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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeals against decision of Full Bench—

JURISDICTION: WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT.

CITATION: THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION. v. THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING and ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING and ELECTRICAL DIVISION WA BRANCH [1999] WASCA 170.

CORAM: KENNEDY J (Presiding Judge).
ANDERSON J.
SCOTT J.

HEARD: 1 OCTOBER 1998.

DELIVERED: 9 SEPTEMBER 1999.

IAC 8 of 1998.

FILE NO/S: IAC 8 of 1998.

BETWEEN: THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Appellant

AND

THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING and ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING and ELECTRICAL DIVISION WA BRANCH
Respondent.

Catchwords—

Industrial relations (WA)—Appeal—Application by Registrar to President of Western Australian Industrial Relations Commission pursuant to *Industrial Relations Act 1979*, s 97Q—Whether appeal by Registrar from decision of President competent

Industrial relations (WA)—Regulation of political expenditure by organizations—*Industrial Relations Act 1979*, s 97P—Whether infringing freedom of political communication

Legislation—

Industrial Relations Act 1979 (WA), s 97P, s 97Q

Result—

Appeal allowed

Decision of President quashed

Matter remitted to President for reconsideration

Representation—

Counsel—

Appellant	:	Mr R J Meadows QC & Ms J H Smith
Respondent	:	Mr P W Johnston & Mr N D Pope
Intervener	:	Mr R J Meadows QC & Ms J H Smith

Solicitors—

Appellant	:	State Crown Solicitor
Respondent	:	Dwyer Durack
Intervener	:	State Crown Solicitor

Case(s) referred to in judgment(s)—

Amalgamated Society of Railway Servants v Osborne [1910] AC 87.

Australian Capital Television Pty Ltd v The Commonwealth of Australia (1992) 177 CLR 106.

Buckley v Valeo 96 SCt 612 (1976).

R v Forbes.

Federal Election Commission v Massachusetts Citizens for Life Inc 107 SCt 616 (1986).

Kruger v The Commonwealth (1997) 190 CLR 1.

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.

Levy v The State of Victors & Ors (1997) 189 CLR 579.

McGinty v The State of Western Australia (1996) 186 CLR 140.

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.

Oil, Chemical and Atomic Workers' International Union v Imperial Oil Ltd (1964) 41 DLR (2d) 1.

Pipefitters Local Union No 562 v United States 92 SCt 2247 (1972).

R v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13.

Reference re Alberta Statutes [1938] SCR 100.

Retail, Wholesale & Department Store Union v Dolphin Delivery Ltd (1986) 33 DLR (4th) 174.

Robe River Iron Associates v Federated Engine Drivers and Firemen's Union (1986) 67 WAIG 315.

Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211.

Theophanous v The Herald & Weekly Times Ltd (1994) 182 CLR 104. .

True v The Australian Coal and Shale Employees Federation Union of Workers WA Branch (1949) 51 WALR 73.

Williams v Hursey (1959) 103 CLR 30.

Case(s) also cited—

Castlemaine Toohey Ltd v South Australia (1990) 169 CLR 436

Hamersley Iron Pty Ltd v Lovell (1998) 19 WAR 316

Kierath v Western Australian Builders Labourers Painters and Plumbers Union (1997) 75 IR 127

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

R v Smithers; ex parte Benson (1912) 16 CLR 99

1 KENNEDY J: I have had the benefit of reading in draft the reasons to be published by Scott J, with which I am generally in agreement, and desire only to make some additional observations of my own.

2 The initiating application by the appellant, the Registrar of the Western Australian Industrial Relations Commission ("the Registrar"), was made pursuant to s 97Q of the *Industrial Relations Act 1979* ("the Act") on the ground that r 15.2.7.2 of the Rules of the respondent was contrary to, or inconsistent with, s 97P(4) of the Act. Section 97Q finds its place in Pt VIC of the Act, which is headed "Political Expenditure by Organizations". This section deals with the rules of organizations. It is in the following terms—

> "Within 12 months of the coming into operation of section 15 of the *Labour Relations Legislation Amendment Act 1997* the Registrar shall review the rules of each organization and shall, by application pursuant to this section, bring before the President the rules of any organization if, in the opinion of the Registrar, any of those rules is contrary to or inconsistent with section 97P."

3 On its face, s 97Q merely requires the Registrar, if, after a review of the rules of an organization, he or she is of the opinion that any of those rules is contrary to or inconsistent with s 97P, "by application pursuant to this section", to "bring before the President" the rules of the organization. This section confers no specific powers upon the President. The relevant powers are, in my opinion, to be found in s 66. That section empowers, amongst others, the Registrar, of his own motion, to apply to the President for an order or direction under the section. The relevant order which was sought in this instance was an order under s 66(2)(a) to disallow a rule of the respondent which, "in the opinion of the President—(i) is contrary to or inconsistent with any Act ...". In my view, therefore, s 97Q requires the Registrar to make an application under that section, but the order to be sought in that application will be an order under s 66(2)(a).

4 I am unable to accept the respondent's argument that the Registrar is restricted to "bringing the rules before the President". Nor do I consider that the Registrar's function can be described merely as administrative and not adversarial, with the claimed consequence that the Registrar, having made the application, has discharged, and therefore exhausted, his or her function under the section. The functions of the Registrar under the Act are many and varied in nature. In this instance, the Registrar having initiated proceedings before the Commission, he was a party to those proceedings pursuant to s 29B of the Act. By s 90(2)(a) of the Act, the Registrar, as a party to the proceedings, had a right of appeal.

5 Although the State Attorney General was an intervener in the appeal, he had no right of appeal because he was not an intervener in the initial proceedings in which the decision appealed from was made—see s 90(2)(b).

6 The Commission, including the President, has no inherent jurisdiction—see *Robe River Iron Associates v Federated Engine Drivers and Firemen's Union* (1986) 67 WAIG 315, applying *R v Forbes; ex parte Bevan* (1972) 127 CLR 1. There being no jurisdiction to do so conferred upon him by the Act, the President had no power to declare invalid any legislation of the Western Australian Parliament. Furthermore, it should be observed that, in this case, the State was not a party to the proceedings. It was, however, accepted that, subject to any appeal, it was open to the President to make an order dismissing the Registrar's application in the event of his reaching the conclusion that Pt VIC of the Act was invalid.

7 A further submission of the respondent was that, as a policy matter relevant to the construction of the Act, it was undesirable for a person subject to the Commission's direction actively to participate in an appeal. Reliance for this contention was placed upon *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13, at 35-36. In my opinion, that decision has no application to the present case. At 35-36, Gibbs, Stephen, Mason, Aickin and Wilson JJ said—

> "There is one final matter. Mr Hughes was instructed by the Tribunal to take the unusual course of contesting the prosecutor's case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a Tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this court is not one which we would wish to encourage. If a Tribunal becomes a protagonist in this court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this court by a Tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal."

8 The relevant tribunal in this case was constituted by the President. The Registrar, as already indicated, was merely a party to the proceedings before the President.

9 In introducing the provisions of Pt VIC of the Act in 1997, the Minister for Labour Relations described its purpose as follows—

> "By their origins and nature, unions have the right to speak and act on matters of political concern or interest. The Bill does not interfere with that freedom nor affect the unions engaging in activities to lobby or criticise a Government or political party through advertisements etc.
>
> However, unions also enjoy a unique monopolistic position in the industrial relations system in that they are the only recognised bodies which can represent the industrial interests of workers under the legislation. Although individuals may join unions to gain their support on industrial issues, it is quite another matter to believe that every member supports his or her payments to the union being donated to a political party or candidate of the choice of the union's leadership. Although the fundamental policy objective of giving individual members a greater say in making such decisions and requiring union leaders to be more accountable to their members for such decisions remains, the approach in the former Bill has been significantly modified as a result of the TLC's recent consultations on the issue."

10 Industrial organizations of employees and employers, where the employees and employers are associated for the purpose of protecting or furthering their respective interests, may be registered under the Act. The requirements attaching to organizations seeking registration are set out in s 55. By s 60(1), an organization shall, upon and during registration, become and be, for the purposes of the Act, a body corporate. By s 60(2), a registered organization is given the powers usually conferred on a body corporate. Upon and after registration, an organization and its members for the time being are made subject to the jurisdiction of the Industrial Appeal Court and the Commission and to the Act. Subject to the Act, all its members are bound by the rules of the organization during the continuance of their membership—see s 61. The President is given power to deal with complaints by members, past members, unsuccessful applicants for membership and by the Registrar, acting on the complaint of, or on behalf of, a member or past member, or of his own motion-see s 66. Organizations are the creatures of the Act, and they are governed by the Act.

11 By s 97P, where it is necessary for the purposes of the section, an organization is required to maintain a separate fund as a political fund. If the organization receives an amount from any of its members to be applied by way of political expenditure, the organization is required to credit the amount to a political fund and it is prohibited from crediting any moneys to a political fund other than moneys so received or interest or other amounts earned or derived from the investment of moneys standing to the credit of the fund and, in particular, it is

prohibited from crediting any moneys from a member's subscriptions to a political fund. It is further prohibited from making any payment of political expenditure other than from moneys already standing to the credit of a political fund. If an organization receives an amount from any of its members to be applied for political expenditure, and that amount is received subject to a direction from the member as to the political party or parties, or election candidate or candidates, to or in respect of which or whom the organization may pay or apply the amount, the organization is prohibited from making any payment contrary to that direction.

12 Pt VIC of the Act is by no means novel in its terms. The long and varied history of legislation in relation to political expenditure by employees' organizations in the United Kingdom, the United States of America, Canada and New Zealand is discussed in K D Ewing, Trade Unions, The Labour Party and The Law : A Study of the Trade Union Act 1913 (1982).

13 In the United Kingdom, the House of Lords in *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87 decided that rules giving trade unions the power to levy contributions from members for the purpose of securing Parliamentary representation were ultra vires and illegal. As a result, the *Trade Union Act 1913* was enacted to confer upon trade unions a statutory right to make political expenditures. That Act was substantially amended by the *Disputes and Trade Unions Act 1927*, which sought to regulate the political expenditure of trade unions in a manner similar to Pt VIC of our Act. Section 4 of the 1927 Act introduced "contracting in" provisions, which required trade unions to collect political contributions by means of a separate and distinct levy and prohibited them from transferring any assets, other than the money raised by the political levy, to their political funds. This provision was repealed in 1946. By s 71 of the *Trade Union and Labour Relations (Consolidation) Act 1992*, trade unions were required to maintain a separate political fund out of which to make payments in furtherance of political objects. It also provided for the exemption of any member who did not wish to contribute to such a fund.

14 It is to be noted that in *True v The Australian Coal and Shale Employees Federation Union of Workers WA Branch* (1949) 51 WALR 73, Dwyer CJ followed the decision of the House of Lords in *Amalgamated Society of Railway Servants v Osborne (supra)*. However, in *Williams v Hursey* (1959) 103 CLR 30, the High Court distinguished the decision of the House of Lords and upheld the validity of a compulsory political levy as being within the power of a union.

15 In New Zealand, s 3 of the *Political Disabilities Removal Act 1960* gave members of trade unions a statutory right of exemption from the obligation to pay political levies.

16 In Canada, a number of the Provinces have regulated political expenditure by organizations—see the *Labour Relations Act 1960 (British Columbia), Electoral Finance Reform Act 1975 (Ontario), Contributions Disclosure Act 1977 (Alberta)* and *Finance of Political Parties Act 1977 (Quebec)*. In *Oil, Chemical and Atomic Workers' International Union v Imperial Oil Ltd* (1964) 41 DLR (2d) 1, the Supreme Court of Canada held the British Columbian legislation to be a valid provincial law under s 92 of the *British North America Act 1867 (Imp)*, on the basis that it was a law with respect to "property and civil rights", in that it protected the individual rights of the union member by providing that he could not be compelled to assist in the financial promotion of political causes with which he disagreed.

17 The position in the United States of America haseen significantly affected by the First Amendment to the United States Constitution concerning freedom of speech. The *Labour Management Relations ("Taft-Hartley") Act 1947* prohibited expenditure by unions on federal elections. It was held in *Pipefitters Local Union No 562 v United States* 92 SCt 2247 (1972) that the prohibition did not apply if the union's political funds were financed by the voluntary donations of its members.

18 In *Buckley v Valeo* 96 SCt 612 (1976), the majority of the Supreme Court, comprising Justices O'Douglas, Brennan, Stewart and Powell, drew a distinction between limitations on the expenditure by political candidates and limitations on contributions to political candidates. At 634-635, the majority said—

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."

19 At 635, the court said—

> "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributors' ability to engage in political communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."

20 The decision in *Buckley v Valeo* was referred to by McHugh J in *Australian Capital Television Pty Ltd v The Commonwealth of Australia* (1992) 177 CLR 106.

21 In *Federal Election Commission v Massachusetts Citizens for Life Inc* 107 SCt 616 (1986), the Supreme Court, in a judgment delivered by Brennan J, held that the *Federal Election Campaign Act* was an unjustified and invalid burden on the right of free speech to the extent that it regulated the political expenditure of organizations formed for political purposes. However, with regard to industrial organizations, the court said at 629—

> "The Commission next argues in support of 441b that it prevents an organization from using an individual's money for purposes that an individual may not support. We acknowledged the legitimacy of this concern as to the dissenting stockholder and union member in *National Right to Work Committee 459 US* at 208, 103 SCt at 559, and in *Pipefitters, 407 US* at 414-415, 92 SCt at 2264. But such persons, as noted, contribute investment funds or union dues for economic gain, and do not necessarily authorise the use of their money for political ends. Furthermore, because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union. It was thus wholly reasonable for Congress to require the establishment of a separate political fund to which persons can make voluntary contributions."

22 The first of the recent decisions of the High Court relating to the implication from the Commonwealth and State Constitutions of a right to freedom of public discussion of political and economic matters was *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. At 47, Brennan J said—

> "To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments. I respectfully agree with Lord Simon of Glaisdale when he said in *Attorney-General v Times Newspapers*—
>
> > 'The first public interest involved is that of freedom of discussion in democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has

to be conducted vicariously, the public press being a principal instrument.'

Freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy." (footnotes omitted)

[23] Having discussed the Canadian cases of *Retail, Wholesale & Department Store Union v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 and *Reference re Alberta Statutes* [1938] SCR 100, Brennan J said, at 50—

"By parity of reasoning, the representative democracy ordained by our Constitution carries with it a comparable freedom for the Australian people and that freedom circumscribes the legislative powers conferred on the Parliament by the Constitution. No law of the Commonwealth can restrict the freedom of the Australian people to discuss governments and political matters unless the law is enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose."

See also Deane and Toohey JJ at 69-77.

[24] In this case, the High Court held s 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth), making it an offence by writing or speech to use words "calculated ... to bring a member of the (Industrial Relations) Commission or the Commission into disrepute", to be invalid.

[25] The reasons for decision in the *Nationwide News Pty Ltd* case were delivered on the same day as those in *Australian Capital Television Pty Ltd v The Commonwealth (supra),* in which the High Court, by a majority comprising Mason CJ, Deane, Toohey and Gaudron JJ, held Pt IIID of the Broadcasting Act 1942 (Cth), prohibiting the broadcasting of political matters during an election period, to be invalid. At 145, Mason CJ said—

"The raison d'etre of freedom of communication in relation to public affairs and political discussion is to enhance the political process (which embraces the electoral process and the workings of Parliament), thus making representative government efficacious."

See also Mason CJ at 142-144.

[26] At 150, Brennan J said—

"It is convenient in the context of Pt IIID to speak of the implied limitation as a freedom of communication, for the terms are reciprocal: the extent of any relevant limitation of legislative power is the scope of the relevant freedom. But, unlike freedoms conferred by a Bill of Rights in the American model, the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation; rather, it is a freedom of the kind for which section 92 of the Constitution provides: an immunity consequent on a limitation of legislative power. The power cannot be exercised to impair unduly the freedom of informed political discussion which is essential to the maintenance of a system of representative government. Whether that freedom is regarded as an incident of the individual right to vote or as inherent in the system of representative and responsible government prescribed by Ch I of the Constitution, it limits the legislative powers otherwise conferred on the Parliament. The freedom begins at a boundary varying with the subject matter of each law." (footnote omitted)

[27] In *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, at 124-125, Mason CJ, Toohey and Gaudron JJ referred to the concept of political discussion. They said—

"For present purposes, it is sufficient to say that "political discussion" includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activites that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices. Barendt [Freedom of Speech (1985), 152] states that—

" 'political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about."

It was this idea which Mason CJ endeavoured to capture when, in *Australian Capital Television,* he referred to "public affairs" as a subject protected by the freedom.

A similar view has been advocated by Alexander Meiklejohn [Political Freedom of Speech (1960), 4]. He says freedom of speech—

"is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech or private interest in speech, on the other hand, has no claim whatsoever to the protection of the First Amendment."

Thus, he distinguishes between commercial speech—"a merchant advertising his wares"-and speech on matters of public concern. The problem is, of course, that what is ordinarily private speech may develop into speech on a matter of public concern with a change in content, emphasis or context. That conclusion is not inconsistent with the proposition that speech which is simply aimed at selling goods and services and enhancing profit-making activities will ordinarily fall outside the area of constitutional protection. Commercial speech without political content "says nothing about how people are governed or how they should govern themselves"." (footnotes omitted)

[28] The judgment in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, was delivered on the same day as that in *Theophanous v Herald & Weekly Times Ltd.* At 233-234, Mason CJ, Toohey and Gaudron JJ, discussing s 73 of the *Constitution Act 1889 (WA)*, said—

"We do not consider that section 73 provides a foundation for any suggestion that the Western Australian Constitution contemplates the possibility that it will be amended in such a way that representative democracy will be abolished. On the contrary, s 73(2) was plainly enacted with the object of reinforcing representative democracy and placing a further constitutional impediment in the way of any attempt to weaken representative democracy. And, so long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are "directly chosen by the people", a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the Commonwealth Constitution, in order to protect the efficacious working of representative democracy and government."

See also *McGinty v The State of Western Australia* (1996) 186 CLR 140, in which the majority of the High Court held that the Western Australian Constitution contained no implication affecting disparities of voting power among the holders of the franchise for the election of members of the State Legislative Council.

[29] A difficulty with the decisions in both *Theophanous* and *Stephens* was that in Theophanous Deane J, although he joined with Mason CJ, Toohey and Gaudron JJ in holding that the defences were good in law, took a view of the scope of the freedom which was significantly different from that of Mason CJ, Toohey and Gaudron JJ. Nevertheless, he considered that the appropriate course for him to follow was to lend his support to the answers given by Mason CJ, Toohey and Gaudron JJ. He did not, however, expressly agree with their reasoning. Similarly, in *Stephens*, there was an identical division of opinion amongst the Justices of the High Court. One again, Deane J simply concurred in the answers which Mason CJ, Toohey and Gaudron JJ gave. Although in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court, as then constituted, in a joint judgment, indicated that *Theophanous* and *Stephens* should be accepted as deciding that, in Australia, the common law rules of defamation must conform to the requirements of the Constitution, they were

satisfied that "some of the expressions and reasoning" in the various judgments in *Theophanous* and *Stephens* should be further considered in order to settle both constitutional doctrine and the contemporary common law for Australia governing the defence of qualified privilege in actions of libel and slander. At 557, their Honours said—

> "Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which sections 7 and 24 and other sections of the Constitution give effect."

At 559, they said—

> "Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system." (footnote omitted)

30 At 560-561, their Honours said—

> "Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections in the sense explained by Birch [Representative and Responsible Government (1964), 17]. Furthermore, because the choice given by ss 7 and 24 must be a true choice with "an opportunity to gain an appreciation of the available alternatives", as Dawson J pointed out in *Australian Capital Television Pty Ltd v The Commonwealth*, legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.
>
> That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power. As Deane J said in *Theophanous*, they are "a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a 'right' in the strict sense". In *Cunliffe v The Commonwealth*, Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said—
>
> > "The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control."
>
> If the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period. Most of the matters necessary to enable "the people" to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election." (footnotes omitted)

31 At 561-562, they continued—

> "However, the freedom of communication which the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end. Different formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts. For ease of expression, throughout these reasons we have used the formulation of reasonably appropriate and adapted." (footnote omitted)

32 At 567-568, their Honours said—

> "When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128 for submitting a proposed amendment of the Constitution to the informed decision of the people. If the first question is answered "Yes" and the second is answered "No", the law is invalid." (footnotes omitted)

33 At 571, they said—

> ".... [T]his Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion—the giving and receiving of information—about government and political matters."

34 As was pointed out by the Solicitor General, the terms, operation and effect of s 97P(4) of the Act do not prevent or impair the respondent from communicating about any particular political matter. Nor do they prevent or impair any mode of communication or an organization or its members having access to the media. There is nothing to prevent an organization from expending the subscriptions of its members, or any other of its funds, on political communication by the organization itself or any of its officers or members. An organization can, for example, advertise in relation to any election. It can advocate to the public and to its members the supporting of a

particular political party or candidate, and it can campaign against proposed legislation.

35 Even if the first question which was identified in *Lange v Australian Broadcasting Commission* is answered in the affirmative, then, in my view, any impairment is indirect, and incidental to the purpose of Pt VIC, which is designed to give individual members of organizations a greater say in their decisions to support a particular political party, and requiring organizations to be more accountable to their members in this respect.

36 As the Solicitor General also pointed out, registered organizations are the only bodies which can represent the interests of employees and employers under the Act, and their ability to fund political donations from members' donations and levies may properly be regulated, to the legitimate end that any levies imposed by an organization and intended to be applied by way of political expenditure should be raised in a manner which ensures that the purpose of the levy is known to its members and agreed to by them.

37 It is noted that the learned President found that the prohibition on the use of membership subscriptions burdened or inhibited the respondent and its members from participating through its federal counterpart or the Trades and Labour Council in the expression of opinion in election campaigns. However, s 97P of the Act applies only to organizations registered under the Act. It has no application to the respondent's federal counterpart. Moreover, there is nothing to indicate that the Trades and Labour Council is a "political party" as defined in s 97N(1) of the Act so as to be affected by s 97P. It is sufficiently clear that the only prohibition against making payments to the Trades and Labour Council or to the federal counterpart of the respondent is where the payment is made on an understanding that it will be applied as "political expenditure" as defined in s 97N.

38 It follows that I would allow this appeal. I am in agreement with the further orders proposed by Scott J.

39 ANDERSON J: I have had the advantage of reading in draft the reasons for judgment of Kennedy J and Scott J. For the reasons expressed in those judgments, I agree that the appeal should be allowed. I agree with the other orders proposed by Scott J.

40 SCOTT J: The appellant, the Registrar of the Western Australian Industrial Relations Commission, pursuant to the provisions of s97Q of the *Industrial Relations Act 1979* ("the Industrial Relations Act") has a specific statutory responsibility. Under that provision he is required to review the rules of each organisation within twelve months of the coming into operation of s15 of the *Labour Relations Legislation Amendment Act 1997* and he is required by application pursuant to the section to bring before the President the rules of any organisation if, in his opinion, any of those rules are contrary to, or inconsistent with s97P. This appeal is from a decision of the learned President folowing such an application in relation to the respondent's rules.

41 The learned President at the completion of the matter concluded his findings as follows—

> "I find sections 97O and 97P(4) of the Act entirely invalid and, insofar as they support and enable the implementation and enforcement of those provisions, I also find invalid sections 97N, 97R, 97S, 97T and 97U. I find 97N and 97P of the Act, insofar as they restrict the political fund to the sources prescribed therein as invalid. I find sections 97Q, 97R, 97S, 97T and 97U of the Act, insofar as they require that the President disallow the subject rules or that penalties be imposed or other actions taken in relation to such invalid provisions also invalid."

42 It is argued by counsel for the respondent that the Registrar had exhausted his powers in relation to this matter once he brought the rules of the organisation before the President for consideration. It was submitted that having done so, the Registrar's function was completed so that no right of appeal reposed in him. It was said that in taking that action under s97Q of the *Industrial Relations Act*, he was exercising an administrative and not a judicial function and as a consequence once the rules had been brought before the learned President, the Registrar had no further role to play. It follows, said counsel for the respondent, that the Registrar would have no right of appeal.

43 It is to be noted that there is a mirror provision in the *Industrial Relations Act* under s66(7) which is expressed to be limited to "orders or directions under this section". It is therefore argued that s66 has no application to this case and it is said that the Registrar has no right of appeal and that in turn, this Court, therefore, has no jurisdiction to hear the matter.

44 In my opinion, that argument is misconceived. The Registrar is by statute made a party to the application under s97Q and is authorised by statute to bring the application. Whilst it is fair to say that he is not an adversarial party, he is, in a very real sense, a representative party who is granted by statute the right to bring an application under the *Industrial Relations Act*. That being the case, in my view, such appellate rights as attached to litigants under this statute equally attach to the Registrar in these circumstances.

45 The error in the respondent's reasoning can be demonstrated by the fact that it is conceded that the respondent could bring an appeal against the findings of the learned President but it is said that the respondent would be the only party who could do so. That, in my submission, illustrates the fallacy in the proposition. The *Industrial Relations Act* clearly envisages that there will be at least two parties to each application and that any party adversely affected by a decision may bring an appeal. (see s90 of the *Industrial Relations Act*). It is sufficient to dispose of this point to conclude that the Registrar is a party who has the right of appeal in this case.

46 Section 97P is under the heading "Political Donations by Organisations" and provides—

> "97P (1) An organisation shall, if necessary for the purpose of this section, maintain a separate fund as a political fund.
>
> (2) If an organisation receives an amount from any of its members to be applied by way of political expenditure, the organisation shall credit the amount to a political fund.
>
> (3) If an organisation receives any interest or other amount earned or derived from the investment of moneys standing to the credit of a political fund, the organisation shall credit the interest or other amount to that political fund.
>
> (4) An organisation shall not credit any moneys to a political fund other than moneys referred to in subsection (2) or (3) and, in particular, shall not credit any moneys from a member's subscriptions to a political fund.
>
> (5) An organisation shall not make any payment by way of political expenditure except from moneys already standing to the credit of a political fund.
>
> (6) If—
>
> (a) an organisation receives an amount from any of its members to be applied for political expenditure; and
>
> (b) that amount is received subject to a direction from the member as to the political party or parties, or election candidate or election candidates, to or in respect of which or whom the organisation may pay or apply the amount,
>
> the organisation shall not make any payment from moneys in a political fund derived from that amount if the payment would be contrary to that direction."

47 These sections are contained within Part VI C of the *Industrial Relations Act 1979* headed "Political Expenditure by Organisations". That section commences with a number of definitions—

> "'political fund' in relation to an organisation, means a fund maintained by the organisation under section 97P(1);
>
> 'political party' means a body corporate or other body or organisation having as one of its objects or activities the promotion of the election of election candidates endorsed by it.

[48] The definition section, s 97N, provides in subpara (2)—

"97N(2) political expenditure is—

(a) making a payment to a political party (whether by way of a membership subscription or affiliation fee or in any other manner);

(b) making a payment to an election candidate or a group of election candidates;

(c) paying expenses directly or indirectly incurred by a political party;

(d) paying expenses directly or indirectly incurred in connection with a parliamentary election by an election candidate or a group of election candidates; or

(e) making a payment to a person on the understanding that that person or other person will directly or indirectly apply the whole or a part of the payment in a way mentioned in paragraphs (a), (b), (c) or (d)."

[49] Pursuant to the powers contained in s97Q, the Registrar, within the time limit imposed, brought before the President certain of the rules of the respondent and in particular r15.2.1, which prescribes the respondent organisation funds and as to what they are to consist of.

[50] Rule 15.2.7.1 specifically confers the power on the respondent organisation "to establish funds for sustenance of members involved in industrial disputes, or for particular or industrial political campaigns."

[51] Rule 15.2.7.1 empowers the respondent to establish a separate and distinct fund to be used to pay for, or for contributions to, the expense of political campaigns.

[52] Rule 15.2.7.2 provides that moneys paid into funds referred to in r15.2.7.1 must not be paid from the Union's general fund into a special fund, except by the specific decision of the State Conference or Council.

[53] For the purpose of the hearing in the Industrial Commission, it was conceded that the provisions of these specific rules were, "contrary to, or inconsistent with s97P" as provided in s97Q, set out earlier in these reasons. The powers of the learned President, once the application had been brought by the Registrar in accordance with the statutory provisions, are to be found in s66 of the *Industrial Relations Act* which provides—

"66(1) The following persons may apply to the President for an order or direction under this section—

(a) a person who is or has been a member of an organization; or

(b) a person who has applied for and not been admitted to membership in an organization; or

(c) the Registrar acting on the complaint of or on behalf of a person referred to in paragraph (a) or of his own motion.

(2) On an application made pursuant to this section, the President may make such order or give such directions relating to the rules of the organization, their observance or non-observance or the manner of their observance, either generally or in the particular case, as he considers to be appropriate and without limiting the generality of the foregoing may—

(a) disallow any rule which, in the opinion of the President—

(i) is contrary to or inconsistent with any Act or law, or an award, industrial agreement, order or direction made, registered or given under this Act;

(ii) is tyrannical or oppressive;

(iii) prevents or hinders any member of the organization from observing the law or the provisions of an award, industrial agreement, order or direction made, registered or given under this Act;

(iv) imposes unreasonable conditions upon the membership of a member or upon an applicant for membership; or

(v) is inconsistent with the democratic control of the organization by its members;

(b) instead of disallowing a rule under paragraph (a), direct the organization to alter that rule within a specified time in such manner as the President may direct;

(c) disallow any rule which has not been altered by the organization after a direction to do so pursuant to paragraph (b);

(ca) where the President disallows any rule under paragraph (a) or (c), give such directions as the President considers necessary to remedy, rectify, reverse or alter or to validate or give effect to, any act, matter or thing that has been done in pursuance of the disallowed rule;

(d) declare the true interpretation of any rule;

(e) inquire into any election for an office in the organization if it is alleged that there has been an irregularity in connection with that election and make such orders and give such directions as the President considers necessary—

(i) to cure the irregularity including rectifying the register of members of the organization; or

(ii) to remedy or alter any direct or indirect consequence thereof;

and

(f) in connection with an inquiry under paragraph (e)

(i) give such directions as the President considers necessary to the Registrar or to any other person in relation to ballot papers, envelopes, lists, or other documents of any kind relating to the election;

(ii) order that any person named in the order shall or shall not, as the case may be, for such period as the President considers reasonable in the circumstances and specifies in the order, act or continue to act in and be deemed to hold an office to which the inquiry relates;

(iii) declare any act done in connection with the election to be void or validate any act so done.

(3) The decision of the President shall be signed and delivered by him.

(4) Any person to whom an order or direction given or made under this section applies shall comply with that order or direction whether or not it is contrary to or inconsistent with any rule of the organization concerned.

(6) A rule disallowed pursuant to subsection (2)(a) or (c) is void.

(7) When 6 months have elapsed after the coming into operation of section 51 of the *Industrial Legislation Amendment Act 1995* the Registrar shall review the rules of each organization and shall, by application pursuant to this section, bring before the President the rules of any organization if, in the opinion of the Registrar, any such rule is contrary to or inconsistent with section 64A or 64B.

(9) The power of the President under subsection (2)(d) may, on a reference made under section 27(1)(u), be exercised by the Full Bench."

[54] It is to be noted from that section, that the President has the power to disallow any rule if in his opinion it is contrary to, or inconsistent with, any Act.

[55] It was pursuant to this statutory regime that the provisions of the respondent's rules fell for consideration by the learned President.

[56] In the result, the learned President, in dealing with the examination, came to the conclusion that ss97O and 97P(4) of the *Industrial Relations Act* were "entirely invalid". In addition, he concluded that "insofar as they support and enable the implementation and enforcement of those provisions, I also

find invalid section 97N, section 97R, section 97S, section 97T and section 97U."

57 The learned President also found—

> "Section 97N and section 97P of the Act, insofar as they restrict the political fund to the sources prescribed therein, as invalid. I find section 97Q, 97R, 97S, 97T and 97U of the Act, insofar as they require that the President disallow the subject rules or that penalties be imposed or other actions taken in relation to such invalid provisions, also invalid."

58 In concluding his reasons as to the basis of invalidity, the learned President said—

> "Those provisions to which I have referred represent a curtailment of the protected freedom by the exercise of legislative power. (Whether the legislation is exceptional or otherwise because of section 109 of the Constitution or for any other reason was not argued before me.)
>
> I have not, on this occasion, been persuaded that the requirement that a political fund be created, from which 'political expenditure' is made, is a cause to find invalidity. Further, I am not persuaded on this occasion, that a similar flaw exists in the provision for industrial organisations' members to have 'political donations' credited to the political fund or paid from it as directed. (A difficulty might arise if identification of donors deterred potential member donors, but I make no judgment on that.)
>
> Such 'donations' are very different from monies provided by members and intended to be the funds of and to be used by the organisation to which the members belong. The same comment applies to the use of the interest on income derived from the funds.
>
> Applying the test which I have enunciated above, I would not find those provisions invalid to that extent.
>
> Insofar as the burden lay upon the respondent organisation to establish that provisions of the Act were invalid in the face of the implied constitutional right, then, on the evidence which I accepted and for the reasons which I have given above, the respondent organisation has so established it."

59 Having thus ruled certain of the provisions of the Act invalid, the learned President came to the conclusion that as a consequence he had no jurisdiction to disallow the subject rules which had been brought before him by the Registrar for consideration.

60 The end result was that the learned President came to the conclusion that the rules would stand but that the provisions of the Act to which I have referred should be struck down. The reasons of the learned President in reaching those conclusions will be discussed later.

61 It is to be noted, however, that nowhere within s66 of the *Industrial Relations Act* (set out earlier in these reasons) is the learned President empowered to strike down sections of the Act.

62 Whilst it may be that the orders made by the learned President were beyond his powers, it is conceded by senior counsel for the appellant that it was open to the learned President to make an order dismissing the application after coming to the view that Part VI C was invalid. For that reason it is necessary to examine this matter on its merits.

