wife. His evidence was he rang her to advise that the applicant had been dismissed because he was drinking on the job. He said that he found out the previous Saturday evening that the applicant had allegedly been drinking on the job and had decided that the applicant should be dismissed. Confirmation of the telephone call is contained in an extract of the telephone records of the respondent tendered in evidence as exhibit R4.

On the following day, Sunday, 1 February 1998, Mr Rossiter said that he saw the applicant before he was due to catch the bus to Esperance in the afternoon at the Roadhouse. His evidence was that he walked over to the applicant and told him that he was finished because he had been drinking on the job. The applicant denied he had. Mr Rossiter's evidence was that the conversation was very short and after the applicant had denied the conduct complained of, he took the keys to the respondent's utility vehicle from the applicant and left. Mr Rossiter testified that he had no further conversation with the applicant about this issue.

Mr Back gave evidence. He has been employed by the respondent since in or about late November 1997, as a painter. He knew and worked with the applicant since the applicant started work with the respondent. Mr Back gave evidence that on 9 January 1998, the applicant finished working about an hour or an hour and a half early but despite this, completed his timesheet for a full day. The applicant's and Mr Back's timesheets were tendered as exhibits R2 and R5 respectively. There was a suggestion in Mr Back's evidence, that he was placed under some pressure by the applicant to ensure that his hours recorded on his timesheet for 9 January, were the same as that of the applicant.

Mr Back said that on Thursday, 29 January 1998, he became aware that it was the applicant's birthday. Both he and the applicant went out to celebrate and drank alcohol that evening. His evidence was that the next day they both felt unwell. He said that at about 9.30 or 10.00 am at smoko, the applicant went back to the house where they were both staying and returned with some beer left over from the evening before. Mr Back said that he actually saw the applicant consume some alcohol on the job at that time. It appears that the applicant then left the job shortly thereafter as he was not feeling well from the night before. Mr Back's evidence was that at about 10.30 that morning, he also left the job as on his evidence he did not want to be responsible for the applicant consuming alcohol on the job as he was in charge of it. Mr Back testified that on two other occasions he had seen the applicant with bottles of alcohol but had not actually seen the applicant consume alcohol on the job other than on the Friday morning to which reference has just been made.

My Findings and Conclusions

The major area of conflict in the evidence in relation to this matter, is the respondent's allegation that the applicant had consumed alcohol on the job, this being the reason that Mr Rossiter said in his evidence that he dismissed the applicant. From my observations of the witnesses, where the evidence of the applicant and Mr Back for the respondent conflicts on this issue, I prefer the evidence of Mr Back who I found to be an impressive witness. He gave his evidence in a forthright manner, and although still employed by the respondent, he did not leave me with the impression that his evidence was tailored to assist the respondent's case. Accordingly, I am satisfied on the evidence and find there was an occasion on or about 30 January 1998, when the applicant did consume alcohol on the job, following the previous evening's festivities between the applicant and Mr Back. Whilst there is not any direct evidence that the applicant actually consumed alcohol on any other occasions, based on Mr Back's evidence of the occasions when he saw the applicant at work in the possession of both empty and half full bottles of alcohol, the inference is clearly open that the applicant, more likely than not, did drink on the job on other occasions also and I so find. Nor am I in a position to make any findings of fact based on the evidence adduced before me, as to whether as a result of the consumption of the alcohol on or about 30 January, the applicant was in any way intoxicated.

As to the status of the applicant, I am not persuaded on the evidence that the applicant was engaged as a casual employee. In any event, I note that the Award in clause 7(2) limits a casual employee's employment to a maximum of five days. The applicant was clearly engaged for a period in excess of this. I find the applicant to have been a full time employee.

As to the issue as to whether the applicant abandoned his employment or was dismissed by the respondent, it is common ground on the evidence of both the applicant and Mr Rossiter, that a discussion took place on the afternoon of Sunday, 1 February 1998, in which the applicant was told by Mr Rossiter that he was in effect being dismissed. There is no doubt about that in my view. The evidence also discloses that the circumstances of the termination was summary in nature in that the applicant received no notice or payment in lieu of notice in accordance with the terms of the Award or under s 170 CM of the Workplace Relations Act 1996 (Cth). I am also satisfied on the evidence and I find, that the conduct of Mr Rossiter, in particular his telephone call to Esperance on the Sunday morning, to the person whom he believed to be the applicant's wife, to advise of the applicant's dismissal, is entirely inconsistent with the agent for the respondent's assertion that the applicant had abandoned his employment. Had Mr Rossiter been of the view that the applicant was leaving his employment and not returning, then clearly there would be no need to dismiss the applicant and certainly no need to telephone the person whom he believed to be the applicant's wife, prior to speaking to the applicant, to inform her of the fact. Moreover, I am satisfied on the evidence and find, that the circumstances of the discussion between the applicant and Mr Rossiter which took place on the Sunday afternoon, were such that the applicant was given no real opportunity to answer Mr Rossiter's allegations.

Accordingly, on the evidence, I am satisfied and I find there was a dismissal by the respondent which dismissal was summary. Furthermore, I am satisfied that the reason for the dismissal was that the applicant had consumed alcohol on the job.

Given my finding that the respondent terminated the applicant's employment summarily without notice, there is what has been variously described as an evidential burden on the respondent, to establish on balance, that the misconduct complained of had in fact occurred: *Newmont Australia Ltd v Australian Workers Union, WA Branch* (1988) 68 WAIG 677 at 679. Notwithstanding this, the persuasive burden still rests on the applicant to demonstrate that in all the circumstances, the dismissal is harsh, oppressive or unfair. Given my findings above, I am satisfied that in this case the respondent has discharged the evidential burden.

It is trite to observe that an employer has the right to dismiss an employee summarily for misconduct. Generally, misconduct is conduct inconsistent with an employee's intention to remain bound to the terms of the contract of employment*: Laws v London Chronicle (Indicator Newspapers) Ltd* (1959) 1 WLR 698 at 701. The range of conduct which might constitute misconduct to justify summary dismissal, is very broad. Drunkenness will generally justify an employer in summarily dismissing an employee if the intoxication is inconsistent with the performance by the employee of his or her obligations under

the contract of employment: *Clouston and Co Ltd v Corry* (1906) AC 122. In this case it was observed at 129 that—

> *"There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon the facts, and is a question of fact."*

As a general proposition, there must be a relationship between the drunkenness and the ability to carry out the employment: *Meyrick v Stirling Bros Ltd* (1982) 1 WALR 51 at 55. It is also the case that industrial tribunals have always regarded drinking on the job and intoxication at work as a very serious matter: *Carlton United Breweries v ALHMWU* 1994 Print L5862; *AWU v Hamersley Iron Pty Ltd* (1977) 57 WAIG 1286. The reason for this is obvious. Employees who consume alcohol at work are at risk of injury both to themselves and other employees and raises the issue of the employer's and employee's duty of care both at Common Law and under Statute.

However, fairness and justice requires that an employee accused of misconduct, be given a reasonable opportunity to offer an explanation and put his or her case. The employer should also, in the circumstances, conduct a reasonable investigation of the relevant circumstances to satisfy itself as to form an honest and genuine belief, based upon reasonable grounds, that the employee is guilty of the misconduct: *Sangwin v Imogen Pty Ltd* (1996) 40 AILR 3-388: *Hooper v Bi-Lo Pty Ltd* (1992) 53 IR 224. It should also be observed that the relevant legal principles relating to unfair dismissal, must be considered in the context of the practical sphere of employer and employee relations and applied in a common sense way: *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 at 7.

Affording an employee procedural fairness in effecting a termination is clearly a relevant consideration and in some cases may be a most important consideration, in assessing overall whether a dismissal is harsh, oppressive or unfair: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. Ultimately however, all the circumstances of the case must be considered. In this case Mr Rossiter clearly relied upon the report of Mr Back as to the applicant's conduct. Implicit is that is Mr Rossiter's acceptance of Mr Back's report as being reliable. In my view, based upon my assessment of Mr Back as a witness in these proceedings, Mr Rossiter had cause to place reliance upon Mr Back'' version of the events and to not accept the applicant's'denial. In my opinion, had Mr Rossiter sought to re-confirm the position with Mr Back in view of the applicant's denial, the outcome would have been as different in any event.

Accordingly, having regard for the seriousness of the conduct of the applicant, I am not persuaded having regard to all the circumstances of the case that the applicant's dismissal was harsh, oppressive or unfair.

Entitlements

Given my conclusion that the summary dismissal was justified, it is not necessary for me to address the applicant's claims for pay in lieu of notice or annual leave entitlements under s 23A(1)(c). However given that the matter was raised, I make the following observations.

The agent for the applicant argued that the terms of s 23A(1)(a) support such an order. The agent for the respondent on the other hand, argued that such claims are beyond jurisdiction, they being within the exclusive jurisdiction of an Industrial Magistrate pursuant to s 83 of the Act. Section 23A relevantly provides as follows—

> *"23A. (1) On a claim of harsh, oppressive or unfair dismissal, the Commission may—*
>
> *(a) order the payment to the claimant of any amount to which the claimant is entitled;*
>
> *(b) order the employer to reinstate or re-employ a claimant who has been harshly, oppressively or unfairly dismissed;*
>
> *(ba) subject to subsections (1a) and (4), order the employer to pay compensation to the claimant for loss or injury caused by the dismissal; and*
>
> *(c) make any ancillary or incidental order that the Commission thinks necessary for giving effect to any order made under this subsection."*

Section 83 of the Act relevantly provides—

> *"83 (1) Subject to this Act, where a person contravenes or fails to comply with any provision of an award, industrial agreement or order, other than an order made under section 32, 44(6) or 66—*
>
> *(a) the Registrar or a Deputy Registrar;*
>
> *(b) an Industrial Inspector;*
>
> *(c) any organisation or association named as a party to the award or employer bound by the award, industrial agreement or order; or*
>
> *(d) any person on his own behalf to whom the award, industrial agreement or order applies,*
>
> *may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the award, industrial agreement or order.*
>
> *(1a) An application for the enforcement of an award, industrial agreement or order (other than an order made under section 32, 44(6) or 66) shall not be made otherwise than to an industrial magistrate's court."*

It is to be noted that s 83(1a) was inserted into the Act by amending Act No.79 of 1995 and commenced 16 January 1996. I pause to observe that as noted below, this amendment followed the insertion into the Act of s 23A and its subsequent amendment.

Section 23A of the Act was inserted by the Industrial Relations Amendment Act No. 15 of 1993 and subsequently amended by the Industrial Legislation Amendment Act No. 1 of 1995 and the Labour Relations Amendment Act No.3 of 1997. As the section is remedial in character, its terms should be construed beneficially: *Bull v The Attorney-General (NSW)* (1913) 17 CLR 370; *Lawson v Lawsons Tile Works Pty Ltd* (1960) 104 CLR 328 at 335; *Bird v Commonwealth* (1988) 78 ALR 469 at 474. Despite being remedial in character however, the section must be interpreted consistent with the actual language used in the statute and a construction that is reasonably open consistent with that language: *Khoury (M&S) v Government Insurance Office of NSW* (1984) 54 ALR 639 at 650.

For the purposes of the interpretation of legislation, the words used in a statute are to be given their ordinary and natural meaning unless the context otherwise indicates. For the purposes of s 23A(1)(a), the word "*entitlement*", should be given its ordinary and natural meaning. The Shorter Oxford English Dictionary defines "*entitle*" as follows—

> *"II.1. to furnish with a title to an estate. Hence gen. to have a rightful claim to anything. 1468. 2. To regard as having a title to something, or as being the agent, cause, or subject of anything – 1690 b. to impute (something) to 1665."*

In my opinion, an entitlement so defined in the context of s 23A(1)(a), is something to which a person has a rightful claim pursuant to their contract of employment. Consistent with that

meaning, I am of the view that the legislature, in inserting s 23A(1)(a) into the Act, intended the Commission to have powers to order payment to a claimant of an amount other than in respect of compensation for unfair dismissal. To hold otherwise would be to render the provisions of s 23A(1)(a) superfluous with no work to do.

It is to be noted that the provisions of s 23A(1), dealing with the powers of the Commission on claims of unfair dismissal, are to be contrasted with the provisions of the Act dealing with contractual benefits. By s 29(1)(b)(ii) of the Act, an employee may refer an industrial matter to the Commission in respect of a claim for a benefit under his or her contract of employment, not being a benefit under an award or order. Whilst it is to be borne in mind that the provisions of s 29 are procedural in character, in that they only refer to by whom matters may be referred to the Commission and the general jurisdiction of the Commission is provided for in s 23 of the Act, the provisions of s 29(1)(b)(ii) are suggestive of an intention by the legislature to expressly exclude claims for benefits under an award or order, to which the provisions of s 83 of the Act have application. There is no such express exclusion in s 23A(1).

What then is meant by "*any amount to which the claimant is entitled*" for the purposes of s 23A(1)(a) when read with the Act as a whole? On one view, it may mean that in relation to a *claim* for harsh, oppressive or unfair dismissal, the Commission is empowered to order the payment of an amount to a claimant arising under the claimant's contract of employment, or relevant award, order or industrial agreement. This is clearly giving the subsection its broadest interpretation and reading down the provisions of s 83. However, in relation to entitlements under awards, industrial agreements or orders (other than orders made under ss 32, 44(6) or 66), it is notable that at the time s 23A(1) was inserted into the Act, there was no corresponding amendment by Parliament to the then s 82(2) of the Act, providing for the exclusive jurisdiction of an industrial magistrate in relation to enforcement issues. Moreover, as I had mentioned above, following the introduction of s 23A(1), Parliament inserted the present s 83(1a), preserving the exclusive jurisdiction of the industrial magistrate's court in relation to enforcement matters. One would have thought that if it was the intention of the legislature, with the enactment of s 23A(1)(a), to enable the Commission to order the payment to a claimant of an amount in respect of an award entitlement, that it would have made a corresponding amendment to s 83 of the Act to make this proposition clear. In the absence of such an amendment, in my opinion, s 23A(1)(a) enables the Commission to order payment to a claimant in respect of an entitlement under his or her contract of employment, but not however, pursuant to the terms of an award, industrial agreement or order, as specified in s 83(1a).

I should observe however, that the powers of the Commission in this regard, are not contingent in my opinion, upon a finding by the Commission that a dismissal is harsh, oppressive or unfair, as is the case with s 23A(b) and (ba).

My conclusions in relation to the enforcement issue, are consistent with earlier authority dealing with the exclusive enforcement jurisdiction in the industrial magistrate's court albeit, prior to the enactment of s 23A of the Act*: Minister for Works and Water Resources v AMWSU* (1983) 63 WAIG 1389 at 1390 per O'Dea P; *Cliffs Robe River Iron Associates v ETU* (1982) 62 WAIG 2696 at 2697; *Crewe and Sons Pty Ltd v AMWU* (1989) 69 WAIG 2623 at 2626, 2628.

In my opinion, the same conclusion should be reached in relation to the claim under the MCEA, given the terms of s 7 of the MCEA, providing for enforcement of a minimum condition of employment under Part III of the Act, at least in so far as an employee who is covered by an award is concerned.

The application is dismissed.

Appearances: Mr N Irvine on behalf of the applicant

Mr C Fayle on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gavin Anthony Chapman

and

JL and MN Rossiter trading as Arunine Painting Services.

No. 356 of 1998.

COMMISSIONER S.J. KENNER.

4 August 1998.

Order.

HAVING heard Mr N. Irvine on behalf of the applicant and Mr C. Fayle on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Steven Ennis

and

Boral Resources (Qld) Pty Limited T/A Boral Shotcrete.

No. 717 of 1998.

27 November 1998.

Reasons for Decision.

COMMISSIONER C.B. PARKS: The applicant is a former employee of the respondent corporation whose employment was terminated by the respondent on 27 March 1998. It is asserted by the applicant that his dismissal from employment was unfair because the respondent had no justifiable reason to end the employment, but if there was, ought have found alternative employment for him in another company within the Boral group of companies, and that, he was underpaid by the respondent in relation to the last day of employment and claims the extent of the underpayment as a benefit due under his contract of employment.

It is common ground that—

(1) The business of the respondent conducted in Western Australia is one of contracting to the mining industry operating in and around the Kalgoorlie and Kambalda areas to apply a cementing agent to surface areas of fractured rock by way of a high pressure jet so as to bind and restrain the treated areas in underground mines. In industry parlance the process of applying the cementing agent in this manner is termed "shotcreting"

(2) Mr Ennis canvassed the respondent seeking employment.

(3) Subsequent to the employment enquiry by Mr Ennis a position of employment became vacant and was offered to him by the respondent and accepted.

(4) Mr Ennis commenced employment as a "Shotcrete Operator" on 24 November 1997, he thereupon undertook that work underground and participated in the associated training.

(5) The employment was subject to a twelve week probationary period.

(6) Employees engaged upon underground shotcreting, and that included Mr Ennis, work one of two daily shifts according to a roster arrangement over 8 consecutive days of duty and 4 consecutive duty free days. The rostered hours of duty equate to 60 hours work per week over the roster cycle.

(7) Within a short time of commencing the shotcreting work the applicant contracted a skin rash which increased with the passage of time.

(8) A general medical practitioner consulted by Mr Ennis regarding his skin rash believed it to be caused by his exposure to the cementing agent and the opinion of a specialist was therefore sought.

(9) Mr Ennis was removed from shotcreting and transferred to alternative work above ground on or about 23 February 1998 where he assisted the Maintenance Foreman to maintain mechanical equipment operated by the respondent.

(10) While assisting with the maintenance of the equipment Mr Ennis experienced a minor recurrence of the rash which he attributed to contact with the cementing agent residue adhered to parts of the mechanical equipment.

(11) When assisting the Maintenance Foreman Mr Ennis worked weekly Monday to Friday, both days inclusive, 60 hours per week.

(12) It was agreed between the parties that the applicant could not return to performing shotcreting work.

(13) Mr Ennis continued to assist the Maintenance Foreman until the respondent terminated his employment on 27 March 1998.

(14) In the weeks immediately preceding 27 March 1998 Mr Ennis proposed to his superior Mr JR Davis, that he be transferred to other employment of some kind within another Boral related company. Mr Davis indicated in response that no transfer arrangements existed between separate companies and that he, Mr Ennis ought formally express to the companies of his choice his interest in gaining employment.

(15) There was no fault on the part of Mr Ennis which caused the termination.

(16) The respondent transferred an employee from underground work to replace Mr Ennis upon the mechanical maintenance work.

The parties are at odds as to the timing and advice the respondent gave to the applicant that his services were to terminate. In my view the differences in the versions of what is said to have occurred is not material. What is plain from both versions is that at or about four weeks prior to 27 March 1998 there was an indication to Mr Ennis that the termination of his employment was imminent and no later than two weeks prior to 27 March 1998 he knew that his employment would end on the date it did. Hence he had been afforded, a greater period of notice of the termination than the one week stipulated in his letter of appointment (exhibit 1 p.2). The notice given was therefore lawful and also reasonable.

Mr Ennis implies that the reason his employment was terminated was because of the disruption his rash had caused, and might further cause the respondent, there being no other apparent reason as in all other respects he had been a satisfactory employee and there was an ongoing volume of mechanical maintenance work to be done which required that a person continue to assist the Maintenance Foreman. Furthermore, when employed upon the mechanical maintenance work the respondent required that he work his weekly hours differently to when he had been employed shotcreting. That the respondent knew did not suit his personal circumstances and therefore Mr Ennis asserts such was done for the purpose of causing him dissatisfaction to the point that he would act to end the employment. That another employee was transferred to replace Mr Ennis upon the mechanical maintenance work, and that such employee had less service with the respondent than Mr Ennis, according to Mr Ennis shows that his removal from that work was not necessary, not justified, and unfair.

Further doubt must be cast upon the respondent's motive for the termination, it is said, in view of the respondent making no attempt to provide him with a transfer to another Boral related company.

Mr JR Davis gave evidence on behalf of the respondent and described Mr Ennis as a most satisfactory employee whom, because of unfortunate circumstances, could not be retained. The position to which Mr Ennis transferred above ground was opportunely created at the time of his transfer and provided the means to continue his employment where the likely exposure to the cementing agent used would be minimal, according to Mr Davis. Mr Davis highlighted that Mr Ennis had been on probation when he contracted the skin rash and indicated that had he wished to terminate the employment of Mr Ennis so as to avoid any inconveniences his condition might cause the respondent such could have been readily achieved at that time. Although Mr Ennis could not continue to perform the work for which he had been engaged Mr Davis says he considered Mr Ennis to be a most satisfactory employee and hence he established the above ground position to which Mr Ennis was transferred.

It is said to have transpired that the respondent's principal client, and on whose minesite the majority of mechanical maintenance work is performed demanded that the equipment used be maintained by either an appropriately accredited person or a person working under the direct supervision of such a person. Mr Ennis is not so qualified and the respondent says it was not practical that he be directly supervised on all work he performed, and that, coupled with the fact that the exposure of Mr Ennis to the cementing agent was not completely eliminated, meant the respondent both could not, and ought not, continue to employ Mr Ennis upon the mechanical maintenance work. No other above ground positions of employment existed and therefore it followed that the employment of Mr Ennis had to be terminated. Mr Davis says that he advised Mr Ennis that the termination was to occur at a particular time however changed circumstance and his wish to reduce the consequences the termination would have for Mr Ennis, allowed him to extend the employment for a further two weeks and it is this period which constituted the final period of notice to Mr Ennis. The volume of mechanical work remained to be done and an employee engaged to work underground subsequent to the employment of Mr Ennis, being also appropriately accredited to perform the mechanical maintenance work, was therefore transferred to that above ground work.

Mr Davis told the Commission that Mr Ennis is wrong to believe that the different hours of work arrangement he was required to work above ground was purposely selected to cause him personal difficulty. Unlike underground work, shift work was not required for the volume of mechanical maintenance work and his working week was that which suited the respondent's maintenance needs and consequently aligned with that of the Maintenance Foreman.

Boral Resources (Qld) Pty Limited is a different corporate entity to all other Boral related businesses in Western Australia. The Commission is advised that it operates completely separately and independently of them and no arrangement exists for the transfer of employees from one to another. This situation had been conveyed to Mr Ennis and, according to Mr Davis, it was also suggested to the applicant by him that he speak to staff within the Kalgoorlie office whom might assist him to frame and pursue approaches to other Boral related businesses however Mr Ennis did not follow that course.

I am satisfied that Mr Davis acted on behalf of the respondent with the intention of retaining Mr Ennis in its employ notwithstanding he was not able to continue in the role for which he had originally been engaged. I do not doubt the word of Mr Davis that he would have remained employed upon mechanical maintenance work were it not for requirements of the principal mining client imposed upon the performance of that work which he could not satisfy and the alternative was not operationally practical. It is plain that Mr Ennis could not work underground and no other position of employment existed above ground and hence the respondent was left with no alternative but to terminate the employment.

The Commission is convinced that an appropriately accredited employee was transferred to the position Mr Ennis had occupied for the sole reason that the respondent comply with the direction of its principal client.

The respondent was not obliged to find the applicant employment with a Boral related company as he seems to believe. Notwithstanding the respondent offered to provide him some assistance to seek employment with such businesses but he did not avail himself of that offer.

Plainly the dismissal was not unfair.

On the final day of employment, 27 March 1998, the applicant ceased work and departed the minesite well before the completion of his rostered hours of work for that day. Mr Ennis was paid wages for 2 of the 12 hours he was rostered to work and it is his claim that he is entitled to be paid for his full wages for the day because he elected to cease work early in response to a statement by Mr Davis that he would allow him to do so. This he took to mean that he would remain entitled to the usual wage for the day. In any event he claims to have worked for 5 hours on the day and not the 2 hours for which he was paid.

Mr Davis denies that he authorised the early cessation of work by Mr Ennis. His recollection of the event is that a supervisor informed him of the early cessation of work by the applicant. The respondent did not contest the number of hours Mr Ennis says he worked on the day.

I am satisfied that Mr Davis did not speak to the applicant regarding his ceasing work early. It is probable that whatever discussion took place relating to the matter occurred between Mr Ennis and the supervisor who then mentioned it to Mr Davis. The recollection of Mr Ennis is inaccurate and that causes me to treat with caution the meaning he ascribes to whatever may have been said in relation to an early cessation of work. Plainly the matter of wages to be paid was not expressly addressed. The Commission is not satisfied that the applicant had a right to payment of the full wage on his final day of employment. Given that there was no challenge to the assertion of Mr Ennis that he worked for 5 hours on the final day I therefore find that to be correct. He was therefore underpaid for 3 hours of work at the rate of $15.60 per hour which was due to him as a benefit under his contract of employment. The respondent will therefore be ordered to pay the applicant the sum of $46.80.

Appearances: Mr B. Walker on behalf of the applicant

Ms E. Mackey on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Steven Ennis

and

Boral Resources (Qld) Pty Ltd.

No. 717 of 1998.

4 December 1998.

Order.

HAVING heard Mr B. Walker on behalf of the applicant and Ms E. Mackey on behalf of the respondent the Commission, pursuant to the power conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Boral Resources (Qld) Pty Ltd pay Mr S. Ennis the sum of $46.80, being an underpayment of wages, within 21 days from the date of this order; and

THAT the abovecited application be otherwise dismissed.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Vicki Franks

and

Kelstar Pty Ltd t/a Lakers Tavern.

No. 763 of 1998.

COMMISSIONER J F GREGOR.

26 November 1998.

Reasons for Decision.

On 5 May 1998, Vicki Franks (the applicant) applied to the Commission for an order pursuant to s.29 of the Industrial Relations Act, 1979, (the Act) on the basis that she had been unfairly dismissed from employment with Kelstar Pty Ltd t/a Lakers Tavern (the respondent) on or about 28 April 1998.

Mr Randles, of Counsel, who appeared for the respondent raised a question concerning the proper identification of the respondent. He said that the application was filed against Lakers Tavern, when the correct identification of the respondent is Kelstar Pty Ltd t/a Lakers Tavern. Mr Randles argued that the onus is on the applicant in any application to ensure that he or she brings the application against the correct legal entity.

I agree this is a true description of the law to be applied however, one must take into account the opportunity that the applicant has to discover the full name of her employer. There is no evidence before the Commission to suggest that the applicant was ever presented with any information which otherwise than described the respondent as Lakers Tavern. The respondent filed an answer on 25 May 1998, which drew attention to the deficiency in the application, however, that Notice of Answer was filed outside the time which was then prescribed in the Industrial Relations Commission Regulations 1985. At that date an Answering statement was to be filed within 7 days of service of the Notice of Application. The applicant therefore had no opportunity to file an amendment to the application within a period which would keep her application alive. To deny her the opportunity to pursue her application when the Notice of Answer and Counter Proposal was filed out of time would be contrary to s.26 of the Act, particularly in the circumstances where there is no dispute between the parties that there was an employment relationship between them. The applicant filed the application against the entity which had been identified as her employer during the total period of her employment, she was given no reason to doubt that the term Lakers Tavern was the name her employer. The respondent is identified without any doubt. An amendment to the name by adding Kelstar Pty Ltd does no more than identify the respondent more precisely. The Commission is authorised to make amendments of this nature by s.27(1)(m). I will vary the name of the respondent. The records with show the respondent is Kelstar Pty Ltd t/a Lakers Tavern.

The applicant was employed by the respondent in December 1997 and she worked until 24 April 1998, as a bar attendant on a casual engagement. Usually she worked 17 hours a week. On a couple of times she worked less than that period but always on the same days of each week. There was the opportunity to change days but she never did, nor were there any difficulties with her employer about hours of work. She was unaware of any difficulty with her employment until late April 1998, when she was asked to work on a Friday night and she declined because she had made other arrangements. On the following Tuesday she came home to find her mother on the telephone in conversation with Ms Trudy Steele, the applicant's supervisor. According to the applicant's mother, Ms Steele had asked her to pass on that the respondent had given the applicant one (1) weeks notice. The applicant then had a discussion with Ms Steele who told her she would not be offered work after she had completed shifts for which she was rostered in the following week. Ms Steele asked her if she would work out shifts rostered for the following week. She refused and hung the telephone up.

The respondent's version of events as told by Ms Steele paints, if not, a different picture of the relationship at least a different emphasis on the events. The respondent says that the

applicant was employed as a casual bar attendant. During the course of an initial interview it was made clear that she had to be flexible and would be required to work extra shifts. Initially she did so. A record of the hours worked was exhibited (Exhibit R1). The exhibit set out a summary of all the hours worked by the applicant during the course of her employment. According to Mr Randles, this disclosed that the applicant was in fact flexible from December through to March were she worked a base roster of 17 hours spread over 3 set shifts on Thursday, Friday and Sunday afternoon but after the end of March she was unable or unwilling to work extra shifts. This was conceded by her in her cross-examination when she said she was unable to do so because her university studies recommenced. This meant she did not have the flexibility to work the same range of hours or shifts.

The respondent says that during this period it telephoned the applicant on a number of occasions and was unable to get any response to messages left either with a male or on the answering machine. There was never any explanation as to why the messages were not returned but what it meant for the respondent is that the applicant was unavailable to continue to work flexibly. This was the substance of her casual employment.

It is the respondent's view that the applicant was a true casual on the basis of a weekly hire which consisted of a bare roster of 17 hours. Additionally, the applicant was required to work various other hours depending upon the workload. This is demonstrated in Exhibit R1.

There was a telephone conversation between the applicant and Ms Steele, which led to Ms Steele, telling the applicant that she would not be offering her work after the completion of the next week of shifts which had already been allocated. The applicant's response was that she would not work out that week. This, Mr Randles concedes she was as a casual entitled to do because she had no obligation to work if she did not want to.

In summary, Mr Randles said there are three (3) things to consider. First the proper identification of the respondent. Second, it is most likely there was no termination because the applicant was on a weekly hire as a casual employee and her weekly hire came to an end after her discussion with Ms Steele when she declined to work the last week of her engagement. Third, there is nothing unfair about the termination in any event. It was made clear to the applicant when she was engaged that she was required to work flexibly. The applicant admitted this in cross-examination. In due course, because of university commitments she was unable to provide service on a flexible basis as and when required. The termination was simply a case of the applicant being unable to perform her part of the employment contract and there was nothing unfair about the contract being brought to an end on that basis.

Before I deal with the question of creditability of witnesses, I need to deal with the law to be applied.

It is for the applicant to establish that the dismissal was in all the circumstances unfair. The test for ascertaining whether a dismissal is harsh, oppressive or unfair is that outlined by the Industrial Appeal Court in *Undercliff Nursing Home v. Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385*. The question to be answered is whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair but if the employment has been terminated in a manner which is procedurally irregular that will not of itself necessarily mean the dismissal is unfair (*see Shire of Esperance v. Mouritz (1991) 71 WAIG 891* and also *Byrne v. Australian Airlines (1995) 65 IR 32*). In *Shire of Esperance v. Mouritz,* Kennedy J also observed that whether an employer in bringing about a dismissal adopted procedures which were fair to the employee, is but an element in determining whether the dismissal was harsh or unjust.

The Commission heard evidence from the applicant. She described herself as an honest person and I have no reason to doubt that she is, however, when assessing the question on the balance of probabilities whose evidence the Commission would accept, I note that there is a considerable difference between the information that the applicant gave to the Commission in examination in chief and what she was prepared to admit to Mr Randles in cross-examination. I take into account that she was unrepresented but even allowing for that fact there are considerable differences between the versions of events. The most significant being that in her examination in chief she gave the impression that the employment was structured in regular shifts when Exhibit R1 clearly show to the contrary.

I heard evidence from Ms Trudy Steele on behalf of the respondent and even though she was not subject to any pressing cross-examination, I have no reason to believe that her evidence did not truthfully relate the events as she recalled them. In cross-examination the applicant eventually agreed with a number of the propositions that Ms Steele advanced. I consider that the evidence of Ms Steele is probably more reliable and where the applicant and respondent differs, I favour that of the respondent.

The issues in this case are not complicated. The applicant was employed by the respondent as a casual bar attendant. The parties agreed that there was a base number of shifts to be worked each week. That work was done on Thursday, Friday and the Sunday afternoon. The applicant agreed that she would work flexibly as a casual employee and did so for the first few months of her employment. The relationship proceeded along without any difficulty during that period. Where the relationship started to fray was when the applicant recommenced her university studies and became less available to cover shifts from that time on. The respondent, on the evidence, made a number of attempts to contact her to work extra shifts but there was little response from her. I accept the version of events from Ms Steele that there were a number of occasions when she left messages on the applicant's contact phone number either by giving the message to a male person or on a message machine. Only on one occasion was there any response.

This state of affairs continued until Ms Steele raised the matter with Mr Gastev, the Manager of the respondent. Between them they decided that the relationship was no longer a productive one for the respondent. Ms Steele made a telephone call to the applicant's contact number, for the purpose of letting the applicant know that the respondent did not wish to continue the relationship. The mother of the applicant answered the call. I accept Ms Steele's story that she knew it was more appropriate to give this advice directly to the applicant but I accept her story that she was pressed by the applicant's mother to tell her the reason for the telephone call. The applicant then had a discussion with Ms Steele which led to Ms Steele telling the applicant that after the completion of the next weeks roster of shifts she would no longer be required and the applicant's response was that she would not work those rostered shifts.

Because of these events it is more likely than not that the employment relationship came to an end by an effluxion of time, the applicant was a bona-fide casual employee and the contract would have come to an end at the next set of rostered shifts. However, the applicant exercised her right not to work those shifts and in effect she resigned. Even if what she did cannot be seen as a resignation, the contract would have expired at the end of the week in any event. This means that the applicant is unable to mount an application under s.29 of the Act because there had been no dismissal.

If I am wrong and there was a dismissal, in all of the circumstances, the dismissal was not unfair. It may have been inconvenient or even upsetting to the applicant to be dismissed but she has not been denied a fair go all round. The respondent made all reasonable attempts to communicate with the applicant. The applicant's own conduct in the last telephone conversation with Ms Steele was at least contributory to the relationship being brought to a conclusion.

On the rules to be applied as they are set out in the *Undercliffe Case (ibid)* and in the *Shire of Esperance v. Moritz (ibid)* there has been no unfair dismissal. For those reasons the application will be dismissed.

Appearances: The applicant appeared on her own behalf.

Mr Randles, of Counsel, appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Vicki Franks

and

Kelstar Pty Ltd t/a Lakers Tavern.

No. 763 of 1998.

COMMISSIONER J F GREGOR.

26 November 1998.

Order.

HAVING heard the Applicant on her own behalf and Mr A Randles, of Counsel, on behalf of the Respondent, the Commission, pursuant to the powers vested in it by the Industrial Relations Act, 1979, the Commission hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michael John Hartnett

and

Skilled Engineering Limited.

No. 16 of 1998.

CHIEF COMMISSIONER W.S. COLEMAN.

5 November 1998.

Reasons for Decision.

CHIEF COMMISSIONER: In August 1996 the applicant was employed by the respondent, a labour hire company, to supervise the sulphuric acid rail load out at the Kalgoorlie Nickel Smelter (KNS). For this he was retained on an annualised salary of $57,000; that was subsequently increased to $60,000 from 7 June 1997. The job was physically demanding. The load out was undertaken in the open and performed wearing full protective clothing and equipment.

The applicant was the first supervisor appointed to the new acid load out installation. He was the respondent's most senior employee on site; there was one other full time employee under this control. From time to time casual employees were trained and employed on load out duties. The status of the position and level of remuneration reflected the necessity for the applicant to have "ownership" of the job. This, I understand to express the aptitude, initiative and commitment required to discharge the respondent's contractual obligations by planning work routines for the acid loading, training other staff, setting up safe work procedures and liaising with the client contractor (Chemtrans) and the plant's owner (Western Mining Corporation). These duties were discharged to the complete satisfaction of the respondent.

The employment relationship came to an end in December 1997. The applicant claims an outstanding contractual benefit under section 29(1)(b)(ii) of the Act.

This claim arises from the incidence of work performed on Sundays. The applicant asserts that while it is acknowledged that some recognition was to be given to the necessity to work on Sunday it was not envisaged that the position demanded a commitment to regularly work seven days a week. When the relationship was entered into the rail load out was to be a 6 day a week operation. The annualised salary accommodated this on the basis of a notional 48 hour week. Initially, the loading schedules were programmed Monday to Saturday. However, it is claimed that 7 day per week load outs became a regular feature of the operation. This it is argued required a commitment from the applicant that was above and beyond that contemplated when the contract of employment was entered into. To give efficacy to that contract it is claimed that an additional term must be implied for the payment of overtime for work performed on Sunday. Initially, it was claimed that the rate of which this payment should be calculated was to be double the hourly rate computed from the annualised salary. However, this was subsequently amended to claim payment at the flat hourly rate based on the annualised salary. It is conceded that the issue of overtime was never raised in discussions when the contract of employment was entered into.

The applicant submits that that term upon which the claim is based can be implied for the following reasons:

- The full scope of duties and commitment necessary to supervise the rail load out operation were not known when the contract of employment was entered into.

  Indeed, it was understood by the parties that the job requirements would become clearer after the applicant had undertaken the client company's induction course.
- At the induction course it was made clear that the acid loading was a "6 day a week operation" with a 6½ hour to 8 hour "window" during which the rail tankers could be loaded. (Exhibit 1).
- Subsequently rail tanker notifications from Westrail involved 7 days per week loadings. This came about as a result of the limited availability of tankers due to maintenance requirements and/or revised scheduling by the plant owner's transport division.
- The respondent's Kalgoorlie Manager acknowledged to the applicant that W.M.C. had "shifted the goal posts" with respect to demands being made to load sulphuric acid.
- The respondent's Kalgoorlie Manager advised the applicant that …"some body will pay…" overtime for work performed on Sundays.
- It was the applicant's understanding from previous experience in employment with the respondent that when the demands of the job increased, overtime payments were "picked up" by the client. However, the applicant acknowledges that this was never discussed when he took up the appointment.

The claim, details of which are appended to the application, identifies hours worked on Sundays by the applicant in the period from 1st September 1996 to 30th November 1997. The total was subsequently amended to claim payment for 44.5 hours at $22.40 per hour and $24.04 per hour for 83 hours.

In support of the claim the applicant called Mr Howard, the employee who worked on the acid load out under his supervision. Mr Howard commenced employment in March 1997 on casual rate and subsequently became a salaried employee. He claims that he was told the terms of employment were a six day week; there was no mention of a seven day week or of overtime payments. However, that become an issue "almost straightaway"! Mr Howard reiterated the applicant's evidence about discussions with the respondent's Manager and the assurances given about payment of overtime. Obviously he was not privy to discussions between the applicant and the respondent when the operation commenced. Mr Howard's position with respect to the requirement to work on Sunday is different from the applicant's evidence.

The respondent presented evidence from Mr Malpass now the National Operations Manager but formerly the Kalgoorlie Manager at the time the applicant commenced employment in August 1996. Mr Malpass had negotiated the respondent's contract with Chemtrans and had recruited the applicant to the position of supervisor.

The contract entered into between the respondent and Chemtrans was worked out on the basis of an estimate of tonnage of acid to be loaded. The discussions with the applicant on terms of his employment centred on the work requirements to accommodate the loading operation. Mr Malpass recalled that he had explained to the applicant that the annualised salary assumed an 8 hour working day to be undertaken over 6 days per week which were not necessarily Monday to Saturday. At the time the train loading schedules were not in place. Furthermore, he claims to have said that if it was felt that that the applicant was being "unfairly dealt with by working seven day a week, eight hours a day" he could

come and speak to the respondent. Mr Malpass explained that if those circumstances arose it could only mean that extra acid was being loaded and that would be grounds to approach Chemtrans for extra payment.

Mr Malpass stated that up until December 1996 when he relinquished the position of Manager at Kalgoorlie, the applicant had not raised the issue of extra payment.

In December 1996 Mr Hanson took over as acting Manager. His appointment was confirmed in February 1997. Mr Hanson was called to give evidence. He was not involved in negotiating the contract between the respondent and Chemtrans but became aware of the contractual arrangements for loading acid when the person working with the applicant had his employment terminated. The applicant raised the issue of Sunday work but at that time the primary concern had been the termination of employment of the other employee.

From Mr Hanson's evidence it appears that the rate of pay had been a matter which concerned the applicant at that time. The matter of payment for Sunday work was taken up with him by the applicant three times between March and September, 1997.

When the applicant commenced employment he had been offered an annualised salary of $60,000. However this had subsequently been reduced to $57,000 after discussions initiated by the respondent. This was accepted by the applicant at the time. However when the co-worker who had commenced with him was terminated from employment the applicant pressed the respondent for an increase in salary. The annualised rate was increased to $60,000 in June and discussions were held with Chemtrans on the possibility of more money under the contract.

Mr Hanson, conceded that the applicant's contract did not envisage that there was going to be a 7 day week or that it would happen on a regular basis. However, that is not to say that his evidence was contrary to that of Mr Malpass. No one accepted that the position to which the applicant was appointed required a 7-day per week commitment each and every week. Mr Hanson promoted the cause of additional remuneration for the applicant in discussions and in correspondence with Chemtrans (Exhibit C). However, what he set out in his letter to the Regional Manager of the client Company does not properly represent the terms of the applicant's contract with the respondent, nor the situation with respect to the total hours worked each week and the number of days being worked each week (See Exhibit 2).

A new arrangement was worked out by the respondent whereby the applicant would have a Monday to Saturday working week and payment at the rate of $140.00 per day for work on Saturday and Sunday. This was rejected by Chemtrans. Dialogue was attempted with W.M.C. but nothing came of the comments made by a supervisor for payment of Sunday work on the load out. This position was reached towards the end of October 1997. In November the applicant gave four weeks notice of termination of employment and subsequently commenced work with Chemtrans in December 1997.

As far as the respondent is concerned there is no need to imply a condition into the contract of employment to accommodate work performed on Sundays. The contract entered into with the applicant recognised the need for flexibility. There was to be "give and take" in that it was said to have been recognised that, on many occasions, the load out operation may be completed in less time than the notional 8 hour day. Furthermore, the annualised salary accommodated all of the vagaries of the position including the requirement to work on Sunday from time to time. Indeed, relief was available when Sunday work became a regular feature of the load out operation. Mr Howard, the applicant's co-worker, could undertake the supervisor's duties and trained casual relief were employed to complete the complement of workers need to undertake the load out operation. However, because they were casual workers that relief was not always available.

While the applicant had built up an expectation that there would be payment for work on Sunday, this was, from the respondent's point of view, contingent upon either a change in tonnage, loaded or a revision in the terms of the contract with the client company, Chemtrans.

The parties presented detailed submissions on implied terms under the law of contract. An extract of Cheshire & Fifoot "Law of Contract (Seventh Australian Edition, 1997)", Section 3—Implied Term (p348 to p362) was presented and extensively referred to by the counsel for the respective parties.

The commitment entered into by Chemtrans to meet the acid loading requirements of WMC dictated the terms of appointment between the applicant and the respondent. Indeed, the logistics of the operation and therefore the particular job requirements were to be clarified after the applicant accepted the position and when he attended the induction conducted by Chemtrans. The operational requirements for acid loading were set down by WMC in its advice to Chemtrans dated 4 April, 1996—

> "Daily production of acid is expected to be in the range of 1700-2000 tonnes, therefore the proposed transport arrangements will be to load approximately 36 tanks each day Monday to Saturday. Sunday will be reserved as a contingency and will be used as and when required to draw down tank levels at KNS caused by ether an outage or above average production. Train fleet sizes may vary, depending on wagon/tank availability and also in the future if acid is supplied to other locations besides Kwinana.
>
> At KNS 20,000 tonnes of acid storage is provided and a 15 wagon loading gantry is currently under construction which will enable rail access either side to permit 30 wagons to be positioned for loading. Preparatory work, together with connecting tank, walking and loading is anticipated not to exceed 8 hours. For safety reasons two operators are required to work together.
>
> Loading is normally expected to occur during daylight hours at KNS, however the operation must be prepared to load any time, day or night, seven days per week if necessary. Training will be given in all facets of safety, terminal operations and wagon load procedures." (Exhibit 3)

In my view there is no inconsistency between the operational requirements set out above, the information provided to the applicant at the induction by Chemtrans and the terms expressed to him by Mr Malpass about the demands of the job and the basis upon which the annualised wage was to be calculated. Importantly, there was a requirement to work on Sunday albeit that this was recognised not to be a regular feature of the employment arrangement. Nevertheless, it was stated to be a requirement and I accept the evidence of Mr Malpass in this regard. This was accepted to be a requirement by the applicant. However, there was a caveat to the contract which, like all of the terms, was expressed orally. It was this: if the incidence of seven day operational requirements became too onerous then the applicant could take it up with the respondent. It was not, as the applicant asserts, a fundamental change in the operational requirements with seven day loadings that precipitated the need to imply another condition to the contract. Nor was it the case that the only basis upon which the contract could be reviewed or varied was that there had to be an increase in the tonnage of acid loaded.