63 The grounds of appeal are—

> "1 The Learned President erred in law in failing to disallow the rules of the Respondent in the terms suggested by the Applicant.
>
> 2 The Learned President erred in law in holding that the whole of Part VI C of the *Industrial Relations Act, 1979* ('the Act') infringes the implied constitutional limitation which prohibits the curtailment of discussion or communication about matters of government and politics ('the implied limitation') and is therefore invalid.
>
> Particulars
>
> The Learned President wrongly held that Part VI C effectively burdens the Respondent's freedom of communication about government or political matters; and
>
> The Learned President should have held that Part VI C is reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.
>
> 3 The Learned President erred in law in holding that Part VI C directly or indirectly prohibits or inhibits the Respondent from applying monies to the Trades and Labour Council of Western Australia or the Respondent's federal counterpart body.
>
> 4 The Learned President erred in law in holding that Part VI C effectively prevents the Respondent from functioning as an organization.
>
> 5 Further and in the alternative to grounds 1,2,3 and 4, the Learned President erred in law in holding the whole of Part VI C of the Act invalid when the President held that only part of the provisions In Part VI C of the Act burdened the Respondent's freedom of communication about government or political matters.
>
> Particulars
>
> The Learned President, having held that—
>
> (a) the creation of a separate political fund under Section 97P(1), (2), (3) & (5) of the Act was not a burden on the Respondent;
>
> (b) the requirement in Section 97P(6) of the Act to disburse payments from the political fund in accordance with the members direction was not a burden on the Respondent; and
>
> (c) Section 97N and 97P of the Act were invalid only in so far as the provisions restrict the political fund to the sources prescribed therein,
>
> should have held that the invalidity was only to the limited extent which he had identified."

64 In dealing with the application, the learned President applied the decision of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ at 567—

> "When a law of a State or Federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect (271)? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of a constitutionally prescribed system of representative and responsible government and procedure prescribed by section 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (272) hereafter collectively 'the system of government prescribed by the Constitution'? If the first question is answered 'yes' and the second question is answered 'no', the law is invalid."

65 Those two tests are accepted as the law to be applied in testing the legislation which the respondent would seek to have impugned in this case. It is common ground between senior counsel for the appellant and counsel for the respondent that these two tests from the *Lange* case are the appropriate tests to apply in this instance. It is how those tests are to be applied, and the end result of the application of them, which reveal the differences between the parties.

66 In considering the application of the tests to the respondent's rules, it is to be noted that before the learned President it was conceded that the respondent's rules were in breach of the section. That concession was withdrawn at the hearing of this appeal, although counsel for the respondent indicated that whilst no such admission was made, the matter should proceed on the basis that the rules concerned were in breach of the section. As I understand the position, counsel for the respondent was reserving the right, at some later date, to argue for the validity of the rules.

[67] With that background, it is necessary to turn to consider the various cases that have applied the "*Lange*" test and to see where this legislation fits in relation to the principles that have emerged applying those tests.

[68] The first thing to be noted about s97P of the *Industrial Relations Act* is that it is directed towards the proper and responsible maintenance of the funds of organisations. The section requires the organisation to credit any amount received to a political fund and to credit interest on any such amount to the political fund. As I understand the argument advanced by counsel for the respondent, the central challenge arises out of the provision of s97P(4) which prohibits any organisation from crediting money to a political fund from members subscriptions.

[69] It is common cause that prior to the insertion of Part VI C into the *Industrial Relations Act*, organisations such as the respondent made donations to political funds from members' subscriptions. It is therefore said that the restriction imposed by s97P(4) prohibits the respondent from taking part in political activities in that way.

[70] As was pointed out during the course of argument, a literal reading of the section would require the organisation to maintain either in separate bank accounts or more probably separate accounting entries in relation to funds contributed to the credit of each political party to which funds were contributed by members.

[71] It was argued by counsel for the respondent that the impugned provisions infringed the implied constitutional limitation in relation to laws limiting discussion or communications about matters of government and politics thus causing the first question in the Lange case to be answered in the affirmative. Counsel for the respondent also submitted that the provisions do not serve a "legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government" so that the second question in the Lange test should also be answered "no", thus invalidating the law.

[72] The first issue that arises is to analyse the nature of the provisions themselves. It is to be noted that the effect of s97P is not to prohibit the donation to a political fund from money properly held by an organisation such as the respondent. That is of course subject to the observation that s97P(4) does prevent the use of member's subscriptions in that way. The section however, contemplates that a separate fund should be created and maintained as a political fund and that amounts received from members should be credited to that fund. It follows that there is no blanket prohibition which would prevent donations flowing from the organisation to a political party.

[73] In analysing these provisions, it is constructive to look at other cases which have been considered applying the same principles. In *Levy v The State of Victors & Ors* (1997) 189 CLR 579, the court was concerned to examine the provisions of the *Wildlife (Game)(Hunting Season) Regulations 1994 (VIC)*.

[74] The basis of the challenge by the plaintiff in that case was succinctly set out in the judgment of Dawson J at 605—

> "The plaintiff has for a number of years campaigned against duck shooting in Victoria and he claims to have entered the permitted hunting area in question during the weekend for a number of purposes: to gather evidence of the cruelty associated with duck shooting and of the killing of protected birds by duck shooters; to draw public attention by television coverage an other means to duck shooting; to debate and criticise those policies of the Victorian Government and laws of the Victorian Parliament which permit duck shooting; to be seen rendering aid to and collecting injured birds; to prevent the shooting of protected birds; to protest in general about duck shooting; and to ensure that the people of Victoria could form and exercise informed political judgments about the stance of the Victorian Government in relation to duck shooting.
>
> The plaintiff claims that the regulation under which he was charged prevented him from pursuing these purposes, at least in the way in which he wished to do so, and was invalid because it contravened an implied freedom of communication said to be conferred by the Commonwealth Constitution and the *Constitution Act 1975 (Vict)*."

[75] The contrary argument was expressed to be that the defendants claimed that the regulations were directed towards ensuring a greater degree of safety of persons in hunting areas and so was within the legislative power of the Victorian Parliament.

[76] *Levy*'s case was complicated by the fact that media organisations and other industrial organisations sought leave to make submissions as intervenors or *amicus curiae*.

[77] Brennan CJ held at 599—

> "The further amended statement of claim contains no ground for challenging the truthfulness of the declaration in regulation 1(a) that the objectivity of the Hunting Season Regulations was the ensuring of a greater degree of safety of persons in hunting areas during the 1994 open season. Accepting that objective, reg 5 contains provisions that were appropriate and adapted to its fulfilment. It follows that, even if reg 5 had the effect of impairing a freedom to discuss government or politics implied in the Constitution of the Commonwealth, it was not invalidated by the implication."

[78] Dawson J held at 608—

> "Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively or not at all. Not only that, but some limitations upon freedom of communication are necessary to ensure the proper working of any electoral system. Apart from regulation of the electoral process itself, elections must take place within the framework of an ordered society and regulation which is directed at producing and maintaining such a framework will not be inconsistent with the free elections contemplated by the Constitution notwithstanding that it may incidentally affect freedom of communication. In other words, the freedom of communication which the Constitution protects against laws which would inhibit is a freedom which is commensurate with reasonable regulation in the interest of an ordered society.
>
> The regulation of which the plaintiff complains may on its face be regarded as reasonable in the interests of an ordered society in that, considered in the light of its objective of achieving a greater degree of safety of persons in hunting areas during the open season for duck in 1994, it is clearly concerned with the maintenance of order in a situation where the interests of duck shooters and others who would be present in the hunting areas (and they would most likely be protesters) may conflict. Whilst the plaintiff may have been prevented from making his protest in a manner which would have achieved maximum publicity and to that extent the regulation in question may have curtailed freedom of communication to a degree, it was to a degree which was reasonable in an orderly society and hence consistent with the free elections which the Constitution requires."

[79] Toohey and Gummow JJ said at 614—

> "On the other hand, the Regulations imposed no general prohibition or regulation of communication or discussion. Nor is there a likelihood that the prohibitions they did impose involved a significant curtailment of the constitutional freedom of the political communication and discussion. In particular, reg 5, under which the plaintiff has been prosecuted, imposed prohibitions which were strictly limited in place and time. The operation of reg 5 is long since spent. The purpose of reg 5 was to ensure a greater degree of safety of all persons in the waters of permitted hunting areas at the commencement of open season 1994. Any impairment of the constitutional freedom was incidental to the achievement of that purpose."

[80] Gaudron, McHugh and Kirby JJ also upheld the validity of the regulation in that case.

[81] Mc Hugh J at 624 expressed his view in this way—

> "However, the freedom from laws that would burden constitutionally protected communications or the opportunity to make or send them is not absolute. The freedom is limited to what is necessary to the effective working of the Constitution's system of representative and responsible government. Consequently, a law that is reasonably appropriate and adapted to serving an end that is

compatible with the maintenance of the constitutional prescribed system of government will not infringe the constitutional implication."

[82] In *Australian Capital Television Pty Ltd v The Commonwealth of Australia* (1992) 177 CLR 106, the High Court examined the provisions of *Broadcasting Act 1942 (Cth)* which prohibited the broadcasting of certain materials other than "exempt matter" during an election period. "Exempt matter" was matter having no connection, or no significant connection with political advertisements or political information. In that case, Mason CJ, Deane, Toohey and Gaudron JJ held that the relevant part of the legislation "was wholly invalid on the ground that it infringed the right to freedom of communication on matters relevant to political discussion that was implied in the system of representative government for which the Constitution provided." In that case it is apparent that the relevant provisions which were sought to be impugned were directly aimed at the curtailment of political discussion. Whilst that was a direct consequence of the legislation under challenge in that case, the same cannot be said here. In this case, there is nothing about the provisions presently under consideration which would in any way directly impinge upon "political discussion" in that sense.

[83] The matter was also discussed in Theophanous v The Herald & Weekly Times Ltd (1994) 182 CLR 104 which involved defamation proceedings in the County Court of Melbourne against the Herald and Weekly Times in respect of a letter written to that newspaper. In that case the majority, Mason CJ, Toohey and Gaudron JJ (with whom Deane J agreed) said at 124—

> "For present purposes, it is sufficient to say that 'political discussion' includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices."

[84] It is accepted that freedom of communication is a wider concept than merely written, verbal or electronic communication. See Australian Capital Television v The Commonwealth (supra) per Mason CJ at 139—

> "Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion. In truth, in a representative democracy, public participation in political discussion is a central element of the political process."

[85] I turn finally to Kruger v The Commonwealth (1997) 190 CLR 1 where Gaudron J said at 115-116—

> "Modern means of communication notwithstanding, freedom of political communication between citizen and citizen and between citizens and their elected representatives entails, at the very least, freedom on the part of citizens to associate with those who wish to communicate information and ideas with respect to political matters and those who wish to listen. It also entails the right to communicate with elected representatives who 'have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform people so that they may make informed judgments on relevant matters'."

[86] Similarly, in the same case, McHugh J said at 142—

> "The reasons that led to the drawing of the implication of freedom of communication lead me to the conclusion that the Constitution also necessarily implies that 'the people' must be free from laws that prevent them from associating with other persons, and from travelling, inside and outside Australia for the purpose of the constitutionally prescribed system of government and referendum procedure. The implication of freedom from laws preventing association and travel must extend, at the very least, to such matters as voting for, or supporting or opposing the election of, candidates for membership of the Senate and House of Representatives, monitoring the performance of and petitioning federal Ministers and parliamentarians and voting in referenda."

[87] Having thus analysed the authorities, it is then necessary to see how those principles apply in this case. The starting point is to examine the purpose of the provisions which the learned President held were invalid. In my opinion, those provisions are directed towards ensuring fiscal responsibility on the part of the organisations responsible for accepting political donations from members. The provisions do not prevent the respondent from making political donations in accordance with the wishes of members, expressed in the terms expressed or implied of the political donations. What the provisions do, is to require the respondent to account separately for the donations received so that ultimately they are directed towards the political organisation, if any, nominated by the individual member. The provisions prevent the organisation itself from using members' funds for the purpose of making direct political donations to a party selected by the organisation. In my opinion, such a law is a fiscal measure designed to ensure proper accountability with respect to the wishes of members in relation to political donations. It is significant to note that the provisions apply to any "organisation" subject to the Industrial Relations Act so that it equally applies to both employer and employee organisations.

[88] Applying the first of the two steps arising out of the Lange case (supra) it is my opinion that these provisions do not effectively burden freedom of communication about government or political matters either in its terms, operation or effect. It is my view of these provisions, as I have said, that they are essentially fiscal provisions aimed at ensuring that money contributed by the organisations' members is properly accounted for and dealt with in accordance with the wishes of the members rather than by the will of the organisation.

[89] Although it is unnecessary therefore to look to the second aspect of the Lange test, in case I am wrong on the first aspect of the test, I have also reached the conclusion that these provisions are reasonably appropriate and adapted to serve a legitimate end, namely, ensuring the fiscal responsibility of the organisation concerned. The provisions thus construed are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

[90] For these reasons I would allow the appeal and order that the matter be remitted to the learned President with a direction to reconsider the rules of the respondent in the light of these reasons and to determine that issue according to law.

[91] I would hear the parties as to any further or other consequential orders required to achieve that end.

WESTERN AUSTRALIAN
INDUSTRIAL APPEAL COURT.

Industrial Relations Act 1979.

Appeal No. IAC 8 of 1998.

IN THE MATTER OF an appeal against the decision of the President of the Western Australian Industrial Relations Commission in matter numbered 2194 of 1997 dated 4 June 1998.

Between

The Registrar of the Western Australian Industrial Relations Commission

Appellant

and

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

Respondent.

Before:

JUSTICE KENNEDY (PRESIDING JUDGE)
JUSTICE ANDERSON
JUSTICE SCOTT.

9 September 1999.

Order.

HAVING heard Mr RJ Meadows QC and with him Ms JH Smith (of Counsel) for the Appellant, and the State Attorney General as Intervener, and Mr PW Johnston and with him Mr ND Pope (both of Counsel) for the Respondent, THE COURT HEREBY ORDERS that—

1. The appeal be allowed; and
2. That the matter be remitted to the learned President for reconsideration of the decision according to law.

(Sgd.) J.A. SPURLING,
[L.S.] Clerk of the Court.

FULL BENCH—
Appeals against decision of Commission—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anne Patricia Ahern
(Appellant)

and

The Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women (Western Australia Branch) Inc
(Respondent).

No. 1768 of 1998.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
COMMISSIONER A R BEECH.
COMMISSIONER P E SCOTT.

15 September 1999.

Reasons for Decision.

THE PRESIDENT: The Full Bench has the consent of both parties to deal with this matter as an order subject to correction under the slip rule and as a question to be dealt with on the papers. The parties have so consented in writing and further submissions have been filed in relation to the matter which I have read and considered.

A question arises as to the meaning of order 2 of the orders of the Commission. The order was perfected and there was, in fact, no speaking to the minutes, upon the option of the parties.

I have read the submissions. The question is whether the order reflects the decision of the Commission and does not involve a revisiting of the decision of the Commission. It is perfectly clear from the majority decision that the Full Bench recognises the appellant was to be paid at the lower Assistant Co-ordinator's rate, except in relation to times when she filled in as Co-ordinator. (The rate depended on identified classifications in the subject award.) The reasons of the majority identify adequately the applicable rates.

Accordingly, the effect and meaning of the reasons of the majority of the Full Bench is that the appellant's entitlements are to be determined—

1. For periods when she fulfilled her normal role as Assistant Co-ordinator by comparison with what she was actually paid as against the rate specified for the Assistant's position, namely the award rate for Assistant Community Services Officer 2nd Year.
2. For periods when she acted in the role of Co-ordinator by comparison with what she was actually paid as against the rate specified in the award for the Co-ordinator's position, namely the award rate for Community Services Officer Level 1 5th Year.

I would, therefore, amend the order issued by the Full Bench on the 15th day of June 1999 in this appeal by inserting paragraph 1 and 2 hereof therein, in lieu of paragraph 2 of the said order, as paragraphs 2(a) and 2(b) respectively.

COMMISSIONER A R BEECH: I respectfully defer to my colleagues who formed the majority decision of the Full Bench, and have nothing to add in this matter.

COMMISSIONER P E SCOTT: I have read the reasons for decision of His Honour, the President. I agree with those reasons and have nothing to add.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch
(Appellant)

and

John Holland Construction & Engineering Pty Ltd
(Respondent).

No. FBA 6 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER S J KENNER.

21 September 1999.

Reasons for Decision.

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench.

This is an appeal against the decision of the Commission at first instance, constituted by a single Commissioner. The appeal is properly brought pursuant to s.49 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act").

By the decision made on 9 June 1999 (79 WAIG 1772), the Commissioner dismissed an application by the abovenamed appellant who had alleged that one of its members, Mr Dean Foelmli, had been unfairly dismissed by the respondent employer.

The appellant now appeals against that decision on the following grounds—

GROUNDS OF APPEAL

"1. The Commissioner failed to take sufficient account of Foelmli's lengthy and good work record when deciding that there were no mitigating circumstances with respect to Foelmli in this case.

2. The Commissioner failed to take sufficient account of Foelmli's actions to resolve the issues between Foelmli and Bond when deciding the outcome of this case.

3. The Commissioner failed to take sufficient account of the fact that Dean Foelmli did not retaliate in the incident which resulted in the dismissal.

4. The Commissioner failed to take sufficient account of the processes applied by the employer in arriving at its decision to terminate Dean Foelmli."

The history of this matter is set out in the reasons for decision of the Full Bench in AFMEPKIU v John Holland Construction & Engineering Pty Ltd 79 WAIG 1302.

The application was dismissed by the Commission on 9 June 1999 after the Commissioner had further heard the matter. The application had been remitted to her to be heard and determined according to law, upon an appeal by the appellant on this appeal, against an earlier decision by the Commission to dismiss an application alleging unfair dismissal of Mr Foelmli (see AFMEPKIU v John Holland Construction & Engineering Pty Ltd 78 WAIG 3870).

We should mention the relevant terms of the order remitting the matter. It was, most appositely—

> "THAT the decision of the Commission in matter No CR 315 of 1997 made on the 12th day of October 1998 be and is hereby suspended and the application be remitted to the Commission to hear and determine in accordance with the reasons for decision and according to law."
>
> (see AFMEPKIU v John Holland Construction & Engineering Pty Ltd 79 WAIG 1302 at 1312).

Put shortly, the only question to be determined was whether a finding of unfairness should be made on the subsidiary findings made already by the Commissioner and not overturned on the first appeal by the Full Bench.

Summarised, the reasons for decision of the Full Bench, (that is of the majority, Cawley C and Beech C), was that the Commissioner had erred because she did not consider or determine whether the consequence of dismissal for misconduct was unfair, having regard not only to the processes applied and the considerations of the employer, but also the circumstances of the employee.

The findings of fact, which might support a finding of unfairness or otherwise, were not considered by the Full Bench at first instance in any detail, except for the President. However, Cawley C at page 1310 made a specific finding that the findings of fact identified in the grounds of appeal should not be interfered with by the Full Bench.

Amongst the findings of the Commission at first instance were findings that the conduct of the parties warranted dismissal, that there was no unfairness in procedure relating to the dismissal, and that Mr Foelmli's record was not such as to save his job, given the circumstances of the incident; further the Commissioner did consider whether an alternative to dismissal should have been chosen.

When the matter came back before the Commissioner from the Full Bench, no submissions were made to her at all, most significantly not on behalf of the appellant.

She, therefore, made findings quoting her concluding comments of 12 October 1998, and reiterating a finding of misconduct which was within the type which can justify instant dismissal for serious misconduct. This finding was not overturned upon the first appeal. The Commissioner also reiterated findings as to the nature of that conduct, taking into account the consequences for Mr Foelmli of his work history and whether any alternative remedy might be more appropriate in these circumstances, finally making a finding that, in all the circumstances, the dismissal was harsh, oppressive or unfair. The dismissal was not harsh, oppressive or unfair so as to constitute an abuse of the employer's lawful right to terminate employment, she found.

Next, Mr Foelmli's actions to resolve the issues between Mr Bond and himself were directed to questions of ill-feeling arising after the fight and fears about Mr Bond which were said not to be warranted and were not divested to the resolution of issues between them.

The Commission did take sufficient account of the processes applied by the employer in arriving at its decision to terminate Mr Foelmli, as we found upon the first appeal. Those processes were not said to be lacking in fairness by the Full Bench upon the first appeal. Thus, it is not a matter now to be raised upon appeal, in any event.

In our opinion, because the findings against which ground 4 are made were not before the Commission at first instance, the appeal in that regard is not competent. Next, nothing was said about prospects for future employment in evidence before the Commission at first instance, as Ms Harrison conceded.

Further, as to Mr Foelmli's lengthy and good record, the Commission did take sufficient account of it, given the circumstances of the matter, even if the appeal on those grounds was competent, which for reasons we have outlined it was not.

We would not find any ground of appeal made out. In particular, there was no error in the exercise of the Commission's discretion. We would dismiss the appeal, for those reasons.

Appearances: Ms J Harrison, as agent, on behalf of the appellant.

Mr A J Randles (of Counsel), by leave, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch
(Appellant)

and

John Holland Construction & Engineering Pty Ltd
(Respondent).

No. FBA 6 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER S J KENNER.

3 September 1999.

Order.

This matter having come on for hearing before the Full Bench on the 3rd day of September 1999, and having heard Ms J Harrison, as agent, on behalf of the appellant and Mr A J Randles (of Counsel), by leave, on behalf of the respondent, and the Full Bench having determined that its reasons for decision will issue at a future date, it is this day, the 3rd day of September 1999, ordered that appeal No FBA 6 of 1999 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.

Gek Lian Tan
(Appellant)

and

Paris and Chrissie Kafetzis trading as Gabriel's Café
(Respondents).

No. 408 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER P E SCOTT.

10 September 1999.

Reasons for Decision.

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench. This is an appeal against the whole of the decision of the Commission, constituted by a single Commissioner, given on 12 February 1999 in matter No 1842 of 1998.

The appellant appeared on her own behalf on this appeal. There was no appearance by or on behalf of the respondents. We were satisfied that they were served with the Notice of Appeal and the Appeal Book and that they had been duly notified of the date of hearing of the appeal.

The decision, made on 26 February 1999, was a dismissal of an application by Ms Tan under s.29(1)(b)(i) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), whereby she alleged that she was unfairly dismissed from her employment by the respondents.

It is against that decision that the appellant now appeals on the following grounds—

GROUNDS OF APPEAL

"1. The Learned Commissioner erred in fact and law in failing to find that the applicant was dismissed on grounds of sickness when he did not take into account exhibits Al and A2. This is supported by—

a. In Commissioner Kenner's conclusion, he found the dismissal to be far from unfair in any event (stated page 8, paragraph 3).

b. However, the evidence given, namely exhibits Al and A2 (page 2, paragraph 3), show that I had an absence from 21 September 1998 to 23 September 1998 inclusive for a medical problem.

2. The Learned Commissioner erred in fact and law in his decisions for ruling by not taking in factual accounts located in the time and wages records book. This is supported by—

a. As to Commissioner Kenner's conclusion that I had approximately one week of absences, there is an accountability of only two days of absences recorded in the time and wages records book, which the respondent did not bring to court. I had asked to view this book after the court hearing. I was repeatedly denied access to view it.

b. Also relating to the conclusion of one week of absences, (page 3, paragraph 5) the respondent has indeed stated that I had requested to go home as I had felt unwell, but in fact I did remain at work

3. The Learned Commissioner erred in law and went against the weight of evidence when coming to his decision by failing to take in full evidence on the basis of the unavailability of the key respondent. This is supported by—

a. Commissioner Kenner observed (page 3, paragraph 6) that Mrs Kafetzis was not present at the proceedings and did not give evidence. To that extent Commissioner Kenner writes that the respondents evidence relating to the telephone discussion on 22 September 1998 was not the best evidence.

b. However on the last paragraph of the same page Commissioner Kenner finds that he now prefers the evidence of Mr Kafetzis, even though he was only speaking of (sic) behalf of Mrs Kafetzis, not actually being in any form of conversation between Mrs Kafetzis and myself.

c. (Page 6, paragraph 2) Mr Kafetzis says he was standing next to his wife when the telephone call took place and only heard what his wife was saying, therefore he would not have heard what I was saying, therefore only interpreting half of the information.

d. Now for Commissioner Kenner to prefer one person's view of the situation, having no evidence, over another person's view who was actively involved in the two way conversation with evidence, exhibits Al and A2, is purely prejudice

e. In relation to Commissioner Kenner's preference of evidence to this matter of the telephone call, he found me to be evasive in my answers to questions and reluctant to make concessions that may harm my case. This is indeed a wrong interpretation. I simply did not understand many of the questions asked by Mr Kafetzis, as they were unclear and uninterpretable to me.

f. Commissioner Kenner states in his conclusion that acknowledging that the respondent's evidence was not the best of evidence (page 7, paragraph 1), it is accepted by Commissioner Kenner that it was not the respondent's intention to that the telephone call that morning be of itself a dismissal.

g. Commissioner Kenner states (page 7, paragraph 2) that for there to be a dismissal, clear and unambiguous words are to be used and if they are not, there may be a requirement for either party to contract of employment to clarify each other's intentions.

h. Commissioner Kenner states in his findings (page 6, paragraph 3) that there was no further contact by the applicant with the respondent. In response to that it is in fact that the respondent also did not ring to see if I was well to come in to work, if he so claims that I was not fired.

i. In relation to this the respondent, being Mrs Kafetzis, had told me on the Tuesday, "I'm afraid we're going to have to let you go".

By an employer stating this to an employee over the phone, there is no other interpretation to that other than a dismissal.

j. (Page 7, paragraph 3) Commissioner Kenner finds it passing strange that in view of that telephone call I did not seek to clarify the position with the respondent. Wouldn't it therefore, in the same context, also be passing strange that the respondent did not seek to clarify the whereabouts of myself, if he claims that he did not fire me?

4. The Learned Commissioner went against the weight of evidence in his final decision for he failed to take into account the unavailability of the respondent being Mrs Kafetzis. This is supported by—

a. Commissioner Kenner also notes on the evidence that at no stage did I attempt to contact the respondent following the events of Tuesday 22 September to provide to the respondent the medical certificate.

b. There is no need to contact the respondent with exhibits Al and A2 for Mrs Kafetzis had already dismissed me. If I was not dismissed, then why I ask, is it that the respondent did not attempt to contact me to see if I were well and the day to which I would be returning to work?

c. Why? This is because the respondent very well knows that they had dismissed me on the Tuesday. At no time did they attempt to contact me.

d. In Commissioner Kenner's opinion (page 8, paragraph 4) an inference is open on the evidence that the applicant herself knew there was an issue regarding her reliability. Commissioner Kenner finds (page 6, paragraph 3) that following the telephone conversation which took place on that Tuesday morning that the respondent had made a decision that it was going to replace the applicant because of concerns regarding my reliability, and in fact did so on the evidence, about one week later. Also it was the intention of the respondent that after I was expected to return to work on the next day that the applicant would be given notice of the respondent's intention to terminate my employment.

e. To that, there is evidence in the time and wages records book that I had only two days of absence prior to the days off due to illness. This book was not brought to the proceedings, and was also denied access to view it by myself on repeated occasions."

On the Notice of Appeal itself, there is a reference to the Workplace Relations Act 1996, which cannot be relied upon in this Commission in this matter, where the Commission exercises, as it does, jurisdiction under state legislation.

BACKGROUND

The respondents, at all material times, conducted a business called "Gabriel's Café" in partnership. The appellant, Ms Gek Lian Tan, was employed as a counter hand from 5 August 1998 to about 22 September 1998.

The appellant was employed on a full-time basis and her hours of duty on commencement were approximately 15 hours per week, which were, one week later, increased to about 30 hours per week. Mr Kafetzis told her that she would be a "full-time casual" according to the appellant, but Mr Kafetzis said in evidence that she was told that she would be a "part-time casual." She was paid $11.00 per hour for each hour worked.

The appellant's complaint was that she was dismissed, not for any reason connected with her work performance, but because of her unavailability to continue work commencing on 21 September 1998 and continuing to 22 September 1998 by reason of illness.

The appellant's evidence was that she attended at work on 21 September 1998 at 8.30 am, but left work at about 10.00 am having suffered from stomach cramps. At 7.30 am that morning, she had rung and spoken to Mrs Chrissie Kafetzis and told her that she was ill. Mrs Kafetzis told her to take two panadols, drink some lemon tea and come to work, which the appellant did. She came to work, notwithstanding that she did feel ill. Eventually, having asked the respondent's permission and having been informed by Mr Kafetzis that it was "not a kindergarten", she went home, as we have observed, at about 10.00 am.

On the morning of Tuesday, 22 September 1998, the appellant still remained unwell. She had an appointment with the doctor on that day because the doctor could not fit her in 21 September 1998. She said that at approximately 7.30 am, she telephoned the restaurant and spoke to the respondent, Mrs Kafetzis, to tell Mrs Kafetzis she would not be able to attend work. Mrs Kafetzis asked her why, and the appellant said because she was ill. She adduced evidence, being exhibits A1 and A2, namely medical certificates, which certified an absence by the appellant for "a medical problem" from 21 September 1998 to 23 September 1998 inclusive.

The appellant's evidence was that, in the telephone discussion on Tuesday morning, 22 September 1998, the respondent, Mrs Kafetzis, said that the respondents needed someone more responsible and that said she would have to let the appellant go. The appellant gave evidence that she understood that this meant that her employment had come to an end and she had been dismissed. She, therefore, made no further contact with the respondents after the telephone discussion.

The appellant also gave evidence that, during the course of her employment, she had time off work to attend to personal matters for a total of about two days, apart from the absences for her illness referred to above. She had not been previously criticised about her work performance. The appellant gave evidence that she did not bring the medical certificates to her employers because "I was fired". There was some written evidence adduced, but no other oral evidence adduced at first instance on behalf of the appellant.

The only evidence adduced on behalf of the respondents was that of Mr Paris Kafetzis. Mrs Kafetzis was not called.

Mr Paris Kafetzis said, in evidence, that the appellant was employed on a casual basis and the hours worked by the staff were based upon client demand. He agreed, however, that the appellant was paid $11.00 an hour. He said that the appellant had had absences from work for personal reasons on a number of occasions and that, on other occasions, she had asked to go home because she felt unwell and was urged to, but did in fact remain at work because she was concerned she would not be paid if she went home.

Mr Kafetzis denied that, at any time, he told the appellant that her employment was terminated as a result of the telephone call between the appellant and Mrs Kafetzis. After the telephone contact, the appellant simply failed to report for duty the next day, as he expected her to do.

Mr Kafetzis said he was standing next to his wife when the telephone call took place and heard what his wife said, namely that the respondents needed a person more responsible and, in view of that, the respondents would have to let her go.

The appellant did ring the shop and Mrs Kafetzis answered. Mr Kafetzis said that he heard his wife say "I am sorry, but we can't keep you. You have to be responsible for this position."

Mr Kafetzis did say in evidence that it was the decision of the respondents, but, in any event, by reason of the number of absences the appellant had had in the previous weeks, that the appellant would be replaced. It was the respondents' evidence that this would occur once the appellant returned to the workplace and she would be given due notice. Mr Kafetzis said that his wife did not tell him that the appellant had said that she was sick. He also said, in cross-examination, that they expected her to return to work, then, on Friday, 25 September 1998, they proposed to give her notice. He said that the words his wife used were not words of dismissal. He emphatically denied that he intended, by the events of 22 September 1998, to dismiss the appellant.

ISSUES AND FINDINGS

The Commissioner observed that the onus of establishing that there was, in fact, a dismissal lay upon the appellant. He did so correctly.

Insofar as there was a conflict in the evidence between the appellant and Mr Kafetzis, the Commissioner preferred the evidence of Mr Kafetzis, observing that he found the appellant somewhat evasive in her answers to questions and reluctant to make concessions that harmed her case.

The Commissioner found that the appellant had been engaged as a counter hand to work on a regular basis, Monday to Friday each week, between 8.00 am and 2.00 pm, 30 hours per week, and had a number of absences from the workplace to attend matters of a personal nature during the six weeks of her employment.

The Commissioner observed that it was more likely than not that the appellant was engaged on a casual basis, although a conclusive finding was not necessary for the determination of the claim, and, further, said that it appeared to him that the appellant's employment would have been more likely than not governed by the terms of the Restaurant, Tearoom and Catering Workers Award, R48 of 1978.

The Commissioner found that, on Monday, 21 September 1998, the appellant did telephone the respondents and advised the respondents that she was feeling ill that morning. He found that, subsequently, she attended for work but did not really perform her duties and then left about 10.00 am. He also found that next day, the appellant rang the respondent, Mrs Kafetzis, at about 7.30 am and spoke to her about her inability to attend work that morning.

The Commissioner found that the appellant said that she was not attending work because she was still feeling unwell. He also found that the appellant said, in the course of this conversation, words to the effect that "this would not happen again".

The Commissioner also found that the respondents expected the appellant to attend for work the next day, which the appellant did not do, and that, furthermore, following the telephone conversation which took place on the Tuesday morning, there was no further contact.

He found, upon the evidence given by Mr Kafetzis, that, following the telephone conversation which took place on the Tuesday morning, that the respondents had made a decision that they were going to replace the appellant because of concerns regarding her reliability and, in fact, did so, on the evidence, about one week later.

The Commissioner also found that it was the intention of the respondents that, after the appellant was expected to return to work on Wednesday, 23 September 1998, the appellant would be given notice of the respondents' intention to terminate her employment.

The Commissioner then concluded that the respondent, Mr Kafetzis', evidence was not the best evidence as to what was said on the telephone from the respondents' point of view. However, he did accept that it was not the intention that Mrs Kafetzis' telephone call of that morning be, of itself, a dismissal. There was no attempt to contact the respondents following the events of Tuesday, 22 September 1998 to provide the medical certificates, exhibits A1 and A2. Further, the respondents' uniform was not returned. In any event, the Commissioner formed the view that, even if there were a dismissal, it would not have been unfair.

The Commissioner found that there was no dismissal. He also found that he preferred the evidence of Mr Kafetzis to that of the appellant. Mr Kafetzis denied that the respondents intended to dismiss the appellant on 22 September 1998. The appellant, of course, at first instance, bore the onus of establishing that there was a dismissal.

The Commissioner found correctly that the appellant had come into work while ill to attend to her duties on 21 September 1998. The Commissioner quite correctly found that the onus lay on the appellant to establish the jurisdictional facts, namely that the appellant was dismissed in the telephone conversation, which took place on 22 September 1998.