The incidence of a seven-day load out schedule was not in itself the basis upon which the adequacy of the wage was to be reviewed. It is the reasonableness of the demands placed on the applicant to perform this work within the context of all of the requirements of his position. Accepting as I have that it was open to the applicant to have the terms of his contract reviewed with the advent of the seven days a week requirement, the full scope of the demand placed upon him attracts consideration. This includes the hours worked over the week, the extent to which relief was provided and the fact that an annualised wage had been negotiated to accommodate the operation upon which he was engaged.

Exhibit 2 (as amended) details the number of hours worked each week, the number of days of the week worked and the frequency of Sunday work. The schedule prepared by the applicant of the hours worked on Sundays was amended and has been accepted by the respondent as a proper record.

I do not accept that with respect to Sunday work there were unreasonable demands placed upon the applicant in the period until the end of December 1996. Indeed, the opportunity was there for the applicant to raise it with the Manager, Mr Malpass at any time up until the time Mr Malpass resigned from that position.

In the five months from January 1997 until the end of May 1997, according to the claim, the applicant worked on Sundays on four occasions. This was not an unreasonable demand given that during that period the total hours worked in excess of 48 hours occurred only once (ie 65 hours week ending 31 May 1997). For another week ie week ending 15 March, the applicant worked 48 hours. On nine occassions he worked between 40 hours and and 47 hours a week; for four weeks his total hours were between 32 hours and 36.5 hours and for the rest of the period his weekly hours less than 25.5 hours per week. There were two weeks in the period for which time sheets were not available.

In June 1997 the applicant received an increase in his annualised wage. In my view, this reaffirmed the nature of his employment arrangement in that the need for flexibility continued to be recognised.

In the period from the beginning of June 1997 until his employment ceased in December 1997 the incidence of Sunday work totalled 14 occasions. On two occasions the applicant worked consecutive Sundays. In October 1997 he worked on Sunday for four consecutive weeks. Also during this period, Sunday work was undertaken on four occasions when total weekly hours worked exceeded 48 hours.

Taking into account the availability of relief, the frequency of Sundays worked, the hours worked each week and the number of hours worked on Sundays, I consider that within the terms of the contract there are grounds to recognise that only work performed on three Sundays out of the fourteen worked in the period should attract recompense over an above the wage at which the applicant was paid.

For efficacy of the contract it is necessary to imply a term to determine the rate at which this work should be paid. It is inappropriate to extrapolate an hourly rate from the annualised wage. That rate accommodates the notion of an all up wage taking into account all of the demands of the job including a notional 48 hours per week commitment.

The matter can best be addressed on the basis of payment which the parties had proposed when a revised contract was under consideration i.e $140 per day for work on Sunday without reference to the number of hours worked. This gives business efficacy to the contract and is a term which is necessary for the reasonable and effective operation of the contract given the circumstances. To this end, I will order the payment of $420.00 (gross) to the applicant. This is reflected in the Minutes of Proposed Order which now issues.

Appearances: Mr Gregoriadis (of Counsel) on behalf of the Applicant.

Ms Mackey (of Counsel) on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michael John Hartnett

and

Skilled Engineering Limited.

No. 16 of 1998.

CHIEF COMMISSIONER W.S. COLEMAN.

6 November 1998.

Order.

HAVING heard Mr Gregoriadis (of Counsel) on behalf of the applicant Ms E. Mackey (of Counsel) on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the respondent pay to the applicant the amount of $420.00 (gross) being for compensation for loss and injury to the applicant for contractual entitlements from employment.

(Sgd.) W.S COLEMAN,
[L.S.] Chief Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Elizabeth Ann Heslington

and

Penman Holdings Pty Ltd T/a Video Ezy Gosnells.

No. 1188 of 1998.

COMMISSIONER A.R. BEECH.

20 November 1998.

Reasons for Decision.

The issue between the parties in this claim of alleged unfair dismissal is whether the applicant, Ms Heslington was truly a casual employee or not. If she was indeed a casual employee, then she was not dismissed because the decision of the respondent not to offer her more hours followed the completion of her last complete period of employment. The respondent operates a video rental shop. Ms Heslington was employed as a sales assistant, assisting in the hire and purchase of videos and games and restocking shelves. As a former customer of the shop, Ms Heslington had been offered the opportunity to work in the shop, an opportunity which she accepted. After two periods of "training" she was told that she would be employed and that she would work, on average, eight hours per week. There is some dispute over the precise words used by the manager of the shop when she was employed and it is unfortunate that he was not called to give evidence of his recollection of the conversation. On the evidence of Ms Heslington, he told her that she had a "shift". Although Mr Saulsman, the owner of the business who gave evidence in these proceedings, disputes that these words were used, he was not present at the time and I accept Ms Heslington's evidence on that point.

Ms Heslington was employed over a period of approximately two months from the 5th April 1998. She was paid as a casual employee. Her evidence, which is uncontested, is that for the two month period she worked regularly each week, although the hours and the days upon which they were worked varied. The variation was to accommodate the hours and days to be worked that week by the other staff members. I am left with the impression that the hours worked each week was the subject of considerable flexibility for precisely that reason. Everyone worked in together to accommodate the changing availability of the other shop assistants. Thus, for example, if another shop assistant was unavailable due to studies or a medical appointment, another employee would either work those hours or exchange shifts. Therefore, in order find out when she would be working Ms Heslington would telephone the shop on Sunday each week.

On Sunday the 7th June 1998, Ms Heslington telephoned the shop, only to be told that the roster had not yet been prepared. Ms Heslington's efforts to find out in the following days what hours she would be working were fruitless. She went into the shop on Wednesday the 10th June 1998, a day upon which she would ordinarily expect to work, to find out when her starting times would be. She was informed by the manager that she would not be offered any more hours. Her evidence is that Mr Regan said he would "have to let her go". The discussion with the manager was polite, it seems, and, among other things, the manager did refer to a downturn in business and that he would be working more hours now. However, the manager also decided that it would be preferable for Mr Saulsman to speak to Ms Heslington and the manager asked the owner to come to the shop to explain the situation to Ms Heslington.

Mr Saulsman then came to the shop and explained to Ms Heslington that the business was not profitable and that he, in conjunction with the manager, had decided that the manager should spend more time in the shop. This would not cost the shop any more for his salary, but it would save on the wages of one of the casual staff. The manager had chosen Ms Heslington as that casual staff member, because she had been the last person employed. According to Mr Saulsman, Ms Heslington accepted that advice and I accept his evidence on this point because of Ms Heslington's evidence that she only became annoyed when she realised that she would not be paid her wages at that time. The evidence is that Ms Heslington

became abusive and, indeed, threatened to take videos from the shop in satisfaction of her wages unless she was paid at that time. Ms Heslington does not dispute this version of events and I accept Mr Saulsman's evidence. As a result of Ms Heslington's antagonistic reaction, Mr Saulsman made arrangements for a cheque to be prepared in an amount calculated by him, and Ms Heslington was given that cheque. She was required to return her work shirt and key. She did so and departed. She claims to have been dismissed and that her dismissal was unfair.

Conclusion

It is quite clear that whether an employee is a casual or not depends upon more than merely the manner in which the employee is paid. A person may be paid as a casual because it is administratively convenient for an employer to do so. Payment as a casual connotes a wage rate which includes annual leave and public holidays for which the employee is not otherwise paid. But an employee who is paid as a casual, whose working arrangements show a pattern of regular and ongoing employment where there is an expectation on the part of the employee that they have regular and ongoing employment on regular hours each week, and a corresponding expectation on the part of the employer that the employee will be available and will work those hours on a regular basis, is likely to be a part time employee rather than a casual.

In this case, Ms Heslington describes herself as casual and part-time in her application. However, what is of more significance is not the label attached to her employment but the pattern of her working. I accept her evidence that she worked each week over the two month period and that her hours were a minimum average of seven or eight hours. However, it is also clear from her evidence that there was no set pattern to her hours. She was required to ring in each week in order to see what hours she would be working. It is true to say that the reason for the telephone call was not to see whether she would be working, but rather to see when she would be working but her pattern of work was characterised by a flexibility and informality that leads more towards the conclusion that she was a casual employee. This conclusion is reinforced by the flexibility in the working pattern of the other staff which is evident from the wages book which became Exhibit A. Also, on one occasion, Ms Heslington refused the opportunity to work on a particular Sunday. It may well be, as she insisted, this only occurred on one occasion and for the most valid of reasons, but it is an example that her employment was characterised by sufficient flexibility and uncertainty that there was no obligation on her part to accept the particular hours offered, and further, a lack of certainty on the part of the employer that she will work the shifts offered.

I therfore find, on the evidence, Ms Heslington was a casual employee. The fact that she was a casual does not end her claim for that reason alone. A casual employee can certainly be dismissed and that dismissal can be unfair. If a casual employee is rostered for work and starts that shift, but is told to leave part way through that shift, I can see no reason in principle why a dismissal has not occurred. But where, as here, Ms Heslington had completed her previous roster and was informed before she commenced another roster that the respondent, for the reasons explained, would not be offering further work, it is difficult to see how a dismissal has occurred. Although the decision not to offer Ms Heslington more hours was handled extremely poorly by the manager of the shop in not telling her before the Wednesday, I cannot conclude that the circumstances amount to a dismissal for the purposes of the *Industrial Relations Act, 1979.*

Even if this conclusion is not correct, and there was a dismissal, it is difficult to see what the Commission's intervention would produce. She does not challenge the respondent's decision to have the manager of the shop work more hours for the sake of the financial difficulties of the business. She was also the last person engaged. I have not found any other issue referred to by Ms Heslington to be relevant. The fact of the financial situation of the business and that she was, effectively, the shortest serving employee, does not suggest unfairness. Although the manager handled the issue poorly, I accept that Mr Saulsman's subsequent explanation to Ms Heslington did much to redress that situation. The deterioration in the meeting which arose from Ms Heslington's understanding that she would not be paid that day does not otherwise lead to the conclusion that the dismissal was unfair.

Accordingly, Ms Heslington's application is dismissed.

Appearances: Ms E.A. Heslington on her own behalf as the applicant.

Mr T. Saulsman on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Elizabeth Ann Heslington

and

Penman Holdings Pty Ltd T/a Video Ezy Gosnells.

No. 1188 of 1998.

20 November 1998.

Order.

HAVING heard Ms E.A. Heslington on her own behalf as the applicant and Mr T. Saulsman on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be dismissed

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Beverly Hornibrook

and

Mark Raine T/A Around Australia Adventures.

No. 1451 of 1998.

25 November 1998.

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions, as edited by the Commissioner.)

COMMISSIONER C.B. PARKS: Before the Commission is an application made pursuant to section 29 of the Industrial Relations Act 1979 wherein it is alleged that the respondent failed to allow to the applicant benefits due under a contract of employment.

No appearance was entered on behalf of the respondent. However, the Commission being satisfied, that the prescribed notices and other correspondence have been forwarded to the respondent by pre-paid postage and that none have been returned unclaimed, is therefore also satisfied that the respondent has received advice of the hearing before the Commission but has elected not to be heard regarding the claims made. Pursuant to the powers contained in s27 of the Act the Commission decided to proceed in the absence of the respondent and determine the matter.

The benefits claimed are those contained in a letter dated 9 July 1998, addressed to Mark Raine, and which is appended to the application filed in the Commission. They are—

"• Wages to 16th June are outstanding (a week and one day) to the value of $695.

- Holiday pay entitlement to the value of $532.
- One week's statutory notice to (sic) value of $661.
- I have not received a Separation Certificate as required by law.
- A Group Tax certificate for the year ended June 30 1998."

The applicant sought not to proceed in relation to the last mentioned two items, correctly so in my view.

Ms Hornibrook has informed the Commission that she has received the payment of $695.00, by cheque, representing the wages aspect of her claim and that the cheque is drawn in the name of "Around Australia Adventures". Hence it is that Ms Hornibrook now seeks to proceed before this Commission only in relation to two of the original claims, those being what has been described as "holiday pay" and that related to "notice".

Having heard the applicant from the bar table I am satisfied that the matters of holiday pay and notice of termination were not established as terms of employment between her and the respondents upon engagement, nor were they agreed during the period of employment, hence they were not terms of her contract of employment. This should be no surprise to the applicant given that she had referred her claims to the Department of Productivity and Labour Relations and has been advised thereon. That advice appears in a Departmental memorandum (exhibit 2) wherein appears the heading identified with the letters "ALV", which I believe is reasonable to assume refers to annual leave, there is the notation "Per Min C ALV Provisions". This I take to be an assessment by the Departmental officer that the right to annual leave arose under the Minimum Conditions of Employment Act 1993.

Further, under the heading "Notice Period", there appears the acronym and words "AIRC—federal legislation". These I take to be his assessment that the entitlement arises under a Commonwealth statute involving the Australian Industrial Relations Commission, and probably the Workplace Relations Act 1996.

The two claims which have proceeded before this commission plainly do not arise as entitlements under the contract of employment that had existed. Consequently they are not claims of the type described in section 29(1)(b)(ii) and therefore may not be prosecuted before the Commission. The application will therefore be dismissed.

Appearances: Ms B. Hornibrook on her own behalf

No appearance on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Beverly Hornibrook

and

Mark Raine trading as Around Australia Adventures.

No. 1451 of 1998.

3 December 1998.

Order.

HAVING heard Ms B. Hornibrook on her own behalf and there being no appearance on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT this application be and is hereby dismissed.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Christopher John Howard

and

Skilled Engineering Limited.

No 101 of 1998.

CHIEF COMMISSIONER W.S. COLEMAN.

17 November 1998.

Order.

HAVING heard the testimony of Mr C.J. Howard in Matter No. 16 of 1998 and there being agreement between the parties that this application be determined having regard to the findings made in Matter No. 16 of 1998,

NOW THEREFORE, the Commission hereby determines that on the evidence presented concerning the terms of the contract of employment and incidence of work on Sunday that the applicant be paid for work on three of these occasions at the rate of $140 per day.

The respondent is to pay the applicant within 14 days of the date of this Order the sum of $420.00 gross for outstanding contractual entitlements.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

William Hull

and

City of Mandurah.

No. 706 of 1998.

COMMISSIONER S J KENNER.

25 November 1998.

Reasons for Decision.

THE COMMISSIONER: This is an application by William Hull ("the applicant") made pursuant to s 29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act") for orders pursuant to s 23A of the Act, arising out of his summary dismissal by the City of Mandurah ("the respondent') on 27 March 1998. The applicant claims that his dismissal was harsh, oppressive and unfair and seeks reinstatement by the Commission.

The applicant was employed by the respondent in or about October 1994, pursuant to the terms of the Municipal Employees (Western Australia) Award, 1982 ("the Award"), an award of the Australian Industrial Relations Commission ("the Federal Commission"), made under the then Conciliation and Arbitration Act 1904 (Cth). The respondent is a named party to the Award.

The respondent, a local government authority, wholly contests the applicant's claim and says that the respondent did not dismiss the applicant harshly, oppressively or unfairly and denies that the applicant is entitled to the relief claimed or any relief at all. Furthermore, the respondent has agitated a number of challenges to the Commission's jurisdiction, arising from the application of the Award to the applicant's employment. Those jurisdictional challenges are as follows—

(1) That the Act only extends to employees whose employment is regulated within the "state industrial relations system" and thereby excludes employees covered by federal awards;

(2) That the terms of the Award are inconsistent with the terms of the Act in relation to harsh, oppressive or unfair dismissal pursuant to s 109 of the Commonwealth Constitution ("s 109") and are accordingly invalid to the extent of that inconsistency; and

(3) That the terms of the Act in relation to harsh, oppressive or unfair dismissal are inconsistent with the terms of the Workplace Relations Act 1996 (Cth) ("the WR Act") relating to unfair dismissal, for the purposes of s 109 and are therefore invalid to the extent of that inconsistency.

By agreement between the parties, the jurisdictional issues raised by the respondent were heard as a threshold issue.

Furthermore, by direction of the Commission the jurisdictional issues raised in this application were to be heard and determined by way of written submissions of the parties and that the original hearing dates for the substantive application were vacated. Subsequently however, both parties availed themselves of the opportunity to put further oral submissions to the Commission.

The applicant was represented by Mr Drake-Brockman of counsel and with him Mr Howlett of counsel. Mr Randles of counsel appeared on behalf of the respondent. Both counsel for the applicant and the respondent put detailed and careful submissions to the Commission, both written and oral, in relation to the jurisdictional issues raised.

For the purposes of convenience, I will deal with the jurisdictional issues raised in the order in which they are set out above.

THE UNFAIR DISMISSAL PROVISIONS OF THE ACT AND FEDERAL AWARD EMPLOYEES

The respondent's argument in relation to this head of challenge to the Commission's jurisdiction, relies upon the application of the decision of the Full Bench of the Industrial Relations Commission of New South Wales ("the NSW Commission") in *Russell Geoffrey Moore v. Newcastle City Council: Re The Civic Theatre Newcastle* (1997) 77 IR 210 to the unfair dismissal provisions of the Act.

Counsel for the respondent put a number of propositions supporting its contention that the unfair dismissal provisions of the Act do not extend to employees covered by Federal awards. It was submitted that from an analysis of relevant sections of the Act, including s 3, dealing with the Act's application offshore, s 6 objects, s 14A regarding dual appointments with the Federal Commission, s 51 national wage case decisions and Part II C arrangements with other industrial authorities, the Act recognises a separate and distinct system of State industrial regulation from the federal system.

Mr Randles further submitted that as s 29(1)(b)(ii) dealing with contractual benefits claims under the Act does not contemplate employees covered by federal awards, it would be inconsistent for the legislature to have intended federal award employees to gain access to the unfair dismissal provisions of the Act. Furthermore, counsel submitted that the terms of s 23(3)(d) of the Act have operation such that employees who have a remedy in relation to unfair dismissal under the WR Act are excluded from the Commission's jurisdiction.

The respondent referred to the legislative history of provisions of the Act from its enactment in 1979 and made reference to various second reading speeches of the responsible Ministers over that time, to the effect that reference to these parliamentary debates confirms the plain and ordinary meaning of the Act to exclude federal award employees: *s 19(1) Interpretation Act 1984.* Furthermore, counsel submitted that the definition of *"employee"* contained in s 7(1) of the Act, was never intended to include an employee covered by a federal award. To that extent, the respondent sought to rely upon the decision of Fielding SC in *Woods v Linfoot Cleaning Services* (1998) 78 WAIG 3373. Further, the respondent submitted that it was never the intention of the legislature in this State to provide employees covered by federal awards, with a choice as to unfair dismissal jurisdiction, when those not covered by federal awards do not have the same choice.

Mr Drake-Brockman submitted that according to the ordinary and natural meaning of the words used in the Act, there was no basis to argue that there is any limitation imposed on the Commission's jurisdiction, such that employees covered by a federal award are necessarily excluded. Counsel referred to the legislative history of the provisions of s 29 of the Act, commencing with the enactment of the then s 29 of the Industrial Arbitration Act 1979, which came into effect by proclamation, on 1 March 1980: *Government Gazette* 8 February 1980 at 383. Counsel argued that at that time, in order to enliven the jurisdiction of the Commission in relation to an unfair dismissal claim, the elements required to be established were—

(1) There must be an industrial matter;

(2) The claim must be made by an employee; and

(3) The claim must allege that the employee had been unfairly dismissed from his employment.

Counsel submitted that those elements are essentially the same as are required under the Act in its present form. Furthermore, Mr Drake-Brockman submitted that as at the time of the enactment of s 29 of the Industrial Arbitration Act, 1979, there were no express limitations in that Act, such that employees covered by a federal award were beyond the Commission's then jurisdiction.

It was submitted that on its plain and ordinary meaning, the provisions of the then s 29 and indeed the present provisions of the Act relating to unfair dismissal, were and are clear and unambiguous and no resort is required to extrinsic aids to interpretation. However, counsel submitted that even if regard is had to extrinsic aids to interpretation by way of reference to various parliamentary debates accompanying the enactment of the Industrial Arbitration Act, 1979, there was no basis to conclude that it was the intention of the legislature to exclude employees covered by federal awards.

In further support of the applicant's arguments, Mr Drake-Brockman made various references to the *Review of Western Australian Labour Relations Legislation*, prepared by Fielding C (as he then was) for the then Minister for Labour Relations. The thrust of the references to that report, supported a submission that individual employees had an unqualified right of access to the Commission in relation to unfair dismissal and denied contractual benefit claims. In relation to the decision in *Woods* (supra), Mr Drake-Brockman urged the Commission as presently constituted to decline to follow that decision.

Mr Drake-Brockman also submitted that the decision of the NSW Commission in *Moore* (supra) is distinguishable and should not be followed in this jurisdiction. That submission was put on two bases. First, that the New South Wales legislation is of a different structure to the Act, in particular s 83 of the Industrial Relations Act 1996 ("the NSW Act") in that s 83 expressly refers to the exclusion of some employees from the unfair dismissal jurisdiction under that Act. Secondly, that the enactment of the NSW Act must be considered in the context of its historical setting, in that it came into effect following the coming into operation of the termination of employment provisions of the WR Act, which is to be contrasted to the position in this State.

Mr Drake-Brockman also referred to the terms of s 29 of the Act as being remedial in character in which case, its provisions should be construed beneficially: *Bull v The Attorney-General (NSW)* (1913) 17 CLR 370. Counsel also generally referred to *Statutory Interpretation in Australia* 3rd Ed DC Pearce and RS Geddes, and the observations of the learned authors at 164-165, in relation to the beneficial construction of s 29 of the Act. Furthermore, in terms of construction, counsel argued that subsequent amendments to the Act leading to the enactment of s 37A and Part IIIA, should not be used to support a narrow interpretation of s 29. It was submitted that these later amendments bore no relation to the terms of s 29 as originally enacted in the Industrial Arbitration Act, 1979.

Finally, counsel referred to the Constitution Act 1889 (WA), to the effect that by s 2, the Western Australian Parliament is empowered to *"make laws for the peace, order and good government of the Colony of Western Australia and its dependencies…"*. The thrust of this submission being that the Western Australian legislature and institutions established by the legislature, should not, without good or cogent reason, limit the scope or operation of the legislature's constitutional and legislative power. Unless there is present a clearly expressed Commonwealth law that is directly or indirectly inconsistent with a State law, the State law should be given its fullest effect.

In dealing with these arguments, it is first necessary to consider the terms of the decision of the Full Bench in *Moore*.

***Moore's* Case**

The proceedings *Moore* involved a reference to the Full Bench of the NSW Commission pursuant to s 193(1) of the NSW Act. The reference originated in proceedings before a single member of the Commission dealing with an application for relief from unfair dismissal. The applicant's employment was governed by the *Theatrical Employees (Live Theatre and Concert) Award 1982 (Federal)*. It was resolved in those earlier proceedings that, as the matter involved a test case, it was appropriate that it be referred to a Full Bench of the NSW Commission for determination. The preliminary issue argued before the Full Bench was whether the NSW Commission had jurisdiction to hear and determine the application under Part VI—Unfair Dismissals of Chapter 2 of the NSW Act. The issues for resolution by the Full Bench in *Moore* were whether the terms of the federal award and the WR Act created an inconsistency with the unfair dismissal provisions of the NSW Act and, also, whether the terms of the NSW Act in relation to unfair dismissal, excluded employees employed under the terms of federal awards.

By reason of the Full Bench's conclusion on the latter issue, the former issue of inconsistency for the purposes of s 109 was not determined. The arguments on the latter issue were as follows. Those against jurisdiction argued that the provisions of the NSW Act, in particular s 83 dealing with the referral of unfair dismissal claims when referring to "*any other employee*", were not intended to apply to employees who were covered by a federal award. They argued that the meaning of the phrase "*any other employee*" should be interpreted in a purposive sense, by requiring the Full Bench to interpret that phrase within the context of the NSW Act as a whole.

Those arguing in favour of the existence of jurisdiction were of the view that the phrase "*any other employee*" should be interpreted strictly in its literal sense and should not be read down to exclude any particular class of employee, including an employee regulated by a federal award.

Section 83 of the NSW Act relevantly provided—

> *"(1) This Part applies to the dismissal of—*
>
> *(a) any public sector employee, or*
>
> *(b) any other employee, except an employee for whom conditions of employment are not set by an industrial instrument and whose annual remuneration is greater than $62,200 (or such greater amount as is prescribed by the regulations)."*

There follows, in s 83 (2), exclusions from the unfair dismissal provisions, including employees under contracts of employment for specified periods of time or tasks; those serving a probationary period; employees on a casual basis for a short period; etc. There is no express exclusion in the NSW Act in relation to federal award employees.

The Full Bench held that it was unable to conclude that the phrase "*any other employee*" had a clear and unequivocal meaning. On this basis, the words used had to be considered in view of the contemporary approach to statutory interpretation, which places emphasis on the purpose of the statute and the context in which the subject expression appears: *Kingston v. Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423*; The Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations)* (1943) 67 CLR 335 at 346*; Hall v. Jones* (1942) 42 SR (NSW) 203*; K. & S. Lake City Freighters Pty Ltd v. Gordon and Gotch Ltd* (1985) 157 CLR 309 at 315.

The Full Bench analysed other provisions of the NSW Act and concluded that no other section of the NSW Act evinced an intention to cross the boundary into the area of federal regulation. Therefore, it followed, that if s 83 was to be interpreted as applying to federal award employees, it would, in the context of the statute as a whole, be unique. The Full Bench also held that s 152(1A) of the WR Act (as it then was) could not give s 83 a meaning which it otherwise did not have.

The Full Bench reviewed extensively the legislative history of the NSW Act, including various second reading speeches concerning the 1996 Industrial Relations Bill, observations of the NSW Commission in State Wage Case Decisions and concluded at 225—

> "*We consider, having regard to the history of the development of the two legislative schemes (State and Commonwealth), the repetition of the relationship between and the need for comity expressed by the National and State Wage Case decisions, together with the unquestioned legal position that federal awards would be paramount in situations of conflict with State laws, that to construe s 83 of the 1996 State Act as applying to employees covered by federal awards would require the manifestation of a clear intention to do so, either expressly or by necessary implication. Such a result could not, in our view, occur as an unintended consequence from competing arguable constructions of section 83 as would lead to the ready adoption of the phrase "any other employee" as being unlimited in its scope. A review of the statements from the second reading speeches above set out does nothing other than to confirm what we see as an intention to maintain two separate (federal and State), but complementary, systems of industrial regulation."*

Furthermore, the Full Bench concluded that if it was the intention of the legislature to cover employees governed by either federal or State awards, there was no good reason to limit the coverage of federal award employees to those whose earnings were not greater than $62,200 but to impose no annual earnings limit on State award employees.

In it analysis, the Full Bench observed at 226—

> *"An examination of the use of the word "employee" throughout the statute, it seems to us, evinces an intention to put in place a State scheme applicable to employees within the State industrial relations aegis. ... That is to say nothing as to the effect of section 152(1A) of the Commonwealth Act not being taken to show an intention to cover the field in respect of the termination of an employee's employment to the exclusion of a State law or a State award, but simply that section 152(1A), and we would add section 170HA, cannot give s83 a coverage over federal award employees which s 83 does not otherwise have. That is, and can only be, a matter for the State legislature within the confines of its constitutional powers and limitations.*"

And further at 227—

> "*We think it tolerably clear that the only instruments falling within the definition of "industrial instrument", including an award and an agreement, are ones which are generated within the State industrial system. Similarly, "industry" must mean one "in and of New South Wales" by reason of the employees engaged in it being covered by State industrial instruments as the relevant and sufficient connection with NSW or, if not so covered, as being capable of such coverage: see: generally Ex parte Richardson: Re Hildred (1972) 2 NSWLR 423, Cosgrove v. International Opal Pty Ltd (1977) AR (NSW) 761, Maloney v. Hoffman (1980) AR (NSW) 318 and Chevron Breeders and Producers of Australia Pty Ltd v. Fast Food Service Development Pty Limited (1984) AR (NSW) 576; an employee under a federal award, of course, is in an industry, or in part of an industry, of wider or national boundaries and so, beyond the scope of the "industry" here defined. In other words, it seems to us, an industry located within and employing persons in NSW is one in and of NSW unless it be one regulated by a federal award in which case the relevant and sufficient connection with the State has been lost.*"

The Full Bench concluded that having regard for all of the matters before it, that federal award employees were excluded from the unfair dismissal remedies under the NSW Act.

The *ratio decidendi* in *Moore* is, in my opinion, for the following reasons and notwithstanding the able arguments of Mr Drake-Brockman, compelling in its application to the unfair dismissal provisions of the Act. For the same reasons, with respect, I agree with the conclusions reached by Fielding SC in *Woods* (supra).

The Statutory Scheme Under the State Act

The short title to the Act provides that it is "*an Act to consolidate and amend the law relating to the prevention and resolution of conflict in respect of industrial matters, the mutual rights and duties of employers and employees, the rights and duties of organisations of employers and employees, and for related purposes*".

The principal objects of the Act are set out in s 6 and provide as follows—

"6. The principal objects of this Act are—

(a) to promote goodwill in industry;

(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;

(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;

(d) to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes;

(e) to encourage the formation of representative organizations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organizations;

(f) to encourage the democratic control of organizations so registered and the full participation by members of such an organization in the affairs of the organization; and

(g) to encourage persons, organizations and authorities involved in, or performing functions with respect to, the conduct of industrial relations under the laws of the State to communicate, consult and co-operate with persons, organizations and authorities involved in, or performing functions with respect to, the conduct or regulation of industrial relations under the laws of the Commonwealth."

By s 7 the following definitions appear—

"award means an award made by the Commission under this Act;

employee means, subject to section 7B—

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

(b) any person whose usual status is that of an employee;

(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or

(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee, ...

"employer" includes, subject to section 7B—

(a) persons, firms, companies and corporations; and

(b) the Crown and any Minister of the Crown or any public authority,

employing one or more employees;

"industrial agreement" means an agreement registered by the Commission under this Act as an industrial agreement;

"industrial matter" means, subject to section 7C any matter affecting or relating to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter relating to ...

"industry" includes each of the following—

(a) any business, trade, manufacture, undertaking, or calling of employers;

(b) the exercise and performance of the functions, powers, and duties of the Crown and any Minister of the Crown, or any public authority;

(c) any calling, service, employment, handicraft, or occupation or vocation of employees,

whether or not, apart from this Act, it is, or is considered to be, industry or of an industrial nature, and also includes—

(d) a branch of an industry or a group of industries;"

An industrial matter may be referred to the Commission by an individual employee. The relevant provisions of ss 29(1)(b) and 23A provide as follows—

"29. (1) An industrial matter may be referred to the Commission—

(b) In the case of a claim by an employee—

(i) that he has been harshly, oppressively or unfairly dismissed from his employment; or

(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service…"

"23A.(1) On a claim of harsh, oppressive or unfair dismissal, the Commission may—

(a) order the payment to the claimant of any amount to which the claimant is entitled;

(b) order the employer to reinstate or re-employ a claimant who has been harshly, oppressively or unfairly dismissed;

(ba) subject to subsections (1a) and (4), order the employer to pay compensation to the claimant for loss or injury caused by the dismissal; and

(c) make any ancillary or incidental order that the Commission thinks necessary for giving effect to any order made under this subsection.

(1a) The Commission is not to make an order under subsection (1) (ba) unless—

(a) it is satisfied that reinstatement or re-employment of the claimant is impracticable; or

(b) the employer has agreed to pay the compensation instead of reinstating or re-employing the claimant.

(2) An order under subsection (1) may require that it be complied with within a specified time.

(3) If an employer fails to comply with an order under subsection (1) (b) the Commission may, upon further application, revoke that order and, subject to subsection (4), make an order for the payment of compensation for loss or injury caused by the dismissal.

(4) The amount ordered to be paid under subsection (1) (ba) or (3) is not to exceed 6 months' remuneration of the claimant, and for the purposes of this subsection the Commission may calculate the amount on the basis of an average rate received during any relevant period of employment.

(5) For avoidance of doubt, an order under subsection (1) (ba) may permit the employer concerned to pay the compensation required in instalments specified in the order."

It is trite to observe that s 29 is not a substantive head of power. It only refers to by whom matters may be referred to the Commission. The head of power in relation to such claims resides in s 23, which enables the Commission to enquire into and deal with any industrial matter referred to it.

Other relevant provisions of the Act include ss 14A and 14B dealing with dual appointments to the Commission and the Federal Commission; s 37A empowering the Minister to suspend an award where a Commonwealth award applies; provisions relating to State branches of federal organisations

and the adoption of rules of federal organisations in ss 71 and 71A; provisions dealing with arrangements with other industrial authorities in Part IIC and Part IIIA, dealing with federal award coverage.

It is apparent from these definitions that an "*award*" and "*industrial agreement*" for the purposes of the Act, can only be made by the Commission within the State system. Likewise, it follows that an "*industrial matter*" and an "*industry*" are in my view a reference to industrial matters and industry in and in respect of this State. This is consistent with the application of accepted legislative constitutional boundaries in that the State Parliament, in enacting the Act, put in place a system of conciliation and arbitration in relation to industrial relations and employment matters within the State arena.

By the terms of s 2 of the Constitution Act 1889 (WA), as noted above, the Western Australian Parliament is authorised to *"make laws for the peace, order and good government of the Colony of Western Australia and its dependencies…"*. It has been long established that provisions such as this in the various State Constitution Acts, have been interpreted in a restrictive sense such that State parliaments were restricted to legislating for persons, events or other matters with a sufficient connection to the State: *Welker v Hewett* (1969) 120 CLR 503. Notwithstanding the enactment of the Australia Act 1986, in particular s 2, giving State parliaments extraterritorial legislative power, it appears that the necessary element of a connection between the subject matter of the legislation and the State is still required: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *State Authorities Superannuation Board v Commissioner of State Taxation for the State of Western Australia* (unreported HCA 21 November 1996). The terms of s 3 of the Act, relating to off-shore application of the Act, are an example of the exercise of such extraterritorial legislative powers, recognising the necessity for the relevant connection with the State, as illustrated by the express terms of this section of the Act.

Additionally, despite the terms of the Australia Act 1986, there appears to have been no change to the essential fabric of the Australian Federation, such that State constitutional boundaries have been fundamentally altered: *Breavington v Godleman and Ors* (1988) 169 CLR 41; *Steven PH John Falherty v Laila Girgis F.C.* (unreported HCA 14 May 1987). In my view, these principles lend support to the proposition that the definitions of "employee", "industrial matter" and "industry" are to be interpreted within the boundaries of the State industrial relations system.

Principles of Interpretation

The contemporary approach to statutory interpretation requires a purposive approach to construction. Section 18 of the Interpretation Act 1984 (WA) requires a preference to be given in the interpretation of a provision of a written law, to a construction that would promote the purpose or object underlying the written law (whether expressly stated or not) to one that would not promote that purpose or object (see also: *Cooper Brookes (Wollongong) Pty Ltd v. Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304, 319-320*; Ross v. The Queen* (1979) 141 CLR 432 at 440).

Additionally, it is permissible, as an aid to construction, to have regard to extrinsic materials to assist in ascertaining the meaning of a written law in its context: s 19 Interpretation Act 1984 (WA). This would include prior enactments and repealed provisions of a statute to establish the interpretation of a statutory scheme: *Statutory Interpretation in Australia 4th Ed. Pearce and Geddes at paras 3.16-3.19.*

Consistent with the approach of the Full Bench in *Moore*, I would not be prepared to interpret the phrase "*employee*" for the purposes of s 29 of the Act, divorced from the context within which that phrase appears in the Act as a whole, despite the apparent attraction of this argument. The authorities referred to and relied upon by the Full Bench in *Moore*, going to the issue of interpreting general words in a statute consistent with their context, to which I have referred earlier in these reasons, are apposite to the matters here in issue.

The Historical Setting

The Act had its origins in the Industrial Conciliation and Arbitration Act 1900 ("the 1900 Act"). The 1900 Act was modelled on similar New Zealand legislation, which was in effect at that time*:* Industrial Conciliation and Arbitration Act 1894 (NZ). The 1900 Act pre-dated the first Commonwealth industrial relations statute by some four years. In the 1900 Act, "*worker*" was defined in s 2 as—

> "*Any person, of the age of 18 years or more, engaged in any employment other than clerical, in the service of an employer.*"

By necessity, that could not have included any person regulated by a federal award, as Commonwealth legislation was not then in existence.

The 1900 Act was divided into two parts, providing for conciliation and arbitration, which were designed to be complementary. The State was divided into industrial districts in respect of each of which there was a Board of Conciliation established. If disputes were not resolved by conciliation by the Boards, they could be heard by the Arbitration Court. The 1900 Act provided for the making of awards and industrial agreements between industrial unions, industrial associations and employers. Unquestionably, the 1900 Act established a system of conciliation and arbitration applicable to Western Australia. This is in contrast, as observed by the Full Bench in *Moore*, to the establishment of the federal conciliation and arbitration system, which had, as its purpose, conciliation and arbitration for the prevention and settlement of *interstate* industrial disputes.

For most of this century, under the Western Australian system, individuals were not able to bring claims in their own right to the Commission. Individuals were only able to pursue claims and grievances, under the auspices of an industrial organisation, which organisation would ordinarily be bound by a State award or industrial agreement. The exception to this was s 66(1)(f) of the then Industrial Arbitration Act 1912, which enabled, from 1963 to 1979, a person acting on behalf of less than 15 employees, to refer an industrial matter to the Commission, as long as in the opinion of the Commission, there was no union to which the employees could conveniently belong nor that the employees concerned should join with other employees to form a society that would be eligible to be registered as a union. That position changed in 1979 with the enactment of the Industrial Arbitration Act 1979 ("the 1979 Act"). The 1979 Act followed a review of its predecessor by the then Senior Commissioner Kelly ("*The Kelly Report*"), which recommended the adoption by the Government of the day of a new Act. The Kelly Report recommended that individual employees be able to make application to the Commission to protect basic entitlements. This included a proposal for an employee to refer to the Commission a claim that he or she had been unfairly dismissed or that he or she had not been allowed a benefit to which he or she was entitled under his or her contract of employment. Also, it was recommended that an employee be able to bring a claim in the Industrial Magistrate's Court for the enforcement of an award or order.

Those recommendations were adopted by the then Government and were contained in the Industrial Arbitration Bill 1979 ("the Bill"). In the second reading speech in relation to the Bill (*Hansard 16 October 1979*), the responsible Minister said at 3618—

> "*The Bill places importance on recognising the needs and rights of the individual. This is consistent with the Government's commitment to create a framework wherein the individual may go about his work without interference.*
>
> *One of the special privileges contained in the earlier legislation was to give unions sole right of access to industrial tribunals to the exclusion not only of other unions but also of individual employees. The individual employee was dependent upon the union or, in some cases, the Industrial Registrar or other official, if he or she wished to seek a remedy under the Act for any grievance he or she might have had. In 1963 some modification was made but this was extremely limited.*
>
> *The Bill provides employees with the capacity to move under the industrial law to protect certain basic entitlements. These are limited and therefore do not threaten the existence or viability of unions nor provide an incentive for them to leave the system.*
>
> *The Bill enables an employee, on his own account, to refer to the Commission a claim that he has been unfairly dismissed or that he has not been allowed a benefit to*

which he is entitled under his contract of employment—a right he did not have before."

At the same time, ss 50 and 51, empowering the Commission to issue general orders and to adopt National Wage Case decisions were also introduced in the Bill. In that respect, the Minister observed at 3619—

"An important further extension of the Commission's role is in its capacity to make general orders. Whereas these are presently limited to the extent that they apply only to those who are covered by awards and agreements of the Commission, they will now be able to be applied to all employees whether under an award or not. ...

The Government has been conscious that disparate wage movements can be harmful to the State's economy and are a cause of dissatisfaction to workers who receive differing amounts compared to their colleagues and workmates simply because they are covered by another—State or Federal—jurisdiction.

Therefore, a provision has been included requiring the Commission to consider and implement national wage decisions, unless there is good reason for not doing so. This is similar to legislation in other States and will provide desirable levels of consistency. The Commission will, however, be able to refrain from adopting a national wage decision if the particular circumstances in Western Australia are such that the Commission sees this as being necessary."

Those provisions, as adopted in the 1979 Act, have continued in essentially the same form to the present time.

Dual System

As with New South Wales, the separate schemes of regulation, both Commonwealth and State continued to develop separately, but with recognition, particularly in relation to wage fixation, of the need for co-operation and co-ordination. This is no more apparent by the express terms of s 51 of the Act, requiring the Commission to give effect to a National Wage Decision, referred to above. Furthermore, the position in this State has largely reflected the New South Wales experience in adopting, by and large, National Wage Decisions, but subject to particular State needs. References to the different legislative framework existing in Western Australia, as opposed to that under the WR Act, highlights the existence of separate systems of wage fixation.

Indications of the dual, but complementary, nature of the federal and State systems were illustrated in the *December 1994 State Wage Case Decision* (1995) 75 WAIG 23, where it was observed at 25—

"*In their most limited application the decisions of the Full Bench provide for adjustments which relate to rates of wages which are applicable generally to awards under the Commonwealth Act. In this respect the Full Bench's decisions repeat and extend wage increases available under the Arbitrated Safety Net Adjustment Principle established in the October 1993 National Wage Decision. At a broader level the August and September 1994 decisions establish a wage fixing regime applicable generally to awards under the Commonwealth Act but which to a significant extent repeat the particular statutory requirements of the federal legislation. That is the dimension of the National Wage Decision which on this occasion has the greatest relevance for this Commission in giving effect to that decision in terms identified under Section 51(2) of the Act. ... This is to be done without materially departing from the substance from the National Wage Decision and without imposing the statutory requirements of the federal Act while maintaining the integrity of the wage fixing system in this State.*"

Further, it was observed by the Commission in Court Session in the *March 1996 State Wage Case* (1996) 76 WAIG 911 at 913—

"*Initiatives taken in the National Wage Decision under Section 150A of the Act to make the $8.00 per week adjustment conditional upon changes to awards and the relevance of those awards being tested at the enterprise level, have to be seen within the wider statutory framework of the Commonwealth Act. It is the statutory commitment to maintaining the relevance of the award system and the protection of the 'no disadvantage test' which distinguishes the federal wage fixing system from that which operates under this jurisdiction.*"

The Commission in Court Session further observed at 912—

"*Likewise it is not intended to establish under the guise of the wage fixing system and award review process which will detract from the focus the Parliament has given through Section 12(2) of the Industrial Relations Legislation Amendment and Repeal Act, 1995 for awards, orders and industrial agreements to be reviewed within six months from 16 January 1996 to make provision for resolution of disputes and the inspection of records.*

The scheme of the wage fixing principles ***as they operate in this jurisdiction*** *provides the opportunity for parties to maintain the relevance of awards through structural efficiency reviews.*" (my emphasis)

The need for conformity, but having regard to the different legislative context and the separateness of the system, was further confirmed in the observations of the Commission in Court Session in this case at 922, dealing with the absence of similar provisions to ss 113A and 113B of the then Commonwealth Act, regarding enterprise flexibility provisions.

The views expressed in these cases illustrate, with respect, the continual existence of separate systems of industrial regulation, attempts to maintain comity between the two systems and the divergent legislative frameworks within which the two systems operate.

A review of other provisions of the Act support the clear identification of a separate, but complementary, federal and State system. These include provisions that I have already referred to for dual federal and State Commission appointments in ss 14A and 14B; provisions relating to State branches of federal organisations and the adoption of rules of federal organisations in ss 71 and 71A; provisions in Part IIC dealing with arrangements with other industrial authorities and Part IIIA in relation to federal award coverage.

Whilst as Mr Drake-Brockman submitted, s 37A and Part IIIA of the Act were inserted into the Act relatively recently, and may not directly affect the right of an individual to bring an application under s 29(1)(b), they confirm in my opinion, the clear distinction in the legislative scheme between those employees subject to the industrial relations system in this State and those in the Commonwealth jurisdiction.

Comments made by the responsible Minister during the committee stages of the Industrial Legislation Amendment Bill 1994, considering the then proposed s 23AA (now repealed), adverted to the State and federal system relationship in the following terms—

"*I note that the Minister now uses the words 'fair and proper' rather than 'adequate and alternate'. Obviously we will not know what those changes are until the Minister amends the federal Act. However, he has signalled that he intends to make changes, that it is not his intention to displace State legislation, and that it is all right for the States to take a different approach, provided it meets certain conditions. I believe in time our original proposition will be found to be the right one, even though I accept that the member does not agree with it. In time, the federal Government will accept that it is an adequate alternative remedy, although it now uses the words 'fair and proper'.*"

Further observations were made as follows—

"Those who got caught up in the federal system should never have been there in the first place. They rightly belong to the State system… We think it only fair and proper for those who would otherwise be dealt with in the State system should come back to it…"

Furthermore, in the second reading speech in relation to the Labour Relations Legislation Amendment Bill 1997 (*Hansard 20 March 1997*), the separateness of the wage fixing systems, federal and State, was confirmed when it was observed by the then responsible Minister dealing with proposals regarding federal award coverage at 726—

"*Federal award coverage: also re-introduced in this Bill are provisions to rationalise federal and state award coverage by a new requirement that unions that choose to go federal think carefully about the potential loss of state*

coverage. ... In practical terms, it means that a union seeking a federal award cannot 'double-dip'. These amendments will allow the cancellation of such a state union's eligibility to represent employees in the state system and will facilitate the substitution of another union—one with a greater commitment to remaining in the state jurisdiction. ...

This Government accepts that the federal system has an important role to play, but the coalition has a strong commitment to maintaining the state system at its optimum level of efficiency. The bottom line is that employers and employees should have an employment system which is accessible, fair, efficient and modestly priced and one in which State industrial authorities, knowledgeable of the WA work environment, are able to respond quickly and effectively to the needs of participants within it."

I also refer to similar observations of the then responsible Minister when dealing with the introduction of s 37A in 1993 in *Hansard 8 July 1993* at 1460-1461. In my view, all of these comments confirm the intent of the legislature to continue to recognise and give effect to separate and distinct systems of regulation in relation to unfair dismissal. Counsel for the applicant submitted that these statements by the then Minister, merely express a desire by the Government for the parties to remain within or return to, as the case may be, the State system, and should be seen in that context alone. Whilst these statements could also be viewed in that context, in my view, as noted above, they confirm the legislature's intention to maintain a distinction between the federal and State systems of industrial regulation.

Considering the terms of the Act, the development of separate but complementary systems of federal and State industrial regulation, as was observed by the Full Bench in *Moore* in relation to s 83 of the NSW Act, there would need to be a very clear indication, either expressly or by necessary implication, that it was intended that the provisions of s 29 of the Act when referring to "*employee*", meant to embrace an employee covered by a federal award. From a review of the provisions of the Act as a whole, nowhere can it be seen that there is evidence of a parliamentary intention to give the word "*employee*" a meaning consistent with including employees covered by federal awards.

I should also add that I do not consider the difference between the terms of s 83 of the NSW Act and s 29 of the Act, in that the former excludes some classes of employee, as being fatal to my conclusion about the scope of the statute in this State. Whilst the Full Bench in *Moore* did consider that matter as a further indication that federal award employees were excluded, the absence of that element in the context of the Act does not, when taken overall, cause me to reach a conclusion other than that which I have reached in this matter.

Sections 152(1A) and 170HA of the WR Act

As to the possible effect of these sections, in my view, the operation of any provisions of the WR Act, in particular ss 152(1A) and 170HA, cannot extend the meaning and effect of the relevant provisions in the Act beyond that which they would otherwise have.

Section 23(3)(d) Act

I turn now to consider the respondent's submission that by reason of s 23(3)(d) of the Act, the Commission is precluded from dealing with this matter.

Section 23(3)(d) provides as follows—

"(3) The Commission in the exercise of the jurisdiction conferred on it by this Part shall not –

(a) …

(b) …

(c) …

(d) regulate the suspension from duty in, discipline in, dismissal from, termination of, or reinstatement in, employment of any employee or any one of a class of employees if there is provision, however expressed, by or under any other Act for or in relation to a matter of that kind and there is provision, however expressed, by or under that other Act for an appeal in a matter of that kind;"

Counsel for the respondent argued that the effect of this provision in the Act is to expressly prohibit the Commission from exercising jurisdiction in the present matter, by reason of there being comprehensive unfair dismissal provisions contained in the WR Act. In my view, with respect, this submission must fail.

By s 5 of the Interpretation Act 1984 the following definitions appear—

"5. In this Act and every other written law—

"Act" means any Act or Ordinance passed by the Parliament of Western Australia, or by any Council previously having authority or power to pass laws in Western Australia, such Act or Ordinance having been assented to by or on behalf of Her Majesty;

"written law" means all Acts for the time being in force and all subsidiary legislation for the time being in force;"

It is therefore clear that for the purposes of s 23(3)(d) of the Act, the reference to *"Act"* is to an Act passed by the Parliament of Western Australia. As the definition of *"Act"* in s 5 of the Interpretation Act 1984 is an exclusive definition and applies to all *"written law"* as defined, in my view, s 23(3)(d) cannot extend to the terms of the WR Act.

I therefore conclude that employees covered by federal awards are not within the Commission's unfair dismissal jurisdiction under the Act

Whilst in view of my conclusions in relation to this head of challenge to the Commission's jurisdiction it is not necessary for me to determine the other two heads of challenge, as they were substantively argued before me I deal with them below.

THE INCONSISTENCY OF THE ACT AND THE AWARD

Counsel for the respondent argued that the terms of the Award in relation to termination of employment and related matters, constituted a comprehensive statement of the mechanisms for dealing with termination of employment to the exclusion of the unfair dismissal provisions of the Act. Counsel referred to s 109 and argued that the Act was invalid to the extent of the inconsistency with the Award. The respondent made reference to a number of decisions of the High Court dealing with the operation of s 109. It was submitted that although not a law of the Commonwealth, inconsistency between the provisions of a federal award and a State law can give rise to s 109 considerations: *Metal Trades Industry Association of Australia v The Amalgamated Metal Workers and Shipwrights Union* (1983) 152 CLR 632 per Gibbs CJ, Wilson and Dawson JJ at 641 and Mason, Brennan and Deane JJ at 648.

Mr Randles referred to the two tests of inconsistency established on the authorities. The first being the covering the field test, in which the Commonwealth law evinces an intention to completely, exhaustively or exclusively govern the law on the conduct or matter, it being inconsistent for a State law to govern the same conduct or matter. Reference was made in this regard to *ex parte McLean* (1930) 43 CLR 472 per Dixon J at 483. Secondly, counsel referred to the direct inconsistency test, in which it is impossible to obey both the Commonwealth and State laws simultaneously or, where the Commonwealth law grants a permission or right and the State law prohibits the exercise of that permission or right: *The Licensing Court of Brisbane; ex parte Daniell* (1920) 28 CLR 23; *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151.

Furthermore, counsel referred to a line of authority to the effect that it may also be the case that even where the Commonwealth law states expressly that it is not intended that the Commonwealth law cover the field, in fact, when regard is had to the terms of the law, it does so. This argument is erected on the foundation that the inconsistency between the Commonwealth law and the State law is generated by s 109 and not by the terms of the Commonwealth law itself. It was also submitted by the respondent that an expression in a Commonwealth law to the effect that it is not intended to cover the field or otherwise expressing an intention to save the operation of a State law, will not be effective in circumstances where there is, notwithstanding such an expression of intention in the Commonwealth law, a direct inconsistency between the Commonwealth law and the State law*: The University of Wollongong v Metwally and Ors* (1984-1985) 158 CLR 447 per Gibbs CJ at 455-456; *R v The Credit Tribunal; ex parte*

General Motors Acceptance Corporation (1977) 137 CLR 545 per Mason J at 563; *Palmdale – AGCI Limited v The Workers' Compensation Commission of New South Wales* (1977) 140 CLR 236 per Mason J at 243.

Counsel for the respondent submitted that the terms of the Award, in particular clause 6– Contract of Service, clause 6A– Introduction of Change, clause 6B– Redundancy and clause 11– Disputes Settlement Procedures of Schedule B, when read together, constitute a comprehensive code in relation to termination of employment. In this respect, counsel referred to the decision of Fielding SC in *Irimia v Swan Transit Services (South) Pty Ltd* (1995) 75 WAIG 747 and my decision in *Mitchell v United Credit Union Limited* (1998) 78 WAIG 2939.

Mr Drake-Brockman argued that there was no direct or indirect consistency between s 29 of the Act and the Award in terms of s 109. Counsel also referred to and relied upon a decision of Fielding C (as he then was) in *John Allbeury v Boddington Shire Council* (1990) 70 WAIG 4123. Furthermore, counsel argued that there was no need in relation to this issue, to rely upon the terms of s 152(1A) of the WR Act in terms of the inconsistency argument.

In order to consider this limb of the respondent's challenge to jurisdiction, it is necessary for me to set out the relevant provisions of the Award.

Clause 6– Contract of Service relevantly provides as follows—

"(a) (i) The period of notice to be given by the Local Authority to an employee to terminate the contract of service shall be—

Period of continuous service	*Period of notice*
1 year or less	*1 week*
1 year and up to the completion of 3 years	*2 weeks*
3 years and up to the completion of 5 years	*3 weeks*
5 years and over	*4 weeks*

(ii) In addition to the notice in paragraph (i) hereof, employees over 45 years of age at the time of the giving of the notice with not less than two years' continuous service, shall be entitled to an additional week's notice.

(iii) Payment in lieu of the notice prescribed in paragraphs (i) and (ii) hereof shall be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(iv) In calculating any payment in lieu of notice the minimum rate of wage an employee would have received in respect of the ordinary time he or she would have worked during the period of notice had his or her employment not been terminated shall be used.

(v) The period of notice in this clause shall not apply in the case of dismissal for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, or in the case of casual employees, or employees engaged for a specific period of time or for a specific task or tasks.

(vi) For the purposes of this clause, continuity of service shall, mutatis mutandis, be as defined in Regulation 5 of the Local Government (Long Service Leave) Regulations 1983, as amended.

Notice of termination by employee

(b) 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.

If an employee fails to give notice the employer shall have the right to withhold moneys due to the employee with a maximum amount equal to the ordinary time rate of pay for the period of notice.

Time off during notice period

(c) Where an employer has given notice of termination to an employee, an employee shall be allowed up to one day's time off without loss of pay for the purpose of seeking other employment.

The time off shall be taken at times that are convenient to the employee after consultation with the employer.

Statement of employment

(d) The employer shall, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of his or her employment and the classification of or the type of work performed by the employee.

Summary dismissal

(e) Notwithstanding the provisions of subclause (a) hereof, the employer shall have the right to dismiss any employee without notice for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty and in such cases the wages shall be paid up to the time of dismissal only.

Unfair dismissals

(f) Termination of employment by an employer shall not be harsh, unjust or unreasonable. For the purposes of this clause, termination of employment shall include terminations with or without notice.

Without limiting the above, except where a distinction, exclusion or preference is based on the inherent requirements of a particular position, termination on the ground of race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin shall constitute a harsh, unjust or unreasonable termination of employment.

(g) Disputes settlement procedures—unfair dismissals.

(i) Subject to the provisions of sections 5, 119, 122 ad 123 of the Conciliation and Arbitration Act 1904, any dispute or claim arising under subclause (f) shall be dealt with according to the appropriate provisions of clause II – Dispute Settlement Procedures of Schedule "B" of this Award.

(ii) The provisions of placitum (i) hereof shall not affect the right of an employee, in the case of a claim by him that he has been unfairly dismissed from his employment, to refer that matter to the Western Australian Industrial Relations Commission in accordance with the provisions of Section 29(b)(i) of the Industrial Relations Act."

Furthermore, clauses 6A– Introduction of Change and 6B– Redundancy, prescribe detailed obligations on an employer in relation to notification of change, discussion with employees and their union(s) regarding major changes in the workplace and redundancy and severance pay. Materially for the purposes of these proceedings, clause 6B(g) provides as follows—

"Disputes settlement procedures—unfair dismissals

(g) (i) Subject to the provision of sections 5, 119, 122 and 123 of the Conciliation and Arbitration Act 1904, any dispute or claim arising under subclause (f) shall be dealt with according to the appropriate provisions of clause 11—Dispute Settlement Procedures of Schedule "B" of this Award.

(ii) The provisions of placitum (i) thereof shall not affect the right of an employee, in the case of a claim by him that he has been unfairly dismissed from his employment, to refer that matter to the Western Australian Industrial Relations Commission in accordance with the provisions of Section 29(b)(i) of the Industrial Relations Act."

Additionally, the terms of clause 11—Dispute Settlement Procedures of Schedule B to the Award relevantly provide as follows—

"(a) Subject to the provisions of the Conciliation and Arbitration Act, 1904 (as amended) any grievance, complaint, claim or dispute, or any matter which is likely to result in a dispute, between a respondent employer and the Union or a respondent employer and his employees, shall be settled in accordance with the procedures set out herein.

(b) Where the matter is raised by an employee, or a group of employees, the following steps shall be observed—

(i) The employee(s) concerned shall discuss the matter with the immediate supervisor. If the matter cannot be resolved at this level the supervisor shall, within 3 days, refer the matter to a more senior officer nominated by the employer and the employee(s) shall be advised accordingly.

(ii) The senior officer shall, if he/she is able, answer the matter raised within one week of it being referred to him/her and, if he/she is not so able, refer the matter to the employer for its attention, and the employee(s) shall be advised accordingly.

(iii) (A) If the matter has been referred in accordance with subparagraph (ii) above the employee(s) or his/her shop steward shall notify the Union Secretary (WA Branch) or his nominee, so that he/she may have the opportunity of discussing the matter with the employer.

(B) The employer shall, as soon as practicable after considering the matter before it, advise the employee(s) or, where necessary the union of its decision. Provided that such advice shall be given within five weeks of the matter being referred to the employer.

(iv) Should the matter remain in dispute after the above processes have been exhausted either party may refer the matter to the Conciliation and Arbitration Commission.

(c) Where the employer seeks to discipline an employee, the following steps shall be observed—

(i) In the event that an employee commits a misdemeanour, the employee's immediate supervisor or any other officer so authorised, may exercise the employer's right to reprimand the employee so that he/she understands the nature and implications of his/her conduct.

(ii) The first two such reprimands shall take the form of warnings and, if given verbally, shall be confirmed in writing as soon as practicable after the giving of the reprimand.

(iii) Should it be necessary, for any reason, to reprimand an employee three times in a period not exceeding twelve months continuous service, the contract of service may, upon the giving of that third reprimand, be terminable by giving notice in accordance with clause 6 – Contract of Service.

(iv) The above procedure is meant to preserve the rights of the individual employee, but it shall not, in any way, limit the right of the employer to summarily dismiss an employee for misconduct.

(d) Nothing in this clause shall limit the right of an individual employee to seek advice from, or be represented by, a shop steward or an appropriate union representative.

(e) The settlement procedures provided by this clause shall be applied to all manner of dispute referred to in subclause (a) thereof, and no party, or individual, or group of individuals, shall commence any other action, of whatever kind, which may frustrate a settlement in accordance with its procedures. Observance of these procedures shall in no way prejudice the right of any party, or individual, in the dispute to refer the matter for resolution by the Conciliation and Arbitration Commission."

Relevant Principles—Section 109 and Section 152 (1A) WRA

In my decision in *Mitchell* (supra) I set out the relevant s 109 principles and my view as to the operation and effect of s 152(1A) of the WR Act. I need not repeat what I said in *Mitchell* and I adopt and apply what I said in relation to these matters, for the purposes of these reasons.

Is the Award Inconsistent with the Act?

Much in the same way that I came to my conclusions in relation to the award under consideration in *Mitchell* (supra), in my opinion, the conclusion is inescapable that the relevant provisions of the Award in this case give rise to an inconsistency for the purposes of s 109. From the terms of the Award to which I have referred, it is apparent that the Award provides a comprehensive code in relation to termination of employment. Not only do the relevant terms of the Award comprehensively deal with the issue of termination of employment, clause 6(f) expressively proscribes harsh, unjust or unreasonable termination of employment. As I said in *Mitchell* (supra) at 2943—

> *"In particular, not only does the clause make provision for termination of employment, but expressly proscribes harsh, unjust or unreasonable termination. As was observed by Fielding SC in Swan Transit, it is hard to imagine a more definitive statement evincing an intention to cover the field."*

Additionally, the terms of the Award to which I have referred contain comprehensive provisions regarding introduction of change and redundancy in clauses 6A and 6B respectively. Importantly, in my view, the terms of clauses 6(g)(i) and 6(B)(g)(i), make express reference to unfair dismissal disputes to be dealt with in accordance with the provisions of clause 11—Dispute Settlement Procedures of Schedule B to the Award. In particular, it is of note that the terms of clause 11—Dispute Settlement Procedures, in particular paragraph (c), sets out in some detail steps an employer must take if the employer seeks to discipline an employee. Most specifically, the terms of -paragraph (c)(iii) expressly provide for the ability of the employer to terminate an employee's employment, should the preconditions in that paragraph be met.

Therefore, in my opinion, not only do the relevant provisions of the Award provide a complete and exhaustive code in relation to termination of employment, the dispute settlement procedures themselves contain what could arguably be described as a necessary procedure that an employer must follow in order to terminate an employee's employment, save for circumstances justifying summary dismissal for misconduct. Furthermore, I observe that the terms of clause 11(b)(iv) of schedule B of the Award, expressly provide for any matters remaining in dispute, which by the terms of clauses 6(g)(i) and 6(B)(g)(i), includes termination of employment disputes, to be referred to the then Conciliation and Arbitration Commission (now the Federal Commission).

Considering these provisions as a whole, it is difficult to imagine a more comprehensive statement of an intention to cover the field in relation to termination of employment for the purposes of s 109. Section 152(1A) of the WR Act does not affect that conclusion, for the reasons that I outlined in *Mitchell* (supra).

I turn now to the issue of direct inconsistency. In my view, the relevant provisions of the Award set out above also give rise to a direct inconsistency for the purposes of s 109, as did the relevant provisions of the award under consideration in *Mitchell* (supra). In my opinion, based upon the authorities as to direct inconsistency, the positive authority to dismiss contained in clause 6(a)(i) of the Award would clearly be altered, impaired or detracted from by the operation of the unfair dismissal provisions of the Act, such as to render those provisions directly inconsistent with the terms of the Award for the purposes of s 109.

The Effect of the "Savings Clause"

I turn now to consider the effect of the "savings clause" contained in clauses 6(g)(ii) and 6(B)(g)(ii), in terms of s 109. For

the reasons which follow, in my opinion, those provisions of the Award do not preserve the unfair dismissal provisions under the Act, despite their terms.

I have set out the provisions of the "savings clauses" above. In terms, the clauses purport to not affect the right of an employee covered by the Award, to bring a claim of unfair dismissal to the Commission in accordance with s 29 of the Act. The question that arises in relation to the operation of the "savings clause", is whether provisions such as those in issue can oust what is otherwise a direct inconsistency between the terms of the Award and the Act, as I have found it to exist in this case. As I observed in *Mitchell* (supra) at 2942—

> *"It is well established that the Commonwealth Parliament may in an enactment, express an intention not to cover the field by providing that a Commonwealth law is not intended to exclude or limit the concurrent operation of any law of a State. A declaration such as this is considered valid and effective to prevent indirect inconsistency,* ***but will not prevent direct inconsistency****."* (my emphasis)

In *R v The Credit Tribunal; ex parte General Motors Acceptance Corporation* (supra) Mason J observed at 563 as follows—

> *"It is of course by now well established that a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision of the kind which arises for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed. In R v Loewenthal; ex parte Black Lock (33) I pointed out that such a provision in a Commonwealth law cannot displace the operation of s 109 in rendering the State law inoperative. But where there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive."*

I also refer to the observations of Gibbs CJ in *Metwally* (supra) at 455-456 and of later observations of Mason J in *Palmdale* (supra) at 243 to the same effect. In my opinion, because by operation of s 109 the unfair dismissal provisions of the Act are directly inconsistent with the relevant terms of the Award, the "savings clause" of the Award cannot preserve that which is directly inconsistent for the purposes of s 109.

Mr Drake-Brockman referred to the decision of the High Court in *R v Clarkson; ex parte General Motors – Holdens Pty Limited and Ors* (1975–1976) 134 CLR 56. This case concerned an application to the Full Court to make absolute an order nisi for prohibition, directed to a member of the then Conciliation and Arbitration Commission, concerning a variation to a federal award which inserted a provision expressly saving the operation of the South Australian unfair dismissal jurisdiction. It is important to observe that the proceedings in *Clarkson* were confined to a challenge to the Conciliation and Arbitration Commission's jurisdiction to insert such a provision in the award there in issue. That question essentially turned upon whether the variation effected to the award was within power, in the sense that it fell within the ambit of the log of claims giving rise to the variation or was incidental to the dispute thereby created. The matter of the effect of the award clause itself for the purposes of s 109 was not directly in issue before the Court.

By majority (Stephen, Mason, Jacobs and Murphy JJ; Barwick CJ dissenting) the Court held that the Conciliation and Arbitration Commission had the necessary jurisdiction to make the variation to the award, essentially on the ground that the variation fell within the ambit of the original log of claims. In considering this issue, Mason J said at 72—

> *"It then becomes necessary to consider the argument that cl.21 is inconsistent with the continued existence under State law of a right on the part of an employee dismissed by notice duly given in accordance with its provision to apply to a State court for an order under State law that he be re-employed. No doubt in some contexts it may be correct to say that the concession of a right in an employer to dismiss upon the giving of a stipulated notice, with the consequence that the employee dismissed is entitled to wages up to the time of dismissal, is inconsistent with, or excludes, the co-existence of a right in the employee to apply to a court for an order that he be re-employed.* ***This conclusion might be readily reached, as it was by the Full Court of the Supreme Court, in the context of an award which comprehensively sets out the rights of the employer and employee, covering dismissal on notice and summary dismissal for misconduct.***
>
> ***But in my opinion a different conclusion should be reached in the context of the claim shortly expressed in cl.21 of the log which is confined, in accordance with the heading 'Contract of Employment', to dismissal on notice or on payment in lieu of notice. In this context I am unable to discern any secure foundation for concluding that cl.21 is so comprehensive in its scope as to exclude the application of a State law such as s.15(1)(e) of the Industrial Conciliation and Arbitration Act (S.A.) from applying to the dismissal of an employee pursuant to its provisions."*** (my emphasis)

Whilst in the minority in this case, Barwick CJ made the following comment at 65—

> *"In the second place, it is not, in my opinion, within the Commission's power to decide that State laws and orders shall or shall not apply to employees bound by the award. Whether State laws do apply will depend on their terms and whether or not they are consistent with the terms of the award. Consistency or inconsistency cannot be determined by express provisions such as those of the purported variation made by Commission. Those questions depend upon the substantive provisions of the award validly settling the industrial dispute."*

In my opinion, Mason J was not, with respect, expressing a view in an unqualified manner, as to the operation and effect of federal provisions of the kind there under consideration. His Honour was, as I apprehend his reasons, indicating that the other relevant terms of the federal instrument under consideration will be important to finally determine whether a federal provision will have effect to save the operation of relevant State law. In this regard, with respect, those observations of His Honour appear to be consistent with the views of the members of the High Court in *Metwally* (supra), *Palmdale* (supra) and *Credit Tribunal* (supra) to which I have referred above.

In conclusion in my view, the existence of the "savings clause" in the Award does not otherwise render the unfair dismissal provisions of the Act operative, so as to found jurisdiction in this matter. I therefore conclude that the provisions of the Act and the Award are both directly and indirectly inconsistent for the purposes of s 109.

THE PROVISIONS OF THE WR ACT DEALING WITH UNFAIR DISMISSAL AND THE ACT

This issue turns on whether the provisions of Division 3 of Part VIA of the WR Act are inconsistent with the unfair dismissal provisions of the Act. The respondent argued that in so far as employees employed by a constitutional corporation and covered by a federal award are concerned, the provisions of Division 3 cover the field in relation to unfair dismissal to the exclusion of the Act and are inconsistent largely for the same reasons that the Award and the Act are inconsistent.

Counsel for the applicant argued that there was no such inconsistency and indeed, the provisions of the WR Act expressly contemplate the existence and concurrent operation of State unfair dismissal laws.

The objects of Division 3 are set out in section 170CA. It provides for conciliation procedures relating to termination of employment; arbitration in the event conciliation is unsuccessful; remedies and sanctions in appropriate cases where termination is found to be harsh, unjust or unreasonable or unlawful respectively; and the giving effect to, by those procedures remedies and sanctions, the Termination of Employment Convention 1982, which appears at Schedule 10 to the WR Act.

Conciliation and arbitration procedures are provided for in ss 170CF and 170CFA. As a result of arbitration, remedies, including reinstatement and compensation are provided for in s 170CH. The Federal Commission has the power to award

costs in certain circumstances in s 170CJ. Subdivision C of Division 3 deals with unlawful termination of employment. A range of remedies in courts of competent jurisdiction are set out. Subdivision D enables the Federal Commission to make orders giving effect to Articles 12 and 13 of the Termination of Employment Convention. Subdivision E empowers the Federal Commission to make orders after an employer fails to consult a trade union about terminations. Finally, Subdivision F deals with other rights relating to termination of employment.

It is clear that regard must be had to the provisions of Division 3 of Part VIA as a whole, in order to determine the intention of the Commonwealth legislature. In particular, in my opinion, the provisions of Subdivision F, dealing with other rights relating to termination of employment, are significant for the purposes of the respondent's covering the field argument. Section 170HA relevantly provides—

> *"170HA Subject only to the operation of sections 170HB and 170HC, the provisions of this Division are not intended to limit any rights that a person or trade union may have to appeal against termination of employment or to secure the making of awards or orders relating to termination of employment."*

Furthermore, the provisions of s 170HB provide as follows—

> *"170HB (1) An application must not be made under section 170CE in relation to the termination of employment of an employee on the ground that the termination was harsh, unjust or unreasonable, or on grounds that include that ground, if proceedings (the prior proceedings) for a remedy in respect of that termination have been commenced by or on behalf of that employee—*
>
> *(a) under another provision of this Act; or*
>
> *(b) under another law of the Commonwealth; or*
>
> *(c) under a law of a State or Territory;*
>
> *alleging that the termination was—*
>
> *(d) harsh, unjust or unreasonable (however described); or*
>
> *(c) unlawful;*
>
> *for a reason other than a failure by the employer to provide a benefit to which the employee was entitled on the termination.*
>
> *170HB (2) Subsection (1) does not prevent an application of the kind referred to in that subsection if the prior proceedings—*
>
> *(a) have been discontinued by the party who began the proceedings; or*
>
> (b) have failed for want of jurisdiction.
>
> *170HB (3) For the avoidance of doubt, a proceeding under this Act or any other law of the Commonwealth or under a law of a State or Territory seeking compensation, or the imposition of a penalty, because an employer has failed, in relation to a termination of employment, to meet an obligation—*
>
> *(a) to give adequate notice of the termination; or*
>
> *(b) to provide a severance payment as a result of the termination; or*
>
> *(c) to provide any other entitlement payable as a result of the termination;*
>
> *is taken to be a proceeding alleging that the termination was unlawful because of a failure to provide a benefit to which the employee was entitled on the termination.*
>
> *170HB (4) If an application of the kind referred to in subsection (1) has been made in respect of a termination, a person is not entitled to take proceedings for any other remedy that, if it had been applied for before the application would, because of the operation of subsection (1), have prevented the application unless the application—*
>
> *(a) is discontinued by the applicant; or*
>
> *(b) fails for want of jurisdiction."*

Similar provisions are set out in s 170HC dealing with allegations of unlawful termination of employment under s 170CK.

As earlier noted, the resolution of the covering the field test of inconsistency, depends upon the intention of the Commonwealth legislature to express, by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter in issue: *ex parte McLean* (supra)*; Metal Trades Industry Association of Australia and Ors v. Amalgamated Metal Workers and Shipwrights Union and Ors* (supra).

In my opinion, the provisions of Subdivision F disclose a legislative intention that the provisions of Division 3 of Part VIA are not intended to constitute a complete, exhaustive or exclusive code as to the law governing termination of employment in relation to employees employed by constitutional corporations under a federal award. Section 170HA indicates that the provisions of Division 3 are not intended to limit any rights to "*appeal*" against termination of employment. Furthermore, the section is not intended to limit any rights to secure the making of awards or orders, relating to termination of employment. The only limitation which, on the plain language of s 170HA appears to apply, is that the section is subject to the operation of ss 170HB and 170HC which deal with what may be described as "*dual applications*" in respect of a termination of employment. The significance of those sections is a matter that I deal with below.

There is nothing to suggest from its terms, that the words used in s 170HA should be given anything other than their plain and ordinary meaning.

The Shorter Oxford English Dictionary defines "*appeal*" to mean—

> "***1.*** *A calling to account before a legal tribunal; in law: a criminal accusation made by one who undertook the penalty to prove it.* ***2.*** *A challenge.* ***3.*** *The transference of a case from an inferior to a higher court; the application for such transference; the transferred case.* ***4.*** *The call to an authority for vindication, or to a witness for corroboration.* ***5.*** *A call for help, etc; an entreaty 1859.* ***6.*** *Language addressed to, or likely to influence, some particular principle, faculty, class etc."*

In its ordinary and natural sense, the word "*appeal*" in my opinion, contemplates a proceeding by a former employee for unfair dismissal pursuant to the terms of a State Act, including the Act. There is nothing in the plain language of s 170HA or the context in which it appears in the WR Act, to suggest that the word "*appeal*" is to be read down to confine an appeal to one arising only under the WR Act. Indeed, the indications are all the other way. First, the introductory words to s 170HA provide "*subject only to the operation of sections 170HB and 170HC*". Given that both ss 170HB and 170HC in themselves, expressly refer to the possibility of proceedings for a remedy in respect of a termination of employment existing under a law of a State or Territory or, indeed, another law of the Commonwealth, it would be inconsistent with that legislative scheme to read the word "*appeal*" in any restricted sense. Secondly in my opinion, the reference in the section to "*the making of awards or orders*" is not to be read as relating only to the making of awards or orders under the WR Act, given the meaning which I suggest should be given to the section as a whole. Clearly, however, those latter words, when referring to awards, would include the definition of "*award*" for the purposes of s 4 of the WR Act and contemplate an award arising out of the exercise by the Federal Commission of its dispute resolution powers under Division VI of the WR Act.

The absence of a Commonwealth legislative intention to cover the field in relation to unfair dismissal is supported also by the provisions of s 170HB(4). This provision effectively requires an employee to make an election to commence proceedings in relation to the termination, either under Subdivision B or under another law, as provided for in s 170HB(1), including a State law.

Accordingly, in my opinion, it cannot be said that from the provisions of Division 3 taken as a whole, it is possible to discern a legislative intention by the Commonwealth to provide an exhaustive code in relation to termination of employment, to the exclusion of State law. Of course, this conclusion cannot affect the scope and application of the unfair dismissal provisions of the Act itself, as I have noted above.

However, my conclusions as to whether the provisions of Division 3 cover the field to the exclusion of the Act, do not deal with the alternative issue as to whether the provisions of Division 3 to any extent, give rise to a direct inconsistency or collision with the unfair dismissal provisions of the Act. As

this matter was not argued substantially in the proceedings before me and I was not taken to the detailed provisions of the WR Act in support of such a proposition, this issue is best left to another occasion on which the Commission has had the benefit of detailed argument.

As a result, this head of jurisdictional challenge must fail.

Conclusion

Accordingly, for all of the above reasons, the application is dismissed for want of jurisdiction.

APPEARANCES: Mr A Drake-Brockman and Mr D Howlett of counsel appeared on behalf of the applicant.

Mr A Randles of counsel appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

William Hull

and

City of Mandurah.

No. 706 of 1998.

COMMISSIONER S J KENNER.

25 November 1998.

Order.

HAVING heard Mr A Drake-Brockman and Mr D Howlett as counsel on behalf of the applicant and Mr A Randles of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

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

WESTERN AUSTRALIAN

INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Rosanna Mancuso

and

Mada Holdings Pty Ltd trading as Total Lifestyle People.

No. 1475 of 1998.

3 December 1998.

Reasons for Decision (extempore)

THE SENIOR COMMISSIONER: This an application brought pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979 whereby the Applicant seeks to recover from the Respondent contractual benefits said to be due to her under her contract of employment with the Respondent. The Respondent has not filed an Answer and despite the matter being listed on a number of occasions, has not, for reasons best known to it or its officers, appeared to oppose the application.

The evidence suggests that at all material times the Respondent carried on business as a finance broker and investment adviser. The Applicant was formerly employed by the Respondent as a loans officer. Her principal task was to give effect to loans arranged by others on behalf of the Respondent for which she was to receive a salary of $32,000 per annum. The terms of her employment in this regard are set out in a letter of appointment. In addition, she says that it was verbally agreed between her and the Respondent's managing director that she was entitled to a fee of $800.00 for each loan she arranged on behalf of the Respondent. Her employment commenced in August 1997 and ended, it seems, in about March 1998.

Amongst the contractual benefits originally forming part of her application were pro rata annual leave, one week's sick leave, employer's superannuation contributions and PAYE tax deductions not remitted to the Commissioner of Taxation. However, at the commencement of the hearing of these proceedings, the Applicant abandoned that aspect of her claim because of serious jurisdictional questions.

That left outstanding a claim of $800.00 for commission said to have been denied to her. The Applicant says that that claim arises in the following manner. She says that, although she was employed as a loans officer, approximately three weeks into her employment the Respondent's managing director, Mr Jonkov, asked if she would assist the Respondent's operations by, in effect, selling packages to customers for refinancing existing mortgages. Normally her task was simply to do the paperwork after consultants employed by the Respondent had, as she called it, "settled deals" to refinance existing mortgages but, she says, that she too was asked to settle deals in her own time. Where she did so, she says that she was entitled to be paid a fee of $800.00. She says the arrangement was that where existing mortgages were refinanced in this way the customers were charged a fee by the Respondent of $1,950.00 out of which, she says, consultants employed by the Respondent were paid $800.00. She says it was agreed that the same arrangement would apply to her.

The Applicant has testified that in respect of one client, Mr and Mrs Cowan, she did indeed settle a deal. The fee of $1,950.00 was paid to the Respondent but she was never paid the $800.00 as promised. She says that when she made a demand on the Respondent for this money the Respondent's managing director admitted that it was due but said that the Respondent could not afford to pay it straight away and asked for it to be paid, as I understand it, by instalments. Despite the fact that almost eight months has expired since her employment ceased, the money has not been paid and thus she brings these proceedings.

Having heard the Applicant I am quite satisfied that her evidence is reliable. I accept her evidence in toto. It follows that I am satisfied and find that she was employed by the Respondent. I am also satisfied and find that it was a term of her employment that where she was responsible for settling or arranging with customers of the Respondent to refinance mortgages and they paid the appropriate fee, that she would be paid $800.00 from that fee. I am satisfied that in respect of at least one customer, the Cowan's, and as a result of her efforts, they refinanced their existing mortgage and that they paid the fee of $1,950.00. I am further satisfied and find that she has not been paid the $800.00 or any other sum out of that fee to her despite admissions from the Respondent's agent that it was due and payable. It follows that in my view the Applicant has made out her claim and is entitled to an order to recover the sum of $800.00.

Appearances: Mr R.W. Clohessy on behalf of the Applicant

No appearance on behalf of the Respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Rosanna Mancuso

and

Mada Holdings Pty Ltd trading as Total Lifestyle People.

No. 1475 of 1998.

3 December 1998.

Order.

HAVING heard Mr R.W. Clohessy on behalf of the Applicant and there being no appearance on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders-

THAT the Respondent pay to the Applicant the sum of $800.00 as payment of a benefit denied to the Applicant under her contract of employment with the Respondent.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Walter Muschek

and

Wards Outdoor Pty Ltd.

No. 1441 of 1998.

20 November 1998.

Order.

THERE being no appearance by the Applicant and having heard Mr E.J. Ward, a director of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT the description of the Respondent be amended to "Wards Outdoor Pty Ltd";
2. THAT the Application be and is hereby dismissed for want of prosecution; and
3. THAT the Applicant pay the Respondent the sum of $50 as and by way of costs and expenses arising out of the Application.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Geoffrey Francis O'Dea

and

South West Maintenance Pty Ltd.

No. 736 of 1998.

COMMISSIONER S J KENNER.

18 November 1998.

Reasons for Decision.

THE COMMISSIONER: At all material times Geoffrey Francis O'Dea ("the applicant") was employed by South West Maintenance Services Pty Ltd ("the respondent") as its general manager. The applicant commenced employment with the respondent on or about 3 February 1997. The applicant's employment came to an end on or about 9 September 1997 in circumstances which are controversial. The applicant now seeks relief by way of this application pursuant to s 29(1)(b)(ii) of the Industrial Relations Act, 1979, ("the Act") in respect of contractual benefits that he says he was entitled to under his contract of employment but denied by the respondent. The applicant claims in the sum of $79, 583.42, comprising amounts in respect of loss of salary, superannuation contributions, and annual leave payments, arising out of a fixed term contract for two years. The applicant also claims for fuel and rent arising from the termination of the contract.

The respondent wholly opposes the applicant's claim and says that the respondent did not terminate the applicant's employment as the applicant resigned. Alternatively, the respondent submitted that even if the applicant's employment was terminated by the respondent, the applicant's claim, at least on and from the acceptance of the termination of the contract by the applicant, is one in damages and is beyond the jurisdiction of the Commission.

Mr Formby of counsel represented the applicant. Mr Raymond of counsel represented the respondent.

Background

The respondent is a company that engages in the machining, fabrication, maintenance, craneage, assembly, site works and provision of labour hire services to the mining and construction industries and project sites within Western Australia. The respondent's business was formed in March 1985. It is essentially a family business, conducted by Mr and Mrs Halligan, both of whom are directors. It appears that in recent years, the respondent has experienced considerable growth and now has an established business in both a workshop and office facility in Donnybrook.

In response to the business growth, and to develop the respondent's business to a higher level of sophistication, the principals of the respondent took a decision to engage a person with management expertise, to guide the business in its next stage of development. In or about December 1996, the applicant and Mr & Mrs Halligan entered into discussions regarding the possibility of the applicant joining the respondent in a management position. By letter dated 3 January 1997, the applicant wrote to Mr & Mrs Halligan, expressing his interest in employment with the respondent, and setting out the attributes and skills that he would bring to the respondent's business. Ultimately, those discussions led to an offer of employment by the respondent to the applicant, for the applicant to become the respondent's general manager. The terms and conditions of the applicant's employment are set out in a letter dated 8 December 1996 and signed by the parties on 8 January 1997 (exhibit A1). The material terms of the applicant's contract of employment provided that the applicant would be engaged as the general manager of the respondent, to be based at its Donnybrook premises. The applicant was to be paid a salary of $84,000 per annum with the contract of employment being for a term of two years with two options to extend for further two-year terms. Other terms of the appointment included a 6% superannuation contribution, four weeks annual leave per annum, and 10 days paid sick leave per annum.

The applicant's duties as the respondent's general manager involved the day to day management of the respondent's business, subject to the direction of the directors. At the material times, the directors of the respondent included Craig and Deslyn Halligan, Mr Rod Flinn, the applicant and Mr Stuart Key, the respondent's chairman. Additionally, the applicant was to be responsible for general reporting requirements to the directors; promoting and developing the respondent's business; attending to financial matters under the direction of the directors (excluding responsibility for financial management of the company); and servicing and maintaining the respondent's existing customers.

The applicant duly commenced in the position of general manager of the respondent. During the course of 1997, it became apparent that there were some difficulties in relation to the applicant's performance as general manager and additionally, relationships between senior members of staff of the respondent, including the applicant. These issues culminated in the applicant's employment coming to an end on or about 9 September 1997. The circumstances of the termination of the applicant's employment are in contest in these proceedings. The applicant argued that his contract of employment for a two year fixed term was repudiated by the respondent on or about that date. The respondent however, denies that it terminated the applicant's employment and argued that the applicant tendered his resignation, which resignation was accepted, thereby bringing the applicant's contract of employment to an end. The respondent denied that it had any further liability to the applicant pursuant to the terms of the contract. As noted above, in the alternative, counsel for the respondent argued that should the Commission find against the respondent on the dismissal issue, then the applicant's claim is in law one for damages and beyond the Commission's jurisdiction.

The Evidence

The only evidence adduced on behalf of the applicant was from the applicant himself. The applicant testified that he was employed by the respondent commencing on 3 February 1997 as its general manager. His role was to oversee the general operations of the respondent, but excluding its financial affairs. He became a member of the respondent's board shortly after commencing employment and additionally, was also the manager of a related company, South West Protective Coatings, but he said that company never paid him. The applicant gave evidence that in discussions with the principals of the respondent, Craig and Deslyn Halligan, it was the Halligan's desire to introduce management skills into the business and to lift the company to a higher level of sophistication. The applicant gave evidence as to the background to him being employed by the respondent. In particular, he was cross-examined as to

the content of exhibit R1, that being his letter mistakenly dated 3 January 1996 (when it should have been 1997). He agreed that he represented to the Halligans that he had skills in relation to people management; training and marketing; an ability to work to deadlines; and time management. He testified that he prepared exhibit R1 after reviewing the terms of a business plan for the respondent dated December 1996 (exhibit R2). He said that after reviewing the business plan, and following discussions with Mr & Mrs Halligan, he was very interested in joining the respondent and set out, in some detail in exhibit R1, what he could do for the company.

It would appear that during the course of the year following the applicant's engagement, all was not well in terms of the respondent's business. The applicant in cross-examination was taken to a number of minutes of board meetings of the respondent during the material times. In particular, reference was made to board minutes for 5 May, 16 June, 21 July, and 18 August 1997. Those minutes are exhibits R3-R6 respectively. There were a number of issues identified as problem areas in those board minutes. I do not propose to traverse them in detail, however, the areas included are the quality of workmanship from the workshop; the need for an incentive scheme for employees; the need for the business to be more actively promoted; delays in relation to acquiring new cranes from an Italian crane company; concerns in relation to cost over-runs and slow progress regarding a new workshop facility; delays in relation to preparation of agreements; and ongoing concerns about workshop productivity. I pause to observe the latter matter appears to have been an ongoing issue.

In his evidence the applicant conceded that as the general manager of the respondent, he was ultimately responsible for the day to day operations of the company. In relation to the matters upon which evidence was adduced concerning operational difficulties, he accepted that in large part, all of those matters were within his field of responsibility. However, he testified that given that the respondent was a family business, he encountered some frustration in decision making and implementing necessary changes. I pause to observe however, that at no stage did the applicant record any concerns he had regarding his ability to implement necessary initiatives, either in the board minutes tendered in evidence or otherwise. The applicant conceded in his evidence, that there was dissatisfaction and criticism being expressed regarding his management control of the respondent's business. However, he testified that prior to joining the respondent, he had no direct experience in managing a construction and maintenance business. He said that this was known and understood by Mr & Mrs Halligan and that he would receive the necessary support in his new role.

The applicant gave evidence in relation to a meeting in or about August 1997 with another employee of the respondent, a Mr Flinn and Mr Halligan. It was common ground that Mr Flinn, who it appears, also had an interest in the South West Protective Coatings business, was a temperamental employee. He was told when he was employed, that he would have to handle Mr Flinn delicately. Importantly in my view, the applicant conceded that Mr Flinn had a difficulty with the way in which the applicant was managing the respondent's business and additionally, there appeared to be clashes of a personal nature between both of them. I refer to this matter below.