The Commissioner accepted that the words were not words of actual dismissal and it was not the respondents' intention that the telephone call was a dismissal. The words were "we need someone more responsible, and we can't keep you on". The Commissioner found that this was a different proposition from the telephone call itself being a dismissal. The Commissioner held that the words were not actually words of dismissal, observing, too, that, for there to be a dismissal or resignation, clear and unambiguous words should be used.

The Commissioner also found that it was strange that the appellant, in view of the telephone call of 22 September 1998, did not seek to clarify the position then or subsequently. However, the appellant's evidence was that she regarded herself as dismissed. There was nothing, in her mind, therefore, to clarify. Equally, it might be said that there was no evidence that the respondents asked her why she had not turned up for work after 22 September 1998.

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 (or employee) could have understood them to be words of resignation (or dismissal) (see Macken, McCarry & Sappideen "The Law of Employment", 4th Edition, pages 168-170).

However, if the words used are ambiguous, then recourse may be had to the surrounding circumstances and to the parties' understanding of what was said (see B G Gale Ltd v Gilbert (1978) ICR 1148 at 1152-1153). The question as to whether or not an employment relationship continues to exist is a question of fact (see Byrne and Frew v Australian Airlines Ltd 185 CLR 410 at 485 per Brennan CJ, Dawson and Toohey JJ).

In the conversation which occurred between the appellant and Mrs Kafetzis, no notice was given. The appellant assumed that this was a summary dismissal and acted upon it. In our opinion, a reasonable employee would have interpreted the conversation as the appellant interpreted it. The words used, which all of the witnesses agreed were plan and unambiguous, were to the effect "we can't keep you, we need someone more responsible". She was entitled to regard herself as having been dismissed.

We are satisfied that the words "we can't keep you" (or similar), coupled with trenchant criticism, were sufficient to be plainly an unambiguous notice of termination. There was no indication that the respondents would see her the next day at work. There was no subsequent attempt to give the appellant notice of termination. There was no inquiry as to why she did not come to work.

We would, therefore, firstly observe that there was no need to have recourse to the circumstances surrounding the dismissal. It was an error to so do, in any detail. Further, even if there were, the circumstances were such that one would have to find that the appellant's opinion that she was dismissed was the right opinion. The circumstances which we have outlined above bear that out.

In the light of all those circumstances, notwithstanding the advantage enjoyed by the Commissioner in seeing the witnesses, the Commissioner erred in finding as he did.

In the light of the actual words used and the events which unfolded, including the fact that no notice subsequent to 22 September 1998 was given, that there was an intention to dismiss at or subsequent to the use of the words to which we have referred, and that no complaint about her conduct was made before 22 September 1998, it is open to the Full Bench to conclude that, in the light of all of the evidence, there was too fragile a base to support a finding that the appellant was unreliable.

The evidence, as a whole, provided significant support to the allegations made by her and, indeed, much of her evidence was accepted by the Commissioner (see State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) and Others 160 ALR 588 (HC)).

We would, for those reasons, find that the appellant was dismissed when she said that she was. The Commissioner should have so found and erred in not doing.

We are satisfied that there was a dismissal. There was jurisdiction. The dismissal was unfair, there being no warning or counselling and the Commissioner having found, in fact, that the appellant was ill at the time of the dismissal. No alternative measures were considered. The absences concerned were either justified or so few in total (two days' absence being incontrovertibly due to illness) that the dismissal was neither substantially or procedurally justified as a matter of fairness. There was sufficient evidence for the Commissioner to find that the dismissal was harsh, oppressive and unfair and he ought to have so found.

It is open to this Full Bench to so find, because there was a finding of no unfairness in the alternative. To so find does not involve a de novo hearing, a breach of s.49(4) in any act contrary to the principle in Walsh v Law Society of New South Wales 164 ALR 405 (HC). It was open to find that the appellant was dismissed.

For those reasons, we would uphold the appeal. We would find that the dismissal was unfair. We would suspend the decision of the Commission at first instance and remit the matter back to the Commission to hear and determine the question of remedy.

Order accordingly

Appearances: Ms G K Tan on her own behalf as appellant

No appearance by or on behalf of the respondents

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gek Lian Tan
(Appellant)

and

Paris and Chrissie Kafetzis trading as Gabriel's Café
(Respondents).

No. 408 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER P E SCOTT.

8 October 1999.

Supplementary Reasons for Decision.

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench. This matter came on before the Full Bench for a speaking to the minutes at the request of Mr Paris Kafetzis on behalf of the respondents.

A minute of proposed order, together with the reasons for decision, had issued to the parties on 10 September 1999, after the hearing of the matter on 20 August 1999.

Mr Kafetzis was twice advised of the nature of a speaking to the minutes by the Associate to the President, in writing, in advance of the speaking to the minutes hearing.

When the speaking to the minutes was heard on 6 October 1999, Mr Kafetzis, although there was a re-explanation to him by the Full Bench of what a speaking to the minutes was, insisted, several times, on attempting to present his substantial case and to review the reasons for decision.

He had, of course, not attended before the Full Bench, pursuant to the notice given to the parties as to the day of the hearing of the appeal, a notice which he acknowledged receiving. That notice contained a reference to the consequences of a non-appearance, which is expressed in the following terms—

> "Take notice that the above is the date listed for the hearing of this matter by the Full Bench. Should you wish to be heard in relation to this matter, you should appear before the Full Bench on the above date at the above time and place. If you do not appear, the Full Bench may hear and determine this matter in your absence."

Mr Kafetzis also informed the Full Bench, at least as we understood his explanation, that he did not wish to attend the hearing of the appeal to present his case because he was too busy with other things and had spent too much time on this matter already.

The Full Bench made it clear that it would not allow Mr Kafetzis to now present the case which he should have presented upon the hearing of the appeal, when the appellant had appeared and presented her case at that time.

The authorities are clear as to what a speaking to the minutes are. We refer to some of those authorities, which prescribe what a speaking to the minutes is. One is CSA v Public Service Commissioner of WA 17 WAIG 22, where Dwyer P said—

> "The object of drawing up the decision of the Court in the form of minutes is to give the representatives of the parties an opportunity to point out any of the provisions of the award which may have been inserted inadvertently or by mistake and which, if allowed to remain would be inconsistent or unworkable or would in some way render the award less perfect than the Court intended it to be. The parties should therefore, when speaking to the minutes, confine their attention to alterations which will have the effect of making the award more workable rather than to alter its substance. (See Burnside, J. in the Printing Trades Award (1925) 4 W.A.I.G. 150 and Dwyer, P., in Minister for Works v. Geraldton Lumpers' Union (1927) 6 W.A.I.G. 332. See also the remarks of Dunphy, P., in Western Australian Government Tramways' Union v. The Commissioner of Railways (1947) 27 W.A.I.G. 523)"

(See also McCorry v Como Investments Pty Ltd 69 WAIG 1000 (IAC) and Sheahan v SSTUWA 69 WAIG 2966 and the cases cited therein.)

As a result, it was clear that there was no amendment sought to be made by Mr Kafetzis to the minutes on behalf of the respondents.

A speaking to the minutes is not an occasion for reopening the substantial case which has already been decided.

The appellant had nothing to say about the minutes except to point out to the Full Bench a small error in the appearances, as recorded in the reasons for decision, where a wrong initial for her appeared.

For those reasons, the Full Bench issued an order in terms of the minutes of proposed order which issued to the parties on 10 September 1999.

Appearances: Ms G L Tan on her own behalf as appellant

Mr P Kafetzis on behalf of the respondents

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gek Lian Tan
(Appellant)

and

Paris and Chrissie Kafetzis trading as Gabriel's Café
(Respondents).

No. 408 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER P E SCOTT.

7 October 1999.

Order.

This matter having come on for hearing before the Full Bench on the 20th day of August 1999, and having heard Ms G L Tan on her own behalf as appellant and there being no appearance by or on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 10th day of September 1999 wherein it was found that the appeal should be upheld, and the abovenamed respondent by oral communication on the 14th day of September 1999 and by letter dated the 22nd day of September 1999 requested a speaking to the minutes hearing, and the speaking to the minutes hearing having been heard on the 6th day of October 1999, it is this day, the 7th day of October 1999, ordered and directed as follows—

(1) THAT the applications herein by the appellant to extend time to file the appeal out of time be and is hereby granted.

(2) THAT appeal No 408 of 1999 be and is hereby upheld.

(3) THAT the decision of the Commission in matter No 1842 of 1998 made on the 12th day of February 1999 be and is hereby suspended and the application remitted to the Commission to hear and determine in accordance with the reasons for decision.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The West Australian Government Railways Commission
(Appellant)

and

The Western Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers
(Respondent).

No. 434 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
SENIOR COMMISSIONER G L FIELDING.
COMMISSIONER C B PARKS.

29 September 1999.

Reasons for Decision.

THE PRESIDENT: This is an appeal by the abovenamed employer against a decision of the Commission made in the form of an order by a single Commissioner on 10 March 1999 in the following terms (see pages 17-18 of the appeal book (hereinafter referred to as "AB"))—

"1. In this Order—

(a) "employee" means an employee of the Western Australian Government Railways Commission trading as Westrail ("Westrail") who is a member of, or is eligible to be a member of, the West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers; and

(b) "former employee" means a person who at the time of the termination of his or her employment with Westrail—

(i) was a member of, or was eligible to be a member of, the West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers; and

(ii) had an entitlement to travel pass arrangements as part of his or her conditions of employment which were to continue after the termination of employment.

2. That Westrail revoke its direction that employee travel pass arrangements were to cease effective from the 1st day of July 1997. Travel pass arrangements as they applied until that date, are to apply from 11 January 1999 as if they were not removed, subject to the following provisions—

(a) Westrail shall provide an amount of $17,000.00 per month from and including 11 January 1999, for the payment of interstate travel passes. Such amount may vary from month to month, but shall average $17,000.00 per month over each period of twelve months.

(b) The amount specified in paragraph 2(a) is the total amount that Westrail shall allocate to interstate travel pass arrangements as a whole and is not exclusively for the benefit of employees and former employees as defined in this order.

(c) Applications for interstate travel passes may be made by employees and by former employees of Westrail.

(d) Where the granting of applications for travel passes made in accordance with paragraph (c) hereof, or for reimbursement in accordance with paragraph (e) hereof, would cost significantly greater than $17,000.00 in any month, Westrail may conduct a ballot of all applications to select those applications to be granted.

(e) Applications for reimbursement, in part or in full, of travel costs expended by employees or former employees since 11 January 1999, due to the cessation of the travel pass arrangements by Westrail, may be made and are to be given reasonable consideration. Such applications are to be made to Westrail no later than 4.00pm on the 30th day of March 1999. Where there is a dispute as to the granting or refusal of any such applications, the matter is to be referred to the Commission.

3. Where Westrail and the West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers are unable to agree on terms for the removal of the travel pass arrangements then the parties shall notify the Commission.

4. This Order shall apply until it is replaced or revoked by further order.

5. Liberty is reserved to either party to apply to vary the terms of this Order consequent upon any variation to the Order in Application CR 127 of 1997 provided it is exercised within 21 days of that variation."

The appeal is properly brought under s.49(1) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act").

Leave was granted to Counsel to appear because the Full Bench, having regard to the questions of law, obviously arising upon this appeal, regarded it as a proper exercise of its discretion to grant such leave, notwithstanding the objection of Mr Wells.

GROUNDS OF APPEAL

The grounds of such appeal, I now produce hereunder (see pages 2-4 (AB))—

"1. The Commission erred and miscarried its discretion in deciding the matter in failing to give any or sufficient weight to—

(a) the delay by the West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers ("the Union") in bringing the application;

(b) the fact that no or no adequate explanation was provided by the Union for the delay;

(c) the time that had elapsed since the interstate travel pass arrangements had been removed by the appellant;

(d) its finding that the appellant was justified in removing the interstate travel pass arrangements;

(e) evidence of negotiations between the appellant and the Union in relation to the removal of the interstate travel pass arrangements; and

(f) the fact that the appellant gave employees two months notice of its decision to remove the interstate travel pass arrangements taking effect and offered to consult with employees affected by the decision.

2. The Commission erred and miscarried its discretion in finding and relying in its decision on the fact that the interstate travel pass arrangements were an entitlement of employees of the appellant pursuant to the contract of employment between them and the appellant.

3. The Commission erred as a matter of law in not finding that it was without jurisdiction—

(a) to inquire into and deal with a matter relating to former employees of the appellant in that—

(i) the Commission only has jurisdiction under the Industrial Relations Act 1979 ("the Act") to inquire into and deal with an industrial matter as defined under the Act; and

(ii) the matter referred to the Commission in so far as it related to former employees was not an industrial matter as defined under the Act;

(b) to make the Order in so far as it relates to former employees of the appellant in that—

(i) the subject matter of the Order is not an industrial matter as defined under the Act; and

(ii) the Order involves an exercise of judicial power;

(c) to make the Order in so far as it relates to the employees of the appellant whose terms and conditions of employment are governed by the provisions of an agreement certified under the Workplace Relations Act 1996 (Cth);

and

(d) to make the Order in so far as it relates to the employees of the appellant whose terms and conditions of employment are governed by an agreement registered under the Workplace Agreements Act 1993 (WA), in that—

(i) where an employer and an employee are parties to a workplace agreement, a matter that is part of the relationship between that employer and that employee is not an industrial matter.

4. The Commission erred as a matter of law in finding that the Union could act in an independent capacity in relation to the interests of former employees of the appellant who had been eligible to be members of the Union but were not at the time members of the Union.

5. The Commission erred and miscarried its discretion in making the Order in that—

(a) the Order is void for uncertainty as to—

(i) the nature of the travel pass arrangements which are referred to in the Order; and

(ii) the classes or categories of employees to whom the Order is to apply;

(b) the Order allows for negotiations between the appellant and the Union in relation to the removal of the interstate travel pass arrangements but does not allow for—

(i) negotiations which may affect the entitlement of former employees of the appellant in relation to the interstate travel pass arrangements;

(c) the Commission failed to give any or sufficient weight to the impracticability of the appellant being able to give effect to the Order in respect of its former employees;

and

(d) the Order does not return the appellant and the Union to the status quo in relation to the interstate travel pass arrangements, in that the interstate travel pass arrangements had not been in place since July 1997.

6. The Commission erred and miscarried its discretion in determining the application by—

(a) incorrectly applying the Commission's wage fixing principles; or

(b) alternatively, not having any or sufficient regard to the wage fixing principles."

The appeal would seem to be against the whole of the decision, although that is not expressed.

BACKGROUND

This dispute came before the Commission because of a longstanding dispute between The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers and the abovenamed appellant (hereinafter referred to as "Westrail"), in relation to interstate pass/fare concessions which were available to Westrail employees and retired employees for travel on the Indian Pacific.

The matter came before the Commission pursuant to s.44 of the Act and the orders to which I have referred above were made pursuant to s.44(9) of the Act.

The respondent, had, at first instance, expressed concern at the withdrawal by Westrail, as at 1 July 1997, of interstate travel pass arrangements which it had extended to employees and past employees. The appellant decided, as at 21 April 1997, that the interstate pass/fare concessions currently available to Westrail employees and retired Westrail employees to travel on all Australian National Line Services would be withdrawn. It was conceded that no notice was given to the organisations or employees concerned (see page 116 (AB)) and no discussions took place with them before this decision was made. Before the Commission, at first instance, the respondent sought an order in similar terms to the order which issued in a related matter, application No CR 127 of 1997 (Australian Railways Union of Workers, West Australian Branch v Western Australian Government Railways Commission trading as Westrail 77 WAIG 2801 at 2806).

The factual background before the Commission on this occasion was conceded by the parties as being sufficiently similar to the background which led to the decision of the Commission in CR 127 of 1997, to be followed. The Commission expressed the view that it could see no good reason for reaching any different conclusions from the findings of the Commission on that occasion. No exception was taken to that view, except on the grounds of alleged delay in this case.

The Commission, therefore, found that the interstate travel pass arrangements were part of a system of passes which had operated within Westrail for approximately 50 years, correctly. Before 1993, the rail network throughout Australia was run by the various states concerned and, through an umbrella organisation, Australian National.

By a system of Railway Commissioners' Conferences, an arrangement operated whereby employees of Westrail and of other state rail organisations received interstate travel passes for the employee and employee's family without cost to Westrail. This system of passes extended into the employee's retirement from Westrail.

Since 1993, the operation of the national rail network changed and is to change. Westrail now pay for full fare for the employees and their dependents who use the passes. Westrail now pay fringe benefits tax upon that payment. The situation is, therefore, far removed from the original position where Westrail could extend interstate travel passes to its employees at little or no cost to itself.

The Commission was, therefore, of the view, as Scott C found in CR 127 of 1997, that there was justification for the removal of the entitlement.

The interstate travel passes were an entitlement of the employees pursuant to the contract of employment between them and Westrail, it was found.

The Commission also concluded as follows—

(1) It is a condition of employment which also operated after the employees' retirement from Westrail.

(2) That interstate travel passes were taken into consideration when wage rates and other conditions of employment of Westrail employees were compared to other employees outside Westrail.

(3) In these days of enterprise bargaining and trade-offs, it is not fair for Westrail to unilaterally remove the interstate travel pass arrangements.

(4) An order should issue in the union's favour restoring the previous interstate travel pass arrangements, pending their removal by negotiation or order of the Commission.

(5) Because of the time which has passed since the removal of the allowance is such that it is not appropriate to restore the interstate travel passes as from 1 July 1997.

(6) The order should operate as from the date of the hearing of the matter. The order to issue should also cover persons who have since retired from Westrail, but who were, at the time, members of or eligible to be members of the union.

The Commission held that it was dealing with an entitlement under the relevant employee's contract of service which was an entitlement which accrued to that person by virtue of him or her being an employee and which operated after the cessation of employment upon the retirement of the employee.

The Commission also held that the applicant union was a principal and not merely an agent of its members and that it acts in an independent capacity and does so because it represents not definite or then ascertainable individuals, but a group or class the actual membership of which is subject to constant change in an industrial relationship.

The Commission, therefore, held that there is no impediment to the union bringing an application on behalf of persons who had that entitlement when they were employees and who were, at that time, members of that class.

The order is expressed to apply to the union members eligible to belong to it.

ISSUES AND CONCLUSIONS

Since the reasons for decision of Scott C in ARU v WA Government Railways Commission t/a Westrail 77 WAIG 2801 were applied, this decision is of some importance. That was a decision on an application which, it was common ground, was made on 30 June 1997 by the ARU, an organisation of employees, the day before the decision to cease payments became operative. The Commission found (at page 2805) that Westrail's decision to revoke the travel pass arrangements was not justifiable. However, the Commissioner went on to find that the matter did not end there. This she found was not a matter where managerial prerogative enabled an employer to make a unilateral decision to withdraw the arrangement, even if reasonable notice were given and provision were made for special circumstances.

The travel pass arrangements, the Commissioner held, were an entitlement or right which had become part of the package of Westrail's employees and part of their package of employment conditions by nearly 50 years of usage. The Commission held, and this finding was not disputed before Beech C, "It is not for Westrail to simply remove this entitlement by announcing that it will do so" (Australian Railways Union of Workers, West Australian Branch v Western Australian Government Railways Commission trading as Westrail (op cit) at 2805).

The Commissioner held, and this also was not challenged before Beech C, that the custom and usage of the travel pass arrangements caused them to have become "defacto award conditions" (Australian Railways Union of Workers, West Australian Branch v Western Australian Government Railways Commission trading as Westrail (op cit) at 2805).

As a result, the Commissioner held that the removal of the travel pass arrangements was a matter which the parties could reasonably have considered in negotiations in the Commission in a number of other matters. She then advised that she would issue an order requiring Westrail to revoke its direction for the cessation of the travel pass arrangements to provide the parties with an opportunity to negotiate terms for its removal; and did so.

I would add that a custom will continue to be binding on those engaged in an industry unless it is expressly dealt with in an award (see Hotel Club Caterers Union v Boans (1920) 14 WAAR 766 and see Hamersley Iron v AMWSU and Others 70 WAIG 2545 (FB) and the cases cited therein). In this case, that such a custom and usage existed and that such a condition of employment existed was not, in fact, challenged.

The Commissioner also noted that the wage fixing principles dated 7 August 1996 (76 WAIG 3368) have been developed over a number of years and provided a mechanism for the parties at the enterprise level to deal with the changed circumstances.

Mr Johnston, who appeared for Westrail at first instance, submitted that "so far as the merit of Westrail's actions go, which have been referred to here by the union, we would adopt or ask the Commission to be guided by the findings of the Commission in CR127 of 97" (see pages 46 and 48 (AB)). There is therefore a concession that the Commission be guided by the reasons for decision of Scott C, the only differentiation which Mr Johnston invited Beech C to make being in relation to the delay in negotiations which occurred on the part of the respondent organisation. Mr Johnston did so whilst conceding that Westrail's action in purporting to evoke the travel pass arrangements was "not the best" (see page 46 (AB)).

I now turn to the grounds of appeal.

WAGE FIXING PRINCIPLES

The question of the operation of the wage fixing principles was raised before the Commission at first instance. In fact, ground 6 of the grounds of appeal alleged that the wage fixing principles were incorrectly applied, or, alternatively, there was no sufficient regard to them by the Commission at first instance.

The Commissioner observed at page 64 (AB)—

> "I don't know that I would be interested in hearing an argument which basically would lead to the conclusion that an employer could withdraw a condition of employment without the risk of offending the principles and it's only when the union seeks to get them back that the wage fixing principles would operate to prevent them doing so. That would have an element of inequity attached to it that I don't think should be encouraged."

Mr Parker submitted to the Full Bench that the enterprise bargaining principle included the prescription that the Commission would generally not arbitrate in respect of claims above the safety net of award wages and conditions.

In enterprise bargaining agreements, too, it was submitted, there is a prescription relied upon that the Commission will have recourse to arbitration only as a last resort.

The Full Bench was referred to the decision in Australian Fine Bone China Pty Ltd v The Federated Brick Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch 79 WAIG 1337 (CICS) and to Scott C's comments, in particular, at page 1339.

It is an error of law, of course, for the Commission not to have regard to the wage fixing principles (see RRIA v CMEWU 68 WAIG 2667 and CWAI v FMWU and Others 69 WAIG 3219).

It was Mr Johnston's submission at first instance that the principles have no application to the removal of the travel concessions, but once that issue was referred for arbitration they do (see page 48 (AB)).

It is difficult to see how this action can be seen to be part of any enterprise bargaining process. What occurred was that there was a unilateral abrogation of a longstanding custom and/or condition of contracts of employment. There was, in my opinion, no arbitration which might properly be said to be part of the enterprise bargaining process. This was a matter which was remediable by means of s.29(1)(b)(ii) proceedings by an individual. Alternatively, the repudiation of a term of a contract of employment in circumstances which the Commission according to equity, good conscience and the substantial merits of the case might be regarded as unfair was a matter which the respondent organisation, at first instance, was entitled to seek to be remedied.

I am not persuaded on the submissions made to me that the wage fixing principles applied. This was not an arbitration of a dispute in the process of negotiations, or, if it were, it is not clear on the face of it. It is also not clear, if that is a hallmark, that the decision of the Commission could not be incorporated into any such agreement (as the principles recite). It was a remedy for the time being which negatived a repudiation of a term of the contract of employment and resolved a dispute.

In particular, I have difficulty with the proposition that the principles have no application to the removal of the travel concessions, but do apply to an application to restore them. In any event, there was a part concession (see page 64 (AB)) that the principles do not apply. For all of those reasons, I am not persuaded that they do, nor am I persuaded that the Commission erred in not applying them as it is submitted they should have been applied.

I think that the matter can best be summed up this way. It cannot be validly submitted that the Wage Fixing Principles can prevent the Commission exercising the jurisdiction conferred on it by s.23, s.29, s.44 and s.32, given the objects of the Act, particularly s.6(a), (b) and (c), and also s.26(1)(a), (c) and (d).

In my opinion, if it is submitted that they do so, then they should be read down. However, as I read the Principles, they provide arbitration as a last resort only in relation to direct negotiations to bring about an enterprise bargaining agreement.

There is nothing to suggest that that was the case here. In any event, it was a matter of dispute which required resolution and was properly within the jurisdiction and power of the Commission to do so. I have a great deal of difficulty with any proposition that the Principles prevent the necessary resolution of disputes under the Act.

EXERCISE OF DISCRETION

There was a ground of appeal expressed in terms that the Commission failed to give any or any sufficient weight to the delay in the respondent organisation bringing this application. The application was lodged in 27 May 1998, some ten months after the entitlement to the interstate travel passes had purported to be withdrawn by the appellant employer. The application was made after two previous attempts to become involved in proceedings related to the withdrawal of the travel passes.

There were negotiations in June 1998 between the parties to this appeal.

Westrail submitted that the respondent organisation should have pursued the matter and that its failure to do so militated against the merit of the application. The Commission did take into account the delay, but not to the extent that he dismissed the application. The Commission refused to order the restoration of travel passes as at 1 July 1997. Instead, he took into account the delay and the failure to properly explain it and restored them only as from the date of hearing. In my opinion, the Commission correctly exercised its discretion in so doing. To order because of the delay that even such delay was not properly explained that an application that the unilateral repudiation of a term of a contract of employment or a defacto term of an award supported by custom and usage would be dismissed would have been entirely unfair. To, however, make the order restoring the benefit operate from the time of the hearing correctly took account of the unexplained delay. In any event, there was no submission of any substantial detriment. There was no miscarriage in the Commission's exercise of discretion in ordering as it did in that respect.

TERM OF THE CONTRACT

The Commission correctly found that the provision of rail passes to employees even after their retirement was a term of the contract of employment. That was the evidence of Mr Young and it was unrefuted. Further, and alternatively, there was the unchallenged finding of Scott C in a decision which Mr Johnston who appeared for the appellant, at first instance, asked the Commission to adopt that the provision of rail passes was a defacto term of the award by way of custom and usage.

The crucial time to so find was when this term was repudiated and nothing was submitted to detract from the correctness of that finding. The Commission found correctly.

JURISDICTION—INDUSTRIAL MATTER

Next, it was submitted that there was no jurisdiction to inquire into and deal with the matter because no jurisdiction was conferred by s.23 of the Act in certain matters. This was because the matter was not an "industrial matter" insofar as it related to former employees, nor was it an "industrial matter" insofar as it purported to apply to employees the subject of a workplace agreement under the Workplace Agreements Act 1993 (WA) or an agreement certified under the Workplace Relations Act 1996 (Cth).

First, it is quite clear that the matter, insofar as it applies to present employees, is an industrial matter as defined. Second, because of the absence of a contract of employment in relation to retired employees, the contract of employment having been expired, and having regard to the definition of "employee" in s.7 of the Act, it cannot be said that there was an "industrial matter" as defined in s.7 of the Act insofar as the same related to jurisdiction in relation to retired or past employees' benefits. I do not think that in the definition of "employee" the term "a person whose usual status is an employee" could be said to refer to a retired person.

"Industrial matter" is defined in s.7 of the Act as follows—

> "**"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 —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
>
> (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
>
> (d) any established custom or usage of any industry, either generally or in the particular locality affected;
>
> (e) the privileges, rights, or duties of any organization or association or any officer or member thereof in or in respect of any industry;
>
> (f) in respect of apprentices or industrial trainees —
>
> (i) their wage rates; and
>
> (ii) subject to the *Industrial Training Act 1975* —
>
> (I) their other conditions of employment; and
>
> (II) the rights, duties, and liabilities of the parties to any agreement of apprenticeship or industrial training agreement;
>
> *[(g) deleted]*
>
> [*(h) deleted*]
>
> (i) any matter, whether falling within the preceding part of this interpretation or not, where —
>
> (i) an organization of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and
>
> (ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;
>
> but does not include —
>
> (j) compulsion to join an organization of employees to obtain or hold employment;
>
> (k) preference of employment at the time of, or during, employment by reason of being or not being a member of an organization of employees;
>
> (l) non-employment by reason of being or not being a member of an organization of employees; or
>
> (m) any matter relating to the matters described in paragraph (j), (k) or (l);"

"Employee" is defined in s.7 of the Act as follows—

> "**"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,
>
> but does not include any person engaged in domestic service in a private home unless —
>
> (e) more than 6 boarders or lodgers are therein received for pay or reward; or
>
> (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged;"

It is also perfectly clear that by virtue of s.7A, s.7B, s.7C and s.7D of the Act, that where an employer and employee are parties to any workplace agreement a matter that is part of that relationship is not an "industrial matter". It is further not within the jurisdiction of the Commission.

A "workplace agreement" is defined in s.7 as follows—

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

Further, s.26A of the Act prohibits the Commission in the exercise of its jurisdiction from receiving in evidence or informing itself of any workplace agreement or any provision of a workplace agreement. The Commission was therefore not entitled to be informed of any workplace agreement or any provision of it. However, the Commission did not purport to deal with those employees on workplace agreements, in any event, or make any orders in relation to them.

The application before the Commission (see pages 5-6 (AB)) makes reference only to "employees" and "retired employees" which must be read in relation to the former, in any event, as referring to an "employee" as that term is defined in the Act. The Commission, however, could not make orders in relation to persons who were not "employees", within the meaning of that term in s.7 of the Act and within the meaning of "industrial matter".

As to persons subject to certified agreements under the Commonwealth legislation, there was not sufficient evidence before the Commission at first instance to determine whether any such agreements if they existed covered the field.

Under s.49(4) of the Act, the Full Bench declined to admit any agreement because it was not tendered at first instance and was not ruled upon by the Commission in the context of s.109 of the Australian Constitution. They did not, therefore, fit within s.49(4) as the same was explained in FCU v George Moss Ltd 70 WAIG 3040 (FB).

REPRESENTATION BY THE RESPONDENT

The Commission found that the respondent organisation was entitled to represent retired or past employees in this matter at first instance. It was submitted on the part of the appellant that they could not because the eligibility rule, Rule 3, of the respondent organisation provided that a person must be employed by the Western Australian Government Railways Commission in a number of classifications before he/she is covered. Rule 3 reads as follows—

" 3. MEMBERSHIP

The Union shall consist of an unlimited number of persons employed by the Western Australian Government Railways Commission as—

(a) locomotive engine drivers;

(b) railcar drivers;

(c) driver's assistants;

(d) trainee enginemen;

(e) locomotive cleaners.

A person who—

(a) is employed on work which, at the 19th December, 1969, was regulated by the provisions of an award to which this Union was not a party; or

(b) is employed on work which the Commission has refused to regulate by an award to which this Union is a party,

shall not be a member of this Union.

A person shall not be a member of this Union who is not a worker except in capacity of an honorary member or a member who or whose personal representative is entitled to some financial benefit or financial assistance under these Rules while not being a worker. Any person eligible for membership of the Union shall, on the presentation of a membership form duly signed and witnessed, be proposed by one and seconded by another member at the monthly meeting of the Union and if a majority of the members present vote in favour of his becoming a member, he shall be considered elected."

I am not of opinion that they can be represented even if they remain members while not employees. I say that without considering cases such as Cameron v Duncan 91965) 8 FLR 148 (FC)(IC), where persons who were no longer employed in specified employment under the rules remained members, so it was held. I say that, too, without considering in detail s.64A, B and C of the Act and those provisions which effect a resignation by operation of the statute (see, too, interestingly, those authorities which held that an award binds future members of an organisation (see Burwood Cinema Ltd *v.* Australian Theatrical and Amusement Employees Association (1925) 35 CLR 528 and WA Timber Workers' Industrial Union v WA Sawmillers' Association (1929) 43 CLR 185 at 189).

This clearly means that such persons are not eligible members if they have retired (nor, I suggest, are honorary members) and cannot be represented by the organisation before the Commission, because, if they are not employees of Westrail, they are ineligible to be members.

JUDICIAL POWER

It was submitted that the Commission cannot exercise judicial power. I should observe that the Commission can and does exercise judicial power even in the course of an arbitration. It cannot, however, enforce an award or order. It was not required to do so here, nor was it required to exercise judicial power because there was no detraction of existing rights, to put the description of judicial power in its correct sense.

THE ORDER—UNCERTAINTY

It was submitted that the order was required to be expressed with certainty and that it was not so expressed. This was upon the authority of Television Corporation v Commonwealth of Australia [1962-1963] 109 CLR 59 (HC) where Kitto J held that proposed conditions in a licence for commercial broadcasting stations or television stations were required to be certain because uncertainty in executive instruments spells legal invalidity and that that arose from something inherent in the provisions by which the Minister's power was created.

I am not certain that that authority is authority for that proposition in relation to this Commission. Even if it were, there was no requirement to exclude employees subject to workplace agreements which are excluded from the jurisdiction of the Commission, in any event. There was no application which related to such employees.

As to those who might be covered by certified agreements under the federal legislation, there was no application in relation to those, but, in any event, there was no evidence that such an agreement covered the field and that the Commonwealth legislation rendered this Act inoperable in relation to those employees. That ground is not made out.

CONCLUSIONS

My reasons in this matter should not be interpreted as saying that past members cannot take action to claim concession travel benefits as contractual benefits under the Act. However, for the reasons which I have expressed, I would uphold the appeal, insofar as the order purports to deal with former employees.

I would vary the order by deleting from it Clause 1(b) and the references to former employees wherever they appear. I would, otherwise, dismiss the appeal.

SENIOR COMMISSIONER: I have had the benefit of reading in draft form the reasons for decision prepared by the President with which I am in general agreement. However, I wish to add some observations of my own.

I agree with the President that the Union as the Applicant in the initial proceedings, did not have any standing to institute the original proceedings on behalf of former employees of the Appellant. The Union's right to institute proceedings before the Commission is governed by section 29(1)(a)(ii) of the *Industrial Relations Act, 1979*. In short the Union even though it is a party principal, and not merely an agent for its members, is only entitled to have a matter referred to the Commission on its initiative where the industrial matter referred relates to persons entitled to be enrolled as members of the Union. Former employees who, by definition are no longer employees, are not entitled to be enrolled as members of the Union. The Act relevantly only makes provision for a Union of employees for the purpose of protecting or furthering the interests of employees. It does not make provision for the registration of a Union consisting in part of persons who were once, but who are no longer, employees. Nothing in the definition of "employee" in section 7 of the Act extends the concept of an employee to include a former employee. Whatever is meant by that part of the definition of "employee" which includes "any person whose usual status is that of an employee" I agree with the President that it does not extend to and include a person who has retired or otherwise left the workforce.