In the meeting in August 1997, the applicant testified that Mr Flinn raised with Mr Halligan his inability to get on with the applicant. The applicant said that at the conclusion of the meeting, Mr Flinn left saying *"he resigned"* and then promptly left the premises. The applicant said he then remained with Mr Halligan and spoke to him about the difficulties. He testified that he told Mr Halligan that if the differences could not be resolved that in his role as the respondent's general manager, *"we could discuss my terminating my contract"* (transcript p10). He said that as far as he was concerned, that matter went no further and the difficulties were resolved by Mr Flinn's resignation. In cross-examination on this point, the applicant denied that he offered his resignation to Mr Halligan. The following exchange took place between the applicant and the respondent's counsel—

> *"MR RAYMOND: Mr O'Dea, I want to put to you right at the outset that you made a number of references on different occasions to a proposal that you resign from the company. I take it from your evidence that you dispute that?—Yes.*
>
> *Your evidence is clear that you never, ever offered to resign?—Yes.*
>
> *You're looking a little hesitant in saying that?—I'm somewhat nervous at being cross-examined. I've never been cross-examined before. This is all new and strange to me.*
>
> *All right. I put it to you that the reason you put forward the suggestion on more than one occasion that you resign was at least in relation to Mr Craig Halligan that you were aware of a number of problems that you had in your performance as general manager. Do you deny that?—No. I don't deny the whole statement.*
>
> *Right. What is it that you accept?—That I was new to that industry, this was a learning curve for me getting away from what my previous work history and background had been."* (transcript p.24)

Then later in cross-examination, the applicant was asked about his difficulties with Mr Flinn. The following exchange took place—

> *"MR RAYMOND: Yes. All the more reason for you to work through or attempt to work through the issues, surely?—Yes, that's true but it has got to be a two way thing. I can't contribute all the time and get no feedback.*
>
> *Yes. Why would you put to Mr Halligan in effect a choice, 'it's got to the point where this has come to a head between – with Rod or my position with the company with have to be looked at'?—I didn't raise—I didn't bring it to a head or make a choice, Rod Flinn chose to announce that he is out of here before Craig and I continue the conversation on our own.*
>
> *Yes, but you raised the matter that I've just referred to?—After I—.*
>
> *'This is something that's got to be dealt with or my position with the company will have to be looked at'?—Rod had already made that decision. He said, 'I'm out of here, I'm gone'. Craig and I sat there. Craig said, 'that is the last time'.*
>
> *Right, I'll put it to you that you well understood his difficulty was with you—?—Rod Flinn?*
>
> *—and your management?—Yes. Yes.*
>
> *You concede that?—Yes.*
>
> *At last?—He has a problem. Personality—we never, ever, ever once sat down and got on to the specifics of what it was about my personality—.*
>
> *KENNER C: You were asked that question a while ago, Mr O'Dea.*
>
> *MR RAYMOND: Alright. Thank you. At last. All right. There was a problem then between you and O'Dea—Sorry, between you and Flinn. I want to put it to you that in this meeting that you're talking about you said to Mr Halligan words indicating to the effect that if it would solve the situation you would resign?—I can't recall those words, no."* (transcript p.54)

I pause to observe that this was the first point during the applicant's evidence that he conceded a difficulty between himself and Mr Flinn, despite the issue being raised with him earlier in the evidence.

On or about 18 August 1997, a board meeting took place. The minutes of that board meeting are exhibit R6. There is a note towards the end of that board minute, referring to the closure of the meeting at 7.00pm, with "SK" (Mr Stewart Key – the Chairman) *"having a few quiet words to both GOD and RF on Craig's behalf"*. The applicant was cross-examined about this. He denied that the purpose for these "few quiet words" after the board meeting was to discuss both his and Mr Flinn's resignation from the respondent. The applicant testified that Mr Key raised with him operational matters that were dealt with in the board meeting proper. He said that he had no recollection and knowledge of the question of resignation coming up in that conversation. He also denied that Mr Key had asked him to remain on until Mr Halligan returned from a business trip in Port Hedland.

The next critical event took place on or about the morning of 9 September 1997. The applicant testified that he attended

the respondent's premises that morning at about 7.30am. When he got into work he went to see Mr Halligan to bid him good morning. His evidence was that Mr Halligan was in the boardroom. He testified that Mr Halligan asked him to come into the boardroom and he closed the door. He said that Mr Halligan then said to him *"I accept your resignation, you can leave now"* (transcript p10). The applicant testified that he was dumbfounded and Mr Halligan's statement came out of the blue. He further said that he did not know what Mr Halligan was talking about or why he said what he did. The applicant's evidence was Mr Halligan was very nervous. He said he told Mr Halligan that he had a contract with the company and "they couldn't do this". According to the applicant, Mr Halligan did not respond. Thereafter, the applicant left the boardroom, returned to his office, gathered his belongings and left the premises. The applicant continued to maintain in his evidence that he never offered his resignation to Mr Halligan. I will return to this matter further below.

Following the meeting that morning, the applicant said that he returned to his home and telephoned Mrs Halligan. His evidence was that she said to him that she was sorry about what had happened. There was some discussion about continued payment. The applicant said that given the financial circumstances of the company, and his contract, he would be happy to be paid on a monthly basis. The applicant then said later that morning he spoke to Mr Halligan by telephone, saying that he thought what had happened was ridiculous and that Mr Halligan said that he would think about it and get back to him but never did. He then said that he met with Mr Halligan about two days later to discuss some business matters. When he raised the issue of his contract, he said Mr Halligan refused to discuss the matter further. The applicant further testified that he thereafter continued to leave telephone messages at the respondent's premises, none of which were returned according to him. In or about November 1997, the applicant said that he met Mr Halligan at the respondent's premises, whilst collecting a friend's vehicle that had been repaired by the respondent. He said that during the course of that visit he again raised the contract issue with Mr Halligan. He said Mr Halligan refused to discuss the matter and that would not make any payments to him, given the financial position of the respondent. Both in cross-examination and re-examination, he testified that Mr Halligan had the applicant's contract in front of him when he was talking to the applicant. I pause to observe that there was no reference to this in the applicant's evidence-in-chief.

Thereafter, the applicant said that he started applying for jobs and indeed had done so prior to that meeting in or about November 1997. A bundle of job applications were tended as exhibit A2. It is of note that of the 27 odd job applications between September 1997 and August 1998 tendered in evidence, not one is for a general management position. The applicant testified that he did not apply for any general management positions, as there were none advertised that he could fill. He also said that he applied in the main, for human resources positions because these jobs were within what he described as his "comfort zone". However, in cross-examination, whilst conceding that a general manager does not have to have specific expertise in all areas of a business' operation, and it was general management skills that were required, he still maintained that the specific industry was important. The clear inference from this being that on his evidence, the applicant declined to apply for any general management positions, because of the specific industries to which they related. I will return to the significance of this evidence and exhibit A2, further below in these reasons.

The applicant then testified that he received a letter dated 15 October 1997 from the respondent. That letter sought to formally confirm the respondent's acceptance of the applicant's offer to resign effective 9 September 1997. The letter was tendered in evidence as exhibit A8. Formal parts omitted, the letter provides as follows—

> *"This letter is to formally record our reluctant acceptance of your offer to resign that was effective on 9 September 1997.*
>
> *Discussions between our Craig Halligan and yourself before the Board Meeting held on 18 August 1997 indicated that if matters were not resolved between the Company and yourself regarding performance in the role and motivation of staff, then you would resign your position.*
>
> *This was openly discussed between the Chairman of the Board and Craig Halligan by telephone on that date.*
>
> *With the departure of Rod Flinn and the business and financial position of the Company as of early September 1997, the Company had no choice but to accept your resignation, effective of (sic) 9 September 1997.*
>
> *At our September Board Meeting, it was resolved that the Board would communicate to you in writing to ensure that all matters had been formally resolved.*
>
> *As agreed with Craig Halligan on 9 September, the Company has continued to pay your salary for a period of one month after your resignation became effective. These payments will now cease.*
>
> *We also wish to notify you that you have been formally resigned from the Board of South West Maintenance Services and all liabilities and matters associated with the Company and yourself have now been dissolved. You are now, in effect, a free agent and may act accordingly.*
>
> *The Company wishes you well in your further endeavours and the Board understands that you may keep in contact with some individuals within the Company in the future.*
>
> *In order to register receipt of this letter, please sign the duplicate copy provided and return to the Company at your earliest convenience.*
>
> *Yours sincerely*
>
> *SOUTH WEST MAINTENANCE SERVICES"*

The applicant denied the truth of the content of the letter insofar as it was material to the circumstances of his departure from the respondent.

On behalf of the respondent, five witnesses were called to give evidence. They included Mr Key, Mr & Mrs Halligan, Miss Mardi Cooke, a former colleague and friend of the applicant and Ms Wendy Cavanagh, the respondent's receptionist. Mr Key was the chairman of the board of the respondent and a management consultant to the company. He testified that he had concerns in relation to difficulties that the applicant was having in the general manager role. He said that matters were not being completed in a timely fashion. He also testified about communication difficulties, a lack of marketing and business development initiatives, a lack of reporting within the business and to the board and generally a lack of progress towards achieving targets set for the business in accordance with the business plan. He said that these matters were the subject of discussion at board meetings. It was the responsibility of the applicant as the general manager in his view, to make sure these matters were resolved.

Mr Key was not aware that the applicant did not have a construction or engineering background, but said that when the applicant commenced with the respondent, he was shown around the sites in relation to the operations of the business and received whatever support that he needed. In relation to the applicant's performance as general manager, Mr Key conceded that there was no specific written warnings to the applicant to improve his performance in the role, however, in his view, the role of the board was to support the general manager in the performance of his duties. Mr Key testified that in hindsight, he had the view that the engagement of the applicant by the respondent was a mistake. Mr Key gave evidence in relation to events surrounding the 18 August 1997 board meeting. He said that immediately prior to the meeting, he had a telephone discussion with Mr Halligan who advised him that both the applicant and Mr Flinn had tendered their resignations. Mr Halligan asked Mr Key to speak with both the applicant and Mr Flinn to try and put the situation "on ice", until Mr Halligan returned from attending to business in Port Hedland. Mr Key also testified that Mr Halligan told him during that same telephone conversation that he, Mr Halligan, had realised that he had made a mistake in employing the applicant as general manager.

Mr Key further said that he understood Mr Halligan's request as one of trying to calm the situation, as there was a lot happening in the business at that time and stability was needed. He said that after the formal meeting of the board had

concluded, he spoke with both Mr Flinn and the applicant. Mr Key said that he spoke with the applicant about there being *"trouble in the camp"*. He said the applicant advised him that he was having difficulty in relationships with others in the company, in particular Mr Flinn. Mr Key testified that he told the applicant to settle things down and to maintain his present role until Mr Halligan returned. When asked about this, he testified that he said this to the applicant because it was Mr Key's understanding that the applicant had offered to resign. Whilst his evidence was that he and the applicant did not specifically discuss the applicant's resignation, he did say that the applicant told him that *"if it came to a choice between me and Mr Flinn then he was prepared to leave"* (transcript p110). Notably, Mr Key did not recall raising operational matters at all with the applicant when he spoke to him after the formal board meeting.

I pause to observe that the applicant's evidence in relation to his conversation with Mr Key is totally at odds with Mr Key's testimony in relation to the same discussion. This is a matter that I deal with further below. Notably also in re-examination, after the matter had been broached in cross-examination, Mr Key gave evidence about his discussion with Mr Flinn. He said that Mr Flinn had told him that he was completely dissatisfied with the applicant's performance as general manager of the respondent and that was the reason that he had chosen to accept a position with another company. Mr Key's evidence was essentially unshaken in cross-examination.

Mr Halligan gave evidence on behalf of the respondent. He described generally how it was that the applicant came to be employed by the respondent. He said that the company needed someone to "polish up" the respondent's business, make it run more efficiently and to improve its image in the market place. Mr Halligan was shown exhibit R1, that being the letter from the applicant to Mr & Mrs Halligan dated 3 January 1997. Mr Halligan testified that the applicant's representations regarding his management skills made an impact on him in his decision to engage the applicant. He testified that he was aware that the applicant did not have a background in construction or maintenance but that did not worry him, as in his view, if the applicant had the necessary leadership and management skills that would not be a difficulty. Mr Halligan gave evidence in relation to his concerns about the feedback he got concerning the applicant's performance. He said he was aware that both Mr Flinn and a Mr Appleby were not happy with the applicant's performance as general manager. It was not apparent on the evidence who Mr Appleby was or what position he held in relation to the applicant. He said that from his discussions with others, it appeared that the applicant was not promoting the business as he should have been and was not attracting new customers. Indeed, he said that the number of customers of the respondent was decreasing not increasing. However, despite this, Mr Halligan said that he wanted to give the applicant time to settle into the job, as he was new to the industry.

In relation to the performance problems with the applicant, Mr Halligan testified that he had discussions with the applicant all the time in relation to running the business. Whilst Mr Halligan was not able to be specific, he referred in his evidence to discussions with the applicant to the effect that areas of the business needed improvement. He said that because he was away from the business regularly, he expected the general manager to get the needed improvements in the business.

Mr Halligan testified concerning the meeting with the applicant and Mr Flinn. He could not recall the date as he said he was always travelling away on company business. He said that he had just returned from a trip when the meeting took place. He said that the discussion between the applicant and Mr Flinn became quite heated. Mr Flinn was expressing his concern about the direction the company was taking and that the business was going backwards and not improving. Mr Halligan said after that Mr Flinn got up and left the meeting by saying *"I'm off"* (transcript p142). Mr Halligan testified that from Mr Flinn's behaviour, he inferred that he was leaving the employment of the respondent. This inference is consistent with evidence given by Ms Cavanagh about Mr Flinn's conduct at that time, which I will deal with later in these reasons.

Mr Halligan said that after Mr Flinn left the meeting, both he and the applicant talked about the problems that the business was having. He said that during the course of that discussion, the applicant said that *"if it would fix the problems that – or problems that he would resign"* (transcript p144). Later, on 18 August 1997, the day of the board meeting, Mr Halligan said he spoke again with the applicant by telephone. He could not recall whether the applicant had rung him or he had initiated the call. He said that during the course of that conversation the position regarding Mr Flinn came up once again. Mr Halligan said that the applicant again offered his resignation, if it was going to fix the problems that the company was having. Mr Halligan gave evidence that he could not afford to have both Mr Flinn and the applicant resign at the same time, as he did not think his wife, Deslyn Halligan, would be able to run the business by herself in his absence.

These events led Mr Halligan to contact Mr Key by telephone later that same day, to ask Mr Key to speak with both the applicant and Mr Flinn, to calm the situation down until he returned. Mr Halligan was cross-examined as to his telephone discussion with the applicant on that day. Mr Halligan was definite that the applicant did not tell him that he "might resign". He said that the words used by the applicant were the same or similar words that he used in the initial conversation with him during the meeting in which Mr Flinn walked out.

Subsequently, Mr Halligan returned from his trip and between that time, which on the evidence was established to be about the time of the opening of the respondent's new workshop on or about 29 August 1997, and 9 September 1997, was seeing for himself how the business was being run on a day to day basis. He testified that by 9 September he had come to the view that matters were not going to change in the business and the applicant did not need any more time to settle in. He said that on that day he met with the applicant in the morning in the respondent's boardroom. He called the applicant into the boardroom and told him that *"he had to accept his resignation and that he was sorry*". Mr Halligan could not recall exactly how the applicant responded but indicated that he also mentioned that he was either sorry or was disappointed.

Mr Halligan testified that there was no mention during the course of that discussion of either the applicant not resigning or being entitled to be paid out under his contract. Mr Halligan said the applicant left the room shortly after this exchange and the meeting was over very quickly. Subsequent to that discussion, either on the same day or the day after, he spoke with Mrs Halligan who reported to him that the applicant had telephoned her and there was some mention of payment for three months. Mr Halligan said that he told his wife that he would not pay this amount as the applicant had given his notice, but would give him one month's pay as a goodwill gesture. The terms of exhibit A8, that being the respondent's letter of 15 October 1997, were put to Mr Halligan in examination-in-chief. He conceded that the statement in that letter that he had agreed with the applicant on 9 September to pay one month's salary was incorrect. Mr Key had apparently prepared the letter without Mr Halligan's direct involvement. In cross-examination, Mr Halligan was quite emphatic that the applicant's two-year contract and any benefits he may have foregone were never raised between he and the applicant at any time.

A further meeting took place between he and the applicant at the respondent's premises, after Mr Halligan had returned from a business trip to Italy. He said that the applicant came in to pick up a trailer. At no time was there any discussion about the applicant's contract. Mr Halligan further testified that when he saw the applicant at or about this time, the relationship between them was not antagonistic and indeed, referred to the fact that he thought that the applicant and Mrs Halligan had been out for dinner at some stage prior to this meeting.

The respondent called Miss Mardi Cooke. She was both a friend and former colleague of the respondent at his previous employer, South West Personnel. When it was put to the applicant that Miss Cooke would be giving evidence in the proceedings, he testified that he had no reason to suggest that she would be other than truthful.

Miss Cooke testified that she received a telephone call from the applicant on the morning of either Monday 8 September or Tuesday 9 September 1997. She went to his house at about 7.30am – 8.00am in the morning. She said that the applicant initially showed her around his house, which he had recently, renovated. When confronted by Miss Cooke as to why she

had been called to his house that morning, she said that his response was *"I want to tell you that I'm going to resign"* (transcript p167). Miss Cooke testified that when she asked the applicant why he was going to resign, he responded to the effect that he was stressed in his position with the respondent and not sleeping. She further testified that the applicant told her that he had told Mr Halligan that he had resigned that morning. However, Mr Halligan had not wanted him to resign and he had taken some time off to think about it. Miss Cooke, when confronted with the applicant's evidence that he had never discussed with her the fact that he had or was going to resign, responded to the effect that his evidence in this regard was a lie. (transcript p168)

Miss Cooke further testified in relation to some performance problems that had arisen regarding the applicant's previous employment with her present employer. Miss Cooke said that she still maintained a friendly relationship with the applicant. Importantly also, Miss Cooke testified that when she saw him the applicant was distressed and upset. As I have already noted, Miss Cooke mentioned in her evidence that the applicant told her that he was stressed and not coping. I pause to observe that this evidence is consistent with the applicant's evidence in re-examination regarding his meeting with Miss Cooke, when the following exchange took place between Mr Formby and the applicant—

> *MR FORMBY: "You said that can't—in answer to the questions of my learned friend that you can't recall saying to her that you had resigned. Do you remember anything about the discussion?—The thing I do—The thing that I do remember in my mind was that the duress I was under, the stresses, I was starting to come apart at the seams, and you, I was clutching at straws, looking for hope and reaching out to friends. Trying to get some sort of validation as to what had happened to me. You know, over the years that Mardi and I worked together, we certainly had our moments of run in because in the industry that we work in, in the human resources industry, it is stressful, it really is and it is one of those situations whereby you let go. You've got to let go daily, hourly and Mardi and I certainly had our ups and downs, like employer and employee would—or two employees would but at the end of the day we were always able to resolve it, we're still friends, we're still mates, we still socialise."* (transcript pp 100-101)

I should also observe that Miss Cooke's evidence and the above extract of the applicant's re-examination, stands in contrast to the evidence of the applicant in cross-examination about the same issue. The following exchange took place during cross-examination—

> *MR RAYMOND: "You became fairly stressed about a number of issues, did you not, relating to the management of the business?—Can you sort of expand on that?*
>
> *Well, there were these issues coming up, things that had to be done that hadn't been done?—No, I wasn't stressed about—*
>
> *You weren't stressed?—Not about the Italian Crane Company and things like that, No."* (transcript p.36)

This is merely one example of inconsistencies in the applicant's evidence and a general reluctance to be frank and forthright about important issues. I will return to this question below when considering my findings.

Mrs Deslyn Halligan gave evidence. She referred to problems the applicant was having in managing the business of the respondent, in particular control over the progress of jobs in the workshop and financial reporting to Mr Halligan regarding job progress. She said that information wasn't available from the applicant when it was needed. Mrs Halligan testified as to the telephone call she received from the applicant on the morning of 9 September 1997. She could not recall what time of the morning the telephone conversation took place. Mrs Halligan testified that the applicant rang her and asked her whether she had heard what had happened to which she responded that she had. The applicant indicated that he still wished to maintain social contact to which Mrs Halligan responded positively. She said that during the course of the telephone conversation, the applicant raised the financial status of the business and him being paid weekly instead of a lump sum *"for the period of the three months that he said was contractually owing to him"* (transcript p174). Mrs Halligan said that the applicant did not mention why the termination had taken place or his entitlement to be employed until January 1999.

Mrs Halligan then testified that later that day she spoke with Mr Halligan and discussed the call she had received from the applicant. She said that she also asked Mr Halligan what had happened that morning and was told that the applicant had gone, it was a quick meeting and there had been no discussion of terms of payment to the applicant. Following this it was agreed between them that the applicant be paid one month's salary on a weekly basis. She also testified that after the events of 9 September 1997, the applicant attended the Halligans' home and had dinner with them and there was no suggestion of any animosity or antagonism between them. She further said that during the course of that evening, the applicant did not mention the issue of his contract or any unfairness in what had occurred, although she indicated she recalled some mention of *"the three months"* at the end of the evening, but she took that matter no further at the time. She also mentioned that given the good relationship that existed with the applicant, any telephone messages left by him would have been returned.

Finally, the respondent called Ms Wendy Cavanagh. Ms Cavanagh was employed as the receptionist at the respondent's business. She testified that she recalled a meeting taking place following which Mr Flinn indicated he was resigning. She said that whilst she wasn't actually in the meeting, the reception desk where she was sitting at the time, was directly opposite the office in which the meeting took place. She said she heard muffled words and raised voices. She then testified that after Mr Flinn had left the room he expressed the view to her, in somewhat colourful language according to the witness, that he had had enough and things weren't working out. She further testified that following the meeting, the general *"office talk"* was that the applicant was going to leave or had resigned.

As is apparent from my summary of the evidence adduced in these proceedings, there is a direct conflict in the evidence given by the applicant and the respondent's witnesses. In order to resolve that conflict, I am required to assess the credibility of the witnesses and form a view as to whose evidence I prefer. In the final analysis, that preference is gleaned from the impressions I have of the witnesses, having seen and heard them give their evidence over the course of the proceedings. Having done so, I have no hesitation in resolving that conflict in favour of the respondent's witnesses. For the respondent, I found that both Mr & Mrs Halligan to be forthright witnesses although it must be accepted that Mr Halligan in particular, had some lapses of memory in relation to a number of issues. It was also apparent to me that Mr Halligan is a man of few words. However, on the key questions of the events of 9 September 1997 and subsequent meetings with the applicant, his evidence was unambiguously clear. Likewise, I found Mr Key to be a reliable witness who gave his evidence as to the business operations of the respondent, the role of the applicant as general manager and the events of 18 August 1997, clearly and succinctly. Furthermore, I found the evidence of Miss Cooke most impressive. I have no reason whatsoever to doubt the thrust of her testimony, particularly given her openly acknowledged continuing friendship with the applicant and former working relationship. Also, I have no reason to doubt the veracity of the evidence of Ms Cavanagh, to the extent to which she was able to testify on matters in issue in these proceedings.

On the other hand, I found many aspects of the applicant's evidence unsatisfactory and quite unconvincing. The applicant was simply unable to recall in his evidence, events and conversations relating to matters critical to the resolution of these proceedings. Moreover, his testimony as to his meeting at his home with Miss Cooke and what he said to her is diametrically opposed to Miss Cooke's evidence on this point, which I have accepted. Further, I found the applicant generally, to be very reluctant to answer questions put to him particularly in cross-examination, in a manner adverse to his case. For example, as I have noted above, it was not until the applicant was pressed in cross-examination, that he finally conceded that he had a conflict with Mr Flinn. Furthermore, I found the applicant's explanation of the conversation he had

with Mr Key after the board meeting on 18 August 1997, where it was referred to in the minutes of that meeting as *"a few quiet words"*, as completely unlikely and wholly unconvincing. I do not accept that this phrase would have been used in the board minutes to describe a discussion on operational issues. This is all the more so when regard is had to the reference to Mr Key speaking to Mr Flinn and the applicant *"on Craig's behalf*". As I have already observed, the applicant was evasive on the issue as to whether he was under stress and pressure at work, when this was put to him in cross-examination. This evidence was however, inconsistent with his later evidence in re-examination and Miss Cooke's evidence. In short, on the credibility issue, I have approached the applicant's evidence with a great deal of caution.

Findings

Accordingly, I am satisfied on the evidence and I find that indeed the applicant was having significant difficulties in the performance of his duties as general manager of the respondent. The board meeting minutes tendered in these proceedings (exhibits R3-R6) make it quite clear that over the course of several months, the applicant's performance as general manager was found wanting in a number of key areas. Furthermore, I am satisfied on the evidence and I find that whilst accepting that the dynamics of a family business may have been some source of frustration for the applicant, ultimately it was the applicant as general manager who was responsible for the day to day affairs of the respondent's business. Moreover, as I have already observed, there is no evidence that directly points to the applicant formally recording any obstacles he encountered to the achievement of his responsibilities as general manager.

I have absolutely no doubt that the respondent, in engaging the applicant, relied upon the representations made to it by the applicant in the applicant's letter of 3 January 1997 (exhibit R1). Exhibit R1 makes it quite clear in my opinion, that the applicant offered his services to the respondent on the basis of management skills that would be generally attributable to the role of a general manager. That is, the management of people and material resources to achieve a business outcome. That is the essence of general management in my opinion. Moreover, exhibit R1 also quite specifically represented what the applicant said he could do for the respondent in a number of areas including general administration of the business and personnel, quality management, business development and other tasks that one would expect a general manager to be responsible for. Indeed, the evidence of Mr Key, which I accept, reinforces in my opinion, what the essence of the applicant's role was in managing the respondent's business.

Moreover, I am satisfied on the evidence before me, that the applicant, at least by in or about September 1997, was feeling somewhat overwhelmed by the responsibilities of his position and his apparent inability to cope with the demands of the position. The applicant's own evidence in re-examination in my view, was very telling as to the circumstances in which the applicant found himself. In his own words, the applicant said he was *"stressed and under duress"*. It is also important to note that this evidence is entirely consistent with the evidence given by Miss Cooke when she visited the applicant's home. As the applicant himself said, Miss Cooke was a long standing friend and a person to whom he turned to in times of need. On the evidence this was clearly one of them in my opinion.

The circumstances in which the applicant found himself, in terms of the stress and difficulties he was having on the job, including the admitted conflict with Mr Flinn, forms an important, perhaps critical part of the factual matrix leading to the events which occurred on or about 9 September 1997. I turn now to those events.

I have no doubt that what occurred on 9 September 1997 was as Mr Halligan described it. That is, in an endeavour to resolve the situation that had developed, the applicant said he would resign if that would resolve the issue. Furthermore, I am satisfied on the evidence and find that that proposition was affirmed between the applicant and Mr Halligan in a telephone conversation which took place on or about 18 August 1997, prior to the respondent's board meeting of that same day. That is, I find that the applicant had expressed at least on two occasions to Mr Halligan, that he would resign from the respondent. The effect of that, in the context of the applicant's contract of employment, is a matter to which I will return further below.

The conclusion that I have reached on the evidence in this regard is also consistent with the evidence of Mr Key as to the events following the respondent's board meeting on 18 August 1997. I do not accept, as I have observed, the applicant's evidence that the *"few quiet words"* were to discuss operational business issues. In my view, it would indeed be passing strange for those matters to not be dealt with entirely during the course of the formal business of the board meeting. It is in my view, far more likely that the events were as Mr Key outlined them, that being that Mr Halligan had asked Mr Key, in his position as chairman, to try and calm the troubled waters involving Mr Flinn, the applicant and the respondent, at least until Mr Halligan could return from his business trip. This evidence is also entirely consistent with Mr Halligan's evidence that in his view, to have two senior people such as the applicant and Mr Flinn departing the business at the same time, would be unmanageable for Mrs Halligan.

In relation to the resignation issue, I consider that the central thrust of Miss Cooke's evidence corroborates the events that I have found to have occurred. It is reasonably clear, as Mr Raymond put in his submissions, that Miss Cooke was mistaken as to the timing of her meeting at the applicant's home. Given the undisputed evidence that the termination took place on 9 September 1997, then Miss Cooke's meeting with the applicant must have been sometime prior to that. It is perhaps though, not surprising given the lapse of time between the material events and these proceedings, that Miss Cooke may have been mistaken as to the relevant dates. However, her evidence as to what was said by the applicant was very clear, unshaken in cross-examination, and completely consistent with the factual circumstances that I have found to exist leading up to the termination of the applicant's contract of employment.

Whilst I do not place much weight upon it, the evidence of Ms Cavanagh, to an extent, completed the picture in terms of the events concerning the applicant's departure. I have no reason to doubt her evidence that there was *"office talk"* to the effect that the applicant was leaving or had resigned from the respondent. When taken in the context of the evidence as a whole, this witness adds further weight to the version of the events as put by the respondent.

Other Matters

There are a number of other issues that bear upon my conclusions in this regard. First, it is material in my view, that there was no evidence that the applicant ever committed to writing his version of the events, in protest at the respondent's alleged conduct. Given the circumstances and the position the applicant held, one would have thought that either immediately or a short time after the events of 9 September 1997, the applicant would have confirmed in writing his non-acceptance of the purported dismissal, if that in fact had occurred. This is particularly so, in the context of what appeared to have been an ongoing social relationship between the applicant and Mr & Mrs Halligan. Furthermore, I find it somewhat odd that on the evidence the applicant, having conceded that Mr Halligan was a man of his word and a person whom the applicant trusted and had respect for, did not take any formal steps to pursue his claim against the respondent for some months after the termination of the employment. The first formal correspondence from the applicant's solicitors to the respondent is dated 16 January 1998 (exhibit R7). Whilst the applicant attempted to explain the delay in his evidence, I find it surprising to say the least, that given the extent to which the applicant said he was aggrieved by the respondent's conduct, it took him so long to formally pursue the matter.

Finally, in relation to the evidence of Mrs Halligan that the applicant raised the issue of "three months" under the contract, it is more likely than not in my opinion that this relates to a misunderstanding of the terms of the contract by the applicant. Whilst this matter is not essential to my conclusions in relation to the applicant's claim, I should observe that in any event if this is indeed the case, the terms of exhibit A1 do not confer on the applicant any monetary benefit in respect of the three month period referred to in the event of resignation by the applicant.

Having made these findings on the evidence, I now turn to consider the legal issues raised by this application.

The Law – Termination of the Contract

In this case, it is common ground that the applicant was employed by the respondent on a contract for an initial term of two years. There is no provision within the contract for termination on notice by either party within that initial two-year period.

In a contract providing for notice, a valid notice of termination will operate according to its tenor and will bring the relevant contract of employment to an end on the expiry of the notice period: *Hill v Parsons* (1972) 1 Ch 305 at 313-314. In the ordinary course, when notice is given in accordance with the terms of the contract, there is no need for an employer to "accept" notice of termination, as the contract of employment will come to an end by the effluxion of time. In *Birrell v Australian National Airlines Commission* (1984) 9 IR 101 Gray J observed at 109—

> *"The giving of notice of termination of a contract, in accordance with the terms of that contract, is a unilateral right. Its existence does not depend in any way on the acceptance or rejection of the notice by the other party to the contract. The giving of such a notice operates to determine the contract by effluxion of the period of notice."*

[See also *Grout v Gunnedah Shire Council (No. 1)* (1994) 1 IRCR 143 at 152; *APESMA v Skilled Engineering Pty Ltd* (1994) 51 IR 236 at 246].

What then is the effect of an invalid notice of termination or repudiation of a contract? Generally speaking, an invalid notice of termination, that being a period of notice of termination inconsistent with the relevant terms of the contract of employment, does not operate to end the contract. In *Gunton v Richmond-Upon-Thames London Borough Council* (1981) 1 Ch 448 Buckley LJ, in considering this issue, said at 467—

> *"In Howard v Pickford Tool Co Ltd (1951) 1 KB 417, 421 Asquith LJ employed a colourful phrase: an unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind. It is common ground that in respect of the generality of contracts that is good law. As Viscount Simon LC said in Heyman v Darwins Ltd (1942) AC 356, 361—*
>
> *"But repudiation by one party standing alone does not terminate a contract. It takes two to end it. By repudiation, on the one side, an acceptance of the repudiation, on the other"*
>
> *This principle was recognised 100 years ago in such cases as Hochster v De La Tour (1853) 2 E & B 678 and Johnstone v Milling (1886) 16 QBD 460."*

[See also *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435; *Hill* (supra)].

Notwithstanding this proposition, an invalid notice of termination of employment, for example, a notice being too short in time, may be accepted by the innocent party to the contract and the employment will terminate on the acceptance of that invalid notice. In *Hill* (supra) Lord Denning MR said at 313—

> *"Then comes the important question: what is the affect of an invalid notice to terminate? Suppose the master gives the servant only one month's notice when he is entitled to six? What is the consequence in law? It seems to me that if a master serves on his servant a notice to terminate his service, and that notice is too short because it is not in accordance with the contract, then it is not in law effective to terminate the contract – unless, of course, the servant accepts it. It is no more effective than an invalid notice to quit. Just as a notice to quit which is too short does not terminate a tenancy, so a notice which is too short does not terminate a contract of employment."*

[See also *Gunton* (supra); *Norwest Holst Group Administration Ltd v Harrison* (1985) ICR 668 at 683; *Grout* (supra); *Gunnedah Shire Council v Grout* (1995) 62 IR 150 at 158, 159-160].

Furthermore, in terms of the circumstances in which a notice of resignation is given, in Macken, McCarry and Sappideen *The Law of Employment Fourth Ed*, the learned authors observe at 169—

> *"Where plain or unambiguous words of resignation or dismissal are used, it appears that resort should not be had to the surrounding circumstances in construing them in order to decide, for example, whether a reasonable employer should or would have understood the words as words of resignation. But if the words used are ambiguous, then recourse may be had to the surrounding circumstances and to the parties understanding of what was said."*

Alternatively to acceptance of a repudiation, a contract of employment may simply come to an end by the agreement of the parties, on the basis of mutual consent*: Birch v University of Liverpool* (1985) ICR 470.

The Effect of the Events of 9 September 1997

In my opinion, based upon the facts as I have found them to be, it is open to conclude that prior to the applicant's brief meeting with Mr Halligan on 9 September 1997, by his plain words, he offered the respondent his resignation. By the terms of the applicant's contract of employment with the respondent, neither the applicant nor the respondent were entitled to give notice of termination of employment within the initial two-year term. To that extent, the applicant's offer amounted to a purported termination that was invalid of itself, to terminate the applicant's contract of employment. On the facts, the conduct of the applicant was in this regard, plain and unambiguous. Furthermore, the acceptance or otherwise of the applicant's offer, in my opinion was important to the resolution of this issue, given the principles established in the authorities that I have referred to above. There is no doubt in my mind on the evidence, that the effect of Mr Halligan's conduct on 9 September 1997, was to accept the applicant's repudiation of the contract, so as to bring the applicant's contract of employment to an end on that acceptance: *Heyman* (supra). There is nothing on the evidence to suggest that Mr Halligan's acceptance of the applicant's repudiation was in any way equivocal. Indeed, the evidence is all the other way. The applicant had no entitlement to be paid salary under the contract beyond that time.

Even if I am wrong in relation to the applicant's words being plain and unambiguous, the surrounding circumstances, in the context of the applicant's own words and conduct, as established on the evidence, lead me inexorably to the same conclusion. That is, the applicant was not coping on the job. He was under great stress. He had a major conflict with other personnel. His leaving was a direct means of resolving all of these issues.

Moreover, there is nothing on the evidence to suggest that the applicant's offers to resign at the time they were given, were made in the heat of the moment or that otherwise, the applicant was emotionally upset, such that I should regard the respondent's acceptance of it with some caution. On the contrary, the evidence points in the other direction. In particular, I refer in this regard to the evidence of Miss Cooke, which establishes that because of the circumstances in which the applicant had found himself, he had decided to resign from the respondent, as a way of out his difficulties. For the reasons which I have already referred to, the meeting between the applicant and Miss Cooke must have occurred sometime before the critical meeting between the applicant and Mr Halligan, on 9 September 1997.

Furthermore, it is open to conclude on the evidence and the findings that I have made, that the conduct of the parties constituted an agreement to terminate the contract. In the case of either the respondent's acceptance of the applicant's repudiation or termination by agreement, the applicant had no entitlement to salary or other benefits under the contract from the date of termination of the contract.

In my opinion, having considered all of the evidence, the applicant has not established on the balance of probabilities, that his employment was terminated by the respondent, so as to give rise to any relief in this jurisdiction.

Contractual Benefit or Damages

In view of my conclusions in relation to the threshold issue as to whether the applicant was dismissed or resigned, it is not necessary for me to determine the issues raised by Mr Raymond on behalf of the respondent, going to the question of the Commission's jurisdiction to deal with the applicant's claim as a denied contractual benefit. However, given that Mr Raymond argued the matter in some detail, I propose to say something about his submissions.

Mr Raymond's primary submission was that in view of decisions of the Industrial Appeal Court in *Kounis Metal Industries Pty Ltd v TWU* (1992) 73 WAIG 14 and *Coles Supermarkets v Coppin & Ors* (1993) 49 IR 275, read in conjunction with the terms of ss 7(1a) and 23A of the Act, the decision of the Full Bench of the Commission in *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307 should no longer be regarded as binding authority. Counsel submitted that in determining a contractual benefit claim, the laws of contract would have application. In that regard, he referred to the decision of Fielding C (as he then was) in *Bartlett v Indian Pacific Limited* (1988) 68 WAIG 2508 at 2519. Furthermore, he submitted that the legislature, in enacting ss 23A(1)(a) and 23A(1)(ba), recognised the distinction between compensation for loss or injury, and an accrued entitlement. The submission being that *"any amount"* for the purposes of s 23A(1)(a), must be an amount accrued as if not, it must be compensation for loss or injury: *Gilmore v Cecil Bros* (1996) 76 WAIG 4434 at 4447.

Furthermore, Mr Raymond submitted that in the case of repudiation, the rights of the parties to a contract including a contract of employment, on termination of the contract, are dependent upon the manner of response of the innocent party. In the case of employment contracts, for a claim to be made for ongoing salary, an employee must, so the submission goes, reject the purported termination by the employer and insist upon performance under the contract. Where this is so, and the employee remains willing and able to perform under the contract, that is the only circumstance in which a claim for ongoing salary could accrue. Alternatively, in the event that the contract is terminated, both parties are released from their obligations under the contract and there can be no claim for a denied contractual benefit: *McDonald v Dennys Lascelles Limited* (1933) 48 CLR 457 per Dixon J at 476-7; *Heyman* (supra); *Gunton* (supra); *Turner v Australasian Coal and Shale Employees Federation* (1984) 9 IR 87; *Siagan v Sanel Pty Ltd* (1994) 54 IR 185.

Counsel argued that in the event an employee accepts the repudiation by the employer, so regarding the contract as at an end, the remaining claim is one for damages for breach of contract and not a contractual benefit. As at the time of the termination of the contract, there is no accrued benefit to future wages or salary to which the employee can be entitled. As to the enactment of s 7(1a) of the Act, Mr Raymond argued that the effect of this amendment to the Act supports the argument so developed. In counsel's submission, the terms of s 7(1a) expressly recognise the distinction between a benefit under a contract of service and the termination of the employer and employee relationship as discussed and considered in cases such as *Siagan* (supra) and *APESMA* (supra).

In my opinion, the respondent's submissions in relation to this issue have considerable force. Decisions of the Industrial Appeal Court to which I have referred, when read with amendments to the Act and the application of relevant principles of contract law, give rise to the proposition that once the contract of employment has come to an end by acceptance by either party of the other's repudiation, any subsequent claim for loss of future salary or wages that would have been earned under the contract of employment if it had remained on foot, is a claim for damages.

The consideration under the contract of employment for the receipt of salary or wages, is the performance of services. Once that ceases or the employee ceases being willing and able to perform services, arguably in my view, there can be no accrued benefit beyond that point. It may well be the case, as Mr Raymond submitted, that the effect of s 7(1a) of the Act is that a claim for denied contractual benefits may be advanced in cases where an application is made for a benefit accrued prior to the termination of the contract of employment, alternatively, where the employment relationship has terminated but the employee has refused to accept the employer's repudiation and the contract of employment remains on foot.

Conclusion

For all of these reasons the applicant's claim is dismissed.

APPEARANCES: Mr H Formby of counsel appeared on behalf of the applicant.

Mr C Raymond of counsel appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Geoffrey Francis O'Dea

and

South West Maintenance Pty Ltd.

No. 736 of 1998.

COMMISSIONER S J KENNER.

18 November 1998.

Order.

HAVING heard Mr H Formby as counsel on behalf of the applicant and Mr C Raymond of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Miss Pina Pisconeri

and

Laurens and Munns, Incorporating Munns Nominees Pty Ltd ACN 008-835-247 and George Laurens (WA) Pty Ltd, ACN 009-118-950.

No. 555 of 1998.

12 November 1998.

Reasons for Decision.

COMMISSIONER S A CAWLEY: This claim relies on the right of access to the Commission's jurisdiction conferred by section 29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act"). That provision is as follows—

29. (1) An industrial matter may be referred to the Commission —

(a) ...

(b) in the case of a claim by an employee—

(i) that he has been harshly, oppressively or unfairly dismissed from his employment; or

(ii) ...

by the employe[r]

Clearly for the right of access to arise there must have been a dismissal of the employee by his or her employer. This is a question of fact.

The parties to this matter, Miss Pina Pisconeri ("the applicant") and Laurens and Munns, Incorporating Munns Nominees Pty Ltd ACN 008-835-247 and George Laurens (WA) Pty Ltd, ACN 009-118-950 ("the respondent") agree that a contract of employment existed between them but do not agree that it was ended by way of dismissal. The respondent says the applicant resigned. The applicant acknowledges that she resigned from the employment but claims that this act was a "dismissal—at the initiative of the employer".

The decided authorities make it abundantly clear that a resignation may constitute a dismissal for the purposes of the jurisdiction of the Commission to deal with a claim brought pursuant to section 29(1)(b)(i) of the Act. The fundamental test is whether the employee had no real alternative but to resign as a result of the conduct of the employer. A situation where a resignation results from an employer giving an

employee the option of resigning or being dismissed may be such a case. And, as Rowland J, with whom Anderson J agreed in the case of The Attorney General v Western Australian Prison Officers' union of Workers (1995) 75 WAIG 3166 at 3169 said, a dismissal by the employer may result where "an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign".

In essence the applicant's claim is that her resignation resulted from conduct by the employer designed to force her to resign so that her "resignation" actually amounted to an act of dismissal by the respondent. The applicant bears the onus of establishing that claim.

The respondent is in the business of debt collecting on behalf of clients. The applicant was employed as a sales representative. She had been employed by the respondent for nearly 4½ years when the contract was terminated on 27 March 1998 at a meeting involving the applicant, her industrial agent Mr T Crossley and Mr K Munns and Mr R Paul for the respondent. The meeting had originally been scheduled for a date in February but was postponed to the March date at the request of the applicant. A list of matters to be discussed at the meeting was produced to the applicant by Munns early in February. The purpose of the meeting was identified by Munns as being a review of the applicant's performance in relation to the items on the list and the applicant was invited to supply him a week prior to the meeting with an agenda of items or other points she wished to raise for discussion. A subsequent letter (dated 18 February 1998) from the applicant to Munns refers to alleged unilateral changes to her contract which "will be discussed at length in our review meeting" but does not specify these. The rest of the letter goes to unspecified assertions about "basis elements" of contracts "missing, according to statute and common law", requests for more detail of her "alleged shortcomings" and other matters. In short, it is not open to conclude that this letter was a response, in terms, to Munns' suggestion and, in fact, the applicant's evidence is that she did not raise any specific agenda items for discussion prior to the meeting of 27 March 1998.

The applicant's evidence as to what happened at the meeting can be summarised as follows. Most of the talking on behalf of the respondent was by Paul. The agenda items listed in the February document were raised one by one. The applicant acknowledges that the notes of outcome said to have been made by Paul and produced to the Commission are an accurate summary of the discussions on the items. These notes include statements to the effect that the applicant was told no concern remained over some items. Questions were raised by the respondent as to why some work was not being done and replies were given by the applicant that she was refusing to do them any more with reasons why. The respondent queried how the applicant's performance in some respects could be improved and her responses, including her disagreeing with figures stated by Paul were recorded. After the agenda items raised by the respondent had been gone through Paul asked the applicant to leave her diary on her desk that day because he and Munns wanted to take the rest of the afternoon and the weekend to review the position and she was told they would have a further meeting with her at 9.00am on the following Monday. The applicant stated she wanted Crossley present at that meeting and, when Paul refused permission for that, she informed him she would not attend. The applicant says that Paul asked her if she wanted to say anything more and she responded with words to the effect that she had been treated disgustingly and worse than a dog. She says Munns asked Crossley several times who was the author of letters sent to the respondent by the applicant. The applicant says Crossley stated the applicant wanted to raise some concerns and asked to be heard. Paul stood up as if to go. Crossley handed over the resignation letter which had been pre-prepared. He also handed an envelope said to contain a psychologist's report on the applicant to Munns or Paul. Munns asked the applicant more than once whether she was resigning. She replied yes. The meeting ended shortly after. The applicant denies the words "constructive dismissal" were spoken at the meeting.

Quite clearly the applicant's own evidence of the course of the meeting of 27 March 1998 does not reveal any conduct by the employer which could be construed as "initiating" her resignation. On the contrary, the evidence is that the presentation of the prepared resignation letter to the respondent was a matter for the discretionary judgement of Crossley and he exercised it. The applicant, in the face of her own failure to respond to the earlier invitation to identify any matters she wished to raise at the meeting, says that Crossley's action was forced by the respondent's declining to enter into discussions on matters she wished to raise at the meeting. But this position is not credible in the circumstances.