Moreover, the matter the subject of the original application so far as it concerned the reinstatement of travel passes for former employees is not an "industrial matter" for the purposes of the Act and therefore is not a matter which falls within the jurisdiction of the Commission. It is now beyond question that a claim by or on behalf of former employees in respect of past employment is not an "industrial matter". As the Industrial Appeal Court held in *Kounis Metal Industries Pty Limited v. Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch (1992) 45 IR 392 at 402* "unless, at the time when the application is made, the relationship [of employer and employee] actually exists, or is expected to come into existence in the future, or did exist and is to be restored, the key element of an 'industrial matter' is missing." That decision was subsequently followed by the Court in *Coles Myer Ltd (t/as Coles Supermarkets) v. Coppin and Ors (1993) 49 IR 275*. Indeed, as a result of those decisions the Act was amended by inserting the provisions of section 7(1a) to enable the Commission to deal with a limited range of matters instituted by former employees. Those provisions would be otiose if the original claim as it applied to former employees was allowed to stand.

It follows that insofar as the order made by the learned Commissioner purported to include former employees of the Appellant it was in excess of jurisdiction and to that extent the appeal should be upheld.

In my opinion there is otherwise no substance to the appeal. In particular, there is no merit in the contention that the order is defective so far as it relates to those employees whose employment is governed by a workplace agreement or by a Federal certified agreement. Clearly, the order can have no application to persons employed by the Appellant under workplace agreements registered pursuant to the *Workplace Agreements Act 1993*. By reason of section 7B of the Act such persons are excluded from the definition of "employee" for the purposes of the *Industrial Relations Act, 1979*. In my view, it is not reading too much into the order of the Commission to infer that it is only to apply to employees as defined in the Act. The original application did not specifically refer to employees covered by a workplace agreement and in my view the application, and certainly the order, should be read as being limited to employees as defined by the Act. Indeed, the reasons for decision published by the learned Commissioner make it clear that the order was not intended to apply to those whose employment was governed by a workplace agreement, or if appropriate, by a Federal certified agreement. There was little or no evidence of the extent to which, if at all, other employees were covered by a Federal certified agreement. If it be that some of the employees in question are employed under such an agreement which either expressly or by implication deals with the question of entitlements to travel passes, as to which there was little or no evidence, much the same considerations apply. The provisions of the *Workplace Relations Act 1996* (Cth) in conjunction with the Commonwealth Constitution operate to render the order ineffective in respect of those employees. The Appellant, having failed to deal with the matter adequately before the learned Commissioner, can hardly complain later if the order is in terms which have the potential to cause it some embarrassment in this regard.

Insofar as the appeal alleges that the learned Commissioner erred in the exercise of his discretion, there is not any merit in the appeal. The very nature of arbitration in industrial relations is that it admits of a range of outcomes. Indeed, as the Act by section 26 makes clear, the Commission has a wide discretion to resolve matters before it and is not necessarily confined to the outcome advanced by one or other of the parties. In this respect arbitration under the *Industrial Relations Act, 1979* differs materially from arbitration in the traditional sense. As pointed out in the time honoured case of *Aust. Workers' Union v. Poon Bros. (W.A.) Pty Ltd and Ors (1983) 4 IR 394* it is necessary for the Appellant to establish that the decision was wrong in law or otherwise wrong in principle. The same approach has, in effect, been endorsed by the Industrial Appeal Court in *Gromark Packaging v. Federated Miscellaneous Workers Union of Australia, WA Branch (1992) 46 IR 98* albeit in a different context. It is not enough that the Appellant does not like the outcome or that another member of the Commission might have arrived at a different solution than that which commended itself to the member of the Commission to whom the matter was entrusted. Too often parties in proceedings before the Commission use the appeal process to re-argue the merits of the matter as if the Full Bench had the same discretion as the Commission at first instance. Having regard to the grounds of appeal raised on this occasion perhaps the time has come to re-emphasise in the strongest terms that appeals based on "errors" of discretion are ordinarily unlikely to have any merit.

COMMISSIONER C B PARKS: I have had the benefit of reading the reasons for decision of His Honour the President in draft form. I agree with those reasons and have nothing to add.

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

Order accordingly

APPEARANCES: Mr D F Parker (of Counsel), by leave, and with him Ms J Furey (of Counsel), by leave, on behalf of the appellant.

Mr R Wells and with him Mr B Curren on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The West Australian Government Railways Commission
(Appellant)

and

The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers
(Respondent).

No. 434 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
SENIOR COMMISSIONER G L FIELDING.
COMMISSIONER C B PARKS.

29 September 1999.

Order.

THIS matter having come on for hearing before the Full Bench on the 26th day of July 1999, and having heard Mr D F Parker (of Counsel), by leave and with him Ms J Furey (of Counsel), by leave, on behalf of the appellant and Mr R Wells and with him Mr B Curren on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 29th day of September 1999, it is this day, the 29th day of September 1999, ordered and directed as follows:—

(1) THAT appeal no 434 of 1999 be and is hereby upheld in so far as the Order purports to deal with former employees.

(2) THAT the decision at first instance be and is hereby varied at first instance by deleting
   (a) Order (1)(b); and
   (b) any reference to "former employees" wherever these words appear in the said order.

(3) THAT save and except for (1) and (2) herein, appeal no 434 of 1999 be and is hereby dismissed.

By the Full Bench

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

FULL BENCH— Appeals against decision of Industrial Magistrate—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Giovanni Basilio Nicoletti and Guiliana Nicoletti
(Appellants)

and

The Transport Workers' Union, Industrial Union of Workers, Western Australian Branch
(Respondent).

No. 406 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER J F GREGOR.

30 September 1999.

Reasons for Decision.

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench.

The abovenamed appellants appealed pursuant to s.84 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") against the decision of the Industrial Magistrate, sitting in the Industrial Court at Perth, on 3 March 1999 in complaint Nos 88 and 89 of 1997.

By complaint No 88 of 1997, the respondent organisation alleged that between 9 and 15 October 1995 at Madora, the abovenamed appellants (who were defendants to the complaint), being a party bound by award No 379 of 1979, they committed a breach thereof in that they failed to pay the correct overtime rate for hours worked outside the ordinary hours of work to their employee, Mr Patrick Tyson, and claimed the sum of $1296.33, and further alleged that on eleven occasions between 2 December and 12 December 1995 (and, in fact, on every date between those days) they failed to pay overtime rates.

By complaint No 89 of 1997 it was alleged that, between 9 and 15 October 1995 at Madora, the abovenamed appellants, being a party bound by award No 379 of 1979, they committed a breach thereof in that they failed to pay double rates for work performed without having ten consecutive hours off duty. The failure to pay was alleged to have been to the same employee, Mr Patrick Tyson, and the sum of $1165.28 was claimed, together with $13,706.18 for alleged breaches from 2 to 12 December 1995 inclusive.

The learned Industrial Magistrate found breaches of the award and imposed a penalty of $200.00 and ordered the payment of costs of $40.60.

There was an order that the defendants pay to Mr Tyson the following—

(1) In respect of complaint No 88 of 1997—$3897.12

(2) In respect of complaint No 89 of 1997—$7171.94.

APPEAL GROUNDS, FINDINGS, ISSUES AND CONCLUSIONS

The crux of this matter is that it is said that the learned Industrial Magistrate was wrong in finding that the appellants were bound by the provisions of the Transport Workers (General) Award No 10 of 1961 when there was no or no sufficient evidence to support such a determination, and further was wrong in holding that <u>Freshwest Corporation Pty Ltd v TWU 71 WAIG 1746 (IAC)</u> (hereinafter referred to as "Freshwest") could be distinguished.

Further, it is alleged that the Industrial Magistrate erred in concluding that the defendants, at the material time, "significantly engaged itself in transportation", and, further, that his conclusion was determinative of the applicability of the Transport Workers (General) Award No 10 of 1961.

Further, it is alleged that the learned Industrial Magistrate erred in law in finding that the award applied in the absence of evidence which would have enabled him to make findings as to what was involved in the industry of general carrier.

The scope clause of the award, Clause 3, as at the time of the hearing, read as follows—

> "This award shall apply to all workers following the vocations referred to in the wages schedule who are eligible for membership in the applicant union and <u>who are employed in the industries referred to in the Schedule of Respondents</u>. Provided that this award shall not apply to bread carters, workers engaged in the timber industry within the South West Land Division nor to workers whose duties involve them in delivering goods or materials solely beyond the West Australian State border."

It had been amended from what it read, at the time "Freshwest" was decided by Scott C in <u>TWU and WD Moore and Co and Others 76 WAIG 198 (22 December 1995)</u>.

The complainant's case was that Mr Tyson was, at the material time, engaged in the vocation referred to in grade 8 of the Wages schedule, which is as follows—

> "Driver multiple articulated vehicle over 53.4 tonnes up to 94 tonnes GCM up to 65 tonnes capacity"

It was found that Mr Tyson carried out work within the vocation described, and that, at all material times, he was eligible to be a member of the respondent organisation.

The learned Industrial Magistrate found, relevantly for the purposes of this appeal, as follows—

(1) Mr Tyson was a witness whose evidence he accepted in its entirety.

(2) He preferred the evidence of Mr Tyson to that of Mr Nicoletti, the aforementioned first defendant, wherever there was a conflict.

(3) (a) That on a perusal of exhibit 8 and the viva voce evidence before the court, transportation was a significant part of the defendants' business and not just ancillary to wheat and sheep farming.

(b) That they acted as general carriers in the transportation of blue metal and fertiliser, and, indeed, the transport of the defendants' "own produce" occurred after sales.

(c) The variation to the award as ordered by Scott C on 22 December 1995 enables the court to give the ordinary meaning to the classification "general carriers".

(d) "General carrier", in the view of the learned Industrial Magistrate, imported an ordinary meaning which was well understood.

(e) The scope provision enabled the award to be applied to those workers employed in the industries set out in the schedule.

(f) "General carriers" were set out in the schedule and he was in no doubt that the defendants were engaged in that industry.

(4) The complainant had otherwise also established all other necessary criteria for the application as provided for in the scope clause.

(5) The scope clause clearly draws the defendants into the award.

(6) The award has application to them.

(7) "Freshwest" can be distinguished by reason of the variation of the scope clause and also the differing factual circumstances.

However, the substance of this appeal was in relation to one main finding and some subsidiary findings; namely that the appellants' were bound by the scope clause, Clause 3, of the Transport Workers (General) Award No 10 of 1961.

A complaint upon appeal was substantially that the Industrial Magistrate erred in finding that the appellants were bound by the provisions of the award because of the scope clause, Clause 3, because there was no or no sufficient evidence to support such a determination and that the Industrial Magistrate erred in holding that the decision in "Freshwest" was distinguishable.

In 1991, when “Freshwest” was decided, the scope clause, Clause 3, read as follows—

> “This award shall apply to all workers following the vocations referred to in the wages schedule, who are eligible for membership in the applicant union and are employed in the industries carried on by the respondent to this award in connection with the transportation of goods and materials. (our underlining) Provided that this award shall not apply to bread carters, workers engaged in the timber industry within the South West Land Division nor to workers whose duties involve them in delivering goods or materials solely beyond the West Australian State border.”

That clause was clearly a clause of the type which the Industrial Appeal Court interpreted in WACJBSIU v Terry Glover Pty Ltd (1970) 50 WAIG 704 at 705 (IAC).

Mr Tyson was employed as a truck driver following a vocation referred to in the wages schedule. He was eligible for membership of the respondent organisation.

The question is whether he was a worker to whom the award applied and whether such employment was “in the industries carried on by the respondents to the award”.

Whether he was an employee to whom the award applied depends on the scope clause. First, it should be observed there are, in the Schedule, a large number of designations of employer to the award, of whom one, under which are a number of employer’s names, is “General Carriers”.

The appeal depends on whether Clause 3 is a “Terry Glover” clause, which it was at the time “Freshwest” was decided, or whether it is now a “Donovan” clause which, in effect, His Worship found.

A “Donovan” clause which takes its name from its categorisation by the Industrial Appeal Court in R J Donovan and Associates Pty Ltd v FCU (1977) 57 WAIG 1317 at 1318 (IAC) (see also WACJBSIU v Terry Glover Pty Ltd (op cit)(IAC) per Burt J and Burswood Executive Health Centre v FMWU 72 WAIG 687 (FB)), is a scope clause where the industries are those defined in the award under industry headings and the named respondents are intended to be representatives of those industries (the appellants are not named respondents). The subject clause is self evidently such a clause.

Thus, applying the dicta of Burt CJ and Wickham J in R J Donovan and Associates Pty Ltd v FCU (op cit) at page 1318 (IAC)—

1. The industry to which the award applies is to be ascertained by the words used to describe it.
2. The industry to which the award relates is not to be ascertained by entering into an enquiry as to the Commission’s objects sought to be attained by any named respondent and the employees employed by it.
3. The naming of the employer under the heading of an industry relieved the prosecution from proving that a relevant employer was, in fact, engaged in that industry, because the scope clause specifically refers to the industry as set out in the Schedule.
4. In this case, the employee concerned was in a prescribed calling and eligible for membership of the TWU.
5. The only question remaining was whether the business of carrying fell within the connotation of the term “General Carrier”.
6. The business of the appellants fell clearly within the connotation and it was the industry described in the Schedule.

His Worship so found and, within the principles which we have outlined, for the reasons which he so found, he was correct in so doing. No ground of appeal is made out for those reasons. We would dismiss the appeal.

Order accordingly

Appearances: Mr P R Eaton (of Counsel), by leave, on behalf of the appellants.

Mr J A Long (of Counsel), by leave, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Giovanni Basilio Nicoletti and Guiliana Nicoletti
(Appellants)

and

The Transport Workers’ Union, Industrial Union of Workers, Western Australian Branch
(Respondent)

No. 406 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER J F GREGOR.

30 September 1999.

Order.

THIS matter having come on for hearing before the Full Bench on the 14th day of September 1999, and having heard Mr P R Eaton (of Counsel), by leave, on behalf of the appellants and Mr J A Long (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 30th day of September 1999 wherein it was found that the appeal should be dismissed, it is this day, the 30th day of September 1999, ordered that appeal No 406 of 1999 be and is hereby dismissed.

By the Full Bench

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

FULL BENCH—
Unions—Application for Orders under Section 72A—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers

and

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch
(Applicants).

No. 1996 of 1998.

and

No 2211 of 1998.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER S J KENNER.

22 September 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench. These two applications, under s.72A of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as “the Act”), were heard together by consent.

As appears from the orders made herein and the reasons for decision issued by the Full Bench on 3 May 1999, BHP Iron Ore Pty Limited (hereinafter referred to as “BHP”) was given leave to be heard in relation to both applications pursuant to s.72A(5) of the Act.

Both applicants were given the right to be heard under s.72A(5) of the Act in relation to each other's application.

The applicants will be referred to hereinafter as "the AWU" and "the CMETSWU" respectively.

The Australian Mines and Metals Association (hereinafter referred to as "the AMMA") was given the right to be heard in relation to both applications. The Australian Council of Trade Unions (hereinafter referred to as "the ACTU") was not.

THE APPLICATIONS

The applications are made under s.72A of the Act. We are satisfied, and it was not in issue, that the applicants were organisations of employees, and, therefore, "organisations" as those are defined in s.72A(1) of the Act.

Both applicants made application seeking orders in the following terms respectively—

THE AWU

"(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 sites in Western Australia in the following classifications set out in the *Iron Ore Production and Processing Award* and the BHP Iron Ore Pty Ltd Enterprise Bargaining Agreement 111—

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, Industrial Union of Workers, 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."

THE CMETSWU

(Following amendment by leave in the course of proceedings.)

"1. The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch ("the CMETU") shall have the exclusive right to represent the industrial interests of all employees employed by BHP Iron Ore Pty Ltd ("BHP") and who are employed at or from Nelson Point or Finucane Island in the following classifications set out in the Iron Ore Production and Processing (Mt Newman Mining Company Pty Limited) Award ("the Award") and the BHP Iron Ore Enterprise Bargaining Agreement 1997 ("the Agreement")

AWU – Levels 1 – 4 inclusive

2. The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers (the "AWU") shall not have the right to represent the industrial interests of the employees referred to in paragraph 1 hereof.

3. The CMETU shall have the right to represent the industrial interests of all employees employed by BHP and who are employed at or from Newman in the following classifications set out in the Award and the Agreement

AWU Levels 1 – 4 inclusive
TWU Levels S1 – S3 inclusive
TWU Level LVS1"

S.72A REQUIREMENTS

The orders sought were, therefore, orders within the jurisdiction of the Commission pursuant to s.72A(2) of the Act.

We are satisfied that both applications were published in the Industrial Gazette and that 30 days had expired since the date of publication before the Full Bench commenced to hear these matters. The applications were published in the Gazette on 2 December 1998 (78 WAIG 4555) and 27 January 1999 (79 WAIG 349) respectively.

The Commission has also afforded to those persons with sufficient interest to be heard an opportunity to be heard, they having taken part in the whole of the hearing of this matter, which was an extensive hearing.

We are satisfied and find that the employees, sought to be represented by each applicant in these proceedings, are a particular class or group of employees employed in an enterprise, as "enterprise" is defined in s.72A of the Act. We say that because, and it was not in dispute, BHP carry on and were, at all material times, carrying on a business or part of a business in the Pilbara, being a region of the State of Western Australia. There was, therefore, jurisdiction and power in the Commission to make the orders sought.

ELIGIBILITY RULES

We reproduce hereunder, for convenience, the relevant parts of the eligibility rules of the AWU and the CMETSWU respectively—

AWU RULES

"4. MEMBERSHIP

The Union shall consist of an unlimited number of workers employed or usually employed in any of the following industries or callings—

(a) ...

(b) Road making and road maintenance, other than in the building industry, and the construction, maintenance, conduct and operations of railways (but excluding the conduct and operations of railways by the Western Australian Government Railways Commission), bridges, water and sewerage works.

(c) Metalliferous mining and the production of minerals (including the harvesting of salt, dredging and sluicing work), the transport, storage, loading and unloading, other than the loading and unloading of ships South of the 26th parallel of latitude, of minerals, metals and ores, the production and supplying of electric current, mechanical engineering, the smelting, reducing and refining of ores and metals (including the charcoal iron and steel industry) and the supplying of firewood for mines.

(d) Stone quarrying, crushing and screening.

(e) Surveying of land.

(f) ...

(g) Boring for water.

(h) Destruction of noxious weeds and vegetation, or the treatment of the products thereof and the eradication of pests and vermin.

(i) ...

(j) Formation and maintenance of golf links, bowling greens, tennis courts, and of all gardens, lawns and greens in connection therewith.

(k) Rubber working, the manufacturing of tyres and tubes, including the tyre retreading industry.

(l) ...

(m) ...

(n) The clearing of land for cultivation, sub-division for settlement and formation of aerodromes and parking areas.

(o) The laying of oil, gas, or steam pipe lines and the installation of electric power lines.

(i) Work at immigration reception centres.

..."

CMETSWU RULES

"4.—ELIGIBILITY FOR MEMBERSHIP

1. The Union shall consist of all workers (save as in hereafter provided) employed in timber yards, sawmills, box factories, plywood and veneer mills, particle board factories, timber fibre board factories, turnery and joinery establishments and saw servicing establishments or in the timber industry generally.

...

2. The Union shall also consist of an unlimited number of persons employed, or usually employed in the State

of Western Australia as carpenters and/or joiners (including ships' carpenters and joiners, carpenters employed on jetties, and wharves, dams and bridges) and joinery assemblers and roof tile fixers and bricklayers, stoneworkers, stonemasons, marble masons, stone, marble or slate polishers, stone, marble or slate machinists and stone, marble, or slate sawyers and labourers in the industry of monumental masonry and foreman, sub-foremen or apprentices to or in any of the foregoing trades provided that no foreman tradesman or sub-foreman tradesman (except acting foremen tradesmen or acting sub-foremen tradesmen) who is eligible for membership of The Foremen (Government) Industrial Union of Workers, W.A. as at the 11th day of December 1986 shall be eligible for membership of the Union

3. The Union shall also admit to membership any person who is employed, or usually employed in the State of Western Australia including all islands bounding the whole coastline of the State in any of the following capacities—

   Engine drivers, steam boiler and gas producer firemen, trimmers or fuelmen or tour guides in power houses, engine cleaners, greasers, boiler cleaners, crane drivers, dynamo attendants in power houses, stationary motor drivers, electric power sub-station attendants, power house switchboard attendants, electric locomotive drivers, railway shunters, locomotive observers, railway car and wagon examiners (not being tradesmen) and railway messengers. Provided that, in respect of the vocations referred to in paragraph 3 hereof, employees of the Western Australian Government Railways Commission and persons eligible for membership of the Coal Miners Industrial Union of Workers of Western Australia employed in the coal mining industry within the State of Western Australia shall not be eligible for membership of the Union.

4. ...
5. ..."

WITNESSES

A number of witness statements were filed on behalf of all persons participating in these proceedings, save and except for the AMMA. Those witness statements were filed pursuant to orders and directions made on 21 April 1999 by the Full Bench where, inter alia, all written statements and answering witness statements were directed to be filed and to stand if admitted as evidence-in-chief of those witnesses. Further, if witnesses were to be cross-examined, notice was to be given.

In the case of the applicant AWU, those witnesses who were called were Mr Timothy Patrick Daly, the Secretary of the applicant AWU and of its federal branch in Western Australia, Mr Michael Daniel Llewellyn, the Assistant Secretary, Mr Darren George Lee and Mr Paul Leonard Asplin, an organiser for the AWU in the Pilbara, all of whom attended to be cross-examined and were cross-examined.

For the CMETSWU, Mr Gary Norman Wood, the Secretary of the WA CFMEU Mining and Energy Division (the federal body) and the Vice-President of the applicant CMETSWU, was called, as was an organiser and former official of the AWU, Mr Donald Graham Bartlem (now a CMETSWU industrial officer), and Mr Geoffrey James Gordon, a former member of the AWU National Executive. There was also evidence, in particular, from Mr Michael Peter Hopkinson, a former AWU delegate and convenor and now a CMETSWU convenor and Mr Daniel Joseph Connors and Mr Kent Charles Lee, who were in a similar situation. There was also evidence from a large number of employees of BHP in the Pilbara who have left the AWU and purported to join the CMETSWU, a large number of whom, but not all, were made available for cross-examination and were in fact cross-examined. All of these were mine workers employed in mine worker classifications.

There was also evidence by written statement from a number of witnesses on behalf of BHP, including Mr Michael Patrick Wheeler, its current Manager Employee Relations, Mr Keith Ritchie, the Manager Human Resources at Port Hedland, Mr Dick Keddie, the Manager Human Resources at Newman, Mr Stuart Hayes, an Industrial Relations Officer and Superintendent Human Resources at Port Hedland, Mr Jim Harris, the Port Maintenance Manager at Port Hedland and a BHP employee for 28 years, Mr Paul Smith, the Manager Finance and Administration Operations at Port Hedland, Mr Geoffrey Alan Knuckey, the Maintenance Superintendent at Mt Newman, and only one of whom, Ms Joneen Priest, an Employee Relations Officer, gave oral evidence.

All of the other written statements for BHP stood as the evidence-in-chief of witnesses, pursuant to the orders of the Commission made on 21 April 1999, and were not cross-examined upon.

Mr Schapper, for the CMETSWU, made submissions concerning witnesses who were not cross-examined upon, but whom he said were put on notice, at least in some cases, by statements of witnesses for another party or participant. We would observe that there is a great deal of evidence of BHP officers uncontroverted by statement or cross-examination which we have adverted to. Ms Priest was cross-examined and we have commented upon her evidence. Mr Schapper elected not to rely on the evidence of a number of witnesses whom he did not call, after being told by the Full Bench that whether he made available or called witnesses or not to give viva voce evidence was a matter for him.

NAMES AND ADDRESSES OF AWU MEMBERS

The Full Bench upheld an objection to the tender of a document by the AWU in the re-examination of Mr Llewellyn as being incomplete. In any event, the Full Bench drew attention to the decision in <u>ALHMWU v WAHHA and Others (1995) 75 WAIG 1801 (FB)</u>.

HISTORY AND FACTS

BHP is a company which, virtually since the commencement of the iron ore industry mining operations in this State, is and has been the employer of all the employees in the predecessor classifications and in the classifications, the subject of these applications. The BHP iron ore operations, the subject of these applications, consist of a mining operation at Mt Whaleback, at Mara Maba and at Mt Newman in this State. There is also a number of satellite ore bodies located around Newman where the operations are conducted by contractors to BHP.

The application by the AWU seeks, it asserts, to entrench by order of the Commission, a state of industrial and legal affairs which has existed for many decades, in that the AWU has been the sole union with representation rights in relation to the group of employees engaged in classifications set out in the application, namely AWU level 1 to AWU level 4 mine workers.

It seems to have been recognised, for the purposes of these proceedings, that BHP is engaged in the metalliferous mining industry and that these persons are employed in that industry.

The AWU is a state registered organisation. There is also a federal registered AWU organisation called "The Australian Workers' Union". There is a state branch of the federally registered organisation also in relation to which there is in force a s.71 order of this Commission, making such branch the counterpart federal body of the AWU.

Except at Newman, the CMETSWU seeks to exclude the AWU from representation of these employees. The CMETSWU is a state registered organisation, and there is a federal registered organisation called the Construction, Forestry, Mining and Energy Union (hereinafter referred to as "the CFMEU"). However, there is no s.71 order whereby the state branch in this State of the federal organisation is a counterpart federal body of the state registered organisation, the second applicant in these proceedings.

The constitutional coverage of the AWU enables the AWU to cover employees in mining and, in particular, involved in processing, shiploading, warehousing, maintenance and town services, trades assistants, laboratory employees, warehouse employees, and railway maintenance employees, except those operating electric power shovels and cranes. (There is a no-demarcation agreement at Mt Newman itself.)

Clause 4(c) of the rules of the AWU demonstrates the wide constitutional coverage in the metalliferous mining industry. Clause 4(j) refers to gardeners.

The CMETSWU's coverage, as was that of its predecessors, is of employees involved with railway engines, trains, driving electric power shovels and cranes, operating power houses, and building workers in the iron ore production and processing industry since the industry began in this State, subject to the no-demarcation agreement in mining operations at Mt Newman itself.

The CMETSWU's representational role has been a comparatively minor one in BHP operations over the years, whereas the AWU's representational role has, on the evidence, always been a major one. This has been the case since the company's operations commenced over 30 years ago.

There is and has been also a Mining Unions Association (hereinafter referred to as "the MUA") to which the AWU, The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch (hereinafter referred to as "the AFMEPKIU"), the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (hereinafter referred to as "the TWU") and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch (hereinafter referred to as "the CEPU") belong. These are the unions who cover employees employed by BHP. The CMETSWU has always refused to belong to the MUA.

As a matter of fact, the BHP iron ore operations, for the purposes of these proceedings, take place at Mt Newman, where the actual mining occurs, as we have said, and at Finucane Island and Nelson Point which are both at Port Hedland. The latter two are the locations of the ports and port facilities.

At Mt Newman, there is a no-demarcation in relation to the coverage of the TWU, the CMETSWU or the AWU.

The AWU classification structure has been set with various levels attaching to each work classification. These classifications relate to the mine site, the plant areas and the port operations. Multi-skilling has spread across all areas of the operation of BHP. The AWU levels 1, 2, 3 and 4 which are contained in the BHP Iron Ore Pty Limited Enterprise Bargaining Agreement III of 1997 are classifications which cover all of the earlier award classifications always covered by the AWU. All of the classifications cover the substantial majority of the 1,500 employees covered by that agreement.

The multi-skilling process was able to be executed effectively because only one union was involved in the negotiations, namely the AWU, according to the evidence. Certainly, the process would, for that reason, be more simple.

Mr Llewellyn's evidence was to that effect (uncontradicted) and was not challenged, and, indeed, was substantially corroborated by the witnesses for BHP. We are satisfied that that is the case and so find.

There was reference to some challenge to this demarcation in the past. The most significant, for the purposes of these applications, was the dispute about the coverage of hydraulic face shovels and excavators in the early 1990's between the two applicant organisations.

Gregor C awarded dual coverage to them (see WMC Limited v AWU 69 WAIG 1110).

Those usual lines of demarcation have clearly existed for some time. There is no evidence that areas now disputed by the CMETSWU, including the crushers (which include the beneficiation plant), maintenance, laboratory, warehouse and port operations have ever been covered by the CMETSWU.

History – Awards, Agreements and Coverage

The award itself forms part of the historical patterns of coverage which the Full Bench was invited to take account of. The full name of the award is the Iron Ore Production and Processing (Mt Newman Mining Company Pty Limited) Award 1997 (hereinafter referred to as "the award"). An award was issued in the 1930's with the AWU and a mining company as parties. The AWU was the first union active in the iron ore industry in this State, as was asserted, and as we find. The Federated Engine Drivers' and Firemen's Union of Western Australia (hereinafter referred to as "the FEDFU"), from which the CMETSWU formed, did not become a party until December 1945. That assertion was not disputed.

The AWU remained a party to the award until 1967 which related to the Pilbara and included the FEDFU, amongst other parties.

The Iron Ore Production and Processing (Mt Newman Mining Pty Limited) Agreement 1974 was made and that provided that the AWU was the appropriate union if it was a party to the 1974 agreement. The AWU was a party to that agreement, and was eligible to enrol the respective employees under its eligibility rule.

In 1974, there was a delineation by the Commission between the AWU and the TWU of coverage at Mt Newman Mining Pty Limited by the Commission and at three other operations in the Pilbara (see AWU v TWU (1975) 55 WAIG 1469-1476).

There is further history of this matter in the case of the award, which did not include the union membership clause which appeared in the 1974 agreement, but in relation to which the AWU and the TWU shared coverage.

Further enterprise bargaining agreements were registered in 1993 and 1995.

The demarcation of union coverage of BHP sites was contained in the 1984 award which is named the Iron Ore Production and Processing (Mt Newman Mining Company Limited) Award No A 29 of 1984 and the enterprise bargaining agreements of 1993 and 1995 to which the AWU was a party. These established a clear structure for union representation derived from the layout and wording of wages and classification provisions of the award of 1984 and the enterprise bargaining agreement. Clause 37 of the BHP Iron Ore Limited Agreement (1974) reinforced the position of the AWU, and this was continued in all of the enterprise bargaining agreements.

BHP Operations

The BHP operations to which we have referred at Mt Newman, where the mine is, are linked by a privately owned railway line to the ports for the operation which are at Nelson Point and Finucane Island at Port Hedland. This is about 450 kilometres by road from Mt Newman. The iron ore is mined and crushed at the mine sites and then railed to the coast for further processing prior to the loading of the ore onto ships. This process includes blending to bring the ore to a saleable standard. At the mine, drilling and blasting of the ore occurs. Face shovels and loaders remove the ore then and it is loaded into haul trucks. These cart the ore to the crushers. There is also a beneficiation plant where impurities are removed from the ore. At the mine, there is also a warehouse, a laboratory, and maintenance functions.

At the mine a variety of equipment is used, including tract dozers, rubber tyred dozers, graders and scrapers for road maintenance, blast hole drills and loaders. The operation of all this equipment has been for some years performed by members of the AWU under AWU coverage. The employees concerned are covered by classifications in the agreement.

The face shovels at the mine at Mt Newman have been operated by CMETSWU members and the haul trucks, however, by TWU members.

The Crusher and Concentrator

This area has always been operated by AWU members and covered exclusively by the AWU. Ore is there crushed and stock piled and impurities separated from it. The operators use small clean-up equipment such as small trucks, front end loaders and backhoes. In addition, the crushing plant is controlled by the operators.

The only other unions involved here are the Amalgamated Metal Workers and Shipwrights Union of Western Australia (hereinafter referred to as "the AMWU") covering fitters and welders, and the CEPU covering electricians. The AWU has covered and does cover trade assistants.

The Warehouse

The warehouse exists for the storage and supply of parts and equipment at the site. This is and has been AWU covered and the equipment used includes forklifts and HIAB trucks.

The Laboratory

The work in the laboratory, which has always been covered by the AWU, involves procuring and testing samples of ore for purity.

Maintenance

The AWU covers and has always covered trade assistants in this area and has covered maintenance operators. It now has replaced the TWU in the coverage of mobile servicemen.

Crane operations, however, are covered by the CMETSWU.

The Ports – Nelson Point and Finucane Island

There is no TWU coverage at the port operations of BHP. The AWU has performed and continues to perform the work in operations at the port which have been performed by the AWU and covered by the AWU. They also perform the same duties as are performed in the plant at the mine. They also perform duties which are essentially identical to those performed at the mine. Similarly, the same observations can be made about the warehouse and the laboratory.

Operations at the port involving cranes are under the cover of the CMETSWU.

In rail operations, the train drivers are covered by the CMETSWU, but rail maintenance is carried out by AWU members and covered by the AWU. These latter employees operate track maintenance, plant and equipment and in organising gangs located at Mt Newman, Port Hedland and Redmont respectively.

The AWU and the CMETSWU

Structure – Representation—Members Leaving the AWU

The unions representing the employees of BHP, namely the AWU, CMETSWU, TWU, AMWU and CEPU, at all of the three sites, operate through convenors, deputy convenors and shop stewards at each site. Because of the resignation from the AWU of a large number of employees, commencing in June 1998 which we will deal with in detail later in these reasons, there is purported dual representation with the CMETSWU of persons at Nelson Point and Finucane Island. That is, employees formerly members of the AWU who now purport to be members of the applicant CMETSWU, are purportedly represented by former shop stewards of the AWU and those who are and were members of the CMETSWU are represented by their own convenors and shop stewards.

The AWU has had an official allocated to BHP employees in the Pilbara since at least the early 1980's. The AWU have an office in Port Hedland, where an office employee also works, and where an organiser, Mr Paul Asplin, who gave evidence in these proceedings, is currently based. He has a four wheel drive vehicle which enables him to drive around this area.

There have been a number of officials over the years. The two major officials over those years have been Mr Bruce Wilson and Mr Donald Graham Bartlem. Mr Bartlem was a major figure in the events from which these applications emanated, and something should be said about him and his role.