Then there is the 2½ page long resignation letter dated 27 March 1998 (but prepared 3-4 days earlier). It includes a conclusion by the applicant that "the working relationship between us is becoming irretrievable", a statement that the applicant "thought [the respondent] would have realised I am charging you with frustration of the contract and constructive dismissal" and a reference to her disappointment that the respondent "did not take the opportunity at the review (sic) meeting to discuss the terms of a possible out of court settlement". In my view these go to an undermining of the integrity of the applicant's position that the resignation on 27 March 1998 was a direct consequence of the respondent's conduct. Indeed as counsel for the respondent pointed out, the statement "becoming irretrievable" is at odds with the concept that the only available option for the employee at the time was resignation.

It was submitted on behalf of the applicant that any difficulties for the applicant's position arising out of the resignation letter are just "technicalities" and regard should be had for the alleged pattern of conduct of the employer between 17 November 1997 up to 27 March 1998. It is this, it was submitted (somewhat incoherently), which gave rise to resignation being the applicant's only option. But the applicant's own evidence as to the employer's conduct in that period and the documents produced by her fall a long way short of establishing that position.

Certainly on 17 November 1997 the respondent identified concerns it said it had about the applicant's work performance. These were not accepted by the applicant then or subsequently as substantiated, valid or fairly raised. She was upset then and her sense of grievance continued. But the matter of whether the criticisms were fair or validly based is not the determinant of the question here. Nor is any sense of grievance or emotional state. It is the conduct of the employer. And that must be established as effectively amounting to a dismissal by way of a resignation because no real alternative existed.

The applicant says the respondent kept changing her contract by changing her duties without her consent. But her own evidence of her duties before and after suggests that the requirement for more record keeping and other matters was not as significant as suggested in submissions. There are other relevant considerations. While the applicant complains of conduct by the employer from 17 November 1997 through to 27 March 1998 driving her out of her employment, she was absent from work on various forms of leave for a not inconsiderable time during this period. This militates against her assertions as to a sustained pattern of conduct by the respondent for the purpose of forcing her to resign. As to the alleged bombardment of her by letters and memoranda, the applicant acknowledged in cross examination that other than the letter of criticism of her performance dated 17 November 1997, the respondent's letters to her were in response to communications from her or at her request and that some of the memoranda were not exclusive to her and concerned general procedures.

In all, it is open to conclude on that evidence that the respondent, having raised concerns about the applicant's performance on 17 November 1997 thereafter set about reviewing the situation up to and including its conduct at the meeting of 27 March 1998 and its intention to pursue that review further was pre-empted by the action of resignation.

And then there is evidence that the terms of the termination of the employment were negotiated and agreed between the parties. The applicant requested in the letter of resignation that the notice period for her to work out be reduced and subsequently Crossley and the respondent agreed on conditions to apply on the termination of the employment. This is a relevant consideration [see Industrial Appeal Court decision in Cargill Australia Limited, Leslie Salt Division (1992) 72 WAIG 1495]. By her acknowledgment in the letter of resignation handed to the respondent on 27 March 1998 of an obligation to give notice of termination the applicant disposes of any claim that the

conduct of the respondent to that point was such to strike at the heart of the contract and give rise to a right for her to walk away from the employment.

There is sufficient, in my view, for the applicant's filed documents to be fatal to her claim that the resignation on 27 March 1998 was in fact a dismissal. And her own evidence more than confirms this conclusion. Indeed, having regard for this, it is difficult to see how a person, competently advised, could contemplate raising a claim that a dismissal actually occurred.

It follows that there was no dismissal for the purposes of the jurisdiction of the Commission and the claim will be struck out.

It remains to deal with two other matters. At the outset of the hearing counsel for the respondent applied to have the claim dismissed pursuant to section 27 of the Act on the basis that the applicant's own documents as filed disclosed that she resigned and, applying the principles enunciated in The Attorney General *v.* Prison Officers' Union (supra) and other authorities, the conditions for a constructive dismissal could not be met. In support of this contention Mr Drake-Brockman referred specifically to paragraphs 51-76 of the applicant's particulars filed on 11 May 1998 and the applicant's letter dated 27 March 1998 informing the respondent of her resignation. The respondent, in effect, sought to rely on those submissions in seeking to have the claim dismissed.

In the light of the foregoing reasons it is not necessary to canvas the respondent's argument further other than to observe that the submissions clearly established a case to answer. But though it was limited to the applicant's own documents, the response from Mr Crossley was largely irrelevant or incomprehensible and lacking in an appreciation of the relevant principles of law; this last even after an adjournment was allowed him so he could check authorities cited by the respondent (which, given the fundamental issue to be argued, should have been known to him). It was only in recognition of the inadequacy of this response to the respondent's application to dismiss that an opportunity for the applicant to give evidence was extended. That opportunity in no way reflected any conclusion as to the respondent's submission. In essence, the respondent's submission had force, and the response to it on behalf of the applicant was so inadequate as to amount to a vacuum in answer. In the circumstances it was considered that an opportunity for the applicant herself to tell her story could be allowed before the respondent's application to dismiss was considered. That occurred and the evidence has been dealt with in the foregoing.

It remains to make express that the respondent's application to have the claim dismissed pursuant to section 27 of the Act is made out. The order which issues will reflect this.

Finally, some observations about Mr Crossley's submissions to the effect that the respondent's application to dismiss took him by surprise thereby resulting in "procedural unfairness" and another example of misdeeds by the respondent (impliedly condoned by the Commission) throughout this matter aimed at denying the applicant an opportunity to put her case.

There is no substance in these assertions. The respondent's position on the alleged dismissal was express in its filed answers to the claim and its intention to pursue an application to have the matter dismissed pursuant to section 27 of the Act was expressed in earlier proceedings in the Commission. Mr Crossley's claims of ambush is a nonsense. As to the record of this claim, if there has been any unfairness it is that the respondent has had to endure defending itself against a claim which turned out to be ill judged, ill advised and hopeless.

24 November 1998

Prior to the order in this matter issuing the respondent gave notice it intended to seek costs. The matter was relisted for the purpose of hearing the parties on this. Mr Clarke submits on behalf of the respondent that an award of costs pursuant to section 27(1)(c) of the Act is warranted in this case because the applicant's own case disclosed no reasonable cause. The respondent is said to have incurred significant costs in staff time devoted to preparing documents in relation to the case, in photocopying and couriering documents and attending proceedings as well as other disbursement costs and it seeks some relief through this application. The respondent further submits that any costs awarded should be personally against the applicant's agent, Mr T C Crossley. In the alternative the respondent seeks costs against the applicant and a recommendation that Mr Crossley himself be responsible for meeting them.

Mr Crossley submitted that there was no jurisdiction to deal with this application for costs as it had not been made on a Form 1 as required by Regulation 8 of the Western Australian Industrial Relations Commission Regulations 1985 as amended ("the regulations") and, despite checking with the Registry "on the hour" he had been unable to establish at the point of hearing that a $5.00 filing fee was paid. The rest of his submission went to assertions as to what costs could not be awarded and complaints that he had not had time to verify that the costs claimed had been incurred. The merit of any award for costs being issued was canvassed only faintly.

Mr Crossley's submission that there is no jurisdiction is wrong in law. Jurisdiction is conferred by the Parliament through the legislation and it not a consequence arising from regulations. The Form 1 argument is wrong and the submission as to the $5.00 filing fee is not worth comment. Section 27(1)(c) of the Act gives the Commission a discretion to order one party to pay another party costs and expenses not including costs for the services of a legal practitioner or agent in relation to any matter before it. An application for costs may be raised as an incident to proceedings. The action contemplated by Regulation 8 is the filing of a substantive claim so as to enable the commencement of proceedings. Applications incidental to the proceedings may be raised at any time. It is simply not the case that an application for costs must be raised by the filing of a Form 1.

Generally the questions for the Commission where an application for costs has been raised is whether or not such an award should be made and, if so, what costs should be awarded. Usually it has been held in this jurisdiction that costs will not be awarded against an applicant except in extreme cases. Applying this test to the matter here it is my view that an award of costs is justified. The claim was not only ill founded but recklessly pursued and bedevilled by poor representation of the applicant. Costs will be awarded. The question then is what costs.

That consideration must be pursuant to section 26 of the Act. It is a matter of what is fair and reasonable in all the circumstances. It is not a matter of penalty. The circumstances include the record of the matter and an appreciation of probable matters for costs involved. So far as the level of costs are concerned, the scale provided in the Rules of the Supreme Court may be used as a guide.

The respondent produced schedules of costs said to have been incurred by the respondent within its business and in disbursements by its solicitors on its behalf. The first refers to costs associated with time expended by staff members and senior personnel in preparing documents, attending proceedings, conferring with counsel and preparing for proceedings as well as some photocopying costs. The disbursement costs said to have been incurred by counsel in photocopying, facsimile, courier and other itemised charges appear in the second schedule.

Given the history of the proceedings in this matter I think it likely that the respondent was forced to expend significant staff resources in defending against the claim and accept it incurred disbursement costs as well. However some of the costs in the first schedule refer to events prior to the date of the applicant's claim being filed. These, I think, should not be considered here. Of the remainder in the first schedule two other items (16 and 25) appear to be repeated/included elsewhere and will not be considered. So far as an hourly rate of cost goes for senior personnel identified in the schedule, I consider the $75.00 figure reasonable but, in the absence of any other detail, a lower rate of say $30.00 per hour is more appropriate with respect to others. Applying these conclusions to the hours in the schedule, which I accept, it is the case that the total is more than $7,000.00. The photocopying costs within the business and the costs of disbursements, would be in addition.

Having regard for the fact that the respondent did not seek full recovery of costs, I consider an award of $4,000.00 reasonable and justified in all the circumstances.

The remaining issue concerns the application of the order. According to Mr Clarke it should be made against Mr Crossley

because of his participatory role in events prior to the end of the applicant's employment. He submitted that as Mr Crossley represented the applicant as a registered industrial agent then he ought to be personally liable for any costs in the same way as a solicitor may be in a case where there has been negligent representation or a serious dereliction of duty as an officer of the court. Mr Crossley submitted any costs ordered had to be against a party, his client, and as he was not a solicitor the standards applying to them did not apply to him.

Before turning to the matter of any representation of the applicant here by a registered industrial agent it is convenient to note the legislative framework. The advent of registered industrial agents was enabled by the insertion of section 112A into the Act. Subclause (1) of that provision relevantly says that "a person" who appears as an agent under section 31, 81E or 91 of the Act is "carrying on business as an industrial agent" (with exclusions of organisations as defined elsewhere in the Act and other named bodies). Subsection (2) provides a penalty of $2,000.00 for " a person" who commits the offence of holding himself out as carrying on business as an industrial agent but who is not registered under the section. Subsection (3) relevantly provides that "a person" registered under section 112A is, for the purposes of section 77A of the Legal Practitioners Act 1893, "authorised to appear for a party, person, or body under section 31, 81E or 91…". Subsection (4) prescribes that "a person" is not to be registered under section 112A unless that person has professional indemnity insurance or has sufficient material resources of a prescribed kind to provide professional indemnity.

Remarkably in view of the ability to charge fees for services in the face of the Legal Practitioners Act 1893, there is no prescribing of any scale of fees or, probably more importantly, no competency standard required either under the Act or through the regulations the Governor is able to make under subsection (5) of the provision in relation to registered industrial agents.

The Industrial Relations (Industrial Agents) Regulations 1997 ("the Industrial Agents Regulations" made pursuant to section 112A(5) were gazetted in December 1997. Before turning to these it is convenient to note that representation by agents registered pursuant to section 112A in proceedings before the Commission is specific to the agency allowed by section 31(1)(c) of the Act. That provision has not changed since 1979 when the Act, which for the first time included access by individual employees to the jurisdiction under section 29, was proclaimed. Subsection 31(1)(c) allows for representation by "an agent", including in the context of section 31(6), whether fee charging or not. It seems arguable then that agency for the purposes of section 31 is to be a matter of choice and to be by an individual (or "natural person") and the purpose of section 112A is to enable fee charging by an individual free of the restraint imposed by the Legal Practitioners Act 1893. But Regulation 4 of the Industrial Agents Regulations, which deals with the application process for registration, provides for registration by individuals and unnatural "persons". And, as the record shows, incorporated companies have been registered as a result: an outcome which may be *ultra vires*. However, this point was not argued and is taken no further here.

I turn now to the question of fact as to whether representation of the applicant in this matter was by a registered industrial agent. On the same date as the claim of unfair dismissal was filed (27 March 1998) a warrant (undated) was filed. It appears to carry the signature of the applicant and identifies "Terence Charles Crossley of T.C. Crossley and Associates" as her agent and Mr Crossley identified himself as the agent for the applicant at the outset of proceedings and in the hearing in July of the interlocutory matter. This and the warrant was reflected in the order which issued then. On 25 September, after various proceedings on the claim and its listing for hearing, another warrant (also undated) was filed. Again apparently signed by the applicant, it identifies her agent now as "Terence Charles Crossley or any other person authorised to appear on behalf of Ichthys Pty Ltd, T/F Crossley Family Trust, T/A T.C. Crossley and Associates or (sic) Industrial Realtions (sic) Help and Advice".

On the face of it this warrant purports to name an individual or any other unnamed "person" to represent the applicant who is to "appear" on behalf of a company which is doing business under one of two trading names. Leaving all that to one side, it is the case that when the matter proceeded to hearing Mr Crossley announced himself as appearing on behalf of the applicant. That is, the applicant was represented throughout the proceedings on this claim by Terence Charles Crossley. But he is not a registered industrial agent.

The record shows that "Ichthys Pty Ltd t/f Crossley Family Trust t/a Crossley and Associates and (sic) Industrial Relations Help and Advice" was registered as an industrial agent on 14 January 1998. But there is no record of any registration of "Terence Charles Crossley" as an industrial agent.

Thus, even if the remedy of awards of costs against legal practitioners by courts in cases where professional standards or duties to courts have not been reasonably met may be applied in this jurisdiction to registered industrial agents (and given the lack of any competency standard for the latter I am not convinced there is power) representation in this case was not by a registered industrial agent.

And further, while I am not convinced there is power under section 27 (1)(c) to make any award of costs against other than a party to the particular proceedings, there is evidence from the cross-examination of the applicant that she endorsed the conduct of her agent, Mr Crossley, in relation to her disputes with the respondent. In all I think that the case to depart from the position that a party is bound by the actions of his or her agent is not made out on merit as a result. The order for costs will be made against the applicant. Minutes now issue.

Appearances: Mr T. Crossley appeared on behalf of the applicant.

Mr A. Drake-Brockman (of Counsel) and later Mr L. Clarke (of counsel) appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Miss Pina Pisconeri

and

Laurens and Munns, Incorporating Munns Nominees Pty Ltd ACN 008-835-247 and George Laurens (WA) Pty Ltd, ACN 009-118-950.

No. 555 of 1998.

24 November 1998.

Order.

HAVING heard Mr T C Crossley on behalf of the applicant and Mr A Drake-Brockman (of counsel) and later Mr L Clarke on behalf of the respondent now therefore I the undersigned pursuant to the powers conferred by the Industrial Relations Act, 1979 and specifically section 27(1)(a)(i) and (ii) and (c), do hereby order—

1. THAT this application be and is dismissed.
2. THAT the applicant pay the respondent the sum of $4,000.00 in costs within thirty (30) days of the 24th day of November 1998.

(Sgd.) S.A CAWLEY,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Cherie Ramsay

and

IV Entertainment MCMXCIII Pty Ltd T/a DV8 Night Club.

No. 1303 of 1998.

20 November 1998.

Order.

HAVING heard Ms C. Ramsay on her own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby declares—

(a) THAT Cherie Ramsay has been denied by IV Entertainment MCMXCIII Pty Ltd T/a DV8 Night Club a benefit under her contract of employment;

(b) THAT IV Entertainment MCMXCIII Pty Ltd T/a DV8 Night Club forthwith pay the sum of $120.00 to Cherie Ramsay by way of a benefit due to her under her contract of employment.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Walter Reid

and

John Holland Construction &
Engineering Pty Ltd.

No. 171 of 1998.

24 November 1998.

Reasons for Decision
(extempore)

SENIOR COMMISSIONER: The Applicant was formerly employed by the Respondent Company from 29 October 1997 until on or about 17 or 18 January 1998. He was, as is common ground, employed as a rigger on the HBI Project near Port Hedland at Boodarie. The Respondent is one of a number of contractors working on that project.

It seems common ground that on or about 14 November 1997 at the Wedgefield accommodation camp where the Applicant was then living an altercation occurred which resulted in another of the Respondent's employees being seriously injured. As a result of that incident, it is common ground that the Applicant was arrested and charged by the police with grievous bodily harm. In fairness it must be said that the Applicant denies that he had anything to do with the incident and pleads innocence of that charge. At all events, it is common ground that after being arrested, the Applicant was incarcerated until he was released on bail some few days later. It is also common ground that it was a condition of that bail, at least at all material times, that he not speak to witnesses associated with the incident and perhaps more significantly that he report to the police at South Hedland on a daily basis. Furthermore, it is common ground that some time after his release from goal the Applicant contacted the Respondent to ascertain what his employment status was. It is common ground that he was told to stay at home, but on full pay pending a determination by the Respondent of precisely what should be done about his employment. The Respondent says that at that time it had fears for his safety at the workplace and therefore determined that it would be in his interests as well in its interests that he remain at home on full pay. Accordingly, the Applicant remained away from the workplace as directed, but on full pay, until his employment was terminated.

By early January 1998 the position regarding concerns for the Applicant's safety apparently had not improved. The Respondent says that threats were still being made. Thus, if the Applicant was to come to the workplace, there would be an "accident" or that he would be otherwise physically harmed. Indeed the Respondent says that its officers were constantly being asked by other employees and by union representatives as to the status of the Applicant's employment, implying that he ought not return.

As a consequence, on or about 15 January 1998 the Applicant met with the Respondent's officers, one of whom was its industrial relations manager, Mr Macaree. It is common ground that his employment was terminated on that occasion. It does not seem to be in dispute, and I accept it to be the fact, that he was paid all his contractual entitlements up until that time, together with one week's pay in lieu of notice, as the relevant Award requires. There is some dispute between the parties as to the reason given on that occasion for the termination. The Applicant says that he was told by Mr Macaree that there was no further work for him. On the other hand, Mr Macaree has testified that the reason he gave for the termination was in effect that the Respondent could not guarantee his well-being at the workplace and could not provide a safe workplace for him.

After his dismissal a preliminary hearing of the charge laid against him by the police was held before the Court of Petty Sessions. As a result the Applicant was committed for trial in the District Court at Port Hedland. Before that trial could take place the charge, as he says, was "dropped". The Crown Prosecutor brought the matter to an end apparently as a result of the potential witnesses changing the information they had earlier given to the police.

The Applicant complains that the dismissal from his employment was unfair. As I understand it, he says that the dismissal was unfair essentially because he has done nothing wrong. On the contrary, he says that he has been the victim of illegal or otherwise unauthorised threats regarding his well-being. In effect, he says that the persons who made those threats are the ones, if any one, who should be dismissed or otherwise dealt with and not him. Furthermore, as I understand him, he denies that there were in fact any such threats made against his well-being. Indeed, he says he worked for some days before his arrest without being subjected to threats and since his dismissal had met with some of his former work colleagues without incident.

The Respondent on the other hand, as I have said, claims that there were persistent and consistent threats from those in the workplace as to his well-being if he was to return to the workplace. It argues that in the circumstances it had no alternative but to terminate the Applicant's employment when it did and that it did so in accordance of the provisions of his contract of employment.

As the agent for the Respondent has rightly said, there is only a minor degree of conflict in the evidence adduced by the Applicant and that adduced by the Respondent. That conflict principally concerns the reason given for the dismissal. As to that matter, I am quite satisfied and find that the reasons were as Mr Macaree has testified. Having heard and observed him, I am quite convinced that he has the clearest recollection of the events of that meeting. He testified that he took notes at the time. Moreover, he was quite unequivocal in his evidence regarding the matter, whereas in some respects the Applicant's evidence was, if not contradictory, somewhat equivocal.

Furthermore, I am satisfied and find that the Respondent, through its managers, from time to time received clear indication from a range of persons, including the workmates of the Applicant, that were he to return to the worksite there would be an "accident" or that he would otherwise be done an injury. In this respect I also unreservedly accept the evidence of Detective Sergeant Clarke, whose evidence in material particular supports the evidence of Mr Macaree. Likewise, I see no reason not to accept the evidence of Mr Hancock, although his evidence was concerned more with events at the camp rather than at the worksite which were of more relevance to the Respondent than the events at the camp.

The law in respect of matters of this nature is quite well settled and clear. It is that the Commission must recognise that the employer has a right under its contract to dismiss and

the real question is whether the Respondent can be said to have abused that right, as is referred to in *Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985) 65 WAIG 385*.

I am satisfied and find that the Respondent genuinely believed that the Applicant's well-being was in jeopardy were he to return to work. That belief was based on what had been said to it by a range of employees from time to time and over what can only be said to be a relatively long time. It seems from their statements that there was a very real prospect of there being an accident at work which would have the potential to injure the Applicant or that he would otherwise be dealt an injury in the workplace. In addition, the evidence of Detective Sergeant Clarke supports this conclusion. I accept the evidence of Mr Macaree and indeed that of Detective Sergeant Clarke that it was simply not possible for the Respondent reasonably to put in place a scheme to protect the Applicant from the potential for injury. That is so given the size of the workforce, given the nature of the site and the nature of the Applicant's vocation which required him to move about and to work from great heights.

It cannot be overlooked that the Respondent did not act precipitously. The Respondent waited for approximately two months before acting to terminated the Applicant's employment. In the meantime, the Respondent continued to pay him his full entitlements whilst he remained at home doing nothing. It kept in contact with him on and off during that period, but on the evidence before me there was no indication that the threats that it was hearing were in any way abating. It could not reasonably be expected, at least in my judgement, to keep the Applicant at home for much longer being paid to do nothing. Furthermore, I accept that the Respondent considered transferring the Applicant to another worksite. As had been said and as is not in dispute, at that time it was a condition of the Applicant's bail that he report daily to the police in South Hedland. In those circumstances I do not think it is unreasonable for the Respondent to conclude that it was not possible to transfer the Applicant to another place. There was no suggestion that he could have been transferred to another workplace in and around Port Hedland. Indeed, the Applicant on his own admission said that he has found it difficult to obtain work in Port Hedland because of what has occurred to him.

The Applicant also complains that an element of the unfairness of the dismissal is that the incident complained of occurred away from the workplace. True it is that it did occur off site, but the consequences of that incident flowed to the workplace and the Respondent could not ignore them. The Applicant was not dismissed for assaulting anybody. He was dismissed, as I find, because the Respondent could not guarantee him a safe working environment. It is beyond question that the Respondent has a duty, by virtue of the law of the State, to provide a safe working place. For reasons which as I find were real it could not guarantee a safe working place for the Applicant. In those circumstances I cannot think that it can properly be said indeed to have abused the right which it has under the Applicant's contract of employment to terminate his employment as it did.

For the foregoing reasons, I am simply not satisfied, on the balance of probabilities, that the Applicant has discharged the onus which he carries to show that the Respondent abused its right to terminate his employment in the industrially accepted sense so as to render it harsh, oppressive or unfair. Hence, in my view, the application should be dismissed and I intend to so order.

Appearances: The Applicant appeared in person.

Ms E.L. Mackey as agent on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Walter Reid

and

John Holland Construction &
Engineering Pty Ltd.

No. 171 of 1998.

24 November 1998.

Order.

HAVING heard the Applicant in person and Ms E.L. Mackey as agent for the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Diana Beath Rokita

and

Jay Brock Pty Ltd t/a Drake Brockman First National
Real Estate.

No. 155 of 1998.

COMMISSIONER S.J. KENNER.

24 July 1998.

Reasons for Decision.

THE COMMISSIONER: By this application Diana Beath Rokita ("the applicant") has made an application pursuant to s 29 of the Industrial Relations Act 1979 ("the Act") against Jay Brock Pty Ltd t/a Drake Brockman First National Real Estate ("the respondent") seeking an order for benefits to which, she says, she is entitled pursuant to her contract of employment with the respondent.

By notice of answer and counter proposal filed on 6 April 1998, the respondent contests the applicant's claim.

Background

It is common cause that in the period between the filing by the respondent of its notice of answer and counter proposal and this matter being heard, a liquidator was appointed to the company by order of the Supreme Court of Western Australia dated on or about 15 April 1998. The liquidator is Mr John Carrello of the accounting firm, Pannell Kerr Forster. By letter dated 18 June 1998 addressed to the Commission, Mr Carrello confirmed his appointment as liquidator of the respondent, and expressed the view that, pursuant to the provisions of s 471B of the Corporations Law ("the Law"), this matter cannot proceed without the consent of the Supreme Court.

The present proceedings were listed to determine, as a threshold issue, whether the present proceedings are stayed pursuant to s 471B of the Law, unless leave of the Supreme Court is obtained.

On the hearing of this matter, Mr Clohessy appeared as agent for the applicant. By letter dated 8 July 1998, the liquidator, notwithstanding service upon him of a notice of hearing of the matter, elected not to be represented in the proceedings. Accordingly, having been satisfied that due notice of the proceedings was given to the parties, I exercised my discretion pursuant to s 27(1)(d) of the Act to hear and determine the matter in the absence of the respondent.

Section 27(1)(u) Reference

At the outset of the proceedings, the agent for the applicant moved a motion that the Commission, pursuant to s 27(1)(u)

of the Act, seek a referral, with the consent of the President, of the preliminary issue to a Full Bench of the Commission.

In support of his submission, the agent for the applicant submitted that the provisions of s 27(1), where reference is made to *"may"*, should be interpreted as mandatory in the sense that *"may"* should be construed to mean *"shall"*. I reject that submission. Clearly, in my opinion, the powers conferred on the Commission pursuant to s 27(1) of the Act are procedural in character. Whilst there are circumstances in which the word *"may"* in a statute is to be construed to mean *"shall"*, this is not one of them. In order to discern whether words used in a statute are mandatory or discretionary, involves consideration as to the subject matter; the importance of the provision that has been disregarded; the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect to decide whether the matter is what is called imperative or only directory: *Howard v. Boddington* (1877) 2 PD 203 per Lord Penzance at 211 (see generally *Pearce and Geddes Statutory Interpretation in Australia 4th Ed Chapter 11*).

Clearly, in the case of s 27(1) of the Act, a range of procedural powers are made available to the Commission, depending upon the circumstances of the matter before the Commission at the relevant time. By its nature, such a provision is enabling and it would be entirely contrary to the structure and operation of the section, taken in the context of the Act as a whole, to construe s 27(1) of the Act as being mandatory. To do so, would clearly make the subsection unworkable. Taken literally, the Commission would be required to exercise all of the procedural powers enumerated in paragraphs (a) to (v) in relation to any matter before it. To simply state that proposition is to illustrate how untenable it is.

Having considered the motion, I declined to exercise my discretion pursuant to s 27(1)(u) and invited the agent for the applicant to put his case.

Relevant Provisions of the Law

For the purposes of these proceedings, it is necessary to set out the relevant provisions of the Law arising from the appointment of a court appointed liquidator. Section 471B is found in Part 5.4B Division 1A of the Law. The section provides as follows—

> *"**471B** While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with—*
>
> *(a) a proceeding in a court against the company or in relation to property of the company; or*
>
> *(b) enforcement process in relation to such property;*
>
> *except with the leave of the Court and in accordance with such terms (if any) as the Court imposes."*

Section 9 of the Law relevantly provides as follows—

> *"court" has the meaning given by section 58AA. "Jurisdiction" means a State or the Capital Territory and, in the case of a State, includes the coastal sea of the State."*

Relevantly, s 58AA provides as follows—

> *"**58AA(1)** Subject to subsection (3), in this Law—*
>
> *"court" means any court when exercising the jurisdiction of this jurisdiction; …"*

It is clear from these definitions that the reference to court exercising *"jurisdiction of this jurisdiction"* means not jurisdiction under the Law, but jurisdiction in the State or Territory in which the court is constituted.

Furthermore, of relevance to the construction of s 471B of the Law, is the terms of s 109H which provides as follows—

> *"**109H** In the interpretation of a provision of this Law, a construction that would promote the purpose or object underlying the Law (whether that purpose or object is expressly stated in the Law or not) is to be preferred to a construction that would not promote that purpose or object."*

The purpose and object underlying provisions such as s 471B (and for that matter ss 440D and 500) is to preserve the assets of a corporation for the benefit of creditors, in the event that the corporation is under official management or is in liquidation. Consistent with that purpose, the Law precludes any proceedings being commenced or continued in a court that may affect such property, except with the leave of one of the prescribed Courts in s 58AA or with the consent of the administrator, as the case requires.

It is not contested that the matter before the Commission is a *"proceeding"* for the purposes of s 471B(a). The term *"proceeding"* has been judicially considered in a number of cases. Generally however, proceedings, at least of a judicial nature, imply some form of adjudication of some kind and order of a court or of some other person or body acting in a judicial capacity: *Quazi v. Quazi* (1979) 3 All ER 424 at 429-430 per Ormrod LJ; or covers any proceedings of a legal nature, even though they do not take place in a court of law: *R. v. Westminster (City) London Borough Rent Officer, ex parte Rendall* (1973) 3 All ER 119 at 121 per Lord Denning MR. In *Andrews v. Uniting Church in Australia Frontier Services t/a Old Timers* (1995) 60 IR 437, consideration was given to the term *"proceeding"* for the purposes of s 347(1) of the then Industrial Relations Act 1988 (Cth). In that matter, Gray J was considering the power of the Industrial Relations Court of Australia to award costs in a review of a Judicial Registrar's exercise of powers pursuant to s 377 of the Industrial Relations Act 1988 (Cth). His Honour referred to relevant provisions of *Halsbury's Laws of England (3rd Ed)* and the decision of Northrop J in *Viner v. Australian Building Construction Employees and Builders Labourers Federation (No. 1)* (1981) 56 FLR 5 at 27-32 and observed at 441—

> *"The passage from Halsbury's Laws of England to which his Honour referred read as follows—*
>
> *'The term "proceeding" is frequently used to denote a step in an action, and obviously it has that meaning in such phrases as "proceeding in any cause or matter". When used alone, however, it is in certain statutes to be construed as synonymous with, or including, "action".*
>
> *At 2, there is a definition of the word "action"—*
>
> *"An action", according to the legal meaning of the term, is a proceeding by which one party seeks in a court of justice to enforce some right against, or to restrain the commission of some wrong by, another party. More concisely it may be said to be "the legal demand of a right", or "the mode of pursuing a right to judgement"".*

For the purposes of the definition of a *"proceeding"*, an *"action"*, in its natural meaning, refers to any proceeding in the nature of litigation between a plaintiff and a defendant (or an applicant and a respondent): *Johnson v. Refuge Assurance Co Ltd* (1913) 1 KB 259 at 264 per Kennedy LJ (see generally *Halsbury's Laws of England 4th Ed Vol 37 paras 17 and 24*). In my opinion, the instant application is a *"proceeding"* for the purposes of s 471B of the Law.

Is the Commission a Court for the Purposes of s 471B?

The Commission is a court of record and has an official seal: *s12 of the Act*. A court of record is a species of court. The proceedings of a court of a record are preserved in its archives and are referred to as records. They are conclusive evidence of what is recorded within them.

It is established that the Commission is not a superior court of record with any inherent jurisdiction or a court of justice in the accepted sense: *Australian Glass Manufacturing Co Pty Ltd & Ors v. Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1992) 72 WAIG 1499; *Robe River Iron Associates v. Federated Engine Drivers' and Firemen's Union of Western Australia* (1987) 67 WAIG 315 at 317 per Brinsden J and Kennedy J at 318; *Amalgamated Metal Workers and Shipwrights Union of Australia, Western Australian Branch v. Griffin Coal Mining Co* (1980) 60 WAIG 2137 per Wallace J at 2139.

However, the proposition that the Commission is not a superior court of record with inherent jurisdiction or a court of justice, is not the end of the matter for the purposes of s 471B. At common law, the meaning of *"court"* is dependent upon the purposes, functions, practices and procedures of the body concerned. There are courts which are not courts of justice: *Royal Aquarium and Summer and Winter Garden Society Ltd v. Parkinson* (1892) 1 QB 431 at 447 per Fry LJ. In *Halsbury's*

Laws of England 4th Ed Vol 10 at para 701 the following appears—

> *"Originally the term 'court' meant, among other things, the Sovereign's palace. It has acquired the meaning of the place where justice is administered and, further, has come to mean the persons who exercise judicial functions under authority derived either directly or indirectly from the Sovereign. All tribunals, however, are not courts, in the sense in which the term is here employed. Courts are tribunals which exercise jurisdiction over persons by reason of the sanction of the law and not merely by reason of voluntary submission to their jurisdiction. Thus, arbitrators, committees of clubs and the like, although they may be tribunals exercising judicial functions, are not 'courts' in this sense of that term. On the other hand, a tribunal may be a court in the strict sense of the term even though the chief part of its duties is not judicial. Parliament is a court. Its duties are mainly deliberative and legislative; the judicial duties are only part of its functions. A coroner's court is a true court although its essential function is investigation."*

Very recently, Beech C has considered the same issue in the context of s 440D of the Law in the matter of *Peter John Walden v. Hansley Holdings Pty Ltd t/a GIS Engineering* (Unreported No. 2142 of 1997, 14 July 1998). The provisions of s 440D of the Law, dealing with a company under administration, are not materially different to the terms of s 471B, save that under s 440D proceedings may be begun, or continued, with the written consent of the administrator as an alternative to leave of the Court. In *Hansley Holdings*, the learned Commissioner concluded, having regard to the functions and powers of the Commission in the context of the purposes and object of Part 5.3A of the Law, that s 440D did apply and prevented the Commission from proceeding to hear and determine that application. I agree with the reasons of the learned Commissioner and with respect, I adopt and apply them for the purposes of these proceedings.

In my opinion, in the exercise of its functions and powers, the Commission does exercise judicial functions. The present application is a case in point which involves essentially the ascertainment, in a judicial fashion, of the terms of the applicant's contract of employment, whether a benefit under that contract has been denied, and the grant of relief consistent with such a finding. A classic statement of the character of judicial proceedings was considered by the Privy Council in *Shell Company of Australia Limited v. Federal Commissioner of Taxation* (1931) AC 275 in which Lord Sankey, giving the opinion of their Lordships, referred to the judgement of Griffith CJ in *Huddart, Parker & Co v. Moorehead* (1909) 8 CLR 330 at 357 and said—

> *"What is 'judicial power'? Their Lordships are of the opinion that one of the best definitions is that given by Griffith CJ in Huddart, Parker & Co v. Moorehead (1), where he says—*
>
> > *'I am of the opinion that the words "judicial power" as used in s.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action'".*

(see also *Royal Aquarium and Summer and Winter Garden Society Ltd v. Parkinson (supra)* per Fry LJ at 446*; Co Partnership Farms v. Harvey-Smith* (1918) 2 KB 405*; Addis v. Crocker & Ors* (1960) 2 All ER 629)

The agent for the applicant relied upon several authorities in support of the proposition that the Commission is not caught by s 471B of the Law. Regrettably, those authorities have not assisted me in determining this matter. In the first case, *Whitechurch v. Tocumwal Bowling Club Ltd (Industrial Relations Commission of New South Wales No. IRC 2569 of 1995)* the issue presently under consideration was not dealt with. The second matter, *White v. Armstrong (Industrial Relations Commission of New South Wales No. IRC 117 of 1995)* was an unfair dismissal claim against a respondent company in liquidation. Whilst s 58AA of the Law was mentioned in the decision and the Commission in that case proceeded to hear the matter, the preliminary point now under consideration was not considered. Furthermore, in *Dragamir Klajajic v. VIP Shopping Trolley Collection Service Pty Ltd (In Liquidation) (Industrial Relations Commission of South Australia No. 1576 of 1997)*, dealing with a claim of harsh, unjust or unreasonable dismissal, Stevens DP took the view that it was not necessary for the applicant to obtain leave pursuant to s 440D of the Law. However, no reasons were expressed for that view being adopted in that case.

For all the above reasons, in my opinion, the provisions of s 471B of the Law do apply to these proceedings before the Commission. Alternatively, and in any event, if I am incorrect in this view, I would in the circumstances, given the express purpose and object of the relevant provisions of the Law, be inclined to exercise my discretion to refrain from further hearing or determining this matter pursuant to s 27(1)(a) of the Act.

I therefore determine this preliminary issue on the basis that the Commission will refrain from further hearing or determining this matter unless and until the applicant obtains leave of the Supreme Court for the matter to proceed. A minute of proposed order will now issue.

Appearances: Mr R. Clohessy on behalf of the applicant

No appearance on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Diana Beath Rokita

and

Jay Brock Pty Ltd t/a Drake Brockman First National Real Estate.

No. 155 of 1998.

COMMISSIONER S.J. KENNER.

24 July 1998.

Order.

Having heard Mr R Clohessy on behalf of the applicant and there being no appearance of behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Commission refrains from further hearing or determining this matter unless and until the applicant obtains leave of the court for the matter to proceed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Alan Rossiter

and

Bernie Ornig—Execucom Technologies.

No. 375 of 1998.

COMMISSIONER S J KENNER.

31 August 1998.

Reasons for Decision.

(Given extemporaneously at the conclusion of the proceedings, taken from the transcript as edited by the Commission)

THE COMMISSIONER: The Commission has before it an application for contractual benefits pursuant to section 29(1)(b)(ii) of the Industrial Relations Act, 1979, ("the Act") by Alan Rossiter ("the applicant") against Execucom Technologies ("the respondent"). The applicant claims that he was employed by the respondent on and from 17 November 1997, as the respondent's corporate manager. The respondent was apparently to be engaged in the computer equipment sales industry.

The respondent did not appear in the proceedings, and the Commission, being satisfied that the respondent was duly served with the notice of application and notice of these proceedings, exercised its discretion pursuant to s 27(1)(d) of the Act to proceed to hear and determine the matter in the absence of the respondent.

The applicant gave evidence on his own behalf. Mr Rossiter said that in response to an advertisement placed in the " West Australian" newspaper by Redline Recruitment ("Redline"), he applied for the position by facsimile letter dated 27 October 1997. The applicant's letter was tendered as exhibit A2.

Mr Rossiter indicated in his application for the position that he had more than 20 years experience in the computer industry and that he considered he had the necessary experience to fulfil the job requirements for the position.

The applicant says that following his written application being submitted, he received a telephone call from Redline to attend an interview. The applicant's evidence was that he attended an interview with Redline and was subsequently requested by Redline to supply a list of referees in support of his application for employment. The applicant duly sent a letter dated 29 October 1997, by facsimile to a Ms Julianna Shern at Redline, which contained three referees in support of his application for employment as requested. That facsimile letter is exhibit A3 in these proceedings.

The applicant testified that following the submission of the referees, as requested by Redline, on or about 2 or 3 November 1997, he was requested to and did attend an interview with Mr Ornig who was the principal of the respondent.

The applicant says that during the course of the interview, Mr Ornig offered Mr Rossiter the position of corporate manager with the respondent at a salary of $60,000.00 per annum. In addition a 6 per cent superannuation contribution was to be payable. The applicant says in his evidence, that the position would involve as part of his responsibilities, to be second in charge for Mr Ornig and effectively run the operations of the respondent in Mr Ornig's absence. Mr Rossiter also said in his evidence that he was offered the possibility of a bonus in the event that the business was fully operational prior to Christmas 1997.

Subsequently, by letter dated 5 November 1997, from Redline which is exhibit A4 in these proceedings, Mr Rossiter's permanent appointment with the respondent in the position of corporate manager was confirmed. The applicant was to commence on Monday, 17 November 1997. The applicant was to be based at what were to be the new premises of the respondent in Scarborough Beach Road, Osborne Park, Perth or alternatively at the respondent's serviced offices in St George's Terrace. Exhibit A4 confirms the applicant's remuneration package as being $60,000.00 per annum plus a 6 per cent superannuation contribution on the applicant's behalf.

Mr Rossiter said that he accepted the appointment on the above basis and commenced duties on behalf of the respondent in the position of corporate manager on and from Monday, 17 November 1997. Mr Rossiter also said that some time shortly after confirmation of his appointment, Mr Ornig telephoned him and requested him to commence the process of hiring sales staff for the respondent's business. Mr Rossiter testified that in connection with that request by Mr Ornig, interviews took place on or about 19 and 20 November 1997, at the respondent's St George's Terrace serviced premises. Following the interviews Mr Rossiter engaged some eight sales representatives. Mr Rossiter's evidence was that those sales representatives were to commence work with the respondent on or about 24 November 1997.

Mr Rossiter further testified that during the course of his employment with the respondent, in addition to engaging sales staff he, in conjunction with a sales consultant, prepared quotes for the supply of computer equipment for prospective clients. Mr Rossiter referred in his evidence, to a quote prepared for a property company, but also tendered in evidence as exhibit A6, a copy of a quotation provided to another company for the supply of computer equipment.

Mr Rossiter further testified that in or about mid to late November 1997, he became anxious as to whether both he and his staff were going to be paid by the respondent. A letter was received by Mr Rossiter from Mr Ornig, dated 26 November 1997, which is exhibit A5 in these proceedings, confirming both Mr Rossiter's appointment with the respondent and foreshadowing difficulties with the opening of the premises in Scarborough Beach Road. The letter however, assured Mr Rossiter that he would be paid on and from 24 November 1997. The evidence was that the same letter was sent to all employees of the respondent.

Mr Rossiter also testified that subsequent to the receipt of this letter, a meeting took place between the staff of the respondent, including the applicant, and Mr Ornig at the proposed premises of the respondent in Scarborough Beach Road. Mr Rossiter says that somewhat surprisingly, the meeting took place outside the building and not inside the premises. The applicant's evidence was that staff were further assured by Mr Ornig that they would receive payment in respect of their services to date.

Mr Rossiter's evidence was however, that by 24 December 1997, no money had been received by him into his bank account for salary to that date. Mr Rossiter then gave evidence in relation to various attempts by him to contact Mr Ornig to inquire as to the position regarding payment of salary for employees. However it appears that those attempts were unsuccessful. Mr Rossiter further testified that on 29 December 1997, he received a letter of that date from Mr Ornig on behalf of the respondent, indicating that due to circumstances beyond

Mr Ornig's control the premises which the respondent was to occupy in Scarborough Beach Road had been leased to another party. Also indicated in that letter, which is marked exhibit A7 in these proceedings, is a statement to the effect that Mr Ornig had decided to cancel the project but undertook to pay everyone $5000.00 into their bank accounts as soon as possible thereafter. That letter also indicated that the respondent had closed business as of 29 December 1997.

Mr Rossiter testified that at no time since that letter did he receive any payment from the respondent. Mr Rossiter further testified that in an endeavour to obtain moneys from the respondent, he engaged the services of a debt collection agency. However, the debt collection agency went out of business at some considerable cost to the applicant on his evidence.

There being no evidence adduced by the respondent in this matter, and having heard and observed Mr Rossiter give his evidence, I accept his evidence. Indeed, in the absence of evidence from the respondent rebutting the applicant's evidence I am obliged to so accept it unless I find it inherently incredible, which I do not.

Accordingly, on the evidence I am satisfied and I find that a contract of employment between the applicant and the respondent was duly formed and came into effect, by the terms of which the applicant was employed by the respondent in the position of corporate manager. This position would involve the applicant being generally responsible for the respondent's

sales team and the whole business operations of the respondent in the absence of Mr Ornig.

I am also satisfied on the evidence and I find that it was a term of the applicant's contract of employment with the respondent that the applicant be paid a salary of $60,000.00 per annum plus a 6 per cent superannuation contribution. I am also satisfied on the evidence and I find, that it was a term of the contract entered into between the applicant and the respondent that a bonus payment would be payable to Mr Rossiter in the event that the business of the respondent commenced prior to Christmas of 1997. I find further however, that there was no specific sum of money mentioned and, in the circumstances which transpired, that bonus was not payable.

I also find that on and from 17 November 1997, Mr Rossiter commenced work on behalf of the respondent and was ready, willing and available to work for the respondent on and from that date. I accept Mr Rossiter's evidence that from about that time, he commenced recruiting other employees for the respondent and indeed as the evidence clearly shows, was actively canvassing for business for the respondent by way of submission of quotations for the sale of computer equipment.