Mr Bartlem was employed by the AMWU from 1981 until 1994 as an organiser in the Pilbara, including in the iron ore industry. He stood for office as secretary of the AMWU and was defeated. He left the AMWU. He worked for the AWU for five months in 1994. From 14 December 1994 to 11 August 1998 he was employed by the AWU, having been appointed by the federal organisation as national metalliferous mining co-ordinator with responsibilities for mining operations during part of this time. Mr Bartlem had represented the BHP employees in, inter alia, the 1997 enterprise bargaining agreement negotiations, chairing the meetings of the single bargaining unit. He had negotiated multi-skilling provisions and a no strike clause, inter alia. Mr Bartlem has been employed by the CMEWTSU as an industrial officer since August 1998.

In 1997, Mr Timothy Patrick Daly was elected secretary of the state AWU and of the state branch of the federal organisation. Mr Bartlem had contemplated standing against him, but, in the end, decided not to because, on the evidence of Mr Geoffrey James Gordon and Mr Michael Peter Hopkinson, he did not have "the numbers." He subsequently stood for election to the National Executive on the same ticket as Mr Terry Muscat who was elected national secretary and others, of whom he was later critical. Mr Bartlem was not, however, elected to office.

Mr Bartlem's evidence was that by April 1998, a number of concerns had arisen amongst AWU delegates employed by BHP at Nelson Point, Finucane Island and Newman. He said, in evidence, that over the period of 1997 and the early part of 1998, AWU delegates employed by BHP at Nelson Point, Finucane Island and Newman expressed grave doubts as to the AWU's ability to oppose BHP's intention to change the status quo by utilising contractors in place of the permanent workforce, by leaving the award system, and by substituting workplace agreements for its workforce, for the award system and award based enterprise bargaining agreements. BHP's attitude to its employees, he said, was changing at this time and this was becoming apparent in the workforce. This view was expressed by various ex-AWU members called on behalf of the CMETSWU in these proceedings, including Mr Daniel Joseph Connors and Mr Michael Peter Hopkinson. The latter two were, on the evidence, persons of some influence.

Mr Bartlem also expressed, as did Mr Gordon in his evidence, that there was faction fighting in the national organisation, the AWU. The evidence was, also, however, that this has now ended. Mr Bartlem also said that there was uneasiness caused by various reports as to the AWU's lack of funds, lack of service, drastically falling membership, falling moral, and financial mismanagement.

It is fair to say that there was no evidence of financial mismanagement, in recent times, in the state AWU nor the federal AWU in this State. However, there was some reference in evidence to financial mismanagement some years ago, and which was of no real relevance to contemporary events.

These reports, according to Mr Bartlem's evidence, were contained in the media and in reports back to members from delegates from the Pilbara to the various committees.

In April 1998, there was "a sense of crisis", Mr Bartlem said. He said that the union was operating near the maximum of its $150,000 overdraft facility; there was a problem, also, when Mr Daly refused to put a notice in the paper upon the death of the wife of Mr Jim Ahern, an ex-AWU mining convenor. Mr Bartlem's evidence was that he was told that Mr Daly refused to do this because the union could not afford the cost of inserting the advertisement. Mr Daly denied that this was the reason, but admitted in evidence that the failure to do so was an error of judgment.

In any event, as a matter of fact, the failure to insert the advertisement had nothing to do with the AWU's finances and more to do with the representation that its financial position was perilous.

Mr Daly and Mr Llewellyn denied that there was any crisis or financial difficulty in the AWU at the time, denied a lack of service, and denied other allegations and criticism. Certainly, there is no evidence of infighting in recent years in the applicant AWU, the state organisation.

On 5 April 1998, only a few months after Mr Daly was elected to office as secretary of the state organisation and the WA branch of the federal organisation, Mr Daly and Mr Bartlem met in Mr Daly's office at Mr Bartlem's request. There was a discussion about what Mr Bartlem said were problems in the AWU. Mr Bartlem suggested to Mr Daly that he should stand down and that he, Mr Bartlem, should be "appointed" as secretary. Mr Bartlem put this on the basis that Mr Daly was not capable of running the organisation. Mr Bartlem also told Mr Daly that he would be looking at other options to ensure that the membership maintained representation, a position he said was supported by the members, who, failing agreement, would also be seeking similar options. This, in our opinion, was open to the interpretation that there was being presaged the sort of events which later occurred.

Next day, Mr Bartlem, as a result of a conversation with Mr Asplin, the AWU organiser, concluded that Mr Daly had revealed the contents of this conversation, which he said he had thought was one between Mr Daly and himself, to others.

As a result, Mr Bartlem forwarded a memorandum to all WA organisers, officials, executive members and officers dated 6 May 1998. That is annexed to his affidavit (exhibit CMEU 3, Annexure 1(a)). Inter alia, in that memorandum, Mr Bartlem alleged that the AWU was considered irrelevant and compliant by employer organisations, employers, other unions and political groups. It confirmed his allegation that the AWU had no direction or leadership and stumbled from issue to issue without industrial or political influence. Inter alia, he confirmed that he advised Mr Daly and Mr Llewellyn that Mr Daly should resign as branch secretary and that Mr Bartlem should be appointed to the position. Significantly, Mr Bartlem confirmed that he would be looking at other options if this could not be amicably agreed and that the Pilbara workforce supported the position which he took. This was plainly a threat to Mr Daly and the AWU, and one which was carried out. There was, of course, no evidence that, at that time, the Pilbara workforce supported that position.

On 8 May 1998, Mr Daly convened a meeting of all staff and officials to discuss the contents of this memorandum. There was a debate during which Mr Daly said that he would not resign. At the conclusion of the meeting both Mr Daly and Mr Bartlem received phone calls from the media (which was reported) who indicated that they had a copy of his memorandum. According to Mr Bartlem, after Mr Daly commented to the media on the memorandum which had been leaked to them, allegedly from the AWU national office, Mr Bartlem gave an interview to the media in the course of which he indicated, to put it generally, that the AWU was in a great deal of difficulty.

On 8 May 1998, Mr Muscat wrote to Mr Bartlem saying that he would be deemed to have abandoned his employment unless he was in Sydney to commence work at 9.00 am on 18 May 1998.

On Monday, 11 May 1998, Mr Bartlem received a facsimile communication from the national secretary of the AWU, Mr Terry Muscat, dated 8 May 1998 directing him to relocate to Sydney and commence work out of the Redfern office on Monday, 11 May 1998. On that same day, Mr Bartlem sent a facsimile to Mr Muscat advising that he would not be in Sydney on 11 May 1998.

On 13 May 1998, Mr Muscat advised a number of companies, including BHP, that Mr Bartlem had been relocated to Sydney and that all future correspondence was to be directed to the national secretary. He also advised that Mr Asplin would continue to serve its members.

On 17 May 1998, Mr Asplin wrote a letter to Mr Daly which he said he had been prevailed upon to write by Mr Bartlem (something which Mr Bartlem denied), in which Mr Asplin was laudatory of Mr Bartlem and disagreed with the fact that Mr Bartlem would no longer play an active role in day to day issues.

On 15 May 1998, Mr Bartlem wrote back saying that he would not.

On 11, 12 and 13 May 1998, facsimiles were sent to Mr Muscat indicating that the BHP membership at the three sites had grave concerns for the future of the AWU. These were communications from Mr Bruce Gibson, president of the Newman section committee, Mr Hopkinson, an AWU convenor at Port Hedland, and from Mr Gordon, a member of the National Executive and a member of the AWU at Finucane Island.

On 20 and 21 May 1998, there were mass meetings of AWU members at Newman, Nelson Point and Finucane Island and resolutions were carried directing section committees to seek "alternative avenues" to the AWU. There were substantial numbers at these meetings. At these meetings, there was also a resolution passed (see exhibit CMEU 3, annexure 5) that no membership fees for the year 1998 to 1999 would be forwarded to the branch.

The resolutions also advised that the membership would not accept any alternative to Mr Bartlem as the representative with direct responsibilities for all matters relating to BHP and condemned the AWU national secretary for advising BHP of a change in representation without any consultation with either the delegates or the membership.

Further, the membership resolved, as was advised by Mr Hopkinson, Mr Gibson and Mr Gordon, that the only possibility of reversing the decline of the WA branch was for Mr Bartlem to be appointed to the position of state secretary of the AWU.

A mass meeting at Cargill Salt carried a similar resolution on 21 May 1998.

It is fair to observe that there was no evidence that the remainder of the members of the AWU in this State or anyone on their behalf has communicated or expressed dissatisfaction or significant dissatisfaction with Mr Daly, Mr Llewellyn or with the AWU's performance.

Between 4 and 9 June 1998, the AWU's solicitors, Hammond Worthington Prevost, wrote to all members of the section committees at each of the three sites advising that the withholding of membership fees, payable under periodic remittance arrangements, was threatening the financial viability of their client, the AWU, and threatening court action.

On 10 June 1998, by a letter faxed to Port Hedland, Mr Bartlem's employment with the AWU was terminated effective immediately (see exhibit CMEU 3, annexure 7, Mr Bartlem's affidavit). The letter was from the national secretary of the union, Mr Terry Muscat and advised, inter alia, that the termination was effected because of Mr Bartlem's failure to work co-operatively with Mr Daly and the WA branch of the union, his dismissive treatment of Mr Muscat and his directions, damaging statements to the press and wilful disregard and disobedience of lawful directions.

AWU members employed by BHP immediately started resigning from the AWU as they became aware of the termination, as Mr Bartlem's evidence revealed. In addition, this is corroborated by the date of a large number of the resignations and by their asserting that the reason was Mr Bartlem's dismissal. The bulk of the resignations at Nelson Point occurred on 10 and 11 June 1998. They occurred at Finucane Island on 27 and 28 June 1998.

According to Mr Darren Lee, however, the resignations were obtained in order to threaten Mr Daly and were not, at first, intended to be forwarded to the AWU offices.

On 14 June 1998, Mr Hopkinson, supported by Mr Gibson, the AWU convenor at Newman, Mr Gordon, the AWU delegate at Finucane Island (and, at one time, a member of the National Executive of the AWU), and Mr Bruce Cotterill, the AWU's Cargill Salt delegate, in a newsletter to AWU members, referred to the resignations which had occurred in support of Mr Bartlem and advised that AWU members remained threatened if Mr Bartlem remained sacked.

There was a meeting of the National Executive of the AWU in late June which received reports from Mr Hopkinson and from Mr Daniel Connors. Both travelled to Sydney twice during that week to try and resolve these matters. Mr Bartlem attended the National Executive Meeting on two occasions, and the National Executive agreed to reinstate him and make up payment of wages after about three weeks.

The National Executive also authorised two members of the National Executive, Mr Kevin Maher and Mr Bob Sneath, to go to the Pilbara to meet the members, discuss matters and report back to the National Administration Committee. This they did.

A meeting took place on 30 June 1998 in Port Hedland, attended by Mr Maher, Mr Sneath and about sixty delegates representing AWU members from Nelson Point, Finucane Island, Newman and Cargill Salt.

The recommendation of Mr Sneath and Mr Maher in their report was that a separate division be put in place in the Pilbara, it having been made clear to Mr Sneath and Mr Maher, that if it was not done, then the majority of members in the Pilbara would walk away from the AWU. This was also to help overcome communication problems between north and south. The division was to be autonomous in all respects, including funding of costs associated with employment of organisers, administration staff and support services.

Mr Bartlem prepared a financial projection of the viability of such an organisation on the basis of there being an increase from 800 members to 1500 members. Mr Daly, in evidence, doubted forcefully that it was possible to achieve these numbers.

The National Administration Committee, however, decided to create a sub-branch within the WA branch federally and, hence, the state officials would still retain responsibility for the sub-branch.

The WA Branch Executive rejected the Sneath/Maher proposal for a separate north west division. Mr Daly's evidence was that the proposal for a separate division was rejected because the state Executive did not wish to be financially responsible for it. We accept that evidence.

The solicitors for the national AWU, Maurice Blackburn and Co, assisted to draft a proposal which was circulated to everyone. This proposal was rejected by a section committee meeting at Newman on the morning of 27 July 1998, which also proposed that the AWU workers should join another union such as the CMETSWU or the TWU.

Mr Bartlem, on all of the evidence, advised the members that they should give the AWU one more week to try to resolve the impasse.

There was a discussion, too, between Mr Bartlem and Mr Michael Patrick Wheeler of BHP in which Mr Bartlem alleged that Mr Wheeler said to him that he should take them to the TWU or the Metalworkers, but not to the CMETSWU, which the company "would not cop" under any circumstances. This was denied by Mr Wheeler in his evidence.

In any event, it was made quite clear throughout these proceedings that BHP wished coverage to remain with the AWU so that the existing award and agreement structure remained in place.

A mass meeting occurred at Newman on 27 July 1998 which rejected the concept of a "Pilbara District" as proposed by Maurice Blackburn and Co and resolved that if their position was not satisfactorily resolved by 4 August 1998, they would refund any monies held by the section committee to enable members and former members to become financial with an alternate organisation (see attachment 13). This resolution was faxed to the national office of the AWU.

On 4 August 1998, a meeting to discuss these problems was held by the National Administration Committee of the AWU.

We should add that, subsequently, on legal advice, an injunction was obtained to "freeze" the monies in all the section accounts. Mr Daly's clear and unrefuted evidence was that this action was taken on legal advice. We so find. (It was, however, an action which annoyed some members of the AWU who had purportedly joined the CMETSWU.)

Mr Bartlem was asked by delegates to make contact with the national President of the CFMEU, Mr Tony Maher, while in Sydney if it became apparent that the National Administration Committee was not going to support the creation of a separate Pilbara division. He met briefly with Mr John Maitland, the Secretary of the national CFMEU, to arrange a meeting between them on 5 August 1998, if that were required.

The National Administration Committee of the AWU decided to implement the sub-branch proposal which had not been supported by the mass meeting. Mr Bartlem informed them that he would not support such a proposal. He said that he would consider his own position over the next few days and, if he still felt the same, would resign.

Mr Bartlem communicated with the Pilbara delegates and Mr Asplin to advise them of the outcome of the National Administration Committee meeting. It was agreed that he should meet with the CMETSWU to indicate to that union the desire of the former AWU members to meet them. He had a meeting with Mr Maitland and Mr Maher, President of the CFMEU, on the morning of 5 August 1998.

Mr Daly held mass meetings at three sites on 6 and 7 August 1998 to report back on the situation as discussed in Sydney. Mr Bartlem alleged that these meetings were poorly attended because Mr Daly had made no contact with any of the delegates. Mr Daly alleged in evidence that the convenors refused to allow him to make contact with the members.

On 7 August 1998, Mr Bartlem gave Mr Muscat his notice of resignation. On 10 August 1998, Mr Bartlem attended a mass meeting to report to workers at Finucane Island, Nelson Point and Cargill Salt. Mr Gary Wood of the CMETSWU addressed meetings on 11 August 1998 at Finucane Island and Nelson Point. An overwhelming majority of employees attended. Mr Bartlem left the meeting and then Mr Wood addressed the employees. After that, the employees had a discussion amongst themselves. They voted to join the CMETSWU.

On 11 August 1998, Mr Bartlem received notice of termination of his employment from Mr Sam Wood of the national AWU.

On 13 August 1998, Mr Bartlem met with officials of the CMETSWU who put an employment proposal to him and he commenced work with the federal CFMEU as an industrial officer on 17 August 1998. Mass meetings at Finucane Island and Nelson Point were advised by Mr Wood on 11 August 1998 that they did not have membership with the CMETSWU.

The ACTU entered into the matter and Mr Tony Morrison was appointed to discuss matters with officials and members and report to the ACTU. He did so.

On 25 February 1999, the ACTU issued its decision—

"Principles—

ACTU Executive supports the following principles for resolving the coverage dispute at BHP Iron Ore Operations.

1. In relation to the re-negotiation of BHP Iron Ore enterprise agreements which expire in December 1999, and any other company/site wide negotiations, the ACTU will assist as facilitator/co-ordinator of appropriate Single Bargaining Unit(s).
2. The ACTU will undertake discussions with BHP Iron Ore unions and Delegate Site Committees to determine the most effective arrangements to develop the SBU(s) outlined above.
3. All unions should maintain the adjournment of their Sec.72A applications. In the event that any Sec.72A application proceeds the ACTU will oppose such applications.
4. That BHP recognise the operation and principles of *The Industrial Relations Agreement* without discrimination based on union membership.
5. The ACTU will be available to provide assistance to resolve any problems that arise in relation to these arrangements.
6. That the following resolution of the above matters by BHP unions, and in consultation Delegate Site Committee, the ACTU seek a meeting with BHP Iron Ore management to seek their agreement to the above industrial principles."

The great majority of resignations from the AWU did occur on 10 June 1998 and in the following two weeks. The majority of members employed at BHP did resign their membership during the period June to August 1998. For about two months, until joining the CMETSWU on 11 August 1998, the workers were not members of any union whilst attempting to reconcile their differences with the AWU.

It is quite clear, on the evidence, that about 80 odd members of the AWU remain at the three sites. It is quite clear, however, that over 300 people purported to join the CMETSWU.

Out of those, about 115 have not paid their full fee or paid any fee and it is a clear inference from that that they have not committed themselves to the CMETSWU. That provides some corroboration for the assertion from Mr Llewellyn and Mr Daly in evidence that, if the Commission ordered it, a number of members would return to the AWU.

There was evidence from a number of ex-AWU members that the AWU was in financial difficulty and, in any event, they had either been looking for the opportunity for some time to resign or, for any other reason, would not return to the AWU, no matter what the Commission ordered. In fact, a number of them said that they would prefer not to be members of any union.

There were, no doubt, rumours being circulated (it was alleged by Mr Bartlem, but he denies it), that the AWU would be sold-up before Christmas 1998 because of its financial difficulties.

It is also quite clear, and we find, that the financial position of the AWU (the applicant) was never as drastic as it was alleged to have been, but that it can readily draw upon support by the federal AWU, and that its membership and finances render it a quite viable union. The AWU financial statements, the evidence of Mr Daly and Mr Llewellyn and the making available by the federal union of Mr Bartlem's services in the Pilbara support such a finding.

It is also fair to say, and we find, that the evidence was that the majority of members who left the AWU went to the TWU at Newman following two convenors who were well respected, one being Mr Bruce Gibson.

The applicant CMETSWU, however, is a shell as Mr Wood confirmed. It does not have its own employees or organisers and relies on the federal organisation altogether. It owns no property and its assets consisted of $211.00 as at the date of hearing.

The AWU state applicant, on the other hand, has a quantity of assets and property in its own name. It does employ organisers in its own right. It can receive assistance from the federal organisation, as instanced by the deployment of Mr Bartlem as national co-ordinator.

We now turn to a number of matters which arise from the evidence of those persons who are former AWU members and are now members of the CMETSWU.

We would observe that BHP has not accepted their membership of the CMETSWU or that the CMETSWU has the right to represent BHP employees in matters pertaining to BHP where the AWU has coverage. Indeed, Mr Bartlem has been advised that entries by him onto the site, in his capacity as CMETSWU industrial officer, are unauthorised and there have been a number of unauthorised CMETSWU meetings conducted by ex-AWU members which have resulted in disruption and the disciplining of those persons. Nonetheless, they have remained outside the AWU to the date of hearing, about twelve months since the upheaval.

One complaint against the AWU is that it is ill equipped, by attitude or otherwise, to deal with a change in attitudes to its employees by BHP. BHP says that its own attitude has not changed, and that, in terms of remuneration, employees are better off than they were some years ago, that it is the only company in the iron ore industry in the Pilbara which remains within the award and award-based EBA system, that it thus far has evinced no intention to do otherwise, and that its notice opting to withdraw from the current EBA is something that it is entitled to do, just as it is entitled to give 90 day notices contracting areas of its work to independent contractors (which have the effect of creating redundancies). BHP, in evidence, laid emphasis on the fact that it, of all the iron ore producers in the Pilbara, was the only one which remained within the award and award-based EBA system.

It was conceded, in evidence, that the proposed new EBA would not seem to differ a great deal from the current EBA, except that there would not be paid attendances for delegates and convenors to attend union meetings.

Further, the evidence from a number of ex-AWU witnesses was that the service provided was no less than that of other unions. The CMETSWU, for example, does not have a resident organiser in the Pilbara. There was evidence from BHP witnesses, unchallenged, that the AWU's service was not of an inferior standard to the service given by other unions. Ex-AWU members, who gave evidence, said that they had hoped that the CMETSWU would do a great deal more than the AWU. However, they were unable to test it as against the AWU, because there was no recognition of the CMETSWU, and it was unable to represent employees on site.

The evidence of the former members, was that the system of convenors and delegates works well in dealing with on site matters. It was further said in evidence that Mr Bartlem, as an official of the AWU, was either very able or satisfactory in what he did in negotiations. We accept that evidence and so find.

There are facilities shared by the organisations of employees at Newman, including the AWU. The CMETSWU have their own separate premises there, although they have no organiser resident in the Pilbara.

The evidence that Mr Bartlem was able to competently perform his duties for four years, which was the overwhelming evidence, contradicts the evidence that the AWU was incapable of having the right approach to dealing with BHP with the perceived new attitude of BHP. It is noteworthy that these complaints have surfaced on the record with any real profile only after or about the time Mr Bartlem commenced to require Mr Daly to resign. It is also significant that Mr Bartlem, on his own evidence, and the evidence of Mr Gordon and Mr Hopkinson, was pushing the separation in the Pilbara.

It is a pity that that proposal, which was a reasonable proposal, was not accepted.

Rumours of the unfinanciality of the AWU were, of course, ill founded and it is the case that some of these were attributed in evidence to Mr Bartlem.

We now turn to the question of the CMETSWU's "taking over" members of the AWU.

It is quite clear that the CMETSWU has either not been concerned by or has merely given lip service to the eligibility rule of the CMETSWU.

It has not been seriously suggested that laboratory workers, warehouse workers, etc, can be covered by the CMETSWU under its eligibility rule. It is quite clear that persons have merely been enrolled in the CMETSWU as members with little or no concern for the eligibility rule. The reference to gardeners being eligible for membership because they drive lawn mowers is some illustration of that.

However, it is quite clear that the recruitment was arranged by Mr Bartlem with the national secretary, Mr Maitland, not with any state organisation and it is no coincidence, it is fair to infer, that Mr Bartlem, shortly after, became an employee of the CFMEU and remains one.

There is also evidence from BHP that it is afraid that, if the CMETSWU application is granted, that the existing structure built up over the years will be dismantled and fresh negotiations will occur; that there will already have been disruption and will continue to be disruption as a result, if the existing longstanding coverage such as this, which supports agreements and awards, is affected by any change in coverage; that the CMETSWU is more rigid and not able to come to terms with such matters as multi-skilling as the AWU; that already a great deal of disruption has taken place because of the CMETSWU purporting to accept the ex-AWU members into their membership and purporting to represent them.

We accept that the dismantling of a long standing set of agreements and awards would occur if existing industrial coverage ceased. That would be an inevitable consequence. It would also bring with it, inevitably, serious uncertainty and perhaps disruption. We accept that a great deal of disruption has taken place already.

That there was no evidence of any disapproval of the AWU of any significance, except that which is contemporaneous with Mr Bartlem's disaffection with Mr Daly occupying the office of secretary and what occurred subsequently when Mr Bartlem led members out of the AWU into the CMETSWU, we also find.

We have considered all of the oral and written evidence, but most significantly that of Ms Priest, Mr Llewellyn, Mr Daly, Mr Bartlem, Mr Wood, Mr Hopkinson and Mr Gordon and correspondence and documents including the ACTU principles.

We find that there is no or no sufficient evidence, which we accept, that BHP's industrial attitudes are changing or that they are changing to such an extent as to justify the view of ex-AWU members that the AWU is incapable of properly representing them. We find that there is no evidence that the AWU was or is in financial difficulty or such financial difficulty as to render it unable to effectively represent its members. The evidence of Mr Daly and Mr Llewellyn, which we accept, and the financial statements are to that effect. We find that it is less dependent on its federal body, by far, than the applicant CMETSWU, which is a shell with no monies or assets to speak of and no employees. We find, too, that, at least in the last four years before these events, the AWU was not said in any substantial way that the AWU was ineffective or, if there was, there is little or no evidence of it.

We find that quite false rumours were spread about the financial situation of the AWU which influenced some members to leave the AWU, on the evidence. We find that this dispute has caused considerable disruption at BHP, which does not accept CMETSWU coverage of employees in the classifications concerned. That was Ms Priest's evidence and it corroborated the evidence of other BHP witnesses. We accept her evidence.

We find that the dissatisfaction amongst employees was due, in a large part, to Mr Bartlem's dismissal following his attempt to persuade Mr Daly to resign.

We are satisfied, on all of the evidence, that the employees who resigned, giving that reason, or who resigned at all, were led to or strongly influenced in their resignations by Mr Bartlem, supported by Mr Hopkinson, Mr Connors and others. Further, they were able to join the CMETSWU, in part, as a result of Mr Bartlem communicating with Mr Maitland to facilitate such a course.

We are satisfied and find, on the evidence, that there is no evidence of any other current dissatisfaction in the AWU in this State outside the Pilbara.

What we have said above contains a number of findings of fact, because much of the evidence, on which we base these findings, was not in dispute. Some findings are based on what was common ground between the parties. However, we want to make the following clear without detracting from the generality of our findings of fact above.

We are satisfied and find as follows—

(1) The AWU has had coverage of the classifications 1 to 4 of mine worker for a great number of years.

(2) The AWU is a general union covering mine workers.

(3) The CMETSWU and its predecessor, the old FEDFU, is a union restricted to crane drivers, shuttle drivers and train crews in the Pilbara in the iron ore mining industry. It is not a general mining union and has limited constitutional coverage of employees at BHP. It has had, for many years, minor coverage in the iron ore industry.

(4) There is a long history of awards and agreements with the AWU as a party dealing with BHP. To dismantle them by changing industrial coverage will lead to instability and uncertainty in industrial relations.

(5) There was no evidence to support the proposition that the AWU is any less effective than any other organisation and, indeed, in some respects, it is more effective.

(6) The CMETSWU has never represented or covered or has the right to represent or cover BHP mine workers, except at Mt Newman.

(7) There was no evidence of dissatisfaction with Mr Daly of any significance until some months after he was elected to office as secretary of the union when Mr Bartlem sought to have him resign.

(8) The impetus for his removal and the consequence attempts to justify it came from Mr Bartlem. Mr Bartlem was supported in this by Mr Hopkinson and others. The resolutions of 20 and 21 May 1998 all emphasise that the membership would not accept any alternative to Mr Bartlem. This occurred after the contretemps with Mr Bartlem which arose because Mr Daly refused to leave office in favour of Mr Bartlem. There is no evidence of disaffection with Mr Daly other than in the Pilbara area where Mr Bartlem was obviously approved and supported. There is no general complaint of AWU representation of any consequence outside the Pilbara. Indeed, there is approbation of it in the Pilbara whilst Mr Bartlem was there.

(9) It is quite clear that Mr Bartlem, supported by some others, was influential in, if not the sole reason for, the departure of members from the membership of the AWU to join the CMETSWU and primarily for his own purposes.

(10) We are also satisfied that, because of the number who have not taken up full membership in the CMETSWU by paying their dues, it is not at all clear that they will not return. We also find that a substantial number of those AWU members recruited to the CMETSWU are members of the federal organisation only.

(11) It is clear, and we find, that BHP, the employer, supports the AWU coverage because it exists under the AWU and its constitution and continues. This is supported by AMMA also. The employer also denies that the CMETSWU has the right to industrially cover the former AWU members.

(12) We find that, were the CMETSWU to be given coverage, there would require to be the need for fresh negotiation of EBA matters, etc. and that this would add to the disruption which has already occurred and which we accept has been and is serious.

(13) We are not satisfied at this stage that BHP proposes to radically change its approach to employees. It denies that it will. If, however, BHP does, then that is a matter which the appropriate union will have to deal with. If the AWU does not deal with it satisfactorily, the appropriate union must answer to its members. (In any event, the Single Bargaining Unit contains all of the employee organisations, including both applicants in these proceedings.)

(14) We are not at all persuaded that the AWU is not capable of properly dealing with BHP, whether it changes its attitude or not.

(15) It is quite clear, and we find, that Mr Bartlem had a vested interest in there being a separate division in the north west which was not necessarily a solution compatible with the interests of employees there. An offer of a sub-branch by the AWU was a reasonable offer in the circumstances and should have been accepted.

(16) We are satisfied that the CMETSWU is seen as a more rigid organisation by the employer and an organisation that is more resolute by some of its members.

(17) That the CMETSWU is a shell and that the influence and impetus in this matter is derived from the federal organisation.

(18) That the AWU at state level is not a shell, having its own property, assets, executive committee and organisers. However, it is able to draw on federal assistance without being a mere shell.

(19) If the CMETSWU were successful in its application, there would be one less organisation covering the Pilbara. Similarly, if the AWU were, that would be the case.

(20) There has been an interchangeability amongst positions and classifications at Mt Newman between the TWU and the CMETSWU.

(21) A greater number of persons joined the TWU at Newman than the CMETSWU when these difficulties arose but the TWU does not press membership of those persons. The TWU has no membership at the ports. The AWU does have, and has had for years, general membership and coverage of the classifications at Mt Newman and the two ports.

(22) We are satisfied that the AWU has adequately represented its members in the Pilbara (particularly BHP employees) and has the capacity to continue to do so.

RELEVANT MATTERS

The relevant matters in these applications are as follows—

(1) Employee preference and freedom of association.

(2) Employer preference.

(3) Industrial behaviour of the organisations concerned.

(4) Discouragement of overlapping coverage.

(5) Constitutional coverage and eligibility.

(6) Established pattern of membership and award and agreement coverage.

(7) The ability to service membership.

(8) Views of the ACTU.

(9) Advancement of the objects of the Act.

(10) The impact of the orders and reduction of numbers of organisations.

(11) The effect of the orders on employer operations, work practices, award structures: the potential for disputes and the burden of change.

EMPLOYEE PREFERENCE

It was submitted on behalf of the CMETSWU that the overwhelming majority of the relevant BHP employees strongly wished to be represented by the CMETSWU and strongly do not wish to be represented by the AWU. It was open to find this, it was submitted, because the CMETSWU's evidence to that effect is uncontradicted; no current employee has given evidence that he/she wishes to be represented by the AWU.

It is true that Mr Lee ceased employment with BHP on 8 April 1999, the date his statement was made, and no steward or convenor of the AWU has given evidence that any employee wishes to be represented by the AWU. Further, none of those who have given a statement for the AWU have asserted that employees wish to be represented by the AWU.

It is true that a large number of employees purported to leave the AWU and join the CMETSWU and that a number gave evidence that they would not return to the AWU, notwithstanding what the Commission ordered. It is true, too, that, at Mt Newman, where the TWU has coverage, more persons left to join the TWU led by influential convenors, than left to join the CMETSWU.

The total membership of the AWU at Finucane Island is 1, at Nelson Point, 22 and at Mt Newman, 42; a total of 65.

The CMETSWU has 73 ex-AWU members at Finucane Island, plus 28 pre-existing members, 161 ex-AWU members at Nelson Point plus 104 pre-existing members, and 28 ex-AWU members at Mt Newman together with 92 pre-existing members. Accordingly, the total pre-existing membership is 224 and ex-AWU is 282; making a total of 506. There are a number of AWU members left which might be as high as 80.

Significantly, too, there are 115 ex-AWU members who left who have not paid full membership fees to the CMETSWU, and, in some cases, no fees at all. That lends some support to Mr Daly's and Mr Llewellyn's evidence that members of the AWU will return if the AWU's application is granted, as we have found. Further, it is some indication of ambivalence in intention by these persons concerning the CMETSWU.

It is also the fact that there was no evidence that members of the AWU who are not employed by BHP, even those at Cargill Salt, have not been shown to be critical or disaffected to any significant extent or at all, as we have found. Indeed, there is no evidence of dissatisfaction or serious criticism, except at Cargill Salt, and that was relatively early in the development of the events leading to these applications, and does not appear to be still the case.

According to Mr Connors and Mr Hopkinson in the Morrison Report to ACTU officers, attached to Mr Wood's statement, the decisions made by the employees were made after long consideration over a period of many months with many meetings involving the employees affected and officials of both unions and the ACTU. That is consistent with the evidence, except that, of course, the resignations occurred immediately after Mr Bartlem's dismissal. The decision to join the CMETSWU occurred after about two months and after autonomy proposals were rejected. However, decisions to resign had, for the most part, occurred shortly after Mr Bartlem was dismissed.

The strength of feeling of the employees, too, is demonstrated by the fact that the employees continued to attend union meetings, notwithstanding that they were disciplined for so doing, it was submitted. We agree that there is a strength of feeling against some persons, but we are not persuaded that it is held by 115, at least.

It is not, however, open to the Full Bench to draw an inference that the opposition to a request for a ballot occurred because the employees would show overwhelming support for the CMETSWU. We would not draw that inference because it is in fact an inference which is obviously too remote.

It was submitted, on behalf of the AWU, that employee preference was not a major factor, that the AWU has been the subject of wholly unjustified criticism and has been attacked by a group of persons who were placed in positions of trust and influence by the union which they now attack. That was plainly the case.

We would first deal with the employee preference of ex-AWU members who have joined the CMETSWU on this basis. First, they have at least at Nelson Point joined the Federal CFMEU. Mr Wood explained that that was because of an omission to use the appropriate applications to enable them to join both the state and federal organisations. However, there is no evidence that such a situation has been remedied, and as far as the evidence reveals these persons are not members of the State organisation. Again, that reduces somewhat the case of the applicant organisation, as does the lack of full financial membership in about 115 members.

Next, as we have observed, in the failure of substantial numbers of members not to pay fees to the CMETSWU, there is evidence of a failure to demonstrate a concrete preference. As Mr Herbert for the AWU correctly submitted, it is open to an inference that a union which provides services and does not enforce fee payment or full fee payment is attractive to persons for that reason. Again, that reduces the force of the employee preference portion of the applicant CMETSWU's case.

Next, it is true that there is currently evidence of disaffection with the AWU by the ex-AWU members who purport to be CMETSWU members. One reason given was that BHP has changed and hardened its industrial attitude and that the AWU does not have the ability or resources to deal with the new approach of BHP. There was also evidence that in the view of some persons the CMETSWU is the sort of organisation which can deal with that approach. However, the main tenor of the evidence of preference by ex-AWU members was directed to personalties, to erroneous perceptions of AWU finances, and to loyalty to Mr Bartlem and others. These views were only manifested, in any significant way, after Mr Bartlem put himself at odds with AWU officers. We observe later there was a failure by them to deal with these matters within the applicant AWU.