I am also satisfied on the evidence and I find that the contract of employment was silent as to notice of termination of employment.

I find that on or about 29 December 1997, as evidenced by exhibit A7, the contract of employment between the applicant and the respondent was brought to an end by the respondent ceasing its business as of that date. I am also satisfied on the evidence and I find that as at the date of termination of the employment by the respondent, the applicant received no notice or payment in lieu of notice.

I turn now to consider the terms of the applicant's claim in this matter. As I have accepted and found, there was a contract of employment entered into between the applicant and the respondent commencing on or about 17 November 1997. On the applicant's evidence, he has received no remuneration whatsoever from the respondent for the entire period of the employment, that being between 17 November 1997 and 29 December 1997. The applicant is entitled to an order for this amount.

The applicant in his claim and in his evidence, has referred to an amount of money which Mr Rossiter testified was promised to him and other staff by Mr Ornig contained in the letter from Mr Ornig dated 29 December 1997. That sum of money is an amount of $5,000.00. However in the circumstances of this case, I find that this was not a term of the contract of employment between the applicant and the respondent, but rather it appears to have been some after-the-event promise by Mr Ornig, to pay the applicant and other employees an amount of money in respect of their period of employment with the respondent.

However that does not dispose of this matter. Pursuant to s 26(2) of the Act, the Commission is not restricted to the specific claim made. As I have found that the applicant's employment was terminated without notice or payment in lieu of notice on or about 29 December 1997, the issue that then arises for consideration by the Commission, in the absence of an agreed term as to notice of termination of employment is whether, and to what extent, a period of notice should be implied into the contract of employment.

It is trite to observe that, in circumstances where the parties have not agreed a term as to notice of termination of employment, the law will imply a period of reasonable notice. What is reasonable notice at common law involves consideration of a range of factors peculiar both to the employee and to the position that the employee occupies. In that connection, I refer to a decision of the Full Bench of this Commission in *Antonio Carlo Tarozzi v The WA Italian Club* (1991) 71 WAIG. 2499.

In that decision, the Full Bench set out a number of indicia as to the legal test to determine what is, in the circumstances of a case, reasonable notice. I should observe however, that what is reasonable notice depends upon the facts of each case. The Full Bench, at 2500 and 2501, set out a number of the relevant principles in determining what is reasonable notice. In relation to factors relevant to the position and the persons there are a number of them and they are the high or low grade of the appointment; the importance of the position; the size of the salary; the nature of the employment; the length of service of the employee; the professional standing of the employee; his or her age; his or her qualifications and experience; his or her degree of job mobility, and what the employee gave up to come to the present employer.

In the circumstances of this case, I am satisfied on the evidence and find that Mr Rossiter was engaged by the respondent in a senior position as corporate manager of the respondent. Given the seniority of the position, the salary attached to that position, Mr Rossiter's length of experience in the computer industry and his present age, which is 53, in my view Mr Rossiter would be entitled at law to a substantial period of notice or payment in lieu thereof.

Having regard to all of the circumstances of the case which, I must say, are most unfortunate indeed for the applicant, it is my conclusion that a period of reasonable notice to be implied would be a period of three months notice. The applicant has been denied the benefit of that notice or payment in lieu thereof. Accordingly, the applicant is entitled to $22,500.00 as ordered. in respect of this benefit. Minutes of proposed order will now issue.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Alan Rossiter

and

Bernie Ornig—Execucom Technologies.

No. 375 of 1998.

COMMISSIONER S. J. KENNER.

11 September 1998.

Order.

HAVING heard Mr A Rossiter on his own behalf and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the respondent pay to the applicant the sum of $22,500.00 gross within twenty one (21) days of the date hereof.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Frank Scott

and

Consolidated Paper Industries (WA) Pty Ltd.

No. 637 of 1998.

COMMISSIONER S J KENNER.

2 December 1998.

Reasons for Decision.

THE COMMISSIONER: Frank J Scott ("the applicant") has brought this application pursuant to s 29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act") against Consolidated Paper Industries (WA) Pty Ltd ("the respondent"). The applicant alleges he was harshly, oppresively or unfairly dismissed by the respondent from his employment on or about 27 March 1998. The applicant does not by this application seek reinstatement, but recognises that this issue is a matter for the exercise of the Commission's discretion pursuant to s 23A of the Act.

Background

The respondent is a company engaged in the printing industry as a wholesale paper merchant and supplier of product to the graphic arts industry. The applicant was employed by the respondent on or about 19 June 1995 as a technical sales representative. He was employed by the respondent to specifically establish a presence in the ink sales part of the printing industry market. It was common ground that up to the time of the employment of the applicant, the respondent had little or no presence in that segment of the market place.

Sales budgets were set by the respondent for the applicant. Those budgets were set independently of any direct input by the applicant and were based upon the budgets set for the respondent's South Australian operations. The respondent considered that due to the sizes of the respective markets, South Australia was an appropriate point of comparison for the Western Australian operations.

In relation to performance against budget, it is not in contest that save for the first year of the applicant's employment, the applicant did not achieve his sales target for the 1996/97 financial year. He had also not achieved budget for any of the months in the 1997/98 financial year up to and including March 1998, the month in which the applicant's employment was terminated by the respondent.

It was also common ground between the parties that the reason for the dismissal of the applicant was his failure to achieve the sales budgets set by the respondent and that the applicant had not been warned by the respondent that his employment was in jeopardy by reason of his failure to attain the sales budgets set for him. It is also not in contest that the applicant was in effect summarily dismissed by the respondent on or about 27 March 1998 by the respondent's WA manager, Mr Newell, although he was paid salary in lieu of notice. Also, it is common ground that the applicant had no prior inkling of what was to befall him on that particular day.

The Arguments

Mr Keogh, appearing as agent on behalf of the applicant, argued that the applicant's dismissal was harsh, oppressive and unfair. He submitted that the sales budgets set for the applicant were established without any input by the applicant and without regard to local market conditions. It was submitted that in effect, the applicant's sales budgets were unrealistically high and he never had any prospect of achieving them. In relation to the latter issue, it was argued that establishing the applicant's sales budgets based upon the similar size market in South Australia did not adequately take into account local market conditions in Western Australia. Indeed, the respondent failed to have regard to issues raised by the applicant in that regard, so the submission went.

The agent for the applicant also submitted that in addition to the substantive unfairness of the applicant's dismissal, the dismissal was procedurally unfair in that the applicant had no warning of his impending dismissal. Given the applicant's age and experience in the industry, the respondent should have been well aware of the impact of a dismissal on the applicant. In essence, the applicant argued that he was denied industrial fairness and had no opportunity to properly answer the allegations against him as to his performance. It was also submitted that the manner in which the dismissal was effected on the day, added to the unfairness of the respondent's conduct.

For the respondent, Mr Heathcoate as agent, argued that the applicant had ample opportunity to achieve the sales budgets set for him by the respondent. Given the extent of the shortfall in the applicant's performance, the respondent submitted that it had been more than reasonable in allowing the situation to continue for as long as it had done. Further, the respondent argued that simply put, the applicant was unable to produce the result that the respondent required and that the giving of warnings in this case would have made no difference in any event. The respondent therefore submitted that the applicant's dismissal was not unfair.

The Evidence and My Findings

The applicant was the only witness called in support of his claim. He gave evidence generally about how he came to be employed by the respondent. He had some 48 years experience in the printing industry and was 62 years of age at the time of these proceedings. He was formerly a state manager of a printing company and had some 32 or 33 years in the print supply sector of the industry. The applicant is a printer by trade. The applicant was engaged by the respondent to promote the ink sales side of the respondent's business. On commencement he was paid a salary of $35,000 per annum and provided with a company car. As at the date of termination, his salary was $38,000 per annum.

The applicant testified that his duties involved sales calls on both large and small printers in the industry to sell the respondent's brand of ink products. He also said he was responsible for the sale of other products, including blankets, paper and chemicals. He said that he was involved to an extent, in ink mixing duties when not selling the respondent's product.

In his first year of employment, the applicant thought he was successful in significantly increasing the sales performance of the company in this area. Sales rose from some $100,000 per annum in the previous year, to some $200,000. His evidence was that he had no real feedback from the respondent during that first year as to his performance, either positive or negative.

The applicant gave evidence in relation to his subsequent budget performance in the 1996/97 and 1997/98 financial years. He admitted that his sales performance was substantially below the budgets set for him for those years. He testified that even though he was the only ink salesperson employed by the respondent in Western Australia, he had no input whatsoever into the setting of the budget. The applicant said that he was told by the respondent to try and obtain market share and to cut prices in order to achieve this if necessary. This would however he said, directly affect the respondent's margin on sales.

The applicant said that in May 1997 he met with a Mr Hinsley, who was at that time, in charge of the respondent's administration function, to ask him about the setting of his sales budget. He was apparently told that it was being prepared. However, the applicant had no input into the figures at that time. The applicant testified that the first time he saw the budget figures was in August 1997. In that same month, the applicant attended a meeting with Messrs Hinsley and Newell. At that meeting, he was advised that the company was not making budget in the ink sales area. The applicant said he told them that the budget set was too high and had been increased from the previous year. The applicant said that at no time during the course of that meeting or subsequently, was he advised as to how the budget level was set or that it related to comparable operations in South Australia. The applicant repeatedly said that he never had any input into the sales targets set for him, despite concerns he expressed regarding local market conditions and that the budget was unachievable. The applicant also gave evidence that in or about April or May 1997, he had to drop prices for process inks by 25%, due to competition in the market. He said this product accounted for half of his budget. The respondent did not contest this.

A further meeting took place in December 1997 in Mr Newell's office. The applicant said that in that meeting, which lasted for approximately 20 minutes, Mr Newell discussed with him ways in which the budget performance could be improved. The applicant said this was a general discussion and nothing was said in relation to his future employment. At about the same time, a representative from the respondent's national head office visited Perth for about four days. Whilst this person had substantial technical expertise in the company's product line, the applicant said that he received no training or product line assistance during this visit, as they spent the time visiting the respondent's customers. The applicant denied in cross-examination, that in the December 1997 meeting with Mr Newell, he was told that changes in personnel in his department were imminent if there was no improvement in the sales performance. The applicant testified that he was not told what sort of changes specifically may occur, only that *"there will be changes"* (transcript p.29).

Following the Christmas holiday and on his return to work in January 1998, the applicant said that he became aware that the respondent had lost a client whilst he was away. This was apparently due to the client not being serviced in the applicant's absence. This led to a loss of sales, the extent of the loss being in dispute. The suggested range on the evidence was between about $5,000 to $10,000 per month.

The applicant said that following, in February 1998, he had a discussion with Mr Newell who suggested that he call on smaller printers in an endeavour to increase sales. The applicant's evidence was that meeting was extremely short and again, nothing was said about his employment with the respondent. The applicant said that he did call on smaller printers as part of his duties.

The applicant described the events on the day he was dismissed. He said he arrived at work as usual in the morning. At about 9.00 or 9.30 am, Mr Newell called him into his office. Present also was a Mr Pearce. The applicant said that he sat down and Mr Newell said to him that due to his non-performance against budget he had no option but to dismiss him. The applicant said that he was speechless and shocked and did not say anything until Mr Newell had finished speaking. Mr Newell then handed him two envelopes and said, *"we'll, tell the trade that you are retiring or resigned"* (transcript p.15). The applicant said that he requested in writing from Mr Newell that the respondent was dismissing him. Mr Newell then told him that he could either leave later on in the day or immediately, but he preferred the latter. The applicant said that he then returned to his office, called a number of customers to tell them what had occurred and to cancel appointments he had made with them in the following week.

Subsequently, the applicant received a letter dated 27 March 1998, confirming his dismissal effective that date. The applicant received four weeks salary in lieu of notice and all accrued entitlements on termination.

The applicant gave evidence as to the effect of the respondent's decision on him. He said that he felt depressed. He had never been dismissed from employment. He said that he felt humiliated and did not believe what had happened to him, given his age and experience in the industry. He believed the matter could have been handled better. The applicant said that subsequent to his dismissal, he had found some casual work commencing on or about 3 April 1998 with another printing company. His duties were that of a general hand. These duties involved emptying bins, sweeping floors, and unloading goods by forklift. The applicant said he had not done this sort of work in the industry for about 47 years, when he was a junior, prior to starting his apprenticeship. He had earned in total $14,471.36 between 3 April and 26 September 1998.

Mr Newell testified on behalf of the respondent. He was the manager of the Western Australian division of the respondent and had some 35 years experience in the printing industry. Mr Newell gave evidence as to the respondent's previous arrangements regarding ink sales, and its decision to employ a sales representative to develop this part of the market, which led to the employment of the applicant. Mr Newell said that it was the respondent's intention to build up the respondent's ink sales and when this was done, for the applicant to train up another employee in order that the applicant could eventually retire.

Mr Newell said he was initially confident in relation to the applicant's performance as when he first joined the respondent, the applicant was achieving budget and he thought this would continue. Mr Newell gave evidence generally as to how the budget for the Western Australian division was set. He said that the South Australian operation of the respondent was used as the basis for setting the Western Australian sales budget in this area, given that it was a comparable market size according to Mr Newell. Mr Newell conceded however, that he did not have direct personal knowledge of the South Australian market place and had not worked in the printing industry there. He had relied on figures provided to him as to the South Australian operation.

The applicant's budget performance was tendered in evidence as exhibits R1 to R4 respectively. It is apparent from those exhibits, that save for the period July to August 1996, the applicant fell considerably short of the respondent's budget expectations. I pause to observe however, there is no reference in exhibits R1 to R4, to the applicant's performance for the full 1995/96 financial year, which on the applicant's uncontradicted evidence, the applicant significantly increased ink sales. Also, Mr Newell accepted that the applicant's budget had, taking the month of October in each year as an example, increased from $5,000 in 1994/95 to $75,000 for 1997/98.

Mr Newell said that he did raise with the applicant the need for better sales results in the Western Australian division to cover costs. He testified generally as to the discussions between he and the applicant in December 1997 and February 1998. Mr Newell conceded that at no time did he expressly indicate to the applicant that his employment with the respondent was in jeopardy by reason of his failure to achieve the sales budgets set for him by the respondent. He further testified that he knew that the dismissal of the applicant would be problematic for the applicant.

In relation to the budget set for the applicant, Mr Newell said that he was under some pressure from head office in relation to the applicant's performance, and he had to defend the applicant.

Mr Newell said that the applicant's continued failure to meet the budget set for him, culminated in his decision that the applicant and the respondent *"would have to part company"* (transcript p.44-45). He gave evidence about the dismissal, which was generally consistent with that given by the applicant. He said that in the dismissal interview, he gave the applicant the option to retire, resign or be dismissed, following which the applicant was subsequently dismissed and provided with a letter confirming this. In terms of the respondent's decision to dismiss the applicant, Mr Newell conceded in cross-examination he had taken the decision to dismiss the applicant and that decision was not up for discussion or review. Mr Newell prepared a note as to what he was going to say to the applicant in the interview that morning. He agreed that it was his preference that the applicant leave the premises immediately on the day of the dismissal, which the applicant did do.

A Mr Keddie, a contract driver to the respondent, gave evidence. He said that in a discussion in or about late January 1998, in a customer's carpark, the applicant indicated to him to the effect that *"if the ink sales don't pick up he would be out the door"* (transcript p.56-57). He also said that there was general discussion between him and the applicant, in relation to the cutting of hours of work at the respondent. Otherwise, Mr Keddie could not be specific as to what was said between them. The applicant could not recall the issue of the ink sales arising in their conversation.

As noted above, there is considerable common ground in this matter. I have no reason to doubt generally the evidence of both the applicant and Mr Newell. I found both witnesses to be reliable and generally forthright in giving their evidence. This is not a case where there are such conflicts in the evidence that I need to form a view as to my general preference for the evidence of one witness over another. The only real exceptions being the conflict between the evidence of Mr Keddie and the applicant as to the meeting in the customer's carpark, but little turns on that in any event in my opinion, and whether the applicant was advised that there would be personnel changes in the ink sales area. In relation to the former, whilst Mr Keddie was associated with the respondent and whilst I have some doubts about it, I am prepared to accept that such a conversation may have taken place. It is important to observe however, that there was no evidence as to the context in which those comments may have been made nor that they were based on any express indications by the respondent to the applicant to that effect.

Whether Mr Newell told the applicant there would be *"personnel changes"* in the ink sales area or not, I do not consider that to be an express indication that the applicant's employment was at risk, having regard to all the circumstances of the case.

Based upon all of the evidence I make the following findings. I am satisfied on the evidence and I find that the applicant's sales budgets were set by the respondent without any direct input by the applicant, despite there being a very marked increase in the applicant's sales budget from the time he was employed by the respondent. I also find that the sales budgets set by the respondent were based upon the respondent's South Australian operations and a comparison made with Western Australia based upon the size of the respective markets.

Furthermore, I find that the applicant's concerns in relation to the increases in his budget, relative to local market conditions, were not, on the evidence before me, given any real consideration by the respondent. The respondent's view was in effect, as highlighted by Mr Newell's evidence, that

"*all salespersons will say their budgets are too high*", and that the respondent had used South Australia as a comparison, which it thought appropriate. As noted above, there is no contest that the applicant fell substantially below the budget performance set for him by the respondent and I so find.

I also find that at no stage prior to 27 March 1998, was the applicant specifically told that any failure by him to achieve budget might lead to his employment being terminated. It is clear that the respondent never told the applicant his employment was at risk. This is despite the fact that on the respondent's figures, as set out in exhibits R1 to R4, the applicant had not met the respondent's sales budget for approximately a year and a half. Moreover, it is apparent that notwithstanding the applicant's sales performance not reaching the budgeted level, the respondent continued to increase the applicant's sales budget quite substantially.

It is not in contest and I find that on the day the applicant was dismissed, he had no idea as to what was to occur on that day. Furthermore, I am satisfied on the evidence that the respondent had made a final decision as to the dismissal of the applicant, with that decision not open to review or reconsideration. In that regard, I find that the applicant was given no opportunity to respond to the allegations put to him by the respondent as to his performance, nor any opportunity to comment on the respondent's proposed course of action to dismiss him. I also find, as was made quite clear from his emotional state as he was giving his evidence, that the dismissal itself was very upsetting for the applicant and has no doubt had a substantial effect on him subsequently. Given the age of the applicant and length of experience in the industry, about which both he and Mr Newell gave evidence, that effect is understandable.

Was the Applicant's Dismissal Harsh, Oppressive or Unfair?

The law in this jurisdiction is well settled in relation unfair dismissal. It must be demonstrated that there has been an abuse of the employer's right to dismiss an employee, such that the dismissal is rendered harsh or oppressive: *Miles v The Federated Miscellaneous Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385. It is also established that it is not for the Commission to assume the role of the manager in considering whether the dismissal is or is not unfair. The test is an objective one in accordance with the Commission's duty pursuant to s 26(1)(a) and (c) of the Act.

Moreover, contemporary standards of industrial fairness require in my view, that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his or her performance or conduct does not improve as required by the employer. This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated, unless they take appropriate remedial steps: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635. It should be emphasised that whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however it may be a most important factor, depending upon the circumstances of the particular case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. It follows however, that a dismissal will not necessarily be unfair in the event of procedural unfairness alone, as all the circumstances need to be considered.

In my view, the circumstances of this case are such that the applicant's dismissal was harsh, oppressive and unfair. In particular, it is clear that the respondent never advised the applicant that his employment was in jeopardy. Given the length of time over which the applicant had not met the respondent's sales budget, this was in my opinion, a most important factor. Additionally, it is also clear that the applicant had no real opportunity on the day of his dismissal, to put anything to the respondent that may have lead the respondent to reconsider its position. Indeed, Mr Newell had made up his mind to dismiss the applicant without any prior warning to the applicant and on his evidence that discussion was not open to review.

Further, the applicant as I have found on the evidence, was to be dismissed on the morning of 27 March 1998 without warning as to the reason for the meeting with Mr Newell. Also, he was effectively directed to leave the premises that day. As to this action, the applicant hardly struck me as a person to do anything untoward if able to remain on the premises. Indeed, given that he took the step to contact customers as to what had occurred that morning and to cancel appointments for the following week, indicates nothing other than a professional approach to the situation, particularly in the context of what had just occurred to him without warning. Given the age of the applicant and on Mr Newell's own evidence, the respondent's knowledge of the possible impact of this decision on the applicant, the lack of procedural fairness is a most important factor in this case.

Moreover, whilst it is not for the Commission to sit in the managerial chair and assess the respondent's decision to set the budgets as it did, it was clear on the evidence that given the applicant's performance against budget, there was perhaps a case to revisit the budget in view of local conditions in consultation with the applicant, who on the evidence, was a very experienced sales person in this area of the industry. As soon as it seemed that there was a problem, the respondent should have raised the issue of the applicant's performance and unless there were mitigating factors, counselled him as to the expectations of the respondent and that if the position did not improve that his employment was in jeopardy. That this did not occur adds overall to the harshness of the decision of the respondent to dismiss the applicant when it did.

For all of these reasons, I conclude that in accordance with the equity and good conscience of the matter, the applicant's dismissal was harsh, oppressive and unfair. As agreed by the parties, the matter will be re-listed for further submissions as to remedy.

APPEARANCES: Mr Keogh as agent appeared on behalf of the applicant.

Mr Heathcote as agent appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Eugene Thomas Watson

and

JK Colero Enterprises Pty Ltd.

No. 343 of 1998.

COMMISSIONER J F GREGOR.

1 December 1998.

Reasons for Decision.

On 24 February 1998, Eugene Thomas Watson (the applicant) applied to the Commission for an order pursuant to s.29 of the Industrial Relations Act, 1979, on the grounds that at the conclusion of a contract of employment with JK Colero Enterprises Pty Ltd (the respondent), he had been unfairly dismissed.

At the commencement of proceedings Mr Armstrong, of Counsel, who appeared for the applicant, sought leave to amend the claim to include orders for benefits said to be due under the contract of employment but at which at the time of the dismissal had not been paid. The revised claim is as follows—

1. By adding in paragraph 24 contractual benefits—
   (a) wages arising from a fixed term contract of employment from the period 5 February 1998 to 30 June 1998 (both inclusive) calculated at 8.6% of the respondent's boat catch less wages received by the applicant from other employment during this period are as follows—

Boat catch	$418,652.80
8.6% thereof	$36,004.14
Less wages from other employment	$980.00
Subtotal	$35,024.24
Less workers compensation paid	$282.24
Balance	$34,741.90

(b) Superannuation at the rate of 6% for the period of the fixed term contact of employment being 15 November 1997 to 30 June 1998, less amount paid by the respondent.

Mr Armstrong cited s.27(1)(l) and (m) as providing powers enabling the Commission to amend the claim. He also drew the attention of the Commission to s.26(1)(2). He told the Commission, advice of the applicant's intention to seek leave to amend was served on the Solicitors for the respondent, Messrs Gynn & Gray, in a letter dated 24 August 1998.

Mr Morrison, of Counsel, who appeared for the respondent opposed the application for leave to amend on the basis that inadequate time was given for the respondent to prepare its case in rebuttal. There had been ample opportunity in the lead up to the hearing for the applicant to seek an amendment of such substantial nature earlier than he did.

The Commission ruled that Section 29(1)(b)(ii) of the Act allows an industrial matter to be referred to it in the case of an employee; that he has not been allowed a benefit by his employer, not being a benefit under an award or order, to which he is entitled to under his contract of service.

The type of issue which is raised here to be canvassed is clearly one of those. What gives rise for concern is the lack of time that the respondent has had to deal with the matter and the prejudice that might arise from having an inadequate time to prepare its case. The Notice of Answer and Counter Proposal (the Answer) filed on or about 10 March 1998, contains an admission that the applicant in this matter was an employee, but the substance of the Answer goes to the status of the applicant as an employee, that is, an allegation that the applicant was a casual [Paragraphs 2, 5, 6, 7 and 8 of the Notice of Answer are relevant]. In particular, in paragraph 2 the casual nature of the contract is alleged. Paragraph 4 refers to re-hiring the applicant repetitively. Paragraph 5 refers to when the employee is not available for re-employment, there was a need for him to arrange relief. The reason that I bring this to attention is that this case was always going to involve issues about what type of contract governed the employment relationship, that is, whether the relationship was a casual or a full-time engagement. It is then in my view, not a large step to move from the proposition that the contract contemplated a full-time engagement to an allegation that there was employment for a fixed term.

The fundamental ingredients to be established by the applicant, in terms of the shape and form of the contract, is not all that much different when one is looking at either full-time engagement or a fixed term. Because of that, I do not think that the respondent is in a position of prejudice. What it does not know was how much money was being asked for. Notwithstanding it should have had more than a few days notice to deal with a new issue of the nature of that raised.

At hearing, the Commission told the parties that it intended to allow the amendment but would allow an adjournment because it did not wish the respondent to be taken by surprise, but there was no reason that it should not deal with the unfair dismissal section of the claim. Mr Morrison did not take up the opportunity of an adjournment and the hearing proceeded.

The principle activities of the respondent in these proceedings are in the Western Australian Rock Lobster industry. It has two Western Rock Lobster Management Fisheries licences. These licences are both subject to an 18% pot reduction, which means that the company can fish 115 pots under licence G260 and 80 pots under licence G171. It has other assets which include two boats, pots and gear. The respondent operates out of the port of Dongara.

The applicant lives in Dongara and has worked in the fishing industry for 13 seasons. During that period he has crewed on a number of boats. He is qualified as a skipper, having completed the necessary courses and sea time but more often than not, he works as a deck hand. He is employed during the fishing season which is from 15 November through to 30 June each year. During the off-season he does other work, but he is obligated to work pre-season and post-season on the boat operated by the respondent. This work is unpaid and the applicant says that he does it because he would not be employed on the boat during the season otherwise. During the fishing season, boats work 7 days per week with varying daily hours. Depending on the location of the fishing ground the work can take place from very early in the morning through to noon or early afternoon.

The applicant first commenced work with the respondent in the 1994 season. He says on a fixed term contract. He worked the full 1995/96 season and almost all of the 1996/97 season. The reason that he did not complete that season is that according to the applicant, his mother was ill and the applicant agreed with Mr J K Colero, the skipper of the vessel upon which the applicant worked, that he could finish the season early and go and visit his sick mother. This happened in or about May 1997. It was agreed between the parties that the applicant would return to work earlier for the pre-season work for the following season 1997/98. He did return as arranged and his contract for the following season was the same as it had been for the previous two (2) years. The basis of payment under the contract is that the applicant would be paid a percentage of the gross catch of the boat. It remained at the rate of 8.6% through each of the seasons that the applicant worked for the respondent.

As to the events relevant to this jurisdiction, the applicant says that he was not a casual worker. In the 1997/98 season he commenced on 15 November 1997 and worked to 2 January 1998. He was injured on the boat and when he returned to port he saw a local doctor on 4 January 1998. He sought medical treatment for a back injury and applied for worker's compensation. He received physiotherapy on a number of occasions and on 4 February 1998, he was given a provisional certificate to return to work. He went to see his skipper, John Colero and presented him with the certificate. Mr Colero then dismissed him. The applicant said that he was fit for work from 4 February 1998, and was anxious to return because there was a particularly lucrative part of the season known as "Big Bank" about to commence. The boats often catch very large quantities of lobster during this period and he wanted to make sure he was able share in the high earnings available during that time. That is why he went to see Mr Colero on 4 February 1998. He did not receive a final medical certificate until 9 February 1998.

Of the precise events that occurred in the meeting on 4 February 1998, there is not much controversy. What the applicant says is that he took his progress medical certificate to Mr Colero and told him that he could return to work. Mr Colero told him that he did not have a job any more, the applicant asked why. He says that Mr Colero told him that his heart was not in the job. The applicant then asked for a separation certificate which Mr Colero gave to him but that separation certificate contained wrong information. It stated that he was put off due to lack of work. The applicant says that the circumstances of the dismissal made life very difficult for him because in a town like Dongara where everyone is well known, it becomes very difficult to get work if employers have to gamble on an employee reputed to have a bad back. The applicant's position concerning the termination was that his employment was terminated while he was incapacitated during a time when he was entitled to receive weekly payments of compensation. According to Mr Armstrong, this raises questions under the Worker's Compensation and Rehabilitation Act and in particular s.84 and s.80AA which requires an employee's position to be held over for a period of 12 months.

When the applicant went to visit his mother in 1997, he arranged for a deck hand to fill in for him. This was not uncommon in the lobster fishing industry. There have been occasions over the years when he was in the same position himself. The applicant thought that the custom was that casual deck hands are not persons who are required to do pre-season or post-season maintenance or repair work on the boat, something which he had done for a number of years. He said that the person who does that work gets the contract for the season. The employment was not casual. It was not irregular. He worked over a fixed period requiring long hours, 7 days a week. Because of the termination, he was denied access to his share of the catch for the balance of the season. He claims he has been unfairly dismissed and on the papers (Exhibit A1) relevant to the catch for the respondents vessel during that time, he is entitled to be paid a sum of $34,741.90 being his share of the catch if he had been allowed to work out his season engagement.

The respondents say that the applicant was a casual employee engaged on a per trip basis. By Mr Colero telling the applicant on 4 February 1998, he was not required, this was not a

dismissal but a refusal to re-employ. That is understandable in the context that the applicant was a casual and if that be true, there was no dismissal and therefore there can be no loss arising. It was conceded that if the respondent was wrong about the applicant being a casual and he was dismissed, there was no unfair dismissal because there was a valid reason to bring the relationship to an end because of the conduct of the applicant and in particular, the operational requirements of the activity. Those operational requirements include the crucial need for the skipper of a boat to be absolutely sure that each member of the crew works safely. There had been indications in the behaviour of the applicant which led Mr Colero, as his skipper, to the conclusion that there were doubts about the attitude of applicant to his work. These gave rise to concerns that he might not concentrate on the job. The repercussions of a failure to do so could well be fatal and therefore Mr Colero was entitled on that basis to bring the relationship to end on that basis. In doing so, he was applying no more than an industry standard and the evidence of Mr Bass, Mr Howarth, Mr Clifford and Mr McMaster were proof of that. The applicant did not meet industry standards and the evidence of the witnesses were called to establish that.

Before I make my assessments of witness credibility, I need to discuss the law involved. The test for determining whether a dismissal is unfair or not is now well settled. The question is whether the respondent has acted harshly, unfairly or oppressively in its dismissal of the applicant. It is for the applicant to establish that the dismissal was in all of the circumstances unfair. The test for ascertaining whether a dismissal is harsh, oppressive or unfair is that outlined by the Industrial Appeal Court in *Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia (1985) 65 WAIG 385*. The question to be answered is whether the right of the employer to terminate the employment has been exercised so harshly, oppressively, or unfairly against the applicant as to amount to an abuse of the right. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair but if the employment has been terminated in a manner which is procedurally irregular that itself will not necessarily mean the dismissal is unfair. This last on the authority of the *Shire of Esperance v. Moritz (1991) 71WAIG 891* and also *Byrne v Australian Airlines (1995)61 IR 32*.

In *Shire of Esperance v. Moritz (ibid.),* Kennedy J observed—

> *"Whether an employer in bringing about a dismissal adopted procedures which were unfair to the employee is but an element in determining whether the dismissal was harsh or unjust."*

An employee as far as practicable will not be dismissed without receiving a warning as to the possibility of dismissal.

Whether or not the applicant was a casual worker is an issue for determination. The rules to be applied have been set out by His Honour The President in *Secro (Australia) Pty Ltd v John Joseph Moreno (1281 of 1995) WAIG 937*. Where His Honour wrote—

> *"The concept of casual employment within the common law of employment, untrammelled by award prescription, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies or particular work requirements of an employer, rather than under a single and ongoing contract of indefinite duration"*
>
> *(See Squirrell v Bibra Lakes Adventure World Pty Ltd t/a Adventure World (op cit) at page 1835 per Fielding C and Steward v Port Noarlunga Hotel Ltd (1980) 47 SAIR 406 at 420).*
>
> *The parties, or course, cannot by use of a label render the nature of a contractual relationship something different to what it is (see Stewart v Port Noarlunga Hotel Ltd (op cit) per Haese DPP at page 5-6).*
>
> *Certain indicia may be indicative of the nature of the contract, but they are not determinative, taken alone. These may include the classifying name given to a worker and initially accepted by the parties, the provision of the relevant award, the reasonable expectation that work would be available to him, the number of hours worked per week, whether his employment was regular, whether the employee worked in accordance with a roster published in advance, whether there was reasonable mutual expectation of continuity of employment, whether the notice is required by an employee prior to employee being absent on leave, whether the employer reasonably expected that work would be available, whether the employee had a consistent starting time and set finishing time, and there may be other indicia.*

I need to discuss the remedies available if I do make a finding of unfair dismissal. Section 23A of the Act sets out the powers of the Commission on the claims of dismissal.

The two primary remedies available to a successful applicant in an unfair dismissal claim are:

(a) reinstatement; or

(b) compensation in lieu of reinstatement.

As recognised by Senior Commissioner Fielding in *Jaggard v. Tranbury Pty Ltd (1996) 76 WAIG 4720*, the primary remedy is reinstatement, and only if the Commission is satisfied that reinstatement is impracticable, or if the employer fails to comply with an order for reinstatement, can it make an order for reinstatement. If an employer exercises the option available to it under s.23A(1a)(b) the Commission must fix compensation instead of making an order to reinstate or re-employ the claimant.

Accordingly, in the Senior Commissioner's view, the Act requires the Commission to make an evaluation of the practicalities of reinstatement based on common sense in the work place. As the Act is concerned with preventing and settling disputes in the work place it should not be interpreted as confining the inquiry to the physical impracticalities but should be taken as requiring an inquiry about the environment in the work place.

In *Jaggard's Case (ibid.)* the Senior Commissioner found that the employment relationship had irretrievably broken down and it was impracticable to reinstate the applicant. In his decision in *Smith v. C.D.M. Australia Pty Ltd (1998 77 WAIG 307)*, Commissioner Beech found that the respondent's trust in the applicant's ability to manage a warehouse and to abide by the company's administrative procedure was damaged. Accordingly, the applicant's actions were destructive of the necessary confidence which needs to exist between an employer and employee in a management capacity which made reinstatement impracticable.

There are principles relevant to awarding compensation. The power to award compensation resides in section 23A(1)(b)(a) of the Act which grants to the Commission the power on a claim for harsh, oppressive or unfair dismissal to make orders—

> *…[that] the employer pay compensation to the claimant for loss or injury for the dismissal."*

It is relevant to recognise that this test is a different test to the old test contained in s.170C(E)(2) of the Work Place Relations Act (Commonwealth) (WPR Act) which provided that if reinstatement of an employee was impracticable, the court may—

> *"If the court considers it appropriate in all of the circumstances of the case, make an order requiring the employer to pay the employee compensation of such amount as the court thinks appropriate."*

The phrase "loss or injury" which is referred to in the Act but not in the WPR Act has a different meaning to compensation. What the applicant must do is show that the loss or injury suffered is in some way linked to the termination of employment.

The phrase "loss or injury" has not been subjected to extensive review but the President made some comments in *Gilmore v. Cecil Brothers F.D.R. Pty Ltd and Another (1996) 76 WAIG 4434*. There His Honour wrote—

> *"The phrase 'loss or injury' means loss occasioned by the employee by the unfair dismissal. That is, actual salary, benefits or amounts that he or she would otherwise earn or which he or she would have been entitled had he or she not been dismissed including continuity for the purposes of long service leave and other entitlements.*
>
> *As to 'injury' that is a general word which embraces not only the loss but the actual harm done to the employee by*

the unfair dismissal. The word 'injuries' is generally a larger word and comprehends in itself all manners of wrongs according the injury includes humiliation and due to feelings being treated with callousness, for example.

In his reasons, His Honour observed that in the *Cecil Brothers Case(ibid.)* he had no need to decide the interesting question of whether loss of reputation should constitute an injury. It is fair to say though, that he observed there seems to be nothing on the surface to suggest such a view would be erroneous.

There are also the observations of Senior Commissioner Fielding in *Jaggard(ibid.)* where he said—

"It's doubtful that the authority to compensate extends to compensation for disappointment, anguish, stress and the like, arising out of the dismissal, but principally is confined to economic loss. This view is premised on some common law cases which do not allow for claims for disappointment, stress associated with a breach of conduct except when there is physical injury or illness."

I think the Senior Commissioner reached these conclusions because he has expressed the view that it ought to be not overlooked that the Commission is essentially an employment tribunal concerned with the repair of employment relationships rather than broad social relationships.

It is well accepted that the process of assessing compensation in any particular case is not an exact science, although it is clear there must be some rational basis for the award. In *Smith v. C.D.M. Australia Pty Ltd(ibid)*, the Full Bench indicated that a useful approach to assessing the quantum of compensation is contained in the *Burswood Management Limited v. Federated Liquor and Allied Employees Union of Australia (1987) 67 WAIG 1529* which establishes that a mode of assessment is to ask what loss had been suffered by the employee as a consequence of his dismissal from employment and that answer will vary according to the nature of the employment.

The matters to be considered in assessing the amount of compensation are the nature of the employment, the period for which the employee has been employed, the period for which employment may be reasonably expected to continue, the length of time which may elapse before the employee may obtain other employment, the nature of that other employment, and any difference in the rate of pay which may be applicable before and after dismissal. The amount to be awarded must not be arbitrary but at the same time is necessary to adopt a fairly broad-brush approach. This must be done in accordance with the statutory limit imposed by s. 23A of the Act; that is, any award made is to be capped at the equivalent of 6 months' earnings.

The Commission is required to make findings on witness credibility. The applicant gave extensive evidence during his examination in chief, where he explained the industry and his view of the incidents between himself and Mr Colero. He was subject to a rigorous cross-examination from Mr Morrison.

My conclusion from observing the applicant during both examination in chief and cross-examination is that I have no doubts as to either veracity of his evidence or the accuracy. I see no reason to find that he has told me anything other than his truthful recollection of events as they occurred.

I also heard evidence on behalf of the respondent, in the main from John Kimberley Colero. Mr Colero impressed a straightforward honest man. He made no attempt to disguise the events that occurred between him and the applicant. For instance, he admitted quite openly that when the applicant had come to his house and handed his provisional medical certificate, he reached his conclusion to dismiss immediately. He was unsure about how he could deal with the problem, he concluded that the applicant should go and he told him immediately that his services were no longer required. There was no precursor, no discussion, he simply asked the applicant to leave. He described the circumstances clearly and simply and he did so in a forthright and truthful way. Evidence was also taken from Hilary Colero, who I understand is involved in the administration of the respondent. In my estimation, Mrs Colero was also a truthful witness as were the other witnesses for the respondent Ian McMaster, Steve Clifford, George Bass and Ray Howarth.

This is a case which turns not upon the credibility of the various witnesses. Together they have told me a story which paints a picture of an industry that some of them I see as unique. They have though, a different interpretation upon the outcome of the same events and it is to this I give my attention in the analysis which follows.

I turn to findings about the nature of the employment contract. The applicant worked for the respondent over 3 seasons. On one occasion he did not complete the whole season. I find, by consent between the parties, when his mother was ill and he wanted to go and visit her. I also find that in accordance with industry standard he took part in work for the respondent both prior to and after each season. I observe that the parties categorised that work as non-paid. That is not necessarily the case. If one accepts that the contract between the parties provides that the applicant receive 8.5% of the catch, the payment is not erected on a daily or hourly basis, it is an amount of money that the boat produces from its catch over a season of around about 7 or 8 months, but to be part of the crew the applicant is obliged to take part in the preparation prior to the season and maintenance after it. In short, the applicant was not employed in any different conditions than it appears, according to the evidence of the respondent's witnesses, occurs generally in the industry.

There are some unique ways in which the industry operates. It is common ground between the parties that on occasions if a deck hand wishes to take leave, that is not sail on a particular day, he organises someone to fill in for him. This is arranged from a pool of deck hands who are available in the Dongara area. Apart from in case Mr Colero identified, the applicant had done this on a number of occasions. I conclude that the arrangement provided for the applicant to provide his services as a deck hand over a period of a season, including pre and post season work, for which he received payment of 8.5% of the total of the boat for the season. The applicant was never known as a casual by the parties. Over the season he worked reasonably regular hours albeit over a spread on a daily basis to accommodate the exigencies of the weather and the location of the fishery. He knew he was required to work 7 days per week over the whole season. There were occasions when he did take leave such as a Boxing Day in 1997. The employee was expected to tell the employer when he was likely to be absent, in fact they had a particular arrangement for replacements during those circumstances. The employer expected that the employee would be available during the whole of the season, in fact, on a couple of occasions in the 1996/97 season when the applicant did not appear for work, the respondent sent someone to make inquiries and pick him up.

The usual concept of a casual worker does not apply here. The applicant was not employed under a series of separate distinct contracts of employment for a fixed period to meet the exigencies of the particular work requirements of the employer. On the contrary, he had a single and ongoing contract of employment. There was an expectation that the employment would last for the fishing season, that is the whole year in fishing terms, and to that extent it was an ongoing contract of indefinite duration. The applicant reserved his place, as it were, for the continuation of that contract by doing work on the respondent's vessel and equipment after the season finished and before the new season had began. If he did that work he was assured that he would having an ongoing relationship with the employer from season to season. What he did between the June and November in the off season other than make himself available for the post-season and pre-season work was his business.

I find that the applicant was not a casual employee. His contract of employment is as I have described in the previous paragraph. He expected to have continued employment from season to season if he fulfilled the obligations of post-season and pre-season work. But he did not have a contract for fixed term. Because the contract is of the nature that I have found, it is permissible to imply a term of notice if the contract was to be brought to an end by either party. I therefore find that he was not on a seasonal fixed term contract.

Striped of extraneous details, the evidence is that the applicant worked for a number of seasons with the respondent. The respondent regarded him as being a little moody sometimes, however, the relationship on a fair reading of the evidence was a satisfactory one. The respondent was not all that happy

that the applicant took time off to see his mother but notwithstanding that he offered him continuation of work in the following season. It is therefore not permissible to rely upon the employees absence which in effect was approved leave as a support for dismissing the applicant in the circumstances that occurred here.

As to the events leading to the dismissal I find the circumstances are that the applicant was pulling pots at sea. There was movement of the deck caused by the vessel running down a slop, this caused him to jar his back. Mr Colero became aware of the incident and the applicant had eventually finished the voyage in the wheelhouse of the vessel. On reaching port, the applicant sought and received treatment for a back injury and eventually he was issued a Progress Medical Certificate (Exhibit A7) (the certificate). On 4 February 1998, he took the certificate to Mr Colero's house and handed it to Mr Colero. I find Mr Colero's response was, as employing the applicant on a trial basis, was quite difficult and he did not know how to accommodate the applicant, given that the vessel would go to sea to fish. Without further consideration he decided to terminate the applicant's services. He did not discuss the matter with the applicant, he did not give the applicant a chance to return to work. Mr Colero had no doubts then about the applicant's performance, it seems to me that his complaints about the applicant's performance, about which much evidence was given were produced in an effort to justify the dismissal when those matters where not in the respondents mind at all when he effected the termination. This was clear for Mr Colero's own evidence.

If I am wrong about what can be described as Mr Colero's spontaneous decision to dismiss and he is entitled to rely on what he described as the applicant's bad attitude, I need to examine the validity of such a suggestion.

Evidence was taken from so-called industry witnesses of the dangers of working the industry. They describe it as being unique, suggesting that a skipper of a cray-fishing vessel should be able to make decisions about who remains in the crew in the absence of considerations that apply in normal workplaces. With respect to the witnesses who were called, the experience of the Commission as constituted in maritime and building industries is to the contrary. It is notorious that in many industries a lack of teamwork or loss of concentration could lead to accidents causing serious injury or death. The lobster fishing industry is no different in this respect. A seafarer on the deck of a lobster fishing boat is in a very similar situation to a seaman on the deck of a workboat or many other types of vessels at sea. The work is dangerous for those who do not concentrate. The same can be said for riggers in the building industry or any building worker who is working at heights or in confined spaces were failure to pay attention could lead to serious accidents. In each of the industries that I have mentioned, the normal laws concerning unfair dismissal apply. For instance, if a worker is grossly negligent causing accident it can lead to dismissal but in normal circumstances, industries strive to achieve safe work performance by education and encouragement to employees to operate carefully and safely. That is, workers who may be showing signs of not working in a safe manner may be counselled, educated in their failings, if there are any in so far as work safety is concerned, brought to their attention. The attitude that has been projected by the witnesses in this case, that deck hands can be dismissed almost at the whim of the skipper is reminiscent of practices in the maritime industry, which are historical and discredited.

I consolidate my findings so far—

- the applicant was not a casual employee;
- nor was he employed for a fixed term; and
- on 4 February 1998, he was unfairly dismissed.

I need to comment on the claim for contractual benefits. This was the subject of the amended claim to which I referred earlier in these reasons. In view of the findings that I have made, I reject the suggestion that there was a fixed term contract for the period of 5 February 1998 to June 1998. The contract was indefinite, season to season, by implication terminable by reasonable notice on either side. I therefore reject the claim that the applicant be paid $34,741.00 as a contractual benefit.

I need to assess what remedy should be granted. It is clear to me that the relationship between the parties has irrevocably broken down. Attempts made after the dismissal to restore it were fruitless. I therefore conclude that reinstatement is not practicable. I need to examine the question of compensation. It is clear that the applicant, if not for the dismissal, would have continued to work for the applicant during the period of 5 February 1998 to 30 June 1998 and on the figures that have been presented to the Commission he would have earned during that period the sum of $35,776.00. From Exhibit A1 it is apparent that the total catch of the vessel during the season 1997/98 was valued at $540,301.00. The applicant's share for the full season would have been $46,465.90. There appears to be no other earnings payable to the applicant by the respondent under the contract that they have. The applicant could have assumed that he would have continued the relationship in the succeeding seasons and similar amount of earnings, governed by the amount of catch, may have been payable to him. The amount of compensation that he would receive untrammelled by the cap, set out in s23A(4) of the Act, would therefore include payment for the balance of the season plus the next season a sum in the vicinity of $80,00.00. The applicant has worked in 5 jobs and earned $980.00 plus received $280.00 workers compensation payment. As from 1 July 1998, he has received $200.00 per week on average as a wet line fisherman. In aggregate these earnings when deducted from total amount of compensation, do not reduce that amount below the amount of money he would have received for six (6) months.

Section 23A(4) caps the compensation an employee would receive for six (6) months earnings calculated on the basis of the average rate received during any relevant period of employment. The relevant period in this case is the season which commences on 15 November and finishes on 30 June. The average monthly earning based on Exhibit A is $6,500.00 capped at 6 months the compensation is $39,366. That is the sum of compensation that the applicant will be awarded.

Orders will issue that the applicant was unfairly dismissed by the respondent on 4 February 1998; that reinstatement is not a viable option and that he be paid compensation by the respondent in the sum of $39,336.00.

Appearances: Mr D Armstrong, of Counsel, appeared on behalf of the applicant.

Mr I Morrison, of Counsel instructed Mr T Leech, Solicitor of Glynn & Gray, appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Eugene Thomas Watson

and

JK Colero Enterprises Pty Ltd.

No. 343 of 1998.

COMMISSIONER J F GREGOR.

1 December 1998.

Order.

HAVING heard Mr D Armstrong, of Counsel, on behalf of the applicant and Mr I Morrision, of Counsel, instructed Mr T Leech, Solicitor, on behalf of the respondent, the Commission pursuant to the powers vested in it by the Industrial Relations Act, 1979, the Commission hereby order—

1. THAT the applicant was unfairly dismissed by the respondent on 4 February 1998; and
2. THAT reinstatement is not a viable option and that the applicant be paid compensation by the respondent in the sum of $39,336.00.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

SECTION 29 (b)—Notation of—

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Alderson S	Bernie Ornig—Execucom Technologies	1556/1998	Beech C.	Discontinued
Anderson S	Fremantle Black and White	1305/1998	Gregor C	Discontinued
Andrews RL	Superbowl Pty Ltd	1753/1998	Gregor C.	Consent Order
Atkinson C	Pumpenickels Food Co	1575/1998	Gregor C.	Discontinued
Barton ST	Soldon Pty Ltd t/a Shell Roadhouse Halls Creek	200/1998	Kenner C.	Consent Orders
Beet T	Youngs WA Pty Ltd	1647/1998	Fielding S.C.	Discontinued
Blackmore GA	Ropan Products	1796/1998	Beech C.	Discontinued
Blakey R	RS Components Pty Ltd	1832/1998	Fielding S.C.	Withdrawn
Bleeker TL	Mowatt Refractories Pty Ltd	1904/1998	Beech C.	Withdrawn
Bonavita I	M.A.N. Pty Ltd	1372/1998	Scott C.	Dismissed
Burnham JT	Western Desert Puntukurnuparna Aborignal Corp	556/1998	Fielding S.C.	Dismissed
Carter MS	Consolidated Business Media Pty Ltd	1662/1998	Scott C.	Dismissed
Chiera SA	Louthean Publishing Pty Ltd	1588/1998	Scott C.	Dismissed
Choy KI	WA Greyhound Racing Association	1713/1998	Fielding S.C.	Discontinued
Clarke D	Brandrill Ltd	1718/1998	Fielding S.C.	Discontinued
Corena G	Sunreef Holdings Pty Ltd	1579/1998	Gregor C.	Discontinued
Donnes T	Youngs WA Pty Ltd	1648/1998	Fielding S.C.	Discontinued
Fabriziani R	Diesel Motors	799/1998	Scott C.	Dismissed
Farley EA	Tronte Holdings Pty Ltd T/A Minepro	1393/1998	Scott C.	Dismissed
Fitton GD	Dynamic Nominees Pty Ltd t/a Feature Paints	1637/1998	Gregor C.	Consent Order
Ford C	University Building Society	1343/1998	Fielding S.C.	Discontinued
Gargett M	Youngs WA Pty Ltd	1649/1998	Fielding S.C.	Discontinued
Garvey P	Healy Airconditioning	919/1998	Kenner C.	Discontinued
Gates SA	P & O Cold Storage	1663/1998	Beech C.	Discontinued
Gillman MJ	Outokumpu Mining Australia Pty Limited	1728/1998	Parks C.	Consent Order
Gjorgievski S	Luni Tunes Pty Ltd	1490/1998	Kenner C.	Withdrawn
Gleeson T	Secureforce International ACN 009 266 675	1532/1998	Kenner C.	Discontinued
Gleeson PL	Lyma Pty Ltd t/a Kimbercrust Bakery	1438/1998	Coleman C.C.	Dismissed
Gorman MD	Senteq Info. Systems—Perth Branch	1500/1998	Fielding S.C.	Discontinued
Halls M	Family Planning Western Australia	917/1998	Beech C.	Discontinued
Harrison JL	Rainville Investments Pty Ltd as trustee for Durand Gangemi Family Trust	2280/1997	Cawley C.	Discontinued
Hart W	JT & CA Warwick Pty Ltd	1391/1998	Gregor C.	Consent Order
Hewett AG	Saw James Capel Ltd	1167/1998	Scott C.	Dismissed
Hewett K	Argyle Diamond Mines	1783/1998	Fielding S.C.	Discontinued
Hewitt SR	Action Bay Pty Ltd t/a Goldfields Toyota	1553/1998	Beech C.	Dismissed
Honner I	Tyco Engineering & Construction (Asia) Pty Ltd	916/1998	Beech C.	Discontinued
Hoskin WL	Fresh Food Industries	1825/1998	Fielding S.C.	Discontinued
Jamieson K	EHI Australia	1730/1998	Kenner C.	Discontinued
Jessap T	Youngs WA Pty Ltd	1651/1998	Fielding S.C.	Discontinued
Johnston RL	Legion Pty and Jones Partners trading as Alu Glass	1697/1998	Parks C.	Dismissed
Jones JD	IFP Pty Ltd	748/1998	Beech C.	Discontinued
Kane E	Tubemakers Steel	1327/1998	Parks C.	Discontinued
Kay AJ	Leeds Insurance Brokers Pty Ltd	1636/1998	Gregor C.	Discontinued
Kirchner J	Australian Fine Leathers Pty Ltd	1283/1998	Beech C.	Discontinued
Koens CMC	96 FM Southern Cross Radio Pty Limited	1506/1998	Gregor C.	Consent Order
Kong KH	Komala Pty Ltd	1658/1998	Gregor C.	Consent Order

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Kornaus MR	Chapmans Creek Vineyard	1148/1998	Kenner C.	Discontinued
Lang MA	AT Adams Pty Ltd	1709/1998	Scott C.	Consent Order
Lanza FA	Action Food Barns (WA) Pty Ltd	1457/1998	Gregor C.	Dismissed
Lantzke A	Mezze Continental Deli	1548/1998	Gregor C.	Consent Order
Leahy CJ	Inside Information Consulting Pty Ltd t/a Inside People	536/1998	Beech C.	Discontinued
Lucas LC	Ryan Mining Pty Ltd t/a Ryan Mining Co.	1357/1997	Beech C.	Discontinued
Lynn BA	M E Mack Valves Pty Ltd	1309/1998	Fielding S.C.	Discontinued
Mace NA	Image Multimedia Centre Limited	1527/1998	Parks C.	Discontinued
Mancuso R	Mada Holdings Pty Ltd & Another	1475/1998	Fielding S.C.	Upheld
Martin AA	Burswood Resort Casino	2392/1997	Gregor C.	Discontinued
Martion AJ	City of Gosells	1908/1998	Kenner C.	Discontinued
Marrs SR	City of Melville	1918/1998	Kenner C.	Discontinued
McFarlane LA	Asstock Pty Ltd t/a Regional Training Services Albany	1735/1998	Coleman C.C.	Dismissed
McFerran S	Abbeyvale Vineyard—Pam & Bill McKay	1638/1998	Kenner C.	Discontinued
Mekss-Oehlers J	Adecco Services Pty Ltd	949/1998	Scott C.	Dismissed
Merry C	Fremantle Boat Lifters	1364/1998	Fielding S.C.	Consent Order
Mercer K	Mercer Mooney (Macaw Nominees)	1857/1998	Scott C.	Withdrawn
Michael CM	Noongar Alcohol & Substance Abuse Service	1468/1998	Gregor C.	Discontinued
Moore M	Waringarri Aboriginal Corporation	588/1998	Kenner C.	Discontinued
Muchek W	Wards Outdoor	1441/1998	Fielding S.C.	Dismissed
Munro K	Jenny Thomas—Foodland Rivervale	1656/1998	Gregor C.	Dismissed
Newby P	Stirling City Council	373/1998	Kenner C.	Discontinued
Oakes MA	Koast Corporation	1639/1998	Kenner C.	Discontinued
Owen-Morgan CA	Materials Consultants Pty Ltd	1831/1998	Fielding S.C.	Discontinued
Palazzolo KJ	Tiny Tots Child Care Centre	1511/1998	Beech C.	Discontinued
Pallotta K	Loren Enterprises Pty Ltd T/A Trafalgars Hotel	1350/1998	Kenner C.	Discontinued
Peetoom DJ	Argyle Diamonds	940/1998	Beech C.	Discontinued
Penman (Jnr) J	Barminco Pty Ltd	1430/1998	Scott C.	Dismissed
Perich S	WA Newspapers Pty Ltd	1510/1998	Kenner C.	Discontinued
Phelan PJ	Villa Design Pty Ltd	1608/1998	Gregor C.	Consent Order
Philip D	Ardross Tyre Service 1989 P/L	1705/1998	Gregor C.	Dismissed
Potter JA	Bushtrail Investments Pty Ltd (ACN 074 733 047) as Trustee for the Jurien Bay Trust trading as Jurien Bay Hotel/Motel	1357/1998	Parks C.	Discontinued
Powrie N	Western Desert Puntukurnuparna Aboriginal Corporation	570/1998	Fielding C.	Dismissed
Prosser JC	Celus Pty Ltd t/a BP Morrison Road	1515/1998	Beech C.	Struck Out
Purves D	Kaiser Engineers Pty Ltd	1525/1998	Kenner C.	Discontinued
Rapley M	Bunbury Chamber of Commerce	1827/1998	Gregor C.	Discontinued
Reid W	John Holland Construction & Engineering Pty Ltd	171/1998	Fielding S.C.	Dismissed
Rickwood J	Wren Oil	1507/1998	Kenner C.	Discontinued
Rintoul MJ	Coleman Transport Services	1115/1998	Scott C.	Dismissed
Roper NA	N T Computer World Centre (WA) Pty Ltd	1667/1998	Scott C.	Dismissed
Rumjantsev PA	Soanar Limited	1149/1998	Beech C.	Discontinued
Ryde G	Argyle Diamond Mines Pty Limited	1021/1998	Beech C.	Discontinued
Schultz LD	Minculture Laboratories Pty Ltd	1433/1998	Coleman C.C.	Dismissed
Shaw PF	Arora Pty Ltd t/a ARB 4x4 Accessories	1545/1998	Beech C.	Discontinued

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Shukralla S	Chubb Lock & Safe	1686/1998	Gregor C.	Discontinued
Squance HE	Ostrich Meat Marketing Co. (Australia) Ltd	1369/1998	Beech C.	Discontinued
Stewart MA	Bi-Lo T/A Newmart Pty Ltd	1920/1998	Scott C.	Dismissed
Stone DJ	Director General Family and Children's Services	1476/1998	Kenner C.	Dismissed
Stranger NL	Interval Resort Networks (Australasia) Pty Ltd	996/1998	Gregor C.	Discontinued
Styles GP	Hard Produce Services Pty Ltd	1351/1998	Kenner C.	Discontinued
Tanaka Y	Kobe Sushi	1760/1998	Parks C.	Dismissed
Teraci T	Nicolas Jason Cassano t/a CFR Trading	695/1998	Beech C.	Discontinued
Truman M	Search Equipment Rentals	1798/1998	Cawley C.	Dismissed
Vice P	Microfusion Pty Ltd	1464/1998	Fielding S.C.	Consent Order
Wakefield NR	Millar Holdings Pty Ltd	1151/1998	Gregor C.	Dismissed
Wait S	John Staley Food and Packaging	1736/1998	Kenner C.	Discontinued
Walker C	Shellaby Pty Ltd T/A Shellabears	994/1998	Scott C.	Dismissed
Walker M	Oka Motor Company Limited	2075/1997	Scott C.	Dismissed
Warner DJ	Press Power Australia Pty Ltd ACN 075 144 606	1460/1998	Kenner C.	Discontinued
Webster GS	Rendezvous Management Pty Ltd t/a Rendezvous Observation City Hotel	1466/1998	Gregor C.	Discontinued
White MTA	Stephen Murray Westropp & Debbie Maree Westropp t/as Westropp Shearing Service	1609/1998	Scott C.	Dismissed
Whittle J	Quality Bakers Australia Ltd t/a Buttercup Bakeries	533/1998	Gregor C.	Discontinued
Wilson BA	Sadie Canning & David Canning T/As SMC Vending Operations	921/1998	Cawley C.	Discontinued
Williams MN	Oriel Café Brasserie	1668/1998	Scott C.	Dismissed
Williams C	Fuchs Australia Pty Ltd	1276/1998	Scott C.	Dismissed
Young CJ	Regaltime Holdings Pty Ltd	1792/1998	Gregor C.	Discontinued

CONFERENCES—
Matters arising out of—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

ABB Engineering Construction Pty Ltd

and

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, WA Branch.

No. C355 of 1998.

COMMISSIONER S J KENNER.

3 December 1998.

Order.

WHEREAS on 2 December 1998 the applicant applied to the Commission for an urgent conference pursuant to s44 of the Industrial Relations Act, 1979;

AND WHEREAS on 3 December 1998 the Commission convened an urgent conference between the parties pursuant to s44 of the Industrial Relations Act, 1979;

AND WHEREAS at the conference the Commission was informed that the applicant and the respondent are in dispute in relation to work being performed by employees of the applicant members of the respondent in connection with drill modules pursuant to a contract between the applicant and Atwood Oceanics Australia and in connection therewith the respondent has demanded by letter dated 25 November 1998 improved allowances and employment conditions including severance payments, a fares and travelling allowance, a site allowance, and improvements in conditions for casual employees on the basis that the respondent regards the work in question as construction work for the purposes of the Metal Trades (General) Award No 13 of 1965 Part II-Construction Work;

AND WHEREAS in support of their demands members of the respondent withdrew their labour commencing on or about 27 November 1998 with further industrial action taking place between that time and the time of these proceedings with the Commission being advised that the members of the respondent have presently withdrawn their labour;

AND WHEREAS having heard from the applicant and the respondent the Commission has formed the view that the industrial action which is occurring constitutes a breach of either or all of clause, 44 – Avoidance of Industrial Disputes of the Metal Trades (General) Award No 13 of 1965; clause 11 – Resolution of Disputes of the ABB Engineering Construction Pty Ltd, Western Australia (Kwinana Workshop) Enterprise Bargaining Agreement 1996 or clause 13 – Resolution of Disputes of the ABB Construction Pty Ltd Western Australia (Kwinana Factory) Enterprise Bargaining Agreement 1998 respectively;

NOW THEREFORE the Commission pursuant to the powers vested in it by the Industrial Relations Act, 1979, and in particular s44 (5b) hereby orders –

(1) THAT each of the employees of the applicant members of the respondent engaged in work in connection

with the Atwood Oceanics Australia drill modules project who are engaged in industrial action concerning matters the subject of these proceedings, cease such industrial action immediately to ensure a return to work on Friday 4 December 1998 immediately following the employees' usual commencement time of work being 7.00 am;

(2) THAT the respondent and each of its officials ensure that work resumes immediately in accordance of the terms of paragraph (1) of this order;

(3) THAT the applicant or the respondent may, on giving 24 hours notice to the other, apply to the Commission to vary, revoke or otherwise set aside the terms of this order.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Civil Service Association of Western Australia Incorporated

and

Chief Executive
Ministry for Planning.

No. PSAC 69 of 1998.

4 December 1998.

Order.

WHEREAS this matter was the subject of conciliation proceedings which adjourned on the basis the applicant was to consider its position and confirm an intention to proceed; and

WHEREAS there has been no such confirmation; and

WHEREAS notice was given the applicant that in the absence of the same the matter may be concluded by order; and

WHEREAS there is no reason of which the Commission is aware why this matter should not now be finalised by an order for discontinuance;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S.A. CAWLEY,
Commissioner
[L.S.] Public Service Arbitrator.

CONFERENCES—
Matters referred—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union of Workers, Western Australian Branch

and

Transfield Pty Ltd, Transfield Facilities and Maintenance Services.

No. CR 229 of 1998.

COMMISSIONER S.J. KENNER.

20 November 1998.

Order.

HAVING heard Mr M Anderton as agent on behalf of the applicant and Ms E Mackey of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby discontinued by leave.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA Branch

and

Kresta Blinds Limited.

No. CR 219 of 1998.

COMMISSIONER S J KENNER.

20 November 1998.

Order.

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby discontinued by leave.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division Western Australian Branch

and

Fremantle Workers' Social and Leisure Club.

No. CR304 of 1998.

3 December 1998.

Order.

WHEREAS the application cited herein was unable to be resolved by conciliation at conferences conducted pursuant to

section 44 of the Industrial Relations Act, 1979 (the Act) on and on 17 November 1998 it was referred for hearing; and

WHEREAS on the aforementioned date the Commission issued a notice that the matter would be heard on 17 December 1998;

AND WHEREAS on 25 November 1998 the Commission received a letter from the applicant requesting that the matter be discontinued;

NOW THEREFORE the Commission, pursuant to the power conferred on it under the Act, hereby orders—

THAT this application be and is hereby wholly discontinued.

(Sgd.) C.B. PARKS,
[L.S.] Commissioner.

CONFERENCES—Notation of—

PARTIES		NUMBER COMMISSIONER	DATE	MATTER	RESULT
Australian Workers Union	Forrestania Gold NL	Fielding SC C315 of 1998	10/11/98	Dismissal	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Wirralie Gold Mines Pty Ltd	Fielding SC C317 of 1998	4/11/98	Fly in-Fly Out Policy Change	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Cargill Australia Limited	Fielding SC C309 of 1998	—	Shifts & Overtime	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	T C Engineering	Kenner C. C252 of 1998	31/8/98	Industrial Action in Support of Wage Increase	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Riverton Engineering Co.	Kenner C. C255 of 1998	19/10/98	Redundancy	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Maicon Engineering	Kenner C. C275 of 1998	8/10/98	Alleged Unfair Dismissal and Contractual Entitlements	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Metalcorp Recyclers	Kenner C. C269 of 1998	25/9/98	Alleged Unfair Dismissal	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Direct Engineering Services Pty Ltd	Kenner C. C271 of 1998	8/10/98	Alleged Unfair Dismissal	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Royal Automobile Club of WA (Inc)	Kenner C. C290 of 1998	9/10/98	Enterprise Agreement Negotiations	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Transfield Construction Pty Ltd	Kenner C. C262 of 1998	11/9/98	Alleged Contractual Entitlements	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Abbotts Radiators & Airconditioning	Kenner C. C297 of 1998	22/10/98	Entitlements to Severance Pay	Discontinued

PARTIES		NUMBER COMMISSIONER	DATE	MATTER	RESULT
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	TVT Engineers Pty Ltd	Kenner C. C322 of 1998	23/11/98	Alleged Unfair Dismissal	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Plumbers Industries Pty Ltd	Kenner C. C301 of 1998	29/10/98	Dispute Over Redundancies Payment	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Austal Ships Pty Ltd	Kenner C. C220 of 1998	21/7/98	Dismissal	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Advanced Reprographics Services	Kenner C. C206 of 1998	20/7/98	Alleged Contractual Entitlements	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Argyle Diamond Mines	Fielding SC C300 of 1998	26/10/98	Restructure of Current Operations	Discontinued
Builders' Labourers, Painters and Plasterers Union	Main Roads Department	Kenner C. C223 of 1998	28/7/98	Membership of Union	Discontinued
Builders' Labourers, Painters and Plasterers Union	SCK Australia Pty Ltd	Kenner C. C230 of 1998	10/9/98	Access to Time and Wages Records	Discontinued
Builders' Labourers, Painters and Plasterers Union	Project Tiling	Kenner C. C251 of 1998	10/9/98	Superannuation Entitlements	Discontinued
Builders' Labourers, Painters and Plasterers Union	Goldfields Scaffolding	Kenner C. C312 of 1998	—	Non-Adherence to Award Obligations	Withdrawn
Builders' Labourers, Painters and Plasterers Union	ABB EPT Management Ltd and Other	Kenner C. C321 of 1998	—	Entitlements	Discontinued
Builders' Labourers, Painters and Plasterers Union	WACO Kwikform Pty Ltd and Others	Kenner C. C243 of 1998	31/8/98	Right of Entry to the Riviera Flats Work Site on Mill Point Road in South Perth	Discontinued
Civil Service Association	Executive Director, Education Department of Western Australia	Scott C. PSAC298 of 1998	12/11/98 13/11/98	Preserving the Integrity of the Agreement	Concluded
Civil Service Association	Mr Carlo Calagero, Executive Director, Western Australian Alcohol and Drug Authority	Scott C. PSAC75 of 1998	—	Meeting of Single Bargaining Unit	Concluded
Civil Service Association	Chief Executive Officer, Western Australian Tourism Commission	Beech C. PSAC76 of 1998	10/11/98	Deployment	Concluded
Civil Service Association	The Hon.Minister For Public Sector Management & Another	Beech C. PSAC78 of 1998	10/11/98	Abolishment of Position and End of Contract	Concluded
Civil Service Association	Department of Environmental Protection	Beech C. PSAC68 of 1998	29/9/98	Denial of Study Leave	Concluded

PARTIES		NUMBER COMMISSIONER	DATE	MATTER	RESULT
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	WA Procast	Kenner C. C296 of 1998	18/11/98	Alleged Contractual Benefits	Referred
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	Selectrix	Kenner C. C292 of 1998	—	Dismissal	Discontinued
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	Timcast Pty Ltd	Kenner C. C295 of 1998	14/10/98	Alleged Unfair Dismissal	Referred
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	Thermelec	Scott C. C293 of 1998	14/10/98	Claim For Payment of Wages	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	Ralph M Lee Pty Ltd	Kenner C. C238 of 1998	31/7/98	Strike Action	Discontinued
Hospital Salaried Officers Association	King Edward Memorial Hospital for Women & Another	PSAC79 of 1998	19/10/98	Pro-rata Long Service Leave	Discontinued
Liquor, Hospitality and Miscellaneous Workers Union	Great Southern Health Service	Beech C. C294 of 1998	17/11/98	Allegations in Relations to Non Performance of Duties	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Biniris (Aust) Pty Ltd	Scott C. C298 of 1998	13/10/98	Hourly Rate of Pay and Allocation of Hours	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Quirk Corporate Cleaning Australia Pty Ltd	Scott C. C260 of 1998	11/9/98 9/11/98	Dismissal	Referred
Liquor, Hospitality and Miscellaneous Workers Union	Action Foundation	Fielding SC C338 of 1998	—	Final Warning	Discontinued
Liquor, Hospitality and Miscellaneous Workers Union	South West Aboriginal Medical Service Inc.	Beech C. C286 of 1998	—	Dismissal	Concluded
Transport Workers Union	BHP Iron Ore Pty Ltd	Fielding SC C341 of 1998	3/12/98	Employee Stood Down	Discontinued

CORRECTIONS—

Editors Note: This correction is republished in the public interest

INDUSTRIAL RELATIONS ACT 1979

CORRECTED NOTICE

PUBLICATION OF APPLICATION PURSUANT TO SECTION 72A

Application Number 1996 of 1998 has been lodged pursuant to Section 72A of the Industrial Relations Act 1979 by The Australian Workers' Union West Australian Branch, Industrial Union of Workers and is published hereunder.

The Application has been listed before the Full Bench at 10.30am on the 8th , 9th, 10th, 11th, and 12th days of February 1999.

Any person who wishes to be heard shall file a notice of application to be heard in accordance with Form 1, setting out the grounds upon which the person claims sufficient interest to be heard in relation to the application and serve it on the applicant at least 7 days before the above date of hearing in accordance with Regulation 101A of the Industrial Relations Commission Regulations 1985.

(Sgd.) J.A. SPURLING,
[L.S.] Registrar.
1 December 1998

Form 1

Industrial Relations Act 1979.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Appl No. 1996 of 1998.

NOTICE OF APPLICATION

To West Australian Industrial Relations Commission, in accordance with Regulation 101A

.....

(name and address of respondent/s—attach schedule if space insufficient)

TAKE NOTICE THAT The Australian Workers" Union West Australian Branch, Industrial Union of Workers, Wellington Fair, Cnr Lord and Wellington Streets Perth W.A 6849, Tel No 9 22 11686

(name and address of applicant/s—attach schedule if necessary)

has this day applied to the Commission

For the order contained in Schedule A of this Application pursuant to Section 72A of the Industrial Relations Act 1979

The grounds on which the application is made are set out in the Schedule B of this application.

(Affix Stamp of Commission)

The appropriate fee is to be paid upon lodgement of this application.

This notice must be completed by the applicant, signed and, where necessary, sealed by him, and a written statement of claim or other adequate description of the subject matter of the application must be attached.

For endorsements see back hereof

Schedule A—Order

The order applied for is that—

(1) The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers ("The AWU") has the exclusive right to represent the industrial interests of all employees employed by BHP Iron Ore Pty Ltd ("BHP") at the sites in Western Australia in the following classifications set out in the *Iron Ore Production an Processing Award* and the BHP Iron Ore Pty Ltd Enterprise Bargaining Agreement III—

AWU Level 1

AWU Level 2

AWU Level 3

AWU Level 4

(2) The Construction Mining and Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch ("the CMETSWU") and the Transport Workers Union of Australia, WA Branch ("TWU") do not have the right to represent the industrial interests of any of the employees employed by BHP Iron Ore Limited ("BHP") at sites in Western Australia in the classifications set out in clause (1) of this order.

Schedule B—Grounds

The grounds for the Application are as follows—

1. The order seeks exclusive coverage of certain employees at BHP sites in Western Australia. This reflects the traditional coverage by the AWU of employees on the sites concerned.
2. Neither the CMETSWU nor the TWU has traditionally covered employees the subject of the order on the sites concerned.
3. The AWU is an "industry union" and is constitutionally able to cover all the employees the subject of this order.
4. The CMETSWU and the TWU do not have constitutional coverage of the employees the subject of the order.
5. The traditional coverage arrangements are the result of a long and deliberate process of determination by the Commission of union representation in the iron ore industry generally and BHP sites in particular over a period of almost 25 years.
6. The traditional demarcation of Union representation on these sites is reflected in the applicable award and industrial agreements.
7. The AWU's traditional representation rights are recognised by the employer as is evidenced by the employers consent to the applicable award and enterprise agreements and administrative arrangements which assist representation to occur.
8. The AWU has competently represented the employees concerned for may years and continues to do so.
9. Recently, the CMETSWU and the TWU has recruited or attempted to recruit members of the AWU employed by BHP in the classification sought to be covered by this order. This has caused disruption and discontent among the employees on the sites concerned and led to the disruption of BHP's operations. Such disruption will continue to occur if the orders sought are not made.
10. The order requested would not increase the number of unions in the workplace.
11. The order is in accordance with the objects of the *Industrial Relations Act 1979 (WA)* ("The Act") for reasons including the following—
    (a) It will promote goodwill in the workplace by ensuring the status quo remains undisturbed.
    (b) It will provide a means of preventing and settling industrial disputation which has occurred and is threatened due to attempts to change the current representational arrangements.
    (c) It is in accordance with the traditional representational arrangements which are reflected in the applicable award and industrial agreements.

(d) It will discourage the overlapping of union coverage by confirming the traditional representational arrangements which are reflected in the applicable award and enterprise bargaining agreement and are in accordance with the constitutional coverage rights of the unions involved.

PROCEDURAL DIRECTIONS AND ORDERS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kim Barry Flaherty

and

The Civil Service Association of Western Australia Incorporated.

No. 634 of 1998.

COMMISSIONER S J KENNER.

25 November 1998.

Order.

HAVING heard Mr L Clark as counsel on behalf of the applicant and Mr M Lynn of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT the application listed for hearing and determination on 3-4 December 1998 be adjourned to a date to be fixed;

(2) THAT each party file and serve a response to each others request for particulars already served within seven (7) days.

(3) THAT each party shall give informal discovery by serving its list of documents within seven (7) days.

(4) THAT inspection of documents discovered shall be completed within fourteen (14) days of service of the informal discovery referred to in paragraph 3 above.

(5) THAT the parties have liberty to apply on short notice.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Janine Wendy Carpenter

and

Summerstrand Holdings Pty Ltd
t/f Janet Smith Family Trust
t/a Specialist Mortgage.

No. 653 of 1998.

COMMISSIONER J F GREGOR.

18 November 1998.

Order.

WHEREAS on 18 November 1998, the parties appeared before the Commission and by agreement asked the Commission to issue directions for the exchange of discoverable documents, a schedule of agreed facts and an arrangement that the parties file their respective submissions and list of authorities by Thursday 26 November 1998; and

WHEREAS the Commission agreed to issue the direction as requested by the parties;

NOW THEREFORE pursuant to the powers vested in it by the Industrial Relations Act, 1979, the Commission hereby directs by consent—

(1) THAT the parties exchange lists of Discoverable Documents by Friday 20 November 1998;

(2) THAT inspection of Discoverable Documents be completed by Wednesday 25 November 1998;

(3) THAT a schedule of Agreed Facts (if any) be filed by Thursday 26 November 1998;

(4) THAT the parties file their respective Submissions and Lists of Authorities by Thursday 26 November 1998.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Peter Harold Summerfield

and

Shire of Katanning.

No. 694 of 1998.

COMMISSIONER S J KENNER.

4 December 1998.

Direction.

HAVING heard Mr D Howlett (of counsel) on behalf of the applicant and Mr S Kemp (of counsel) on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT the hearing dates of 14-17 December 1998 listed for this matter be and are hereby vacated;

(2) THAT the matter be dealt with by way of written submissions;

(3) THAT the applicant file and serve its written submissions by 9 December 1998;

(4) THAT the respondent file and serve its written submissions by 16 December 1998;

(5) THAT the parties have liberty to apply on short notice.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Dean Christopher Howarth

and

The Mattress Renovators Perth Pty Ltd.

No. 918 of 1998.

COMMISSIONER P E SCOTT.

12 November 1998.

Order.

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the application was set down for hearing and determination on the 11th day of November 1998; and

WHEREAS at that hearing it was agreed that the application be amended to correctly name the Respondent;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders, by consent—

THAT name of the Respondent be, and is hereby amended to "The Mattress Renovators Perth Pty Ltd".

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Ronald Harrington-Smith

and

Aboriginal and Torres Strait Islander Commission.

No. 1279 of 1998.

1 September 1998.

Order.

WHEREAS an application was lodged in the Commission pursuant to section 29 of the Industrial Relations Act against the Eastern Goldfields Aboriginal Corporation Resource Agency and against the Aboriginal and Torres Strait Islander Commission;

AND WHEREAS on 1 September 1998 the applicant advised the Commission that he wished to withdraw that part of the application as against the Aboriginal and Torres Strait Islander Commission;

AND HAVING HEARD Mr A. Dungey (of counsel) on behalf of the applicant;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the Industrial Relations Act 1979, hereby order—

THAT the Aboriginal and Torres Strait Islander Commission be deleted as a respondent to this application.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Christopher Robert Bright

and

St George Bank Limited.

No. 1660 of 1998.

COMMISSIONER P E SCOTT.

27 November 1998.

Direction.

WHEREAS on Wednesday 25 November 1998 the Commission convened a conference to deal with interlocutory matters associated with this application; and

HAVING heard from Ms M Lynn (of Counsel) for the Applicant and Mr B DiGirolami (of Counsel) for the Respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the Industrial Relations Act 1979, hereby directs—

1. THAT the parties are to provide mutual discovery of any documents in the possession, custody and/or control of the parties relating to the matters in dispute between them. In particular, within 14 days of the date of the conference, being 25 November 1998—
   (a) The Respondent shall provide to the Applicant those documents (where such documents exist)—
      (i) set out in points 1 to 9 of the Application for Production of Documents filed by the Applicant; and
      (ii) referred to in the Applicant's letter dated 10 November 1998; and
   (b) The Applicant shall provide to the Respondent all documents:
      (i) regarding the Applicant's mitigation of loss;
      (ii) relating to the Applicant and "the Law Firm" referred to in the Respondent's position document of 1 October 1998; and
      (iii) in his possession relevant to the dispute between the parties.
2. THAT the Applicant shall respond to the Respondent's position document of 1 October 1998 within 7 days of receipt of those documents set out in subparagraph (1)(a) above.
3. THAT in the event that the Respondent intends to rely on consequences or effects of the Applicant's actions said to be the cause of his dismissal, then it should advise the Applicant of the consequences and effects upon which it seeks to rely.
4. THAT the parties shall prepare a statement of agreed facts prior to the hearing of this matter.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gregory Francis Burke

and

Sovereign Cove Pty Ltd And Others.

No. 1779 of 1998.

COMMISSIONER P E SCOTT.

10 November 1998.

Order.

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS by letter dated the 29th day of October 1998 the Applicant sought to strike out "Deamont Pty Ltd" as a Respondent to the application; and

WHEREAS by letter dated the 2nd day of November 1998 the Commission directed Deamont Pty Ltd to advise if it objected to being stuck out of the matter and further that if it did not contact the Commission by 4.00pm on the 9th day of November 1998 it would be assumed that it had no objection to being struck out as a Respondent to the application and an order would issue in these terms; and

WHEREAS by 4.00pm on the 9th day of November 1998, Deamont Pty Ltd had not contacted the Commission;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT Deamont Pty Ltd be struck out as a Respondent to the application.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

NOTICES— Cancellation of Awards/ Agreements/Respondents— Under Section 47—

A.W.U. BELLWAY MOUNT SEABROOK TALC MINING AGREEMENT 1980.
No. 2 of 1980.

NOTICE.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to cancel out the following agreement, namely the

A.W.U. Bellway Mount Seabrook Talc Mining Agreement 1980 No. 2 of 1980

on the grounds that there are no longer any persons employed under the provisions of that agreement.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 686 of 1977 Part 69 on all correspondence.

Dated 11 December 1998

J. SPURLING,
Registrar.

CONTRACT CLEANERS' (MINISTRY OF EDUCATION) AWARD 1990.
No. A5 of 1981.

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to strike out the following parties/respondents to the Contract Cleaners' (Ministry of Education) Award, 1990 No. A5 of 1981, namely

Azaores Cleaning Company, 55 Brodie Crescent, South Hedland WA 6722

Tempo Services Pty Ltd, 21 Colray Avenue, Osborne Park WA 6017

on the grounds that the respondents are no longer operating in the industry or employing persons in the industry to which the award applies.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 76 of 1980 Part 244 on all correspondence.

Dated 11 December 1998.

J. SPURLING,
Registrar.

NOTICE

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS
COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to cancel out the following awards/agreements/orders, namely the

Draughtsmen's, Tracers' and Planners' (Mt Newman Mining Company

Pty Ltd & Goldsworthy Mining Ltd) Award 1976 No. 3 of 1975;

Goldsworthy Mining Limited ADSTE Staff Award No. A33 of 1981;

Pilbara Energy Project Construction Agreement No. AG 31 of 1995;

Pilbara Energy Project (Newman Power Station) Agreement No. AG 13 of 1996;

Yandi Construction Order No. CR 361 of 1991;

Yarrie Construction Order No. C 230 of 1993.

on the grounds that there are no longer any persons employed under the provisions of the awards/agreements/orders.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 686 of 1977 Parts 37, 170 & 177—180 on all correspondence.

Dated 11 December 1998.

J. SPURLING,
Registrar.

NOTICE

WESTERN AUSTRALIAN

INDUSTRIAL RELATIONS

COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to cancel the following award, namely the

Dresser Minerals – A.W.U. Mining and Process Award 1979 No. R 33 of 1979 on the grounds that there are no longer any persons employed under the provisions of that award.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 686 of 1977, Part 171 on all correspondence.

Dated 11 December 1998.

J. SPURLING,
Registrar.

ENROLLED NURSES AND NURSING ASSISTANTS (PRIVATE) AWARD.
No. 8 of 1978.

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to strike out the following party/respondent to the Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978, namely

Annesley Private Hospital, Mt. Lawley

on the grounds that the respondent is no longer operating in the industry or employing persons in the industry to which the award applies.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 76 of 1980 Part 242 on all correspondence.

Dated 11 December 1998.

J. SPURLING,
Registrar.

FERRIES MASTERS' ENGINEERS' AND DECKHANDS' (TRANSPERTH) AWARD 1964.

No. 8 of 1965.

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to cancel out the following award, namely the

Ferries Masters' Engineers' and Deckhands' (Transperth) Award 1964 No. 8 of 1965

on the grounds that there are no longer any persons employed under the provisions of that award.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 686 of 1977, Part 175 on all correspondence.

Dated 11 December 1998.

J. SPURLING,
Registrar.

METAL TRADES (GENERAL) AWARD 1966.
No. 13 of 1965.

NOTICE.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to strike out the following parties/respondents to the Metal Trades (General) Award 1966 No. 13 of 1965, namely

Adams, William & Co. Ltd, 362 South Street, O'Connor WA 6163

Avery, W. & T. (Aust.) Pty Ltd, 374 Murray Street, Perth WA 6000

Barclay & Sharland Pty Ltd, PO Box 295, Hamilton Hill WA 6163

Bouchers Industries Ltd, 349 Scarborough Beach Road, Osborne Park WA 6017

Bradshaws Pty Ltd, 97 Belmont Avenue, Belmont WA 6104

Bushell, Charles & Co., 18 King Edward Road, Osborne Park WA 6017

Carse, E.W. & Co., 83 Abernethy Road, Belmont WA 6104

Cosmo Prod., 44 Morrison Road, Midland WA 6056

Crump & Cornish, Leger Street, Balcatta WA 6021

Diamond Ice & Cold Storage Coy. Pty Ltd, 278 Scarborough Beach Road, Osborne Park WA 6017

Forrestfield Industries Pty Ltd, Hale Road, Forrestfield WA 6058

Fry, E.J., 45 Munt Street, Bayswater WA 6053

Gaunt, C.W. & Sons, 12 Clune Street, Bayswater WA 6053

Golden Gleam Fish Processing Co. Pty Ltd, Augustus Street, Geraldton WA 6530

Hadfields (W.A.) 1934 Ltd, Railway Parade, Bassendean WA 6054

List, F. & Sons Pty Ltd, 223 Collier Road, Bayswater WA 6053

McAlister, T. Pty Ltd, 18 Denninup Way, Malaga WA 6062

Mr Whippy (Perth) Pty Ltd, 396 Scarborough Beach Road, Osborne Park WA 6017

Sawyers Engineers Pty Ltd, 8 Palmerston Street, Bentley WA 6102

Singer Aust. Pty Ltd, 30 Coolgardie Street, West Perth WA 6005

Supa-Furn Distributors, 485 Scarborough Beach Road, Osborne Park WA 6017

Telcon Aust. Pty Ltd, 198 Railway Parade, West Perth WA 6005

Thomas Bros., 15 Mallard Way, Canington WA 6107

Turner, E.J., 4 Ensign Street, Narrogin WA 6312

W.A. Forge Co. Ltd, Gnangara Road, Wanneroo WA 6065

West Australian Rope & Twine Co. Pty Ltd, 719 Stirling Highway, Mosman Park WA 6102

Wiltshire Bros., Fitzgerald Street, Geraldton WA 6530

on the grounds that the respondents are no longer operating in the industry or employing persons in the industry to which the award applies.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 76 of 1980 Part 198 on all correspondence.

Dated 11 December 1998

J. SPURLING,
Registrar.

PHOTOGRAPHIC INDUSTRY AWARD 1980.
No. A9 of 1980.

NOTICE.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to strike out the following parties/respondents to the Photographic Industry Award 1980 No. A9 of 1980, namely

Craftsman Prints, 2 Edward Street, Fremantle WA 6160

Photo Laboratories Ltd, 5 Belmont Avenue, Belmont WA 6104

Viva Colour, 26 Brown Street, Claremont WA 6010

on the grounds that the respondents are no longer operating in the industry or employing persons in the industry to which the award applies.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 76 of 1980 Part 161 on all correspondence.

Dated 11 December 1998

J. SPURLING,
Registrar.

RETAIL FOOD ESTABLISHMENTS EMPLOYEES AGREEMENT.
No. AG 15 of 1992.

NOTICE

WESTERN AUSTRALIAN

INDUSTRIAL RELATIONS COMMISSION.

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to strike out the following parties/respondents to the Retail Food Establishments Employees Agreement No. AG15 of 1992, namely —

Amalgamated Food and Poultry Pty Ltd Inc in WA Trading as Red Rooster Foods, 342 Scarbourough Beach Rd, Osborne Park WA 6017

N.J. & A.S. Wise & Neil and Ann Wise Trading as Pizza Hut, 77 Walter Rd, Bedford WA 6052

Russoney Pty Ltd (Russell & Yvonne Furner) Trading as Pizza Hut, Adalia St, Kallaroo WA 6025 and 4/551 Moolandah Boulevard,Kingsley WA 6026

Malvery Pty Ltd and James Lavender Trading as Pizza Hut, 2861-2869 Albany Hwy, Kelmscott WA 6111

Linda & Tony Cuccovia Trading as Pizza Hut, Shop 2, Willetton, Neighbourhood Shopping Centre, Willetton WA 6155

Competitive Foods Ltd Trading as Hungry Jacks & Kentucky Fried Chicken, 77 Hay St, Subiaco WA 6008

Aleht Holdings Pty Ltd Trading as Chicken Treat, Cnr Ferndale Crs and Meltcalf Rd, Ferndale WA 6155

Montello Holdings Pty Ltd Trading as Chicken Treat, 484 Stirling Hwy, Cottesloe WA 6011

Afra Pty Ltd Trading as Chicken Treat, Shop 8, Coolibah Plaza, Greenwood WA 6024

Glen Hawkins Trading as Chicken Treat, 427B Carrington St, Hamilton Hill WA 6163

Abkam Pty Ltd Trading as Chicken Treat, Shop 22, Kelmscott Plaza, Kelmscott WA 6111

Lynne Ellen Harris Trading as Chicken Treat, 1699 Albany Hwy, Kenwick WA 6107

Vinod & Kirja Bhautoo Trading as Chicken Treat, Shop 3A Langford Village, Langford WA 6155

Nigrus Holdings Pty Ltd Trading as Chicken Treat, 2 Pace Rd, Medina WA 6167

Chiron Pty Ltd Trading as Chicken Treat, 37 Mends St, South Perth WA 6151

Roland Sylvester Ott Trading as Chicken Treat, 98A Wanneroo Rd, Tuart Hill WA 6060

Chickenco Pty Ltd & River Rooster Australia Pty Ltd Trading as River Rooster, c/- Papalia & Reynolds, 12 Prince St, Busselton WA 6280

Graphic Holdings Pty Ltd and David Grylls Trading as Pizza Hut, Shop 36A Forrestfield

Forum, Strelitzia Ave, Forrestfield WA 6058

on the grounds that the respondents are no longer operating in the industry or employing persons in the industry to which the agreement applies.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 76 of 1980 Part 138 on all correspondence.