We would observe, as is the fact, that the preponderance of the evidence was that the AWU worked well through its existing site system of convenors and stewards. That was the evidence of some persons who otherwise were critical of the AWU.

It is not to the point to say that that system of convenors/shop stewards has been dismantled by the departure of persons purportedly to become members of the CMETSWU. That is because the active dismantling was not the act of the AWU. The system can still operate for and on behalf of AWU members. There was no evidence that it could not or would not.

We would also observe, as we have found, that there was no evidence that BHP's attitudes have hardened to the extent alleged. The company's evidence was to the effect that there was no decline in working conditions and no change in industrial relations strategy. That was the evidence of Mr Wheeler in his answering statement, paragraphs 3 to 19, of Mr Ritchie in his statement, paragraphs 3 to 9, and the answering statement of Ms Priest, paragraphs 2 to 21, who was called to give evidence and whose evidence corroborates that of Mr Wheeler and Mr Ritchie, who were not called to give evidence. We accept Ms Priests' evidence, having seen her in the witness box, and we therefore accepted the evidence which she corroborates of Mr Wheeler and Mr Ritchie in that respect.

It should be observed, in relation to the criticism of the AWU in the past, that the existing EBA of 1997 approved by the single bargaining unit (presided over by Mr Bartlem) on behalf of all the unions involved contains a no strike clause, that the alcohol and drug policy was supported by all unions, including the AWU, and elements of the applicant CMETSWU. Further, the 90 day notices are provided for in the agreements negotiated whilst Mr Bartlem was in the AWU.

It is therefore open to BHP to make use of 90 day notices in accordance with the award. There is no evidence that the AWU has not dealt with 90 day notices in an appropriate manner. There seems to be no evidence of any expression of problems in recent times concerning the AWU approach until Mr Bartlem was dismissed. Certainly, there was some criticism of some organisers in the past. However, Mr Bartlem's activities over the last few years in major matters was not criticised and in some cases he was praised as an able officer. Further, the AWU does have an organiser in the Pilbara and has had for some years, which is some earnest of its interest in the area.

We have found that BHP's attitude had not hardened to the extent of rendering the AWU irrelevant or ineffective. (That is not to say that in future BHP's attitude might change.)

Further, as we have found, a realistic attempt was made to accommodate the Pilbara employees' aspirations by the AWU by affording a degree of autonomy, which in the circumstances was reasonable. That, however, was not accepted by the persons concerned who shortly afterward joined the CMETSWU. Much difficulty would have been avoided had it been accepted.

Next, there is no evidence of a great deal of in-fighting in the AWU, save and except what occurred some months after Mr Daly's election at the instance of Mr Bartlem. We have so found. Criticisms of Mr Daly and Mr Muscat were not in existence until the difficulties with Mr Bartlem arose. These criticisms were insufficient to prevent Mr Daly and Mr Muscat being elected.

Mr Bartlem himself and Mr Gordon stood for election to the National Executive of the AWU on the same ticket as Mr Muscat. (Mr Bartlem was unsuccessful, Mr Gordon was not.) In democratic organisations the majority does often carry the day and this is not always agreed to by the minority. This was conceded in evidence and the subject of a submission which we accept from Mr Herbert. That sort of dynamic is not always to be confused with detrimental infighting.

Quite clearly, members (who are BHP employees) who later left the AWU were informed that the AWU was on its financial last legs or was in a dire financial state. As a matter of fact, that is not and was not the case, as we have found.

Quite clearly, too, some witnesses were mistakenly of the view that there was financial difficulty because of stories pertaining to some financial mismanagement some years ago in the AWU, of which there is no evidence presently.

We have found that the AWU was not in any substantial financial difficulty, although it had a large overdraft. It was quite clear that the federal organisation as, in any event, willing to assist it as it did with the provision of Mr Bartlem's services in the Pilbara.

Further, some weight was obviously attached by some witnesses to Mr Daly's unfortunate decision not to place a notice in the paper relating to the death of Mr Jim Ahern's wife. However unfortunate as that was, it was insignificant in the scheme of things, and was no indication of financial difficulty for the AWU. The criticism of Mr Daly for allegedly going to sleep in meetings was, we accept, untrue.

Further, Mr Bartlem was a driving force behind setting up an autonomous Pilbara division of the AWU, as we have observed. From the evidence, it is clear that some persons may not have left the AWU had that been achieved whilst some others would still have done so. It is also quite clear from the resignation notices and other evidence that Mr Bartlem's dismissal after he had attempted to force the recently elected Mr Daly to resign was a major factor in large numbers purporting to leave the AWU. Mr Bartlem himself conceded in evidence that he supported the autonomy proposal and Mr Hopkins said in evidence that Mr Bartlem did.

A measure of the approach of those who had left the AWU was the rejection of the offer of a sub-branch within the AWU in the Pilbara which would have offered some significant autonomy. The public and private disparagement of the AWU dated, on the evidence, from after the events of April 1998 and particularly the discussions between Mr Bartlem and Mr Daly and Mr Daly's refusal to stand down.

We have found that the AWU was not incompetent or inefficient (indeed we have already referred to the evidence that the shop steward convenor system was not and that Mr Bartlem was not).

As we have found, too, some members did not wish to join the CMETSWU but joined the TWU and did so against the background of the disruption which was occurring.

Industrial representation should not, it was submitted, be subject to change, having regard solely to the personal aspirations of a small group of disaffected officials in a workplace, thereby creating a circumstance under which agreements and obligations undertaken by the incumbent union can be effectively overturned. That is a submission with which we agree.

As we have found (and we express the finding in more detail for the purposes of the consideration of this factor), the evidence of the CMETSWU witnesses, of Mr Daly, Mr Bartlem, Mr Llewelllyn and Mr Asplin, lead to a finding that the change in union membership followed an unsuccessful attempt by Mr Bartlem to obtain a more influential role in the AWU organisation, either as secretary or in a position in an autonomous Pilbara branch. That is substantially what we find above.

It is fair to say, also, that this is a matter which could and should have been resolved internally within the union as s.110(1) of the Act directs and does and did not require or justify disregard for the pattern of coverage established for in excess of 20 years.

Even if the members who purported to leave the AWU had not followed Mr Bartlem and others and their preference was their own (and based on correct perceptions which it was not), then it still could not stand, in this case, as the sole or the most influential determining factor. (Indeed, even were there a ballot which revealed this as a preference, that would still be the case.) It is one consideration only in this case.

Something should be said about Mr Schapper's submissions that the persons who had left the AWU had exercised freedom of association and that this concept was supported by the legislation, federally and in this State.

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

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

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

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

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

Further, s.61 of the Act requires all members of an organisation to be bound by the rules of the organisation during the continuance of their membership and that includes the eligibility rule. S.61 reads as follows—

> "Upon and after registration, the organization and its members for the time being shall be subject to the jurisdiction of the Court and the Commission and to this Act; and, subject to this Act, all its members shall be bound by the rules of the organization during the continuance of their membership."

Whilst we are satisfied that employee preference was recognised, having regard to a number of factual misconceptions, and as part of the activity of Mr Bartlem, Mr Hopkinson, Mr Connors and some others, we are not of the view that the evidence of preference is sufficient to move this Commission to the detriment of the AWU application, even if it were, in this case, the sole determining consideration.

In any event, for the reasons which we have expressed, it will be rare for employee preference to be the sole and major determining factor in a s.72A application. There may, of course, be cases where, having regard to all of the merits, employee preference is a paramount and compelling reason to make an order or orders in a s.72A matter. One such example might be where an organisation is so inept or timid or dysfunctional that it cannot or does not adequately represent its members.

> "It is important, too, to remember that the importance to employees of the continued existence of strong and militant unionism should not and cannot be discouraged. The fact that any one union is more militant than another is not a factor that should count against the union in determining an application under s.118A of the Act. Nor, on the other hand, can the fact that a union chooses a different path to pursue its members' industrial interest."

(See per Williams DP in Re CSR Ltd and Others (No 40407 of 1995) (unreported) delivered 1 April 1996 (AIRC) at page 21). We respectfully adopt those dicta. However, acceptable vigour and zeal (words which we prefer to "militancy") are not to be confused with unnecessary disruption or with the unjustified breach of contemporary industrial practices, or breaches of awards, agreements or of the law. These matters are very much matters which would count against an organisation of employees or employers and also an employer in a relevant case.

The absence from the Act of any indication of a relative weight for considerations to be assessed in a determination of a s.72A application does not preclude prima facie weight being given to the retention of an existing right of coverage (see Re Queensland Alumina Ltd [1991] 42 IR 304 (AIRC) per Munro J).

In practice, this may mean no more than that the balance of consideration in favour of orders being made under s.72A must be of sufficient degree to satisfy the Commission that it should displace the existing rights of an objecting organisation or add to the rights of an applicant organisation. This is because the Commission is required to act in equity and good conscience and on the substantial merits of the case (see also per Munro J in Re Queensland Alumina Ltd (op cit)).

In this case, there is evidence of a preference by a number of persons for membership of the CMETSWU. These persons are all ex-members of the AWU. The fact that, in the past, some persons might have been improperly enrolled as CMETSWU members, such as Mr Geoff Wai, does not alter this situation. This, however, was not an application by the CMETSWU to sustain the membership base upon which its registration exists. This was an application for coverage of persons who rightly belong to the AWU and, as a matter of fact, have been covered by the AWU and have been represented industrially by the AWU for a large number of years. This is not a case of FEDFU members resisting being compelled to be members of the AWU, as was the case in Re Queensland Alumina Ltd (op cit).

There is nothing in this legislation which compels one to elevate the consideration that persons wish to leave the AWU and join the CMETSWU above all others. Nor is it the weightiest consideration in any event, even if the preference were a preference expressed on complete merit. If the exercise of jurisdiction were to be balanced in favour of acceding to the preference of members of organisations, there may be little room for the jurisdiction to be exercised (as Munro J observed in Re Queensland Alumina Ltd (op cit) at page 327).

In our opinion, in any event, the preference of the ex-AWU members is not the preference of all of the AWU members, nor is it, as evidenced by the failure to pay the full CMETSWU contribution by persons who purported to join the CMETSWU, the unequivocal preference of all of the AWU members.

Further, the preference is based, to some extent, on misconceptions and was, to a large extent, the result of the activities of disgruntled and/or self interested officials.

For those reasons, we do not regard the preference of members as expressed to be sufficient in itself to enable the AWU application to be refused or the CMETSWU application granted in this case.

EMPLOYER PREFERENCE

Employer preference and the effect of the Commission's determination upon the employer's operation have been recognised by the Commission as factors relevant to its determination of a s.72A application.

In this case, BHP supported the maintenance of the status quo, submitting that the Commission ought to maintain that status quo and make the orders sought by the AWU for the following reasons—

(1) Failure to do so will set a precedent for other changes in representational arrangements. This is likely to lead to an increase in union activity and possible new unions and/or demarcation disputes. This would have a detrimental effect on workplace relations and productivity would distract management from attending to the core business and will be viewed with apprehension by customers.

(2) The current dispute has caused disruption to the company's operations, has drained management time and resources and is affecting the company's ability to properly manage its business and will continue to do so until coverage is determined.

(3) The existing arrangement is reflected in the Enterprise Bargaining Agreements and applicable industrial agreements were reached by consent. Changing consensual arrangements means that agreements provide no long term certainty and this presents a problem for long term business planning which is viewed apprehensively.

(4) In BHP's experience, the resolution of workplace issues and the introduction of change is severely hampered in multi-union and un-demarced groups.

(5) Changes in existing representation arrangements will require the renegotiation of current arrangements and are likely to impact on work practices and industrial relations in the workplace in the long term.

The BHP eschews any preference for either the AWU or the CMETSWU. However, in contradiction of this position, it also favours continuation of existing coverage, which is to prefer the AWU.

Since the purpose of a union is to represent employees in their industrial interests with their employer, it is not safe or desirable to place any weight on which union the employer prefers to have represent its employees; incidentally, the employer will choose the union which is best for it rather than the employee, Mr Schapper submitted.

The AMMA does not support the AWU application, but nonetheless supports the maintenance of their present representational rights. This, it was submitted by the AMMA, was well founded, taking account of longstanding dealings which the company has had with both of the unions within its operations, albeit at different levels. The AMMA supports the company's preference and is an interested bystander.

In our opinion, and as we have found (and this anticipates our canvassing of other relevant considerations), there have been many years of coverage of mine workers exclusively in the classifications the subject of these applications.

The award and the Iron Ore Agreements I, II and III constitute a whole structure which has been built up over the years based on the AWU coverage of these classifications (save and except for the coverage at the mine site at Mt Newman pursuant to the agreement between the TWU, the CMETSWU and the AWU). It is quite clear that the removal of AWU coverage would halt a process of continuity over years, require new negotiations and new structures, and pull down an edifice which has not been established on the evidence before the Full Bench to be detrimental to industrial relations in the industry (particularly, but not exclusively, given the unrefuted evidence of wage increases in the last few years and particularly to the employees in the classifications the subject of these applications). That is a cogent consideration.

Further, we accept that failure to maintain the status quo and giving exclusive coverage to the CMETSWU might set a precedent for representation by an organisation to be overturned on the basis of perceptions which might be erroneous (as some of the perceptions in this case of persons who left the AWU clearly are). Further, such an overturning might also occur for reasons which are insufficient.

We accept the evidence that the current dispute which has involved meetings regarded by BHP as unauthorised, the dual representation within the CMETSWU of longstanding CMETSWU members and the recently "joined" AWU members, has created tension and has resulted in a drain on management time and resources.

BHP will need to be consistent in recognising appropriate coverage and not to ignore coverage as it did in cases such as the two employees in the laboratory who purported to remain CFMEU members.

We accept that major difficulties which would arise in the change of existing industrial agreements (as we have already said) given, in particular, that they were, as we accept, reached by consent. The factors which we have outlined, rather than any expressed preference of the employer, lead us to the view that the employees' preference, on those facts, is a relevant consideration of weight. Those factors are, in this case, those which weigh in favour of the AWU and not the CMETSWU.

BEHAVIOUR OF THE ORGANISATIONS

In this case, the applicant AWU, on the evidence, has not behaved in a way which is exceptionable, and there is no evidence of behaviour which should count against it on its application. It has sought to maintain coverage which exists under its eligibility rule and is recognised in a longstanding history of awards, agreements and practice.

The CMETSWU, however, has most certainly in practice purported to enrol members over whom it has no constitutional coverage and/or purported to industrially represent them in a manner which has led to lengthy disruption in the workplace. (The purported coverage of horticultural workers in the face of the AWU's representation of them under its constitution is an obvious example, as is purporting to represent laboratory and warehouse employees who have been under the cover of the AWU).

It is not an answer to say that a small number of persons, about three, who had been CMETSWU members and moved to AWU classifications should stand in the face of the AWU coverage because they purported to remain as members of the CMETSWU.

Further, it is quite clear that, notwithstanding the provisions of s.61 of the Act, the CMETSWU does not pay any or any sufficient attention to constitutional coverage in cases where people seek representation. (That was Mr Wood's evidence). There were criticisms in evidence by BHP witnesses or rigidity in demarcation matters on the part of the CMETSWU and of a greater flexibility in matters such as multi-skilling by the AWU, although it was also asserted that the latter adequately and properly represented their members. Without having details of the alleged rigidity, we do not propose to make findings or findings which attach a great deal of weight to that proposition, unfavourable to the CMETSWU. We can, however, find that the CMETSWU's attitude to coverage of persons insofar as it is the applicant and not the federal organisation's attitude, has been a source of disruption and that it has acted contrary to s.61 of the Act. Further, such an attitude presages problems which might lead to future serious disruption. It is contrary to the law and to contemporary industrial standards.

We would add this, too, that given the participation of Mr Maher and Mr Maitland of the federal CFMEU (and Mr Maitland was the person to whom Mr Bartlem went to for decisions as to acceptance of ex-AWU members purportedly as members of the CMETSWU), it is not at all certain that the CMETSWU is anything but a shell. Further, it is not at all certain that the real participant in what has occurred is the CMETSWU and not the federal organisation.

We have already referred to Nelson Point members purporting to enrol in and remaining in the federal CFMEU. The behaviour of the AWU weighs heavily in its favour and that of the CMETSWU, heavily against it.

CONSTITUTIONAL COVERAGE

The AWU is an industry union and not a vocational union and it has broad constitutional coverage of employees engaged in the mining industry.

The CMETSWU is a vocational union which covers employees employed in the various parts of work covered by the rules of the CMETSWU. The CMETSWU has coverage in areas such as locomotive drivers, crane drivers, firemen and certain powerhouse employees. The term "engine driver" is a narrow term (see FEDFU v Archibald and Thorpe and Others (1963) 43 WAIG 348 and FEDFU v Hamersley Iron Pty Ltd and Others (1979) 60 WAIG 148). The FEDFU did not have constitutional coverage of HIAB's unless the vehicle was being used as a crane rather than as a tool to transport, load or unload goods, it was held. Mine workers operate fixed plants which process ore. Those duties fall within the constitutional coverage of the AWU with respect to minerals.

It was not strongly submitted by Mr Schapper that it was otherwise. His submission was that it is not necessary for the Commission to determine where the constitutional coverage lies. This was because the weight to be attached to this factor, in the circumstances of the case, is minimal. We do not agree. To hold that well-established employee choice should be overridden or downgraded by the mere fact that the employee is or is not eligible to join a union, whose eligibility rule was written decades ago, would, in his submission, be perverse. The submission was that both state and federal parliaments have recognised the political right to be represented by an industrial organisation of choice or not and political sanctions for infringements of the right.

Constitutional coverage has evolved in an ad hoc manner, he submitted, determined by the precise form of eligibility rules and the conferral of a wide discretionary power to change coverage under s.72A of the Act is inconsistent with the discretion being fettered by preconceived notions of the prima facie desirability of perpetuating existing coverage be submitted.

Industry considerations have been eschewed against the background of wage fixing principles requiring employers and employees to focus on individual enterprise, in favour of considerations particular to the individual enterprise.

Whilst the registration of an organisation under the Act creates a legal entity separate from the sum of the members, the rights and duties conferred by registration, being those of the union and not its members, the whole purpose conferring those rights and duties is to allow and assist the union to carry out its representative role. Thus, where a group of employees does not wish to be represented by a particular union, it would be a perversion of the rationale of the Act to hold that the employees' choice should be subordinated to the union's "rights", so the submission went.

There is nothing before the Full Bench which indicates, as Mr Schapper submitted, that AWU coverage is a result of some ad hoc process. What we have observed and found is clear is that the AWU is a general coverage organisation with longstanding and general coverage in the mining industry, including the iron ore producing and processing industry, which is at the heart of this application. That is so in this case in this State and it would seem, in parts of this country.

The CMETSWU is an organisation with limited coverage over the years in the industry upon which a full reading of its eligibility rule one can reach that conclusion (see the extent of the eligibility rules of both organisations set out above). There are few employees in this industry on a fair reading of the rules who are eligible to be covered by the applicant CMETSWU, if any.

The constitutional coverage supports an important and consensually negotiated edifice upon which industrial relations in the industry have existed for years. Constitutional coverage should not be lightly brushed aside.

For all of those reasons, there is every reason on the evidence why, apart from what we have just said, there is no compelling evidence or reason why this should occur. In particular, for the reasons which we have already expressed, the mere preference of members is not sufficient in the circumstances of this case to brush aside the constitutional coverage. In addition, there is no other loss of faith in the AWU on the evidence anyway, even if the preference of the ex-AWU members at BHP were as cogent or legitimate as Mr Schapper submitted it to be, which it is not.

REDUCING THE NUMBER OF UNIONS

In our opinion, the granting of the AWU application would reduce the number of organisations covering employees at Newman in particular because the CMETSWU would be excluded. Further, it would avoid the anomaly of having exclusive AWU coverage at the ports and AWU/CMETSWU coverage at Newman. In that respect, to grant such an application would be beneficial to the AWU and to industrial goodwill. Further, to accede to such an application is to properly confirm existing coverage under the award in one organisation. The question of overlapping is solved. On both counts, to do so would bring self-evident benefit to the AWU, its members and BHP. That is another cogent factor which supports the AWU application.

It was submitted that the existence of the no demarcation agreement clearly enables current competition between the unions concerning representation of certain employees and there is clear potential for this to escalate. Given the evidence we have heard, we would agree.

ESTABLISHED PATTERN OF MEMBERSHIP AWARD AND AGREEMENT COVERAGE

As we have found above, there is a pattern over many years of award agreement and membership coverage by the applicant AWU in the iron ore production and processing industry and in the mining industry. The AWU is a general coverage union. The CFMEU has not covered those classifications and is a restricted coverage union, and has always been, in relation to BHP employees. (The exception is the no-demarcation agreement at the mines at Mt Newman.)

This long standing pattern, for the reasons we have expressed, including the likely service detriment to BHP and the AWU, should not be disturbed. That consideration is a strong consideration in favour of the AWU application.

THE CAPACITY TO SERVICE UNION MEMBERS

We have found that the AWU standard of service and capacity to service its members is adequate.

The former AWU stewards and convenors who effectively serviced their members' needs to June 1998 have become CMETSWU stewards and convenors.

It was submitted that the lack of an office in Port Hedland does not affect the capacity of the CMETSWU to effectively represent the employees because the officials attached to the AWU Port Hedland office were not involved with BHP and BHP did not deal with them. Mr Bartlem said that BHP dealt only with him and he resided in Perth and, in addition, Mr Asplin said the same. In our opinion, the evidence was clear, and we have concluded that the AWU's service was and has been, at least in recent times, effective and adequate. That that is the case rests to a large extent on the evidence of persons called as witnesses for the CMETWSWU. We have already referred to the evidence to that effect. We are still of the view that an office and the presence of an organiser in the Pilbara is a very satisfactory form of service, notwithstanding modern communications. For AWU members, CMETSWU service remains, so far, an unknown quantity at least on a long term basis. That factor is in favour of the AWU application.

THE ACTU POSITION

Mr Schapper submitted that the Full Bench has deprived the ACTU of the opportunity to be heard in its own right. That submission has not merit. Nothing has prevented ACTU witnesses being called to give evidence, and none were called.

In any event, the ACTU position is set out in the draft ACTU decision about Pilbara BHP, attached to the statement of Mr Gary Wood, made by the Executive on 25 February 1999. That decision is directed more to the status quo than not.

CONFORMITY WITH THE OBJECTS OF THE ACT (INCLUDING DISCOURAGING OVERLAPPING COVERAGE)

We now deal with the objects of the Act and the question of conformity with them. As to s.6(a) and (b) of the Act, it is quite clear that to make the orders sought by the CMETSWU would encourage and provide for consultation (or enhance goodwill in industry) with a view to amicable agreement because to do so would involve a demarcation consented to in a range of consent awards and agreements being overturned.

Similarly, to effect inconsistency in the system by such to its dismantling after a long period of years would not be conducive to the achievement of the object prescribed by s.6(c) of the Act.

Further, if the AWU is denied representation under awards to which it is a party, it cannot enforce them (see s.6(d)). In some cases, the AWU is the only organisation which is a party to such awards or agreements.

As to s.6(e) and (f), we would make the following observations. Mr Herbert submitted that failing to give exclusive coverage to the AWU at Newman would give overlapping coverage which would encourage conflict and be contrary to s.6(e) and which would be discouraged by acceding to the AWU orders to the exclusion of the CMETSWU. As to s.6(e), we conclude that to accede to a preference expressed and implemented to leave the AWU, as the evidence in this case is, and join the CMETSWU would be to countenance what has occurred contrary to s.61 of the Act in many cases. Further, this would also countenance the removal of membership from one organisation to another on the basis of erroneous and inadequate views. It would also enable such a thing to occur where there has been an offer of autonomy within the organisation and the organisation has sought to solve the matter internally as s.110 of the Act requires. To make such a decision on the evidence before the Commission in this case would be to act contrary to s.6(f) of the Act in that to do so would be to encourage persons to act contrary to the democratic control of the organisation, which democratic control established Mr Daly as secretary but a few months before. It would enable a minority group to set up their own majority without a justifiable basis for doing so and thus detract from the right of the members of the organisation to control their own organisation. That is, of course, a different case from where a majority oppresses a minority which was not the evidence in this case.

Next, it is quite clear that insofar as Mr Bartlem sought to act contrary to the democratic control of the organisation by its members by assisting in its destabilisation that it would be acting contrary to s.6(f) of the Act to enable the AWU's coverage to be removed. It would be to countenance activities contrary to s.6(f), on the evidence in this case. That factor weighs also in favour of the AWU and against the CMETSWU. The objects of the Act would, for those reasons, be best advanced by granting the AWU application and dismissing the CMETSWU application.

IMPACT OF ORDERS ON ORGANISATIONS AND OTHERS S.26(1)(C) AND (D)

If orders were granted acceding to the application by the CMETSWU, then the AWU would be removed from coverage of members and excluded from an area where it has long held coverage and represented persons industrially without good reason. (If there were good reason, it would, of course, be a different matter).

If the CMETSWU application is refused, it suffers no detriment, save and except that it does not have an increase of members, nor does it obtain coverage in an area, which, on the evidence, it is not entitled to seek coverage; or where, in fact, the reality is that the CMETSWU is not and never has been the substantial coverage organisation.

As to BHP, on its own evidence, the status quo is to its benefit and its benefit is served by an order acceding to the AWU application and dismissing the CMETSWU application.

As to the members in the employ of BHP who have purported to leave the AWU and join the CMETSWU, some will no doubt see it as detrimental to them if the AWU application is granted. It is clear, as we have found, that it would not be detrimental, given our view of the efficacy of the AWU, on the evidence.

As to the community under s.26(1)(d) of the Act, its interests are served by the objects of the Act being achieved by an order acceding to the AWU's application and dismissing the CMETSWU's application.

THE EFFECT OF THE ORDERS ON EMPLOYER OPERATIONS, WORK PRACTICES, AWARD STRUCTURES AND THE POTENTIAL FOR DISPUTES AND THE BURDEN OF CHANGE

As we have found above, to dismiss the application of the AWU and grant the application of the CMETSWU would affect operations of the employer, has already done so, would cause the dismantling, for no good reason, of the award and agreement structure, with resultant likely severe disruption, and the potential for disputes as a result. The case for change in this respect has not been made out. It would also seriously reduce the AWU's ability to cover persons in the iron ore industry.

The preservation of the status quo and its reinforcement by excluding the CMETSWU at Mt Newman is a strong consideration in the AWU's favour and against the CMETSWU.

CONCLUSIONS

We have considered all of the evidence, all of the material and all of the submissions.

For those reasons, given that all of those relevant factors weigh against granting the CMETSWU application and for granting the AWU application, the interests of BHP, the AWU and its members and of the public interest in the Pilbara, having regard to the objects of the Act and s.26(1)(a), (c) and (d) of the Act, require that an order be made according to the equity, good conscience and the substantial merits of the case. Thus, we would grant the AWU's application and make orders to reflect it and would dismiss the CMETSWU's application. We would order accordingly.

Order accordingly

Appearances: Mr A Herbert QC (of Counsel), by leave, and with him Mr B Kilmartin (of Counsel), by leave, on behalf of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers.

Mr A D Lucev (of Counsel), by leave, and with him Ms M Binet (of Counsel), by leave, on behalf of BHP Iron Ore Pty Ltd.

Mr D H Schapper (of Counsel), by leave, on behalf of The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch.

Mr R Gifford on behalf of the Australian Mines and Metals Association (Inc).

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers

and

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch
(Applicants).

No. 1996 of 1998.

and

No. 2211 of 1998.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER S J KENNER.

22 September 1999.

Order.

THESE matters having come on for hearing before the Full Bench on the 14th, 15th, 16th, 17th, 18th, 21st, 22nd, 23rd and 24th days of June 1999 and having heard Mr A Herbert QC (of Counsel), by leave, and with him Mr B Kilmartin (of Counsel), by leave, on behalf of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (hereinafter referred to as the "AWU"), Mr A D Lucev (of Counsel), by leave, and with him Ms M Binet (of Counsel), by leave, on behalf of BHP Iron Ore Pty Ltd (hereinafter referred to as "BHP"), Mr D H Schapper (of Counsel), by leave, on behalf of The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as "CMETSWU"), and Mr R Gifford on behalf of the Australian Mines and Metals Association (Inc) (hereinafter referred to as "AMMA"), and the Full Bench having reserved its decision on the matters and reasons for decision being delivered on the 22nd day of September 1999, it is this day, the 22nd day of September 1999, ordered and declared as follows—

(1) THAT application No 1996 of 1998 be and is hereby granted in the following terms—

(a) 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 sites in Western Australia in the following classifications set out in the Iron Ore Production and 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

(b) 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)(a) of this order.

(2) THAT application No 2211 of 1998 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.

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
(Applicant)

No. 1996 of 1998.

and

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch
(Applicant).

No. 2211 of 1998.

and

The Transport Workers' Union, Industrial Union of Workers, Western Australian Branch.

No. 68 of 1999.

BEFORE THE FULL BENCH

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

3 May 1999.

Reasons for Decision.

THE PRESIDENT: There were before the Full Bench, on 12 April 1999, a number of applications, brought pursuant to s.72A of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), together with a number of applications for a declaration that there was sufficient interest for those latter applicants to be heard pursuant to s.72A(5) of the Act.

The first was an application (No 1996 of 1998) pursuant to s.72A of the Act by The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (hereinafter referred to as the "AWU"), No 1996 of 1998, in relation to which directions and orders have already been made following the hearing of various submissions in relation to that application, on 8 February 1999. The application is, however, still to be heard and determined.

The persons in that application whom it was declared had sufficient interest to be heard in relation to that application were BHP Iron Ore Pty Ltd (hereinafter referred to as "BHP"), Australian Mines & Metals Association (Inc) (hereinafter referred to as the "AMMA"), The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as the "CMETSWU") and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch (hereinafter referred to as the "AFMEPKIU").

Application No 2211 of 1998 is made by the CMETSWU. That matter came on before the Full Bench also on 12 April 1999.

A further application, made pursuant to s.72A of the Act was made by The Transport Workers' Union, Industrial Union of Workers, Western Australian Branch (hereinafter referred to as the "TWU"), application No 68 of 1999.

WITHDRAWAL OF APPLICATIONS AND WITHDRAWAL FROM PROCEEDINGS

Mr J A Long of Counsel, appearing for the TWU in all three applications, sought leave to withdraw application No 68 of 1999, which was the TWU's application.

The TWU also withdrew from its participation as a person having leave to be heard, in relation to application No 1996 of 1998 (the AWU application).

The TWU had sought to be heard, too, in relation to the CMETSWU application, No 2211 of 1998, but withdrew that application.

Leave to withdraw was granted in each case upon the application of the CMETSWU being amended in terms of orders and directions which issued from this Commission on 21 April 1999.

The AFMEPKIU, through its agent, Mr G Sturman, had been granted a right to be heard in application No 1996 of 1998, but had not sought to be heard in relation to any other application.

He, too, on his principal organisation's behalf, sought leave for that organisation to withdraw from the proceedings and that leave was granted.

APPLICATIONS TO BE HEARD UNDER S.72A(5) OF THE ACT APPLICATION NO 2211 OF 1998

Applications to be heard in relation to this application, which is the application by the CMETSWU, were made by BHP, the AMMA, the AWU and the Australian Council of Trade Unions (hereinafter referred to as the "ACTU").

There was no objection from the applicant or any other person represented in these proceedings for leave to be heard being granted to the AWU and BHP.

Their interests were clear from the earlier application No 1996 of 1998 and leave was accordingly granted.

There was an objection to the application of the AMMA to be heard by the CMETSWU. This matter was raised in relation to application No 1996 of 1998. The submissions in that matter were not materially different from those submissions heard in matter No 1996 of 1998 on 8 February 1999. I, therefore, apply the reasoning which appears in my reasons for decision which issued in relation to the decision made on 8 February 1999 to declare that the AMMA had sufficient interest to be heard in those proceedings. The reasons for that decision are unreported as yet, but issued on 3 March 1999.

That application was supported, too, by the AWU and by BHP, through their Counsel. I was, therefore, of the view and in agreement with the Chief Commissioner, that the AMMA should be given leave to become a s.72A(5) participant in application No 2211 of 1998.

The ACTU, which is, as is well-known, the peak body of employee organisations in the Federal sphere, has as its State branch the Trades and Labour Council of Western Australia (hereinafter referred to as the "TLC").

It is noteworthy that, under s.29A of the Act, in certain proceedings, the TLC, which is defined in s.7 of the Act, and the AMMA are entitled as a right to be given an opportunity to be heard in proceedings in relation to certain applications concerning issuing awards and varying the area or scope of an award or industrial agreement and the registration of agreements.

The ACTU, it was common ground, has been involved in trying to conciliate or mediate between the AWU and the CMETSWU in relation to the subject matter of this application. The ACTU application was filed out of time because a meeting of State "unions" involved in these proceedings was not able to be held until 6 April 1999. All other tings being equal, I would not regard the fact that the application was made out of time as an insurmountable obstacle.

Ms Mayman, who appeared for the ACTU, submitted that there was agreement on some, but not all, of the issues between the parties. She adopted the principles in R v Ludeke and Others; Ex parte Customs Officers Association of Australia, Fourth Division [1985] 155 CLR 513 (HC) in seeking to be heard. She submitted that the ACTU had sufficient interest to be heard pursuant to s.72A(5) of the Act. That application was objected to by the AWU and BHP, but supported by the CMETSWU and the AFMEPKIU. The AMMA had no objection to the application being granted.

First, the basis of Ms Mayman's submission was that the ACTU had sufficient interest because it had been and was continuing to attempt to bring about a resolution of the matter. Second, the submission was, that the ACTU had an interest as the peak national body for the Federal employee organisations with membership in this State. It is, of course, the case that the two applicants before the Full Bench on this occasion are State registered organisations.

It was submitted by Mr Lucev, Counsel for BHP, that there was no need for representation of organisations by the peak body, the ACTU, because Counsel already represented them and, further, that the ACTU, even after several months, had not been able to bring about a settlement of the matter.

Mr Schapper, Counsel for the CMETSWU, submitted, inter alia, for practical purposes, that there was no formal distinction between the TLC and the ACTU. The ACTU's views have been held to be a relevant consideration in previous s.72A matters, as Mr Schapper submitted, but he also informed the Full Bench that his client would, in any event, adduce evidence of that body's views.

He, therefore, submitted that, whilst the ACTU's opinions were relevant, to hold that they did not have sufficient interest to be heard would be illogical and absurd.

Mr Herbert, who appeared for the AWU, submitted that the ACTU purported not to represent its members but itself in these proceedings. He also submitted that an interest in mediation or conciliation on the part of the ACTU is not sufficient to enable them to support an interest in the proceedings.

It is helpful to look at s.72A and s.72A(5) of the Act in particular. What occurs is that an application is made by an organisation or employer or the Minister which, broadly put, seeks an order conferring on an organisation exclusive rights to represent classes or groups of employees employed in an enterprise, or excluding an organisation (of employees, as defined in s.72A(1)) from representing classes or groups of employees employed in an enterprise.

The Full Bench may not make any order of the type prescribed in s.72A(2) of the Act without giving persons having, in the opinion of the Full Bench, a sufficient interest in the matter, an opportunity to be heard. Such an opportunity may, in my opinion, be limited or unlimited, conditional or unconditional.

To constitute sufficient interest means that a person might be so sufficiently or likely to be affected by any order made as to representation of employers pursuant to s.72A(5) of the Act that it should, as a matter of natural justice, be heard.

Further, persons should establish that he/she/it is and should be directly affected, subject to what I say hereinafter (see R v Ludeke (op cit) per Gibbs CJ, Brennan and Dawson JJ). I should also add that what might be a direct interest in an award matter might well differ from what might be a direct interest in a s.72A matter.

It is also to be noted that in R v Ludeke (op cit), Gibbs CJ and Dawson J held that a person whose rights are not directly affected by proceedings is not entitled to intervene in the proceedings, although, in many cases, considerations of fairness may induce the Commission to allow someone who is likely to be indirectly affected by the outcome of the proceedings to intervene in them. I apply, with respect, that dictum.

The application by the ACTU to be heard pursuant to s.72A(5) of the Act was dismissed by the majority of the Full Bench. In my opinion, the ACTU did not and does not have sufficient interest in the context of the principle in R v Ludeke and Others; Ex parte Customs Officers Association of Australia, Fourth Division (op cit) to enable it to be afforded an opportunity to be heard, within the meaning of s.72A(5) of the Act. In particular, unlike the AMMA, which represents employers in the industry and/or contractors who contract to BHP within the subject industry, the ACTU does not represent the employees concerned in those matters. (The applicants, it would seem, do or are entitled to represent some, at least.) In particular, the ACTU does not represent the employees who are members of or eligible to be members of the two abovementioned State registered organisations qua, State registered organisations. The ACTU, as a Federal body, is a further step removed than the TLC, as a State body.

Further, the fact that the ACTU is a peak body, purporting to conciliate between two organisations, does not constitute sufficient interest to be heard. The ACTU does, as Mr Herbert submitted, purport to represent itself in any event. Further, there is no detriment likely to be suffered by it if an order is made without an opportunity being granted to be heard, whereas, in relation to the AMMA's members, it is foreseeable that that might occur.

APPLICATION TO ADJOURN

The CMETSWU made application to adjourn the proceedings on three grounds—

1. To enable the ACTU to continue its process of conciliation and/or mediation.
2. To enable a secret ballot of employees to be taken.
3. To enable directions to be given so the proceedings are conducted with a maximum of expedition, economy and fairness.

FURTHER MEDIATION AND/OR CONCILIATION

In relation to the first ground of application, it was not in dispute that the process which the ACTU was supervising had not, over several months, brought about success. However, it seemed to me that, particularly if the matter could be brought on relatively quickly, one last chance might be given. At the same time, any forensic disadvantage to the AWU caused by that organisation commencing its case, then being interrupted, would be eliminated. In addition, any necessary directions to put the case on a proper footing, now that the participants have been determined, would, in my opinion, assist.

SECRET BALLOT

As to the submission that there ought to be an order "that the Registrar investigate by way of a secret ballot the wishes of the relevant employees of BHP Iron Ore Pty Ltd as to union coverage and report the same to the Commission", it is clear that there is no power in the Commission to order a secret ballot in a matter such as this under s.72A of the Act and I adopt what was said in <u>Re an application by CMETSWU 78 WAIG 1581 (FB)</u> ("The RGC Mineral Sands Case"). In particular, I observe as follows—

(1) Nothing was said to persuade me that the decision in that matter and the reasons therefor of the majority were wrong. (The Full Bench is, therefore, bound by that decision, in any event.)

(2) S.27(1)(v) of the Act is, on the authority of <u>RRIA v FEDFU 67 WAIG 315 (IAC)</u> referred to therein, a machinery provision only. It does not provide a power to direct the Registrar to conduct a secret ballot. Nowhere in the Act is any such power expressed. Nor is there any power of delegation of any such power, even if it existed.

(3) S.27(1)(v) of the Act must be read in the context of the other powers conferred on the Full Bench under s.27(1).

(4) S.27(p),(q) and (r) of the Act are powers which are specifically prescribed to be delegable and no other power under s.27 is.

(5) Wherever secret ballots are authorised to be conducted, such as under s.55 and s.69 of the Act, and in relation to pre-strike ballots, they are authorised by regulation or specifically in the Act.

Interestingly, too, in the Federal Act, there is a specific power conferred on the Commission under s.135 of the Workplace Relations Act 1996 (hereinafter referred to as the "WR Act") to order secret ballots (see also s.136 of the WR Act), even though s.111(t), a section in similar terms to s.27(1)(v), exists also. That illustrates what I say is the situation with the Act.

I am not of opinion that this Commission should be and can be assisted by the decision of O'Connor P in <u>Re CFMEU and FEDFA v Abbot Point Bulkcoal Pty Limited (Print M2071 No 1181 of 1995) delivered 23 May 1995</u>, where she invokes s.111(t) of the WR Act, which is in similar terms to s.27(1)(v) of the Act, for the reasons which I have already expressed, when that Act contains specific statutory powers to order secret ballots of employees.

Put shortly, I would expect there to be a specific power conferred on the Commission to conduct secret ballots in circumstances such as this and there is not, either expressly or impliedly.

(In any event, interestingly, secret ballots by way of referendum are often provided for in rules of organisations and orders for such to be conducted, can be made only by the President under s.66 of the Act and that is a specific provision relating to rules. I have not examined the rules of these organisations in that context.)

(6) Further, if s.26(1)(v) of the Act has the meaning given it by Mr Schapper, then s.27(1)(a) to (u) are, as Mr Herbert submitted, otiose.

(7) Under s.27(1)(v) of the Act, there can be no delegation of the power to any officer of the Commission because none is expressed as being delegable and the powers under s.27 are conferred on the Commission.

(8) It is not for the Commission, although it can inform itself under s.26(1)(a) of the Act, generally speaking, to pursue evidence. It is for the parties or other participants in proceedings to produce it (see <u>Eastern Goldfields Butchers Unions v Allen (1908) 7 WAAR 155</u>). The application is one which requires the Full Bench, through the Commission's officers, to pursue evidence.

(9) Next, there is no power in the Commission under s.93(8) or s.94 of the Act to direct the Registrar or any other officer of the Commission to conduct a ballot because a ballot is not an investigation, nor is it a report. A ballot is precisely that. Further, to ask the Registrar to investigate a matter such as this is to ask him to obtain evidence, even if this were practically possible, by directing the Registrar or another officer to knock on doors or to personally intervene or send questionnaires to persons concerned, to investigate. It should be said that an investigation is a limited process and does not involve and cannot involve the delegation of the Commission's powers because the Act does not so authorise.

Indeed, and further, I am not persuaded that a party can necessarily seek that an order be made under s.93(8) of the Act. (I would also add that the application for an investigation rather than a ballot was made by Mr Schapper orally in the course of argument and was not part of his original application for a ballot.)

Further, as a matter of merit, the order should not be made because—

1. The matter of the preference of employees is one relevant matter only and it is better that that preference be before the Commission through witnesses, in proceedings where all the other evidence can be tested.
2. The decision in the end is not a matter for the members of the applicant organisations, but for the Commission.
3. The best evidence is that of persons who are prepared to come forward and speak to their preferences.
4. Some employer preferences are relevant, too, and these are open to testing.

RECONSTITUTION OF THE BENCH

On 12 April 1999 (see page 138 of the transcript (hereinafter referred to as "TR")), the Commission advised as follows—

"We should warn you that it may be necessary, and probably will be necessary, to reconstitute this Bench for the matter to be heard then, otherwise the matter would have to be heard much later; namely July. So we assume that there will be no objection, if it is necessary to reconstitute the Bench."

The Full Bench said this because one member had already committed himself to leave in the month of June and the earliest date when a Full Bench could properly be convened was in the month of June 1999. Otherwise, it would have to be heard in the month of July 1999.

Given that these matters have been on foot for some time, then the Full Bench was anxious, even though it had acceded to the application to adjourn, partly to enable more conciliation and mediation to occur and partly to put directions in place for the just and expedient conduct of proceedings, that the matter proceed as soon as possible.

No objection was made at the time.

The Full Bench also, at the same time, invited the parties to file Minutes of Proposed Orders (as to any directions) for its consideration. The Full Bench did not invite further submissions.

Nonetheless, the Full Bench received a written submission from Mr Schapper on behalf of the CMETSWU dated 12 April 1999, in which he objected to the Full Bench being reconstituted. This, in turn, caused Messrs Freehills, acting as Solicitors for BHP, to respond also by way of unsolicited written submissions.

The principles which apply to reconstituting courts have been authoritatively pronounced upon in R v Lewis (1988) 78 ALR 477 (HC) by the High Court and there is a very useful summary of the principles by Kirby P, as he then was, in Wentworth v Rogers and Another (No 3) (1986) 6 NSWLR (CA) 642 at 649—

"1. If specific provision is made by a statute for the reconstitution of the court following the death, illness, resignation, prolonged absence or other incapacity of a Judge who has part heard a case, the legislation will govern the substitution: *Chua Chee Chor v Chua Kim Yong*. ([1962] 1 WLR 1464; [1963] 1 All ER 102 (PC))

2. Statute apart, the primary rule is that once a court embarks upon the hearing of the case, prima facie the court as so constituted should conclude the hearing and any reconstitution of the court in the middle of proceedings will be an irregularity warranting intervention on appeal or review to require a new trial de novo.

3. The primary rule is subject to the exception that if an ancillary, severable and distinct matter is severed and not dealt with in an earlier proceeding, it may be determined by another judge, or an appeal court including another judge: *Orr v Holmes*. ((1948) 76 CLR 632)

4. The primary rule applies with special force where the part heard case is before the court constituted by a judge and jury (*Coleshill*) or where, though constituted by a judge alone, there is a serious conflict of evidence: *Chua Chee Chor v Chua Kim Yong*; *Brennan v Brennan*. ((1953) 89 CLR 129) In such cases proper practice requires recommencement of the trial de novo.

5. The above requirements, if not followed, may result in an order for a new trial. But in certain circumstances such an order will not be made. The guiding principle is the demands of justice in the particular case. Relevant to the application of that principle is a consideration of the extent of any possible prejudice done by the procedure that was followed and the risk of injustice arising from it as well as the expense and delay that would be occasioned by an order for a trial de novo in the circumstances that have occurred: *Brennan v Brennan; Cotogno v Lamb* ((No 2)(1985) 3NSWLR 221; Cotogno v Lamb (No 3) (1986) 5 NSWLR 559).

6. It is also relevant in this last connection to consider the conduct of the parties, and those who represented them (if any) at the trial for if they have induced, acquiesced in or waived the irregularity they will not normally thereafter be heard to complain of it: *British Reinforced Concrete* case; *Brennan v Brennan*."

In this case, there is power to allocate in the Chief Commissioner (see s.26(1) of the Act). An allocation at the request of the Full Bench to enable the Bench to be lawfully reconstituted is in power.

I would also refer to R v Lewis (op cit), where the reconstitution of a court after directions have been given was not held to be exceptionable. In this case, the reconstitution is to occur after directions were made and before the substance of the matter is dealt with and could not be exceptionable for this reason. Put another way, that part of the proceedings now completed is plainly ancillary, severable and distinct and the reconstitution is not incompatible with the demands of justice in the case. The CMETSWU, in any event, by its failure to raise the matter at the hearing, must be held to have acquiesced or waived its right to object to the reconstitution of the Bench.

DIRECTIONS

The directions which the Full Bench have now made are the directions which, in our view, it was necessary to make for the expeditious and just hearing and determination of the matter.

As to orders sought by the CMETSWU that the names of employees of BHP be revealed, that is not a matter which I would determine without hearing submissions in open court. This was not raised in open court when submissions as to directions were sought and should not be disposed of by correspondence. It was raised in the letter which Mr Schapper forwarded to my Associate and which is referred to above.

I have considered all of the submissions in detail. For those reasons, I make and have made the orders and given the directions referred to herein.

CHIEF COMMISSIONER W S COLEMAN: I have had the opportunity to read the President's draft reasons for decision. Except for dismissing the ACTU's applications to be heard in relation to Matter Nos. 1996 of 1998 and 2211 of 1998, I agree with the Hon. President.

I would recognise the sufficiency of the interest of the ACTU in these matters and afford that organisation the opportunity to be heard. The respective state unions pursuing these applications under Section 72A of the Act have sought the ACTU's involvement in attempting to have the issue mediated between them. Already that involvement has been accepted as the basis upon which an adjournment has been granted. Now another has been acceded to. The interest that the ACTU pursues is not one that identifies directly with the rights of that organisation. However, as a peak body, it plays an important role in promoting the interests of its constituent organisations and therefore their members with respect to the industrial coverage in an enterprise. Where the respective applicants, at various times, have relied upon the ACTU's involvement to assist in achieving an acceptable outcome without recourse to arbitration, the interest that the ACTU has in informing the Commission of its efforts is, in my view, sufficient to attract the exercise of the wide discretion under Section 72A(5) in that organisation's favour. That interest, based as it is on the ACTU's role in mediating a resolution between the applicant unions is consistent with the realisation of the objects of the Act. The Commission should recognise an interest that goes to that objective.

In all other respects I agree with the orders.

SENIOR COMMISSIONER G L FIELDING: I have had the advantage of reading in draft form the reasons for decision prepared by the President. I agree with the orders he proposes. I can shortly state my reasons.

Application by the Australian Mines and Metals Association Incorporated to be heard.

For the reasons I advanced in respect of Application No. 1996 of 1998 I would not grant the Association leave to be heard. Nonetheless, I acknowledge that on the basis of the decision of the majority of the Full Bench in that matter, the Association should be granted leave to be heard in this matter.

Application by the Australian Council of Trade Unions to be heard.

I am far from convinced that the Council has an interest in the matter sufficient to warrant it being given an opportunity to be heard. It appears that the Council's only interest in this matter is as a mediator or peace broker. The agent for the Council in seeking leave to be heard said that the Council only wished to be heard for the purposes of inviting the Full Bench to adjourn both matters to enable the Council to sponsor further discussions between the relevant unions with a view to brokering an agreement between the unions and thereby avoid the necessity for arbitration. In those circumstances it is difficult to see how the Council can be said to have a sufficient interest in the matter warranting it being given the opportunity to be heard. The Council does not suggest that its interest is any more than a mediator or conciliator acting outside and independently of the Commission. Indeed, the agent for the Council intimated that if granted leave to be heard once she had put the case on behalf of the Council for the adjournment, the Council would seek to withdraw from the proceedings.

True it is that in past proceedings of this nature the Commission has considered the views of the Council as to which of any of competing unions should be given coverage of work in a particular workplace. However, in this case the Council does not seek to be heard on that basis. It seems that all the Council wishes to do at this time is to act as a mediator outside of the Commission and not make submissions as to the merits of the matter. Even making allowance for the fact that the Commission is an industrial tribunal rather than a court of law, and thus a liberal or robust interpretation of what is a 'sufficient interest' for these purposes may be warranted, I am not satisfied that the Council has, in the circumstances, an interest sufficient to warrant it being heard.

Application for adjournment to conciliate

I agree with the President that insofar as the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union seeks to adjourn its Application and that instituted by the Australian Workers' Union in order to allow the relevant unions to confer, there is little or no merit in the request. The Application instituted by the Australian Workers' Union was adjourned some time ago for that purpose and it appears that the parties are no further advanced. The matter in issue in both Applications is now a long standing one. There has been ample time for discussion. The matter is causing difficulties in the workplace and needs to be resolved promptly.

Application for adjournment and ballot of employees

Likewise, I do not consider that the Applications should be adjourned to allow for a Commission sanctioned ballot of the affected employees. Despite the valiant efforts of Counsel for the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union to persuade us otherwise, I am not satisfied that the Commission has power to order that a ballot of the affected employees be held. Even if such power existed I am far from convinced that it would be beneficial for there to be such a ballot.

Insofar as the Applicant relies on the provisions of paragraph (b) of section 26(1) to ground its application for a ballot, the application has little or no merit. In my view that paragraph is directed to the manner in which the Commission receives evidence or information. As counsel for the Australian Workers' Union suggests it is not designed to enable the Commission to "manufacture evidence which does not exist". Rather, it is designed to enable the Commission to receive information about existing facts without regard to the rules of evidence.

Equally, I consider it reading too much into the provisions of subsection 27(1) of the Act to say that the Commission has power to order a ballot of the kind now in question. Although, as counsel suggests, the provisions of subsection 27(1) by paragraphs (p), (q) and (r) expressly make provision for the Commission to seek information, they do so in a manner which, in my opinion, provides little scope to infer that they should be interpreted as indicating that the Commission should have still wider powers than those specified in those paragraphs to obtain information. Those paragraphs appear to be interrelated. Paragraph (p) gives the Commission power to enter upon certain premises, paragraph (q) gives the Commission power to inspect what is on those premises and paragraph (r) the power to question any person who may be on "any such premises". They are quite specific and in my view, it would be contrary to the established principles of statutory interpretation to suggest that the Commission has further powers of interrogation than those there specified in respect of matters before it. The argument to the contrary is not assisted by reference to the provisions of paragraph (r). As pointed out by Brinsden J. in *Robe River Iron Associates v. The Federated Engine Drivers' aand [sic] Firemens' Union of Workers of Western Australia (1987) 67 WAIG 315 at page 317* the provisions of that paragraph are in essence "merely a dragnet clause to cover any other form of direction or order or action of a procedural nature" not covered specifically by the preceding paragraphs of the subsection. Whilst it might be said as counsel for the Applicant says, that the result of such a ballot might contribute to the "just hearing and determination of the matter", if not also an expeditious hearing and determination of the matter, an order requiring such a ballot goes beyond being an order of a procedural nature relating to the conduct of the proceedings. Indeed, as counsel for the Australian Workers' Union argues, to interpret paragraph (v) in the way suggested by Counsel for the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union would, in effect, render paragraphs (p), (q) and certainly (r) otiose.

Counsel for the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union referred to and relied upon the decision of the Australian Industrial Relations Commission in the *Federated Engine Drivers' and Firemens' Association of Australia v. Abbot Point Bulkcoal Pty Ltd (Print M2071; (1995) 38 AILR 3-166(29))* in which it was held that the provisions of section 111(1)(t) of the Workplace Relations Act 1996 (Cth), which for all intents and purposes are in terms identical to those of paragraph (v) of section 27(1) of the Industrial Relations Act 1979, empowered the Australian Commission to order the conduct of a ballot of the kind now in question. It must be conceded that there is little to distinguish that case from the present. However, it is not a decision binding on this Commission and was made in respect of a different statutory instrument. The Workplace Relations Act 1996 unlike the State legislation, makes express provision in section 135 for the Australian Commission to order a ballot of the kind now in question. The fact that the Commonwealth Parliament thought it necessary to make express provision for a secret ballot, notwithstanding the existence of the general power to give all such directions and do all such things as are necessary for the speedy and just hearing and determination of an industrial matter, could be taken to suggest that the general power was insufficient for this purpose.

Likewise, I do not consider the Commission has power under the provisions of 93(8) and 94 of the Industrial Relations Act 1979 to make an order of the kind envisaged by the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union. I consider it reading too much into those sections to hold that they give the Commission power to direct the Registrar to conduct a ballot of the kind in question. Those sections simply authorise the Commission to direct the Registrar to investigate and report in relation to any matter within the jurisdiction of the Commission as the Commission thinks necessary. Significantly section 27(2) expressly enables the inspectoral and inquisitorial powers of the Commission specified in paragraphs (p), (q) and (r) to be exercised by an officer of the Commission, which would include the Registrar. Presumably, that subsection is designed to compliment the provisions of section 93(8). The legislation, having expressly specified the powers of the Commission and the authority of the Registrar in this respect, there is no scope to infer that the Commission has additional powers by directing the Registrar to investigate and report. In my view it is one thing to require the Registrar to investigate, for example, the extent to which, if at all, employees of BHP Iron Ore Pty Ltd want their industrial interests to be represented by one union or another, but it is quite another thing to direct that the Registrar conduct a formal ballot for that purpose.

Even if the Commission did have the power to order a ballot of the kind sought by the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union, on this occasion I would be reluctant to exercise that power. The Union has not suggested that the ballot could or should be compulsory or that the Commission has the power to order a ballot which was compulsory. Having regard to the fact that at least one of the unions concerned, namely the Australian Workers' Union, does not support the holding of such a ballot, the outcome of the ballot is not likely to produce much more information than is now already available by other means at the disposal of each of the unions. Furthermore, because the ballot is not compulsory, there exists a real possibility that the ballot could produce a misleading or otherwise unhelpful result.

Adjournment and Procedural Directions

In my view the application for an adjournment on the basis that there is a need to put in place procedural directions to expedite the proceedings is well founded. Although the Commission is enjoined to go about its business without regard to legal forms and technicalities, the hearing and determination of a matter such as this would, if nothing else, be expedited by the use of procedural directions of this kind requested by the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union. All the indications are that unless action of this kind is taken, the hearing of the matter will be protracted to a degree which is highly undesirable. In the circumstances, even at this late stage, it is in the interests of the parties that each of the Applications be adjourned to a date to be fixed in order that there be time for the parties to exchange at least, witness statements and copies of documents to be relied upon in these proceedings. If, in the interim the Australian Council of Trade Unions is able to broker a settlement which hitherto it has been unable to do, so much the better.

Reconstitution of the Bench

I agree with the observations of the President and have nothing further to add.

APPEARANCES: Mr A Herbert QC (of Counsel), by leave, and with him Mr B Kilmartin (of Counsel), by leave, on behalf of the AWU

Mr A D Lucev (of Counsel), by leave, and with him Ms Melanie Binet (of Counsel), by leave, on behalf of BHP

Mr D H Schapper (of Counsel), by leave, on behalf of the CMETSWU

Mr J A Long (of Counsel), by leave, on behalf of the TWU

Mr G Sturman on behalf of the AFMEPKIU

Mr R Gifford on behalf of the AMMA

Ms S M Mayman on behalf of the ACTU

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
(Applicant)

No. 1996 of 1998.

and

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch
(Applicant)

No. 2211 of 1998.

and

The Transport Workers' Union, Industrial Union of Workers, Western Australian Branch
(Applicant).

No. 68 of 1999.

BEFORE THE FULL BENCH

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

28 April 1999.

Order.

THESE matters having come on for hearing before the Full Bench on the 12th day of April 1999, and having heard Mr A Herbert QC (of Counsel), by leave, and with him Mr B Kilmartin (of Counsel), by leave, on behalf of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (hereinafter referred to as the "AWU"), and Mr A D Lucev (of Counsel), by leave, and with him Ms Melanie Binet (of Counsel), by leave, on behalf of BHP Iron Ore Pty Ltd (hereinafter referred to as "BHP"), and Mr D H Schapper (of Counsel), by leave, on behalf of The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as the "CMETSWU"), and Mr J A Long (of Counsel), by leave, on behalf of The Transport Workers' Union, Industrial Union of Workers, Western Australian Branch (hereinafter referred to as the "TWU"), and Mr G Sturman on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch (hereinafter referred to as the "AFMEPKIU"), and Mr R Gifford on behalf of the Australian Mines & Metals Association (Inc) (hereinafter referred to as "AMMA"), and Ms S M Mayman for the Australian Council of Trade Unions (hereinafter referred to as the "ACTU") and the Full Bench having reserved its decision on the matter, and having determined that reasons for decision should be delivered at a future date, it is this day, the 28th day of April 1999, ordered and declared as follows—

(1) IT IS DECLARED THAT in relation to application No 2211 of 1998, BHP, AWU and AMMA have sufficient interest to be heard pursuant to s.72A(5) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act").

(2) IT IS DECLARED THAT in relation to applications Nos 1996 of 1998 and 2211 of 1998, the ACTU does not have sufficient interest to be heard and therefore their application pursuant to s.72A(5) of the Act be and is hereby dismissed.

(3) THAT leave be and is hereby granted to the TWU to withdraw its application to be heard pursuant to s.72A(5) of the Act from application No 2211 of 1998 and to withdraw from proceedings in application No 1996 of 1998.

(4) THAT leave be and is hereby granted to the AFMEPKIU to withdraw from application No 1996 of 1998 and also to withdraw from those proceedings.

(5) THAT application No 2211 of 1998 be amended so that Paragraph 3 of the Orders sought by the CMETSWU is amended so that the words "TWU – levels S1-3 inclusive" and "TWU Level LVS1" are deleted therefrom.

(6) THAT leave be and is hereby granted for application No 68 of 1999 by the TWU to be withdrawn and the Full Bench will refrain from hearing the said application, such leave having been granted.

(7) THAT the application by the CMETSWU for an order that the Registrar investigate by way of a secret ballot or otherwise the wishes of the relevant employees of BHP Iron Ore Pty Ltd as to union coverage and report the same to the Commission and the parties be and is hereby dismissed.

(8) THAT applications Nos 2211 of 1998 and 1996 of 1998 be and are hereby adjourned to 10.30 am on Monday, the 14th day of June 1999, Tuesday, the 15th day of June 1999, Wednesday, the 16th day of June 1999, Thursday, the 17th day of June 1999, Friday, the 18th day of June 1999, Monday, the 21st day of June 1999, Tuesday, the 22nd day of June 1999, Wednesday, the 23rd day of June 1999, Thursday, the 24th day of June 1999 and Friday, the 25th day of June 1999, for hearing and determination.

By the Full Bench

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
(Applicant)

No. 1996 of 1998

and

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch
(Applicant).

No. 2211 of 1998.

BEFORE THE FULL BENCH

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

21 April 1999.

Orders and Directions.

THIS matter having come on for hearing before the Full Bench on the 12th day of April 1999, and having heard Mr A Herbert QC (of Counsel), by leave, and with him Mr B Kilmartin (of Counsel), by leave, on behalf of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (hereinafter referred to as the "AWU"), and Mr A D Lucev (of Counsel), by leave, and with him Ms M Binet (of Counsel), by leave, on behalf of BHP Iron Ore Pty Ltd (hereinafter referred to as "BHP"), and Mr D H Schapper (of Counsel), by leave, on behalf of The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch, and Mr R Gifford on behalf of the Australian Mines & Metals Association (Inc), and the Full Bench having determined that the following orders and directions were necessary and expedient for the just hearing and determination of the matter, it is this day, the 21st day of April 1999, ordered and directed as follows—

(1) THAT the two abovenamed applications be heard together.

(2) THAT all of the abovenamed applicants and the s.72A(5) participants in these proceedings do file and serve the written statements of all witnesses called whom it is proposed to call to give evidence in these proceedings on or before the 7th day of May 1999.

(3) THAT the abovenamed applicants and the s.72A(5) participants do file and serve any answering witness statements by the 21st day of May 1999.

(4) THAT such written statements, if admitted in evidence, shall stand as the evidence-in-chief of such witnesses.

(5) THAT any documents upon which any party intends to adduce in evidence shall be annexed in copy form to the statement of the witness through whom it is to be tendered.

(6) THAT no evidence-in-chief may be adduced which is not contained in the said written statements of witnesses without the leave of the Full Bench.

(7) THAT copies of all documents proposed to be produced in the abovementioned proceedings other than through a witness shall be served on the applicants on or before the 7th day of May 1999.

(8) (a) THAT the applicants and the s.72A(5) participants shall give notice to each other in writing on or before the 30th day of May 1999 of the names of those witnesses whom they seek to cross-examine and the same shall then be produced for cross-examination by the applicant or participant seeking to adduce their evidence.

(b) If no such notification is given, then such witnesses shall not be required to attend.

(9) THAT a witness in respect of whom a written statement as aforesaid has not been filed shall not give evidence without the leave of the Full Bench.

(10) THAT the applicants and the s.72A(5) participants shall file and serve full opening statements and lists of authorities on or before the 4th day of June 1999.

(11) THAT a list of all witnesses to be called in triplicate shall be filed and served by the applicants and all participants on or before the 7th day of June 1999.

(12) THAT there be liberty to apply on 48 hours' notice to the Commission to the applicants and the s.72A(5) participants.

By the Full Bench

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
(Applicant).

No. 1996 of 1998.

BEFORE THE FULL BENCH

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

3 March 1999.

Reasons for Decision.

THE PRESIDENT: This is an application brought pursuant to s.72 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") by the applicant organisation.

Without objection, and based on the grounds contained in their applications to be heard under s.72A(5) of the Act, the Full Bench found that the following organisations had sufficient interest to be heard—

(a) The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch ("the CMETSWU").

(b) The Transport Workers' Union, Industrial Union of Workers, Western Australian Branch ("the TWU").

(c) BHP Iron Ore Pty Ltd ("BHP").

(d) The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch ("the AFMEPKIU").

(e) Australian Mines and Metals Association (Inc) ("the AMMA").

There are two aspects of the applications for leave to be heard which require some comment.

THE AMMA AND S.72A(5) OF THE ACT

First, there is the application for leave to be heard by the AMMA. In my opinion, there was sufficient interest for the Full Bench to give the AMMA a right to be heard because the AMMA is a peak employer body, representing the industrial interests of a large number of mining and mining contracting companies. It was not in issue that this application was the first such application by the applicant organisation in the mining industry and the first occasion upon which a view as to such an application might be put by an employer body.

It was also submitted that the outcome of the application is likely to have implications for other mining or contracting companies generally and, in particular, companies contracted to BHP (see pages 10-11 of the transcript (hereinafter referred to as "TR").

What is of interest to the AMMA, it is submitted, is the activities of the CMETSWU and the TWU within the iron ore industry and the likely claims which might be made, presumably if they were successful in resisting the AWU application.

The AMMA seeks, too, to support the BHP position. However, I am not certain that that constitutes sufficient interest on its own. Insofar as that is connected to the interest which the

AMMA, as an association of employees has in union coverage or in duty where it has members, then it is part of the AMMA interest to which I have already referred.

Mr Schapper, in his submissions on behalf of the CMETSWU, made something of the fact that individual producers of iron ore or contractors sought to be heard individually in these proceedings. However, the fact of the matter is that associations such as AMMA exist to represent their members and the interest of those members. The test is not whether AMMA is immediately concerned but has sufficient interest to enable it to be heard.

I am satisfied that, when the question of whether an organisation of employees seeks to exclusively represent employees in the iron ore industry, and the determination of this question involves the avowed interests of its member organisations in so doing, then in conformity with the principle in R v Ludeke and Others; Ex parte Customs Officers' Association of Australia, Fourth Division [1985] 155 CLR 513 (HC), I was satisfied that there was sufficient interest to enable the AMMA to be heard in these proceedings, for those reasons.

THE CMETSWU AND S.27(1)(J) & (K) OF THE ACT

Although the Full Bench recognised the CMETSWU's (and its counterpart Federal body) right to be heard, the organisation also sought to be given leave to intervene pursuant to s.27(1)(k) of the Act and, in the alternative, to be joined as a party to the proceedings. I would add that I would wish to be persuaded that the counterpart Federal body had a substantial role to play in this matter.

In HSOA v CSA 76 WAIG 1673 at 1675-1676 (FB) (see, too, Re an application by FMWU 73 WAIG 563 (FB)), the Full Bench unanimously held that s.27(1)(k) of the Act, limited as it was by the words "Except or otherwise provided in this Act", did not apply to s.72A proceedings. I do not propose to repeat what I said in that case, but merely apply the detail of what I said (see also TWU and ALHMWU 76 WAIG 4877 (FB)).

In Re an application by CMETSWU 78 WAIG 1585 (FB), the Full Bench dealt with the question of whether persons given a right to be heard could claim costs and held that they could not. I observed at page 1586 that persons could not apply to become a party because proceedings were not inter partes and applied some of the reasoning of Murray J in Re Western Australian Industrial Relations Commission; Ex parte Confederation of Western Australian Industry (Inc) (1992) 6 WAR 555 at 569-570, in relation to persons seeking to become a party in s.51 proceedings.

Further, it is to be noted that the power to direct parties to be struck out or persons to be joined is subject to the same qualification as the s.27(1)(k) power and all other powers in s.27 of the Act, namely "Except as otherwise provided in this Act".

S.72A is a special and particular provision within the Act which provides otherwise than s.27(1)(j) or (k). It provides for applications to be made and for persons with sufficient interest to be heard. It makes no provision for parties other than applicants (see s.29B of the Act).

S.72A proceedings are not "inter partes", unlike, say, s.29(1)(b)(i) proceedings.

Mr Schapper submitted that s.72A of the Act did not prescribe a separate category of participant in proceedings, but merely prescribed that the Commission could not make any order described in s.72A(2) without giving a person who, in the opinion of the Full Bench, has a sufficient interest in the matter, an opportunity to be heard. If that is what is meant, that is, that the Commission must give someone who might be affected by its order a right to be heard, then that is already the common law. Indeed, if an adverse finding were likely to be made (see Annetts and Another v McCann and Another [1990] 170 CLR 596 (HC) and Kioa and Others v West and Another [1985] 159 CLR 550), then, as a matter of common law, they might be heard. There was simply no need to insert s.72A(5).

However, there is provided a specific requirement that a person must be heard if he or she has a sufficient interest, the same test for interveners and a test which supplants the right of parties. Put shortly, s.72A(5) of the Act makes provision for a special class of participants and s.27(1)(j) and (k) do not apply to the CMETSWU. I am not persuaded that I should depart from what the Full Bench said in the authorities to which I referred.

For those reasons, I agreed to dismiss the CMETSWU application in those respects.

ADJOURNMENT

I now turn to the adjournment of these proceedings.

All parties agreed that the proceedings be adjourned whilst ACTU sponsored efforts to bring about a resolution of the matter, at least so far as the organisations of employees were concerned.