Dated 11 December 1998.

J. SPURLING, Registrar.

AWARDS/AGREEMENTS— Consolidation of—

BREADCARTERS' (METROPOLITAN) AWARD.
No. A35 of 1963.

Pursuant to section 93(6) of the Industrial Relations Act 1979 the following award has been consolidated and is published hereunder for general information.

Dated at Perth this 9th day of December 1998.

J. SPURLING,
Registrar.

Breadcarters' (Metropolitan) Award

1.—TITLE

This award shall be known as the "Breadcarters' (Metropolitan) Award" and replaces Award No. 29 of 1949, as amended.

1A.—STATEMENT OF PRINCIPLES—JUNE, 1998

It is a condition of this award/industrial agreement that any variation to its terms on or from the 12th day of June, 1998 including the $14, $12 and $10 per week arbitrated safety net adjustments, the increase in the adult minimum wage to $373.40 per week and previous arbitrated safety net adjustments, shall not be made except in compliance with the Statement of Principles—June, 1998 set down by the Commission in Matter No. 757 of 1998.

1B.—MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $373.40 per week.

(3) The Minimum Adult Award Wage of $373.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions to June, 1998, including the increase in Matter No. 757 of 1998.

(4) Unless otherwise provided in this clause adults employed as casual or part time employees shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of $373.40 per week.

(6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskills placements, or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(7) Subject to this clause the Minimum Adult Award Wage shall—

(a) apply to all work in ordinary hours.

(b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and annual leave and for all other purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the June 1998 State Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the adult minimum wage.

2.—ARRANGEMENT

3.—SCOPE

This award shall apply to the workers classified in clause 6.—Wages, employed in or in connection with the delivery or conveyance of bread.

4.—AREA

This award shall apply to the locality comprised within radius of 45 kilometres from the G.P.O. Perth.

5.—TERM

The term of the award shall be for a period of three (3) years from the date hereof.

6.—WAGES

(1) The following shall be the total minimum rates of wages payable to employees covered by this award.

	Base Rate $	Supplementary Payment $	Safety Net Adjustment $	Total Weekly Wage $
Grade 1 Loader Yardperson	314.30	44.90	48.00	407.20
Grade 2 Breadcarter in charge of rigid vehicle up to 4.5 tonnes Gross Vehicle Mass (GVM) or Gross Combination Mass (GCM) Loader in charge of automatic slicing and wrapping machine Breadcarter	327.70	46.80	4800	422.50
Grade 3 Breadcarter in charge of rigid vehicle 4.5 to 13.9 tonnes GVM or GCM	334.40	47.80	48.00	430.20
Grade 4 Breadcarter in charge of rigid vehicle over 13.9 tonnes GVM or GCM up to 13 tonnes capacity	344.50	49.20	34.00	441.70
Grade 5 Breadcarter in charge of rigid vehicle and trailer up to 22.4 tonnes GCM over 10 and up to 15 tonnes capacity	351.10	50.20	48.00	449.30
Grade 6 Breadcarter in charge of articulated vehicle 3 or more axles over 22.4 tonnes GCM over 22 and up to 39 tonnes capacity	357.90	51.10	48.00	457.00

Leading Hands

A leading hand appointed as such by the employer and placed in charge of—

(a) Not less than three and not more than ten other workers shall be paid $19.26 per week extra.

(b) More than ten and not more than twenty other workers shall be paid $28.74 per week extra.

(c) More than twenty other workers shall be paid $36.42 per week extra.

(2) JUNIOR WORKERS—

Rates of pay (percent of total wage payable to an adult worker for the class of work performed).

	%
If under 17 years of age	60
If 17 and under 18 years of age	70
If 18 and under 19 years of age	85
If 19 and under 20 years of age	90
If 20 years of age	100

No junior under 17 years of age shall be permitted to be in sole charge of a motor vehicle.

A junior who is required to have a "B" class motor vehicle driver's license shall be paid the full adult rate.

(3) CASUALS—

Casual hands shall be paid at the rate of 20 per cent in addition to the rates prescribed herein.

(4) Breadcarters who are required in any week to collect monies and account for them as part of their duties are to be paid $5.11 per week in addition to the rates before mentioned.

(5) (a) Loaders who are required to commence working before 4.00 a.m. on any day shall be paid for each day so worked, an extra 30 per cent:

(b) Loaders who are required to commence work between 4.01 a.m. and 7.00 a.m. on any day shall be paid an extra 15 per cent for each day so worked.

(6) Breadcarters who are required to commence working before 7.00 am on any day shall be paid an extra 15 per cent for each day so worked.

6A—SUPPLEMENTARY PAYMENT AND SAFETY NET ADJUSTMENT

(1) The rates of pay in this award include three arbitrated safety net adjustments totalling $24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December 1993 State Wage Decision, the December 1994 State Wage Decision and the March 1996 State Wage Decision. The first, second and third $8.00 per week arbitrated safety net adjustments may be offset to the extent of any wage increase payable since 1 November 1991 pursuant to enterprise

agreements or consent awards or award variations to give effect to enterprise agreements, insofar as that wage increase or part of it has not previously been used to offset an arbitrated safety net adjustment. Increases made under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreement, are not to be used to offset arbitrated safety net adjustments.

Furthermore the rates of pay in this award include the $10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 14th day of November 1997.

This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this award and which are above the wage rates prescribed in it, provided that the above award payments include wages payable under an enterprise agreement in which absorption is not contrary to the terms of the enterprise agreement.

Increases made under State Wage Case Principles prior to November 1997, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $10.00 per week.

The rates of pay in this award include the arbitrated safety net adjustment payable under the June 1998 State Wage Case Decision. This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

(2) The supplementary payment payable to an employee pursuant to the provisions of Clause 6.—Wages hereof shall be for all purposes of this Award.

(3) The supplementary payments prescribed in Clause 6.—Wages hereof are in substitution for overaward payments as defined to the extent of any Award wage increase arising out of the application of minimum rates adjustments and broadbanding increases arising out of the September 1989 State Wage Decision.

(4) "Overaward payment" is defined as the amount (whether it be termed overaward payment, attendance bonus, service increment, or any term whatsoever) which an employee would receive in excess of the award wage which applied immediately prior to the introduction of supplementary payments for the classification in which such employee is engaged. Provided that such payment should exclude overtime, shift allowances, penalty rates, disability allowances, fares and travelling time allowances and any other ancillary payments of a like nature prescribed by this Award.

(5) Supplementary payments set out in Clause 6.—Wages hereof represent payment in lieu of equivalent overaward payments.

"Overaward Payment" is defined as the amount (whether it be termed "overaward payment", "attendance bonus", "service increment" or any term whatsoever) which an employee would receive in excess of the "award wage" which applied prior to the decision of the Western Australian Industrial Relations Commission dated 24 December, 1993 (Application No. 1457 of 1993) for the classification in which such employee is engaged. Provided that such payment shall exclude overtime, shift allowances, penalty rates, disability allowances, fares and travelling time allowances and any other ancillary payments of a like nature prescribed by the Award.

7.—HOURS

SECTION A—HOURS

(1) The ordinary hours of work shall be an average of 38 per week to be worked on one of the following basis—

(a) 38 hours within a work cycle not exceeding seven consecutive days; or

(b) 76 hours within a work cycle not exceeding 14 consecutive days; or

(c) 114 hours within a work cycle not exceeding 21 consecutive days; or

(d) 152 hours within a work cycle not exceeding 28 consecutive days.

(2) The ordinary hours of work shall consist of work performed over a period of eight consecutive hours on each working day unless agreed between the employer and the majority of his employees in the plant or section or sections concerned. Such work shall not, in any one week be performed on more than five consecutive days being Monday to Friday inclusive.

(3) Any time worked after eight hours on any one day will be paid for at the rate of time and one half for the first two hours and double time thereafter.

(4) In a week in which an award holiday/holidays falls on what would otherwise be an ordinary working day/days, the ordinary weekly hours shall be reduced by the number of hours that would have been worked on that day/days.

(5) No employee shall be allowed to resume work until he has had a clear ten hours off.

SECTION B—Implementation of 38 Hour Week—

(1) Except as provided in subclause (4) hereof, the method of implementation of the 38 hour week may be any one of the following—

(a) by employees working less than eight ordinary hours each day;

(b) by employees working less than eight ordinary hours on one or more days each week; or

(c) by fixing one day of ordinary working hours on which all employees will be off duty during a particular work cycle; or

(d) by rostering employees off duty on various days of the week during a particular work cycle so that each employee has one day of ordinary hours off duty during that cycle.

(e) Any day off duty shall be arranged so that it does not coincide with a holiday prescribed in subclause (1) of Clause 9.—Holidays, of this award.

(2) In each plant, an assessment should be made as to which method of implementation best suits the business and the proposal shall be discussed with the employees concerned, the objective being to reach agreement on the method of implementation prior to 29/5/85.

(3) In the absence of an agreement at plant level, the procedure for resolving special, anomalous or extraordinary problems shall be as follows—

(a) Consultation shall take place within the particular establishment concerned.

(b) If it is unable to be resolved at establishment level, the matter shall be referred to the State Secretary of the Union (or Unions) concerned or his deputy, at which level a conference of the parties shall be convened without delay.

(c) In the absence of agreement either party may refer the matter to the Western Australian Industrial Relations Commission.

(4) Different methods of implementation of a 38 hour week may apply to various groups or sections of employees in the plant or establishment concerned.

(5) Notice of Days Off Duty

Except as provided in subclause (6) hereof, in cases where, by virtue of the arrangement of his ordinary working hours, an employee in accordance with paragraphs (c) and (d) of subclause (1) hereof, is entitled to a day off duty during his work cycle, such employee shall be advised by the employer at least four weeks in advance of the day he is to take off duty.

(6) (a) An employer, with the agreement of the majority of employees concerned, may substitute the day an employee is to take off in accordance with paragraphs (c) and (d) of subclause (1) hereof, for another day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation.

(b) An employer and employee may by agreement substitute the day the employee is to take off for another day.

(c) An employer may institute a banking system of Rostered Days Off.

Employees would therefore work on what would normally have been their rostered day off and accrue an entitlement to bank a rostered day off to be taken at a mutually convenient time for both the employee and the employer.

No payments or penalty payment shall be made to employees working under this substitute banked Rostered Day Off. However the employer will maintain a record of the number of Rostered Days banked and will apply the Average Pay System during the weeks when an employee elects to take a banked Rostered Day Off.

$$\frac{\text{Average weekly pay}}{5} \times \text{Number of Banked Substitute Days}$$

SECTION C—Procedures for In-Plant Discussions—

(1) Procedures shall be established for in-plant discussions, the objective being to agree on the method of implementing a 38 hour week in accordance with Section A—Hours and B—Implementation of 38 Hour Week of this clause and shall entail an objective review of current practices to establish where improvements can be made and implemented.

(2) The procedures should allow for in-plant discussions to continue even though all matters may not be resolved by 29/5/85.

(3) The procedures should make suggestions as to the recording of understandings reached and methods of communicating agreements and understandings to all employees, including the overcoming of language difficulties.

(4) The procedures should allow for the monitoring of agreements and understandings reached in-plant.

(5) In cases where agreement cannot be reached in-plant in the first instances or where problems arise after initial agreements of understandings have been achieved in-plant, a formal monitoring procedure shall apply. The basic steps in this procedure shall be as applies with respect to special, anomalous or extraordinary problems as prescribed in subclause (3) of Section B of this clause.

SECTION D—Hours Transition Provision—

(1) The concept of a 38 hour week shall operate from the beginning of the first pay period commencing on or after 29/5/85 however in recognition of the difficulties associated with its introduction an employer may implement the 38 hour week after that date provided that such implementation shall occur no later than 29/8/85.

(2) Where an employer implements the 38 hour week at a date later than the beginning of the first pay period commencing on or after 29/5/85 an employee shall become entitled to a payment at the date of implementation which shall accrue at the rate of two ordinary hours' pay for each week of 40 ordinary hours that is worked after the beginning of the first pay period commencing on or after 29/5/85. Provided that in any such week where less than 40 ordinary hours are worked then the rate of two ordinary hours' pay shall be reduced proportionately except where an employee is absent from duty in a circumstance that entitles him to payment for the absence pursuant to other provisions of this award.

8.—OVERTIME

(1) All overtime shall be paid in addition to the ordinary wage at the rate of time and one half for the first two hours and double time thereafter.

(2) Overtime shall be paid for all hours on duty in excess of the hours prescribed in Clause 7.—Hours of this Award.

(3) Notwithstanding anything contained herein—

(a) Any employer may require any worker to work reasonable overtime at overtime rates and such worker shall work overtime in accordance with such requirements.

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

(4) No worker shall be allowed to resume work until the worker has had a clear ten hours off.

(5) A worker required to work overtime for more than one and one half hours without being notified on the previous day or earlier that he will be so required to work shall be supplied with a reasonable meal by the employer or paid $5.50 for a meal.

(6) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he has notified the worker concerned on the previous day or earlier that such second or subsequent meal will also be required to provide such meals or pay an amount of $3.80 for each second or subsequent meal.

(7) No such payments need to be made to a worker living in the same locality as his place of work who can reasonably return home for such meals.

9.—HOLIDAYS

(a) (i) Subject to subclause (c) of this clause,the following days, or the days observed in lieu thereof shall be granted as holidays to all workers without deduction of pay, namely: New Year's Day, Australia Day, Labour Day, Good Friday, Easter Monday, Anzac Day, State Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day.

(ii) Where Christmas Day or New Year's Day falls on a Saturday or a Sunday such holiday shall be observed on the next succeeding Monday and where Boxing Day falls on a Sunday or a Monday such holiday shall be observed on the next succeeding Tuesday; in each such case the substituted day shall be deemed a holiday without deduction of pay in lieu of the day for which it is substituted.

(b) Any worker who is absent from work for any cause other than sickness (proof whereof shall lie on the worker) on the working day immediately before or the working day immediately following any of the days mentioned in subclause (1) hereof shall not be entitled to payment for the holiday.

(c) Within a radius of twenty-eight miles of the G.P.O. Perth, workers may be required to work on the loading and delivery of bread only on Australia Day, Foundation Day and Sovereign's Birthday and on New Year's Day and Anzac Day when these days are observed on a Monday in which case an additional day on fullpay shall be added to the annual leave of the worker or payment of one and a half day's pay for such holiday shall be made to the worker. Provided that volunteers shall have the first option of working on the foregoing holidays. Provided further that if as a result of the worker's own default only part of a day is worked by the worker on any such day additional pay or leave shall be equivalent only to the time actually worked on such day.

10.—PAYMENT OF WAGES

(1) Wages shall be paid weekly on a Wednesday, Thursday or Friday. No employer shall hold more than two days wages in hand, except for circumstances agreed between the Union and the employer to be beyond the employer's control.

(2) All wages shall be paid enclosed in an envelope, which shall be clearly endorsed on the outside with the particulars hereunder—

(a) Name
(b) Hourly Rate
(c) Overtime
(d) Allowance
(e) Penalties
(f) Gross Wage
(g) Deductions
(h) Nett Wage

Provided that at the option of the employer, the particulars mentioned may be stated on a slip of paper and included in the envelope.

(3) An employee may be paid his wages by cheque or into his bank or building society account. Where wages continue to be paid in cash payment may be made during the employees time provided that the employee is kept waiting no longer than 15 minutes.

(4) Employee who actually works 38 ordinary hours each week

In the case of an employee whose ordinary hours of work are arranged so that he works 38 ordinary hours each week, wages shall be paid weekly.

(5) Employee who works an average of 38 ordinary hours each week

In the case of an employee whose ordinary hours of work are arranged so that he works an average of 38 ordinary hours each week during a particular work cycle, wages may be paid weekly according to a weekly average of ordinary hours worked even though more or less than 38 ordinary hours may be worked in any particular week of the work cycle.

(6) Rostered day off coinciding with pay day

In the event that an employee, by virtue of the arrangement of his ordinary working hours, is to take a day off on a day which coincides with pay day, such employee shall be paid no later than the working day immediately following pay day.

(7) Commencement and Termination of Employment

(a) An employee who lawfully leaves his employment or is dismissed for reasons other than misconduct shall be paid all monies due to him at the termination of his service with the employer, before leaving the employers premises or alternatively (except in the case of casual employees) a cheque for the amount due may be forwarded to the employees last known address within 48 hours of such termination.

(b) An employee who commences employment during a work cycle shall either—

(i) receive payment for any Day Off duty occasioned by Clause 7.—Hours only for the hours accrued toward that day off during the work cycle;

(ii) be paid for the hours actually worked in that work cycle and not be granted a day off with pay.

(c) An employee who has not taken the Day Off due to him during the work cycle in which employment is terminated, the wages due to that employee shall include a total of hours accrued toward that day off during that work cycle for which payment has not already been made.

(d) Where the employee has taken a Day Off during the work cycle in which employment is terminated, the wages due to that employee shall be reduced by the total of hours for which payment has already been made but which have not accrued toward that Day Off during the work cycle.

(8) Payment for Day Off

An employee who is absent from duty other than on a public holiday or day in lieu thereof, paid sick leave, or bereavement leave shall have his payment for any Day Off duty occasioned by Clause 7.—Hours of this award reduced proportionately.

11.—SHORTAGES AND CHANGE MONEY

(1) A worker with a shortage debited against him shall be allowed to check his books and sheets and any previous relevant books or sheets.

(2) The employer may deduct any shortage from any wages due or otherwise recover the amount from him.

(3) Employer to advise workers of any shortages on a daily basis on the next working day.

(4) If shortages exceed $100.00 in any week, a worker with the consent of the Union may agree to allow such shortages to carry over for one more week before being deducted.

(5) In the absence of consent referred to in (3) such shortages shall be deducted on a weekly basis.

(6) A worker shall not be required to use nor shall he use his own money for the purpose of giving change.

12.—GENERAL CONDITIONS

(1) The employer shall place a copy of this award in a convenient place where the industry is carried on and is easily accessible to the workers.

(2) Juniors may be employed in the proportion of one junior to every five adults or fraction of five employed.

(3) (a) An employer may direct an employee to carry out such duties as are within limits of the employee's skill, competence and training consistent with the classification structure of this award, provided that such duties are not designed to promote deskilling.

(b) An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been trained in the use of such tools and equipment.

(c) Any direction issued by an employer pursuant to paragraphs (a) and (b) shall be consistent with the employer's responsibilities to provide a safe and healthy working environment.

13.—DEFINITIONS

(1) "Bread Carter" shall mean an employee appointed as such who may be required to perform incidental and peripheral work of a general nature in addition to the following specific duties—

- delivery and conveying of bread and associated products
- loading and packing of vehicle
- maintain the vehicle in a clean condition and carry out minor maintenance/checking to maintain the vehicle in a roadworthy condition
- collect crates
- maintain the paperwork associated with the load and sales
- merchandise products by delivery and replenishing of stock in retail outlets.

(2) "Junior" shall mean any person in receipt of less than the adult wage.

(3) "Yardperson" shall mean an employee appointed as such who may be required to perform general duties in and around the bakery and which may involve cleaning and crate washing.

(4) "Loader" shall mean and include a worker engaged in the sorting, packing, wrapping, slicing or loading of bread.

(5) "Gross Combination Mass" means—

(a) in the case of an articulated truck or trailer combination—

the maximum permissible mass (whether described as the gross train mass or otherwise) for the motor vehicle and the trailer(s) or semi-trailer(s) attached to it, together with the load carried on each, as stated in any certificate that is issued in respect of the motor vehicle by the relevant Authority or by the corresponding authority of another State or Territory or that is required by law to be painted or displayed on the motor vehicle; and

(b) in any other case—

the maximum permissible mass (whether described as the gross vehicle mass or otherwise) for the motor vehicle and its load (including any trailer and its load) as stated in a certificate of registration or other certificate that is issued in respect of the motor vehicle by the relevant Authority or by the corresponding authority of another State or Territory or that is required by law to be painted or displayed on the motor vehicle.

(c) this definition is inclusive of that for "Gross Vehicle Mass".

14.—ANNUAL LEAVE

(1) Except as hereinafter provided, a period of four consecutive weeks' leave with payment of ordinary wages as prescribed shall be allowed annually to a worker by his employer after a period of twelve months' continuous service with that employer.

(2) (a) During a period of annual leave a worker shall be paid a loading of 17 1/2 per cent calculated on his ordinary wage as prescribed.

Provided that where the worker would have received early start loadings prescribed by Clause 6.—Wages had he not been on leave during the relevant period and such loadings would have entitled him to a greater amount than the loading of 17 1/2 per cent, then the early start loadings shall be added to the rate of wage as prescribed in subclause (1) hereof in lieu of the 17 1/2 per cent loading.

(b) The loading prescribed by this subclause shall not apply to proportionate leave on termination.

(3) If any award holiday falls within a worker's period of annual leave and is observed on a day which in the case of that

worker would have been an ordinary working day there shall be added to that period one day being an ordinary working day for each such holiday observed as aforesaid.

(4) Any time in respect of which a worker is absent from work except time for which he is entitled to claim sick pay or time spent on holidays or annual leave as prescribed by this award shall not count for the purpose of determining his right to annual leave.

(5) (a) A worker whose employment terminates after he has completed a twelve monthly qualifying period and who has not been allowed the leave prescribed under this clause in respect of that qualifying period shall be given payment in lieu of that leave or, in a case to which subclause (7) of this clause applies, in lieu of so much of that leave as has not been allowed unless—

(i) he has been justifiably dismissed for misconduct; and

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

(b) If, after one month's continuous service in any qualifying twelve monthly period an employee lawfully leaves his employment or his employment is terminated by the employer through no fault of the employee, the employee shall—

(i) if such termination occurs before 29/5/85 be paid 3.08 hours' pay at the rate of wage prescribed by subclause (1) of this clause, divided by forty, in respect of each completed week of continuous service; or

(ii) if termination occurs on or after 29/5/85 be paid 2.923 hours pay at the rate of wage prescribed by subclause (1) of this clause, divided by thirty-eight, in respect of each completed week of continuous service.

(6) In the event of a worker being employed by an employer for portion only of a year, he shall only be entitled, subject to subclause (5) hereof to such leave on full pay as is proportionate to his length of service during that period with such employer, and if such leave is not equal to the leave given to the other workers, he shall not be entitled to work or pay whilst the other workers of such employer are on leave on full pay.

(7) In special circumstances and by mutual consent of the employer, the worker and the Union, annual leave may be taken in not more than two periods.

(8) The provisions of this clause shall not apply to casual workers.

(9) Short-term Annual Leave

An employee may request and, with the consent of the employer, take short-term annual leave, not exceeding four days in any calendar year, at a time or times separate from any of the periods determined in accordance with subclause (7).

(10) An employer may require annual leave to be taken within 12 months of it becoming due. An employee, in following the requirement of an employer pursuant to this subclause, may take all Annual Leave due including any pro-rata or proportionate entitlement due.

15.—SICK LEAVE

(1) (a) An employee who is unable to attend or remain at his place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the provisions of this clause.

(b) An employee who works an average of 38 ordinary hours each week during a particular work cycle shall be entitled to pay during such absence calculated as follows—

$$\frac{\text{duration of absence}}{\text{ordinary hours normally worked that day}} \times \frac{\text{appropriate weekly rate}}{5}$$

An employee shall not be entitled to claim payment for personal ill health or injury nor will his sick leave entitlement be reduced if such ill health or injury occurs on the week day he is to take off duty occasioned by Clause 7.—Hours of this award.

(c) Notwithstanding the provisions of paragraph (b) of this subclause an employer may adopt an alternative method of payment of sick entitlements where the employer and the majority of his employees so agree.

(d) Entitlement to payment shall accrue at the rate of 1/6th of a week for each completed month of service with the employer.

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

(2) The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this clause may be claimed by the employee if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during the year at the time of the absence. Provided that an employee shall not be entitled to claim payment for any period exceeding ten weeks in any one year of service.

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

(4) The provisions of this clause do not apply to an employee who fails to produce a certificate from a medical practitioner dated at the time of the absence or who fails to supply such other proof of the illness or injury as the employer may reasonably require provided that the employee shall not be required to produce a certificate from a medical practitioner with respect to absences of two days or less unless after two such absences in any year of service the employer requests in writing that the next and subsequent absences in that year if any, shall be accompanied by such certificate.

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

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

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

(d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 14.—Annual Leave.

(e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 14.—Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.

(6) Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (3) of clause 2 of the Long Service Leave provisions published in volume 59 of the Western Australian Industrial Gazette at pages 1-6, the paid sick leave standing to the credit of the employee at the date of transmission from service with the transmittor shall stand to the credit of the employee at the commencement of service

with the transmittee and may be claimed in accordance with the provisions of this clause.

(7) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and Assistance Act nor to employees whose injury or illness is the result of the employee's own misconduct.

(8) The provisions of this clause do not apply to casual employees.

16.—ENGAGEMENT

(a) Except as hereinafter provided the contract of service shall be by the week and shall be terminable by one (1) week's notice on either side or by the payment or fortfeiture as the case may be of one (1) week's wages.

(b) In the case of casual workers the contract of service shall be by the hour and shall be terminable by one (1) hour's notice on either side or by the payment or forfeiture as the case may be of one (1) hour's wages.

(c) This clause does not affect the right to dismiss for misconduct in which case wages shall be paid up to the time of dismissal.

17.—MEAL AND REST BREAKS

(1) Meal Break—

A meal interval of not less than 30 minutes nor more than one hour shall be allowed to and taken by each worker daily to commence at any time between the end of the fourth hour of the days work and the end of five and one half hours work from the commencement of such work.

(2) Rest Break—

An employee shall be entitled to a rest period of ten minutes, after eight hours of work in any shift and a further rest period of ten minutes for every two hours worked thereafter in that shift.

Such rest periods shall count as part of the time worked and shall be taken at a time to suit the convenience of the employer and the employee before or after the entitlement accrues.

(3) A loader shall be permitted to partake of refreshment at or in the vicinity of his place of work provided that work is not interrupted.

18.—TIME AND WAGES RECORD

A time and wages record shall be kept by the employer in a place readily accessible to each worker in which such worker shall enter time he starts and finishes work each day, the times during which the meal interval is taken, the hours worked each week and the amount of wages received, together with his signature for same. Such book shall be open for inspection during ordinary working hours by a duly accredited official or either the applicant or respondent Union and he shall be allowed to take extracts therefrom. Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the employer. If for any reason the book be not available at the bakehouse when the official calls to inspect it, it shall be made available for inspection within twelve (12) hours. Any system of automatic recording by mechanical means shall be deemed a compliance with this clause, to the extent of the information recorded.

Consistent with the terms of the Labour Relations Legislation Amendment Act 1997 and S.23(3)(c)(iii) of the Industrial Relations Act a representative of the Union shall not exercise the rights under this clause with respect to entering any part of the premises of the employer unless the employer is the employer, or former employer of a member of the Union.

19.—LEARNING A ROUND

An employer shall be permitted to reduce the prescribed wage of a bread carter to the minimum wage whilst such worker is learning a round under the supervision of another employee but for no longer than the first ten days of his employment as a bread carter.

20.—JUNIOR WORKER' CERTIFICATE

(1) Junior workers, upon being engaged, shall if required, furnish the employer with a certificate containing the following particulars—

(i) Name in full

(ii) Age and date of birth

(iii) Name of each previous employer

(iv) Class of work performed for each previous employer.

(2) No worker shall have any claim upon any employer for additional pay in the event of the age of the worker being wrongly stated on the certificate, and, in such case, the employer shall not be guilty of a breach of this award.

21.—BREAKDOWNS

The employer shall be permitted to deduct payment for any day or portion of a day upon which a worker cannot be usefully employed because of any strike by the union or unions affiliated with it or by any other Association or union, or through the breakdown of the employer's machinery but not including the breakdown of a vehicle used in the delivery of bread, or any stoppage of work by any cause which the employer cannot reasonably prevent.

22.—LONG SERVICE LEAVE

The long service leave provisions set out in Volume 60 of the "Western Australian Industrial Gazette" at pages 1 to 6 both inclusive are hereby incorporated in and shall be deemed to be part of this award.

23.—WORKERS—ADDITIONAL OBLIGATIONS

RE: EMPLOYMENT

Repealed by Section 7(1)(k) of Industrial Arbitration Act, 1979.

24.—PART-TIME LOADERS AND DRIVERS/ MERCHANDISERS

(1) Notwithstanding anything contained in this award, an employer may employ employees as part time loaders and drivers/merchandisers regularly.

(2) Part time employee means an employee working less than 38 hours each week.

(3) Part time employees shall be paid an hourly rate which is 1/38th of the weekly rate for the type of work being performed.

(4) A part time employee may be employed for up to eight ordinary hours in any one day.

(5) A part time employee who works in excess of the ordinary daily or weekly hours of work shall be paid overtime in accordance with Clause 8.—Overtime of this award.

(6) The "early start premiums" provided by Clause 6.—Wages, subclauses (5) and (6) shall only apply to ordinary hours worked and not be payable on overtime hours worked.

(7) Part time employees shall be entitled to receive pro-rata entitlements to: payment for absence due to personal illness, annual leave, bereavement leave, jury service, long service leave.

(8) Where a part-time employee is normally rostered or expected to work on a day which is a public holiday and is not required to work on that day, the employee shall receive payment for the number of hours that would have been worked.

24A.—CASUAL EMPLOYMENT

(1) An employer shall, wherever practicable, notify a casual employee that their services are not required the next working day.

(2) A casual employee may be employed for up to eight ordinary hours in any one day.

(3) A casual employee while working ordinary hours, shall be paid on an hourly basis 1/38th of the appropriate weekly wage rate prescribed by the award, plus 20% of ordinary time earnings for the work performed. A minimum payment of four hours is to be paid each day required.

(4) The "early start premium" provided by subclauses (5) and (6) of Clause 6.—Wages of this award shall only apply to ordinary hours worked and not payable on overtime hours worked.

(5) In addition to normal overtime rates a casual employee while working overtime or outside of ordinary hours, shall be paid on an hourly basis 1/38th of the appropriate weekly wage rate prescribed by the award, plus 10% of ordinary time earnings for the work performed.

(6) A casual employee shall not be entitled to the benefits of clauses 9.—Holidays, 14.—Annual Leave, 15.—Sick Leave or 25.—Bereavement Leave of this Award.

25.—BEREAVEMENT LEAVE

(1) A worker, other than a casual worker, shall, on the death within Australia of a wife, husband, father, mother, brother, sister, child or stepchild, be entitled on notice of leave up to and including the day of the funeral of such relation and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the worker in two ordinary working days. Proof of such death shall be furnished by the worker to the satisfaction of his employer.

(2) Payment in respect of bereavement leave is to be made only where the worker otherwise would have been on duty and shall not be granted in any case where the worker concerned would have been off duty in accordance with any shift roster, or on long service leave, annual leave, sick leave, worker's compensation, leave without pay or on a public holiday.

26.—MATERNITY LEAVE

(1) Eligibility for Maternity Leave

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

For the purposes of this clause—

(a) A worker shall include a part-time worker but shall not include a worker engaged upon casual or seasonal work.

(b) Maternity leave shall mean unpaid maternity leave.

(2) Period of Leave and Commencement of Leave

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

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

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

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

(3) Transfer to a Safe-Job

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

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

(4) Variation of Period of Maternity Leave

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

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

(5) Cancellation of Maternity Leave

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

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

(6) Special Maternity Leave and Sick Leave

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

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

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

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

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

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

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

(7) Maternity Leave and Other Leave Entitlements

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

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

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

(8) Effect of Maternity Leave on Employment

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

(9) Termination of Employment

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

(b) An employer shall not terminate the employment of a worker on the ground of her pregnancy or of her absence on maternity leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

(10) Return to Work After Maternity Leave

(a) A worker shall confirm her intention of returning to her work by notice in writing to the employer given not less than four weeks prior to the expiration of her period of maternity leave.

(b) A worker, upon the expiration of the notice required by paragraph (a) hereof, shall be entitled to the position which

she held immediately before proceeding on maternity leave or, in the case of a worker who was transferred to a safe job pursuant to subclause (3), to the position which she held immediately before such transfer. Where such position no longer exists but there are other positions available for which the worker is qualified and the duties of which she is capable of performing, she shall be entitled to a position as nearly comparable in status and salary or wage to that of her former position.

(11) Replacement Workers

(a) A replacement worker is a worker specifically engaged as a result of a worker proceeding on maternity leave.

(b) Before an employer engages a replacement worker under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the worker who is being replaced.

(c) Before an employer engages a person to replace a worker temporarily promoted or transferred in order to replace a worker exercising her rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the worker who is being replaced.

(d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement worker.

(e) A replacement worker shall not be entitled to any of the rights conferred by this clause except where her employment continues beyond the twelve months qualifying period.

27.—AIR CONDITIONING

(1) Subject to the exclusions in subclause (3) of this clause, where the employer commences to lease or renew a lease or first purchase a motor vehicle after 29th July, 1982, for use by an employee working under the terms of this award, such motor vehicle shall be fitted with and continue to be fitted with a refrigerated air conditioning unit in reasonable working order.

(2) Subject to the exclusions contained in subclause (3) of this clause, where the employer commenced to lease or renewed a lease or first purchased a motor vehicle before 29th July, 1982, for use by an employee working under the terms of this award, such motor vehicle shall be fitted with a refrigerated air conditioning unit in reasonable operating order before November 1, 1984.

(3) Provided that subclauses (1) and (2) of this clause shall not apply—

(a) if the employer, the employee and union mutually agree in writing that an air-conditioning unit should not be provided in respect of a particular vehicle. A copy of any such agreement shall be provided to the employer, the employee and the union;

(b) to an employer in respect to an employee using a motor vehicle where such employee works solely outside of the summer months of the year;

(c) to an employer in respect to an employee using a motor vehicle in any sector of Western Australia south of the 26th parallel of latitude in respect of which the provision of an air-conditioning unit is mutually agreed in writing between the employer, the employee and the union to be inappropriate. Where no agreement is reached the matter shall be determined by the Commission.

(d) to an employer in respect to an employee using a motor vehicle in any sector of Western Australia south of the 26th parallel of latitude where the nature of deliveries in the industry involves a substantial number of short duration stops which significantly affect the capability of an air conditioning unit in reducing the heat disability. This exclusion applies to van driver/salesmen of all descriptions and small order deliveries and pickups of all descriptions. Any dispute as to the application of this paragraph shall be determined by the Commission.

28.—SETTLEMENT OF DISPUTE PROCEDURE

Subject to the Industrial Relations Act, 1979, any dispute or claim shall be dealt with in the following manner—

(1) In the first instance all the facts of the dispute matter or grievance will be discussed without delay between the employee/s concerned and the appropriate supervisor/s. The appropriate Shop Steward/s to be present if requested by the employee/s.

(2) If not settled, the matter shall be discussed between an accredited Union Representative and the delegated Officer of the Company.

(3) If agreement has not then been reached, the matter shall be discussed between a Management Representative of the Company and an appropriate Official of the Union.

(4) If the matter is still not settled, it shall be submitted to the W.A. Industrial Relations Commission for decision which shall, subject to any appeal in accordance with the Act, be final.

(5) Until the matter is determined, work shall continue in accordance with the pre-dispute conditions. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this subclause.

(6) The parties will co-operate to ensure that these procedures are carried out expeditiously.

(7) In the event of a work stoppage, such employees as are necessary shall, where appropriate, complete production in process to avoid spoilage and clean the plant according to hygiene requirements before stopping work.

29.—AWARD MODERNISATION

(1) The parties are committed to modernising the terms of the Award so that it provides for more flexible working arrangements, improves the quality of working life, enhances skills and job satisfaction and assists positively in the restructuring process.

(2) In conjunction with testing the new award structure, the union is prepared to discuss all matters raised by the employers for increased flexibility. As such any discussion with the union must be premised on the understanding that—

(a) The majority of employees at each enterprise must genuinely agree.

(b) No employee will lose income as a result of the change.

(c) The union must be party to the agreement, and in particular, where enterprise level discussions are considering matters requiring any award variation, the union must be invited to participate.

(d) The union will not unreasonably oppose any agreement.

(e) Any agreement shall be subject, where appropriate, to approval by the Western Australian Industrial Relations Commission and, if approved, shall operate as a Schedule to this Award and take precedence over any inconsistency.

(f) The disputes procedure will apply if agreement cannot be reached in the implementation process on a particular issue.

(3) Should an agreement be reached pursuant to subclause (2) at a particular enterprise and that agreement requires award variation the parties will not oppose that award variation for that particular provision for that particular enterprise.

(4) The parties agree that under this heading any award matter can be raised for discussion.

(5) The parties agree that working parties will meet and continue to meet with the aim of modernising the award.

30.—TRAINING LEAVE

(1) Following proper consultation, which may involve the setting up of training committees, the employer shall develop a training policy and programme consistent with—

(a) the current and future skill needs of the enterprise;

(b) the size, structure and nature of the operations of the enterprise;

(c) the need to develop vocational skills relevant to the enterprise and the Transport/Baking Industry, through courses conducted by accredited educational institutions and providers.

(2) Where it is agreed by the employer that additional training should be undertaken by an employee, training may be undertaken either on or off the job. If the training is undertaken during ordinary working hours, the employee concerned shall not suffer any loss of pay. An employer shall not unreasonably withhold such paid training leave.

31.—SUPPORTED WAGE SYSTEM

(1) This clause sets out the provisions to apply to employees who because of the effects of a disability are eligible to be employed under the Supported Wage System in accordance with this clause.

(2) Definitions

In the context of this clause, the following definitions shall apply—

(a) "Supported Wage System" means the Commonwealth Government system to promote employment for people who can not work at full award wages because of a disability, as documented in 'Supported Wage System: Guidelines and Assessment Process'.

(b) "Accredited Assessor" means a person accredited by the Management Unit established by the Commonwealth under the Supported Wage System to perform assessment of an individual's productive capacity within the Supported Wage System.

(c) "Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.

(d) "Assessment Instrument" means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

(3) Eligibility Criteria

(a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and, who meet the impairment criteria for receipt of a Disability Support Pension.

(b) The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this clause relating to the rehabilitation of employees who are injured in the course of their current employment.

(c) (i) This clause does not apply to employers in respect of their facility, program, undertaking, service or the like which receive funding under the 'Disability Services Act 1986', and fulfil the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or eligible for a Disability Support Pension.

(ii) Provided that this exclusion shall not prevent services funded under Sections 10 or 12A of the Act referred to in subparagraph (i) hereof, engaging persons who meet the eligibility criteria under the Supported Wages System, on work covered by this award, where both parties wish to access the system provided all other criteria are met.

(4) Supported Wage Rates

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

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

(ii) Provided that the amount payable shall be not less than the 'ordinary income free area' as defined in the Social Security Act 1991 (which at 1 July 1994 was $45 per week).

(b) Where an employee's assessed capacity rate is ten percent, they shall receive a high degree of assistance and support.

(5) Assessment of Capacity

(a) For the purpose of establishing the percentage of the award rate to be paid to an employee under this award, the productivity capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either—

(i) The employer and the union, in consultation with the employee, or, if desired, by any of these; or

(ii) The employer and an accredited assessor from a panel agreed to by the parties to the award and the employee.

(6) Lodgment of Assessment Instrument

(a) All assessment instruments under the condition of this clause including the appropriate percentage of the award rate to be paid to the employee, shall be lodged by the employer with the Registrar of the Western Australian Industrial Relations Commission.

(b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where the union party to this award is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

(7) Review of Assessment

The assessment of the applicable percentage to be applied in respect of the rate of pay should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedure for assessing capacity under the Supported Wage System.

(8) Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the minimum wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this award, but be paid at the rate of wage as determined in accordance with this clause.

(9) Workplace Adjustment

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

(10) Trial Period

(a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provision of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time, not exceeding four weeks, may be utilised where required.

(b) During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

(c) The minimum amount payable to the employee during the trial period shall be not less than the figure defined in subclause (4) (a) (ii) of this clause.

(d) Work trials should include induction or training as appropriate to the job being trialed.

(e) Where the employer and the employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (5) of this clause.

(11) The conditions of employment to apply during the trial period or in a continuing employment relationship shall be documented, a copy of which shall be provided by the employer to the person employed in accordance with this clause.

APPENDIX—RESOLUTION OF DISPUTES REQUIREMENTS

(1) This Appendix is inserted into the award/industrial agreement as a result of legislation which came into effect on 16 January 1996.(Industrial Relations Legislation Amendment and Repeal Act 1995) and further varied by legislation which came into effect on May 23 1997 (Labour Relations Legislation Amendment Act 1997.)

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

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

SCHEDULE OF RESPONDENTS

Bread Manufacturers (Perth and Suburbs) Industrial Union of Employers of Western Australia.

APPENDIX—S.49B—INSPECTION OF RECORDS REQUIREMENTS

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

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

(i) the employer is of the opinion that access to the records by the representative of the organisation would infringe the privacy of persons who are not members of the organisation; and

(ii) the employer undertakes to produce the records to an Industrial Inspector within 48 hours of being notified of the requirement to inspect by the representative.

(b) The power of inspection may only be exercised by a representative of an organisation of employees authorised for the purpose in accordance with the rules of the organisation.

(c) Before exercising a power of inspection, the representative shall give reasonable notice of not less than 24 hours to an employer.

AND WHEREAS the appellant subsequently filed a Notice of Discontinuance;

AND HAVING HEARD Ms Mr E. Rea on behalf of the appellant and Mr N. Narula on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the Industrial Relations Act 1979, hereby order—

THAT the appeal be discontinued.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Robert Tana

and

Disability Services Commission.

No. PSAB 8 of 1998.

16 November 1998.

Order.

WHEREAS on 13 March 1998 the application cited herein was filed in the Commission pursuant to section 80I of the Industrial Relations Act, 1979 (the Act); and

WHEREAS on 16 July 1998 a conference was held pursuant to the powers of the Public Service Appeal Board in accordance with the Act; and

WHEREAS the Appeal was listed to be heard on 13 November 1998; and

WHEREAS at the aforementioned hearing, and at the close of the applicant's case, the applicant sought leave to withdraw the application;

AND WHEREAS there being no objection thereto by the respondent;

NOW THEREFORE the Public Service Appeal Board, pursuant to the power conferred on it under the Act, hereby orders—

THAT this application be and is hereby wholly discontinued.

(Sgd.) C.B. PARKS,
[L.S.] Public Service Appeal Board.

PUBLIC SERVICE APPEAL BOARD—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Laura Judeline Court

and

Ministry for Planning

No. PSAB 15 of 1998.

1 December 1998.

Order.

WHEREAS an appeal was lodged in the Commission pursuant to section 80I of the *Industrial Relations Act, 1979*;

AND WHEREAS a meeting between the parties was convened;

AND WHEREAS the application was subsequently listed for hearing;

NOTICES—
Union matters—

NOTICE

Appl No. 2117 of 1998

NOTICE is given of an application by the Australian Railways Union of Workers, West Australian Branch and The West Australian Locomotive Engine Drivers', Firemens' and Cleaners' Union of Workers for the amalgamation of those organisations to form a new organisation to be known as the "*Australian Rail, Tram & Bus Industry Union West Australian Branch*".

The application is made pursuant to Section 72 of the Industrial Relations Act 1979.

The rules of the proposed new organisation relating to the qualification of persons for membership are set out below—

"*5 – Eligibility For Membership*

Any person employed in the Western Australian Government Railways Services, who is an employee within the meaning of

the Industrial Relations Act 1979 (WA) as amended or replaced from time to time may be admitted as a member.

No person shall be a member of this Union except in the capacity of an honorary member, who is not an employee within the meaning of the Industrial Relations Act 1979 (WA) as amended or replaced from time to time.

Not withstanding the above provision, a person who is admitted to membership pursuant to these provisions and who subsequently is elected as a paid Office Bearer of the Union or becomes an employee of the Union , shall be entitled to remain as a member while holding such office or engaged in such employment."

This matter has been listed before the Full Bench on the 3rd day of February 1999.

A copy of the application and the rules of the proposed organisation may be inspected at my office, National Mutual Centre, 16th floor, 111 St George's Terrace, Perth.

Any organisation registered under the Industrial Relations Act 1979, or any person who satisfies the Full Bench that he has a sufficient interest or desires to object to the application may do so by filing a notice of objection in accordance with the Industrial Relations Commission Regulations 1985.

8 December 1998

R. C. LOVEGROVE,
Deputy Registrar.