Mr Schapper, on behalf of the CMETSWU, sought to have the matter adjourned to 12 April 1999, when an application by the CMETSWU and, indeed, the AWU, are listed for hearing.

The Full Bench was of the opinion that attempts to settle should not, at this stage, be the subject of a "deadline" and, indeed, might benefit from such an approach. However, so that the rights of the participants in the proceedings should be preserved, the Full Bench gave a right to them all to apply to relist this application for hearing on 48 hours' notice in writing.

CHIEF COMMISSIONER W S COLEMAN: I have had the benefit of reading, in draft, the reasons set down by the President with which I am in agreement.

While it acknowledges no direct interest in the substantiative application before the Commission, the Australian Mines and Metals Association (Incorporated) has established sufficient interest to be heard given its representation within the mining industry and the possible implications for its members.

On the application by the Construction, Mining, Energy. Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch to be joined as a party or be given leave to intervene, the authority as it stands establishes that this should be refused. (See H.S.O.A. v C.S.A. (1996) 76 WAIG 1673).

SENIOR COMMISSIONER G L FIELDING: I have had the advantage of reading the draft reasons for decision prepared by the President. At least in one respect I have a different opinion from him regarding the outcome of the interlocutory matters. I can state my reasons for so concluding shortly.

The right to be heard

In my opinion the Australian Mines and Metals Association (Inc) does not have a sufficient interest for the purposes of section 72A(5) of the Act entitling it to be heard, nor do I consider it appropriate for the Commission to exercise the discretion it undoubtedly has to grant leave for the Association to be heard in any event.

It seems accepted, and I take it to be the case, that a "sufficient interest" for the purposes of section 72A(5) of the Act is to be taken as a direct interest as determined in accordance with the formulae explained in *R v Ludeke and Ors; Ex parte The Customs Officers' Association of Australia, Fourth Division (1985) 155 CLR 513*. Not by any proper measure can it be said that the Association has a direct interest in this matter. Nothing the Commission can do lawfully as a result of this application will in any way, directly or even indirectly, affect the Association itself. Furthermore, none of its members are likely to be directly affected by the proceedings. The application is directed to the rights affecting certain employees of BHP Iron Ore Pty Ltd only. BHP Iron Ore Pty Ltd was said not to be a member of the Association.

In fairness, the agent for the Association did not advance the Association's claim to be on that basis. Instead, the claim to be heard was put on the basis "that there may be a prospect" that contractors of BHP Iron Ore Pty Ltd might be affected by any change of rights of union representation and also that there "may be a possibility" that the consequences of any changed representational rights "may be sought to be extended to other mining industry employees" in the Pilbara. Such an interest is, at best, remotely indirect if not speculative and certainly not such that it could be said to be a sufficient interest.

The agent for the Association also suggested that the Association "as a peak body" had a sufficient interest in the matter. Again, in my opinion, that is not the case. Assuming for the present purposes that the Association is a peak body representing the industrial relations interests of many employers in the mining industry in this State, it does not thereby derive any special privileges under the Act beyond those specially given to it by the Act. The Association is not registered as an organisation under the Act. Although the Association is given special standing in respect of proceedings before the Commission in respect of General Orders made under Division 3 of Part II of the Act and in respect of applications for new, and in some cases, the amendment of existing awards and the registration of industrial agreements, no such standing is given in respect of an application of the nature now before the Full Bench. There may well be good reason for that because the question of union membership in a particular enterprise is not normally a matter within the control of the employer, and indeed, is a matter largely outlawed by Part IIA of the Act. In any event, the fact that the Association is given special rights in the form of a statutory right to be heard in some cases, is no reason to conclude that it has such a right in all cases. The better approach is to infer from the fact that the Association is expressly given special standing in some cases but not in others, that the Association is not to have special standing universally in other cases. In my view the Association, as with any other person or body, needs to establish that it has a sufficient interest in accordance with the normal tests. That requires that the Association establish that it has a direct interest in the matter.

There is no bar to the Commission giving the Association, or for that matter any other person or body, the right to be heard in the absence of such a direct interest. However, having regard to the nature of the instant application which, as previously mentioned, is confined to the employees of a particular enterprise, there is little to be gained from allowing others to become involved. It is preferable that the proceedings be confined to those directly affected. Matters of this nature should be determined based on reason rather than on industrial might. Certainly, if all the Association wishes to do on this occasion is to support the case advanced by BHP, there seems little to be gained for granting the Association the leave it seeks.

The right to intervene or be joined as a party

I agree with the President that the application by the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch to be joined as a party or be given leave to intervene should be refused. As the President has indicated the Full Bench has previously decided that it does not have the power to grant such an application. In the interest of consistency those decisions should be followed unless and until the Industrial Appeal Court decides otherwise the issues are fully re-argued before the Full Bench.

I feel bound to say however, that were the matter free from authority I would have been inclined to grant the Union leave to intervene. No one questioned that the Union is not directly affected by the application and therefore had sufficient interest to be granted leave to intervene. Although the provisions of section 72A of the Act give the Commission special jurisdiction, the section cannot be taken as being independent of the other provisions of the Act. Thus, the incidental powers given to the Commission in the exercise of its jurisdiction by section 27 apply unless the Act provides otherwise. I do not read section 72A, and in particular the provisions in subsection 72A(5), as being inconsistent with the provisions of sub-paragraphs (j) and (k) of subsection 27(1) which empower the Commission to direct persons to be joined as parties or permit the intervention of any person who in the opinion of the Commission has a sufficient interest in a particular matter. Subsection 72A(5) does not govern the basis upon which a person with a sufficient interest might be heard. Subsection 72A(5) simply imposes a limitation on the exercise by the Commission of the jurisdiction given by section 72A. As counsel for the Union submitted, subsection 72A(5) is “a negative condition upon the exercise of the power of the Commission” to exercise that jurisdiction. In the circumstances, I find difficulty in accepting that the provisions of subsection 72A(5) should be taken as excluding the power in the Commission to entertain an application for intervention by a person with a sufficient interest or to entertain an application for the joinder as a party. My difficulty is compounded by the fact that such an interpretation removes the right of appeal which persons with a sufficient interest in the matter might otherwise have had. By reason of section 90 of the Act only persons who are parties or interveners have a right of appeal from decisions of the Full Bench to the Industrial Appeal Court. Given the importance which, in matters of this kind, the Act places on persons with a sufficient interest being heard, it is difficult to comprehend that the legislation should be interpreted as thereby denying those persons a right of appeal which they might otherwise have had, a right which as interested persons they could reasonably expect to retain.

Accordingly in my view, but for the decided cases, there is a case for granting the Union leave to intervene or otherwise joining the Union as a party.

Order accordingly

APPEARANCES: Mr A Herbert QC (of Counsel), by leave, and with him Mr B Kilmartin (of Counsel), by leave, on behalf of the applicant

Mr A D Lucev (of Counsel), by leave, on behalf of BHP Iron Ore Pty Ltd

Mr D H Schapper (of Counsel), by leave, on behalf of The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch

Mr J A Long (of Counsel), by leave, on behalf of The Transport Workers’ Union, Industrial Union of Workers, Western Australian Branch

Mr G Sturman on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch

Mr R Gifford on behalf of the Australian Mines and Metals Association (Inc)

FULL BENCH—Procedural Directions and Orders—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Burswood Resort (Management) Ltd
(Respondent).

No. FBA 4 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
SENIOR COMMISSIONER G L FIELDING.
COMMISSIONER P E SCOTT.

1 October 1999.

Order.

THIS matter having been due to come on for hearing before the Full Bench on the 1st day of October 1999, and the abovenamed appellant having, by facsimile transmissions dated the 28th and, further, the 29th day of September 1999, applied to adjourn the hearing and determination of the appeal herein sine die pending the hearing and determination of matter No CR 159 of 1999 before Senior Commissioner G L Fielding in the Western Australian Industrial Relations Commission, and the respondent having consented to the adjournment by facsimile transmission dated the 30th day of September 1999, and the parties hereto having consented to waive the requirements of s.35 of the Industrial Relations Act 1979 (as amended), it is this day, the 1st day of October 1999 ordered, by consent, that the hearing and determination of appeal No FBA 4 of 1999 be and is hereby adjourned sine die.

By the Full Bench

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Master Plumbers' and Mechanical Services Association of Western Australia (Union of Employers)
(Applicant).

No. 106 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
COMMISSIONER J F GREGOR.

10 September 1999.

Order.

THIS matter having been due to come on for hearing before the Full Bench on the 10th day of September 1999, and the abovenamed applicant having, by letter dated the 8th day of September 1999, applied to adjourn the hearing and determination of the application and there being no other party or intervener and the applicant herein having consented to waive the requirements of s.35 of the Industrial Relations Act 1979 (as amended), it is this day, the 10th day of September 1999, ordered that the matter be and is hereby adjourned sine die.

By the Full Bench

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Pearl & Dean Pty Ltd and Pearl & Dean Group Pty Ltd
(Appellants)

and

Jeanette Marie Levine
(Respondent).

No. FBA 8 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
COMMISSIONER A R BEECH.
COMMISSIONER P E SCOTT.

17 September 1999.

Order.

THIS Notice of Appeal, having been filed in the Registry of the Commission on the 2nd day of July 1999 and having been served upon the respondent on the 6th day of July 1999 and a Declaration of Service of the same having been filed in the Registry of the Commission on the 8th day of July 1999, and the abovenamed appellants having, on the 13th day of September 1999, filed an Amended Notice of Application in the Registry of the Commission, applied to the Commission for orders that the appeal be withdrawn and there be no order as to costs, and the parties herein having consented in writing to the orders being made in the terms of the aforementioned application, it is this day the 17th day of September 1999 ordered, by consent, as follows—

1. THAT there be leave for Appeal No FBA 8 of 1999 to be withdrawn.
2. THAT the Full Bench refrain from hearing the said appeal further.
3. THAT there be no order as to costs.

By the Full Bench

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

PRESIDENT—
Matters dealt with—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Robert Blakeman AFT the Blakeman family Trust T/A McBride's Collectables and Giftware
(Applicant)

and

Joanne Gudgin
(Respondent).

No. PRES 9 of 1999.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

20 September 1999.

Reasons for Decision.

THE PRESIDENT: This is an application by the abovenamed applicant brought pursuant to s.49(11) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") seeking the stay of the operation of the whole of the decision of the Commission made on 26 August 1999 in application No 2088 of 1998 and deposited in the Registrar's Office on 31 August 1999.

The Notice of Appeal was filed on 6 September 1999 and duly served. I am satisfied and find that the appeal has been "instituted" within the meaning of s.49(11) of the Act. I am satisfied and find that since the applicant was the respondent at first instance that he had sufficient interest to support this application.

The application for a stay was filed on 8 September 1999.

The order sought to be stayed is an order made on an application made by the abovenamed respondent in which she alleged that she was unfairly dismissed by the abovenamed applicant. Formal parts omitted, the order reads as follows—

"1. DECLARE THAT—
   (a) The dismissal of Joanne Gudgin by the respondent was harsh; and
   (b) Reinstatement is impracticable.
2. ORDER THAT McBride's Collectables and Giftware pay Joanne Gudgin within 7 working days of the date of this order—
   (a) a sum equal to 3 weeks' wages at the shop floor rate by way of compensation for the dismissal which occurred; and
   (b) the pro rata annual leave due to her for the period between the last anniversary date of her employment to the date of her dismissal calculated at the rate at which her completed periods of annual leave were paid to her."

The appeal is against the quantum of compensation ordered. The appeal is also against a number of findings of the Commission at first instance, in particular but not solely based upon the evidence of the respondent employee and a co-fellow employee Mrs Margaret Catherine Sturrock. It is alleged, in particular, in the appeal grounds that evidence given by Mrs Sturrock, which the Commission at first instance preferred to that of Mr Blakeman, was false since she was not present in Bunbury on the date referred to. It follows, say the grounds of appeal, that in matters where the respondent's evidence was supported by that of Mrs Sturrock her evidence was also false.

Mr Blakeman submitted that there was a serious issue to be tried because—

(1) The actual time that Miss Gudgin was unemployed after her dismissal was four weeks and one day not five weeks, and accordingly the amount awarded should be equal to two weeks and not three.

(2) That he had two witnesses who would confirm in evidence that Mrs Sturrock was not in Bunbury on Monday, 9 November 1998, the day when Miss Gudgin was dismissed.

(3) That this witnesses evidence was therefore false and insofar as it corroborated the respondent the evidence was false.

Mr Blakeman submitted that the balance of convenience lay with him because if the amount of the order, which he said was $1500 to $2000, was paid out, and he succeeded on appeal, he would have to sue to recover monies.

Miss Gudgin submitted—

(1) That no false evidence was given.

(2) That she had been deprived of compensation for her dismissal for many months.

(3) She also asserted in evidence that she was employed and had been for some months.

(4) That she gave evidence of over four weeks unemployment which the Commission wrote down as five weeks; an approximate amount only.

PRINCIPLES

The principles applicable are well settled (see Gawooleng Dawang Inc v Lupton and Others 72 WAIG 1310)—

(1) The applicant must establish that there is a serious issue to be tried.

It has not been established that there is a serious issue to be tried because, putting aside the question of whether the Full Bench would admit fresh evidence, the Commission at first instance found that Miss Gudgin had made an error in printing off information and permitting Mrs Sturrock to read it. He then went on to make findings as to unfairness, but the presence or absence of Mrs Sturrock on 9 November 1998 does not have a great deal to do with a finding that Miss Gudgin acted correctly.

Further, I am not persuaded that a finding that Mrs Sturrock's evidence was false would probably lead to a finding that the dismissal was unfair. I am not therefore persuaded that there was a serious issue to be tried. I am not persuaded either that the finding of five weeks loss of employment was erroneous at all or was so erroneous that that ground of appeal would be made out.

(2) The applicant must establish that the balance of convenience favours the applicant. The dismissal occurred on 9 November 1998. Miss Gudgin still has not been paid compensation and it is now over 10 months later.

(3) Miss Gudgin is presently in employment and has been for some months. There is no evidence that if the appeal were successful she could not repay the monies. It is not a matter of sufficient inconvenience that the applicant would have to sue to recover the amount of the order were he successful on appeal.

The balance of convenience favours the respondent not the applicant. Further, no reason has been established as to why the respondent should be deprived of the fruits of her "litigation".

Having regard to s.26(1)(c) of the Act, the interests of the applicant should not take precedence over the respondent. The equity, good conscience and the substantial merits of the case favour the respondent. Alternatively, they have not been established to favour the applicant.

I would add that the findings I have made and the conclusions which I have reached are for the purposes of these proceedings only.

For those reasons, the application is dismissed.

Order accordingly

Appearances: Mr R Blakeman on behalf of the applicant.

Miss J Gudgin, on her own behalf, as respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Robert Blakeman AFT the Blakeman family Trust T/A McBride's Collectables and Giftware
(Applicant)

and

Joanne Gudgin
(Respondent).

No. PRES 9 of 1999.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

20 September 1999.

Order.

THIS matter having come on for hearing before me on the 17th day of September 1999, and having heard Mr R Blakeman on behalf of the applicant and Miss J Gudgin, on her own behalf, as respondent, and having reserved my decision on the matter, and reasons for decision being delivered on the 20th day of September 1999 wherein I found that the application should be dismissed and gave reasons therefore, it is this day, the 20th day of September 1999, ordered that application No PRES 9 of 1999 be and is hereby dismissed.

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

PUBLIC SERVICE ARBITRATOR— Awards/Agreements— Variation of—

**GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989.
No. PSA A3 of 1989.**

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Albany Port Authority and Others.

No. P 12 of 1999.

Government Officers Salaries, Allowances and Conditions Award 1989.
No. PSA A3 of 1989.

23 September 1999.

Order.

HAVING HEARD Mr D. Newman on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 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 23rd day of September 1999.

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

Schedule.

1. Schedule I.—Clause 18.—Overtime: Delete Part 1 of this schedule and insert the following in lieu thereof—

PART I—OUT OF HOURS CONTACT

(Operative from 1st pay period on or after 1/8/99)

Standby	$5.67 per hour
On Call	$2.83 per hour
Availability	$1.42 per hour

2. Schedule K.—Shiftwork Allowance: Delete this schedule and insert the following in lieu thereof—

SCHEDULE K.—SHIFTWORK ALLOWANCE

A shift work allowance of $13.11 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

3. Schedule L.—Other Allowances: Delete this Schedule and insert the following in lieu thereof—

SCHEDULE L.—OTHER ALLOWANCES

(1) Diving—(Clause 33)

$4.51 per hour or part thereof.

(2) Flying—(Clause 34)

(a) Observation and photographic duties in fixed wing aircraft—$8.33 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres—$11.41 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance—$15.76 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel—meals on board not prepared by cook—$21.23 per day.

(ii) Government Vessel—meals on board are prepared by a cook—$15.98 per day.

(iii) Non Government Vessel—$19.37 each overnight period.

(b) Hard Living Allowance—44 cents per hour or part thereof.

HOSPITAL SALARIED OFFICERS AWARD, 1968.
No. 39 of 1968.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Hospital Salaried Officers Association of Western Australia (Union of Workers)

and

Albany Health Service and Others.

No. P 3 of 1999.

Hospital Salaried Officers Award, 1968.

1 October 1999.

Order.

HAVING heard Ms C L L Thomas on behalf of the Applicant and Mr J P Hetman 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 Hospital Salaried Officers Award, 1968 as amended be varied in accordance with the following schedule and that such variations shall have effect on and from the 1st day of January 1999.

(Sgd.) G.L. FIELDING,
[L.S.] Public Service Arbitrator/
Senior Commissioner.

Schedule.

Clause 24A.—Travelling, Transfers and Relieving Duty—Rates of Allowance: Delete this clause and insert in lieu thereof the following—

24A.—TRAVELLING, TRANSFERS AND RELIEVING DUTY—RATES OF ALLOWANCE

Item	Particulars	Column A Daily Rate	Column B Daily Rate Married Officer: Relieving Allowance For Period in Excess of 42 Days (Clause 24 (3)(ii)) Transfer Allowance for Period in Excess of Prescribed Period (Clause 22(2))	Column C Daily Rate Single Officer: Relieving Allowance for Period in Excess of 42 Days (Clause 24 (3)(Ii))
		$	$	$
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
(1)	W.A.—South of 26° South Latitude	8.15		
(2)	W.A.—North of 26° South Latitude	10.50		
(3)	Interstate	10.50		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
(4)	W.A.—Metropolitan Hotel or Motel	154.60	77.30	51.50
(5)	Locality South of 26° South Latitude	116.70	58.35	38.85
(6)	Locality North of 26° South Latitude:			
	Broome	201.55	100.80	67.10
	Carnarvon	149.20	74.60	49.70
	Dampier	158.70	79.35	52.85
	Derby	148.75	74.35	49.55
	Exmouth	153.50	76.75	51.10
	Fitzroy Crossing	156.45	78.20	52.10
	Gascoyne Junction	103.00	51.50	34.30
	Halls Creek	179.20	89.60	59.65
	Karratha	232.25	116.10	77.35
	Kununurra	161.00	80.50	53.60
	Marble Bar	127.00	63.50	42.30
	Newman	204.00	102.00	68.00
	Nullagine	108.20	54.10	36.00
	Onslow	102.00	51.00	34.00
	Pannawonica	157.20	78.60	52.35
	Paraburdoo	192.50	96.25	64.10
	Port Hedland	202.20	101.10	67.35
	Roebourne	119.70	59.85	39.85
	Sandfire	103.50	51.75	34.45
	Shark Bay	134.50	67.25	44.80
	Tom Price	170.50	85.25	56.75
	Turkey Creek	109.70	54.85	36.50
	Wickham	124.40	62.20	41.45
	Wyndham	107.00	53.50	35.60
(7)	Interstate—Capital City			
	Sydney	195.35	97.70	65.05
	Melbourne	190.70	95.35	63.50
	Other Capitals	158.90	79.45	52.90

		$	$	$
(8)	Interstate—Other than Capital City	116.70	58.35	38.85

ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL

(9)	W.A.—South of 26° South Latitude	54.00
(10)	W.A.—North of 26° South Latitude	63.95
(11)	Interstate	63.95

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL NOT INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED

(12)	W.A.—South of 26° South Latitude:	
	Breakfast	10.20
	Lunch	10.20
	Evening Meal	25.45
(13)	W.A.—North of 26° South Latitude:	
	Breakfast	12.50
	Lunch	16.70
	Evening Meal	24.25
(14)	Interstate	
	Breakfast	12.50
	Lunch	16.70
	Evening Meal	24.25

DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 22(4))

(15)	Each Adult	18.35
(16)	Each Child	3.15

MIDDAY MEAL (CLAUSE 21(11))

(17)	Rate per meal	4.45
(18)	Maximum reimbursement per pay period	22.25

The allowance prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award, 1992.

PUBLIC SERVICE AWARD 1992.
No. PSA A4 of 1989.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Albany Port Authority and Others.

No. P 15 of 1999.

Public Service Award 1992.
No. PSA A4 of 1989.

23 September 1999.

Order.

HAVING HEARD Mr D. Newman on behalf of the applicant Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the Public Service Award 1992 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 23rd day of September 1999.

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

Schedule.

1. Schedule H—Overtime: Delete Part 1 of this schedule and insert the following in lieu thereof—

PART I—OUT OF HOURS CONTACT

(Operative from 1st pay period on or after 1/8/99)

Standby	$5.67 per hour
On Call	$2.83 per hour
Availability	$1.42 per hour

2. Schedule J—Shiftwork Allowance: Delete this schedule and insert the following in lieu thereof—

SCHEDULE J—SHIFT WORK ALLOWANCE

A shift work allowance of $13.11 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

3. Schedule K—Diving, Flying and Seagoing Allowances: Delete this schedule and insert the following in lieu thereof—

SCHEDULE K—DIVING, FLYING AND SEAGOING ALLOWANCES

(1) Diving—(Clause 33)

$4.51 per hour or part thereof.

(2) Flying—(Clause 34)

(a) Observation and photographic duties in fixed wing aircraft—$8.33 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres—$11.41 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance—$15.76 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel—meals on board not prepared by cook—$21.23 per day.

(ii) Government Vessel—meals on board are prepared by a cook—$15.98 per day.

(iii) Non Government Vessel—$19.37 each overnight period.

(b) Hard Living Allowance—44 cents per hour or part thereof.

AWARDS/AGREEMENTS—Variation of—

ABORIGINAL MEDICAL SERVICE EMPLOYEES' AWARD.
No. A 26 of 1987.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Broome Regional Aboriginal Medical Service and Others.

No. 883 of 1999.

Aboriginal Medical Service Employees' Award.
No. A 26 of 1987.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and there being no appearance on behalf of the respondents, the

Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Aboriginal Medical Service Employees' Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 24A. – Bilingual Allowance: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) In recognition of the increased effectiveness and productivity of bilingual employees, if an employee is required during the course of employment or as part of his/her duties to apply skills within subclause (1) of this clause, the employee who shall be competently bilingual shall be paid an allowance of—

Level 1—$1101.00 per annum.

Level 1 is an elementary level. This level of accreditation is appropriate for employees who are capable of using a minimal knowledge of language for the purpose of simple communication.

Level 2—$2203.10 per annum.

Level 2 represents a level of ability for the ordinary purposes of general business, conversation, reading and writing.

2. Clause 26. – Wages: Delete paragraphs (a), (b) and (c) of subclause (18) of this clause and insert in lieu thereof the following—

(a) $15.10 per week when in charge of not less than three and not more than 10 other employees;

(b) $22.55 per week when in charge of more than 10 and not more than 20 other employees; and

(c) $30.00 per week when in charge of more than 20 employees.

3. Schedule A – Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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ACTIV FOUNDATION (SALARIED OFFICERS) AWARD. No. 13 of 1977.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Hospital Salaried Officers Association of Western Australia (Union of Workers)

and

The Board of Management,
Activ Foundation Incorporated.

No. 440 of 1999.

ACTIV Foundation (Salaried Officers) Award.
No. 13 of 1977.

8 October 1999.

Order.

HAVING heard Ms C L L Thomas on behalf of the Applicant and Mr G L Burns 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 ACTIV Foundation (Salaried Officers) Award, No. 13 of 1977 as amended be varied in accordance with the following schedule and that such variations shall have effect on or after the date hereof.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

Clause 26.—Travelling, Transfers And Relieving Duty—Rates Of Allowance: Delete this clause and insert in lieu thereof the following—

26.—TRAVELLING, TRANSFERS AND RELIEVING DUTY—RATES OF ALLOWANCE

Item	Particulars	Column A Daily Rate	Column B Daily Rate Officers With Dependants: Relieving Allowance for Period in Excess of 42 Days (Clause 25 (3)(b)) Transfer Allowance for Period in Excess of Prescribed Period (Clause (23)(2))	Column C Daily Rate Officers Without Dependants: Relieving Allowance for Period in Excess of 42 Days (Clause 25 (3)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA—South of 26° South Latitude	8.15		
(2)	WA—North of 26° South Latitude	10.50		
(3)	Interstate	10.50		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA—Metropolitan Hotel or Motel	154.60	77.30	51.50
(5)	Locality South of 26° South Latitude	116.70	58.35	38.85
(6)	Locality North of 26° South Latitude			
	Broome	201.55	100.80	67.10
	Carnarvon	149.20	74.60	49.70
	Dampier	158.70	79.35	52.85
	Derby	148.75	74.35	49.55
	Exmouth	153.50	76.75	51.10
	Fitzroy Crossing	156.45	78.20	52.10
	Gascoyne Junction	103.00	51.50	34.30
	Halls Creek	179.20	89.60	59.65
	Karratha	232.25	116.10	77.35
	Kununurra	161.00	80.50	53.60
	Marble Bar	127.00	63.50	42.30
	Newman	204.00	102.00	68.00
	Nullagine	108.20	54.10	36.00
	Onslow	102.00	51.00	34.00
	Pannawonica	157.20	78.60	52.35
	Paraburdoo	192.50	96.25	64.10
	Port Hedland	202.20	101.10	67.35
	Roebourne	119.70	59.85	39.85
	Sandfire	103.50	51.75	34.45
	Shark Bay	134.50	67.25	44.80
	Tom Price	170.50	85.25	56.75
	Turkey Creek	109.70	54.85	36.50
	Wickham	124.40	62.20	41.45
	Wyndham	107.00	53.50	35.60
(7)	Interstate—Capital City			
	Sydney	195.35	97.70	65.05
	Melbourne	190.70	95.35	63.50
	Other Capitals	158.90	79.45	52.90

		$	$	$
(8)	Interstate—Other than Capital City	116.70	58.35	38.85

ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL

(9)	WA—South of 26° South Latitude	54.00
(10)	WA—North of 26° South Latitude	63.95
(11)	Interstate	63.95

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED

(12)	WA—South of 26° South Latitude:	
	Breakfast	10.20
	Lunch	10.20
	Dinner	25.45
(13)	WA—North of 26° South Latitude	
	Breakfast	12.50
	Lunch	16.70
	Dinner	24.25
(14)	Interstate	
	Breakfast	12.50
	Lunch	16.70
	Dinner	24.25

DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE (23)(4))

(15)	Each Adult	18.35
(16)	Each Child	3.15

MIDDAY MEAL (CLAUSE (22)(11))

(17)	Rate per meal	4.45
(18)	Maximum reimbursement per pay period	22.25

The allowances prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award, 1992.

AERATED WATER AND CORDIAL MANUFACTURING INDUSTRY AWARD 1975.
No. 10 of 1975.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Coca-Cola Bottlers and Others.

No. 884 of 1999.

Aerated Water and Cordial Manufacturing Industry Award.
No. 10 of 1975.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr M. Beros on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Aerated Water and Cordial Manufacturing Industry Award 1975 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 10. – Wages: Delete paragraph (b) of subclause (1) and insert in lieu thereof the following—

(b) Production Employee—Grade 2 410.00 60.00 470.00

Shall mean an employee classified as such who is engaged on work in connection with or incidental to the production and distribution operations of the employer and who in addition to the duties of a Production Employee—Grade 1 may be required to regularly carry out the specific duties listed hereunder.

Specific Duties—Grade 2

- Syrup and/or cordial makers mixing recipes or formulae who are not solely responsible for ensuring adherence to quality standards of batches.
- Operators of Filling machines.
- Operators of labelling, palletising or depalletising, case packing or unpacking, carton or multi packing machines.
- Employees engaged on routine line testing.
- Forklift Driver
- Truck Driver

Provided that drivers who are required to collect money during any week or portion of a week as part of their duties and account for it shall be paid $3.90 for such a week in addition to the rate of wage prescribed above.

2. Clause 10. – Wages: Delete paragraph (c) of subclause (2) and insert in lieu thereof the following—

(c) Driver of motor vehicle 387.70 60.00 447.70

Provided that drivers who are required to collect money during any week or portion of a week as part of their duties and account for it shall be paid $3.60 for such week in addition to the rate of wage prescribed above.

3. Clause 10. – Wages: Delete paragraphs (a), (b) and (c) of subclause (4) and insert in lieu thereof the following—

(a)	If placed in charge of not less than 3 and not more than 10 other employees	18.80
(b)	If placed in charge of more than 10 and not more than 20 other employees	28.90
(c)	If placed in charge of more than 20 other employees	38.45

4. Schedule A – Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

ANIMAL WELFARE INDUSTRY AWARD.
No. 8 of 1968.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

PS Adams and Others.

No. 888 of 1999.

Animal Welfare Industry Award.
No. 8 of 1968.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms L. Avon-Smith on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Animal Welfare Industry Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 19. – Rates of Pay: Delete subclauses (7) and (8) of this clause and insert in lieu thereof the following—

(7) An employee placed in charge of three or more other employees shall be paid an amount of $19.05 per week in addition to his/her ordinary rate of pay.

(8) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift an allowance of $1.75 per day shall be paid.

2. Clause 20. – Protective Clothing and Uniforms: Delete subclauses (7) and (8) of this clause and insert in lieu thereof the following—

(5) In lieu of the provision of uniforms the employer may pay an allowance of $3.45 per week.

3. Schedule A – Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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BAKERS' (COUNTRY) AWARD. No. 18 of 1977.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Acme Bakery and Others.

No. 890 of 1999.

Bakers' (Country) Award.

No. 18 of 1977.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Bakers' (Country) Award No. 18 of 1977 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 8. – Wages: Delete paragraphs (d) and (e) of subclause (1) of this clause and insert in lieu thereof the following—

(d) Foreman—

In addition to the total wage prescribed in this subclause for a doughmaker a foreman shall be paid—

	Rate Per Week $
(i) if placed in charge of less than four other employees	12.00
(ii) if placed in charge of more than four but less than ten other employees	19.00
(iii) if placed in charge of more than ten and not more than 20 other employees	29.15
(iv) if placed in charge of more than 20 other employees	39.70

(e) Disability Allowance—

In addition to the total wage prescribed in this subclause, a disability allowance of $5.10 per week shall be paid to doughmakers and single hand bakers.

2. Schedule A – Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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BAKERS' (METROPOLITAN) AWARD. No. 13 of 1987.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Baking Industry Employers' Association of Western Australia.

No. 891 of 1999.

Bakers' (Metropolitan) Award .

No. 13 of 1987.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr M. Beros 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 Bakers' (Metropolitan) Award No. 13 of 1987 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 8. – Wages: Delete paragraphs (d) and (e) of subclause (1) of this clause and insert in lieu thereof the following—

(d) Foreperson: In addition to the total wage prescribed in this clause for a doughmaker, a foreperson shall be paid—

		$
(i)	if placed in charge of less than four other employees (per week)	11.80
(ii)	if placed in charge of four but less than ten other employees (per week)	18.95
(iii)	if placed in charge of ten and not more than 20 other employees (per week)	29.05
(iv)	if placed in charge of 20 or more other employees (per week)	37.45

(e) Disability Allowance—

In addition to the total wage prescribed in this subclause a disability allowance of $4.95 per week shall be paid to doughmakers and single hand bakers.

2. Schedule A – Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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BP REFINERY (KWINANA) (SECURITY OFFICERS') AWARD 1978.
No. R 56 of 1978.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

BP Oil Refinery Pty Ltd.

No. 892 of 1999.

BP Refinery (Kwinana) (Security Officers') Award 1978.

No. R 56 of 1978.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr C. Keys 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 BP Refinery (Kwinana) (Security Officers') Award 1978 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 20. – Wages: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) Leading Hands:—

Any officer placed in charge of other officers shall be paid in addition to the appropriate wage prescribed, the following—

		$ Per Week
(a)	if placed in charge of not less than 3 and not more than 10 other officers	18.90
(b)	if placed in charge of not less than 10 and not more than 20 other officers	29.00
(c)	if placed in charge of more than 20 other officers	37.35

2. Schedule A – Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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BRUSHMAKERS AWARD OF 1999.
No. 30 of 1959.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

ED Oates Brushware Ltd.

No. 893 of 1999.

Brushmakers Award
No. 30 of 1959.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms L. Avon-Smith on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Brushmakers Award No. 30 of 1959 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 9.—Leading Hands: Delete subclauses (1) and (2) of this clause and insert in lieu thereof the following—

(1)	When placed in charge of not less than two nor more than four other workers	21.20
(2)	When placed in charge of five or more other workers	26.25

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

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CLEANERS AND CARETAKERS AWARD, 1969.
No. 12 of 1969.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Coca-Cola Bottlers (Perth) Pty Ltd and Others.

No. 902 of 1999.

Cleaners and Caretakers Award, 1969.
No. 12 of 1969.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr C. Keys on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Cleaners and Caretakers Award, 1969 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 20.—Special Rates and Conditions: Delete paragraphs (a) and (b) of subclause (8) of this clause and insert in lieu thereof the following—

(a) Washing towels, 27 cents each.

(b) Washing dusters, 20 cents each.

2. Clause 20.—Special Rates and Conditions: Delete paragraphs (a) and (b) of subclause (10) of this clause and insert in lieu thereof the following—

(a) Where it is necessary to go wholly outside a building to clean windows an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $1.92 per day.

(b) Where an employee is required to clean windows from a swinging scaffold or similar device he/she shall be paid 34 cents per hour extra for every hour or part thereof so worked.

3. Clause 20.—Special Rates and Conditions: Delete subclause (11) of this clause and insert in lieu thereof the following—

(11) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than three hours, an allowance of $2.19 per day shall be paid. This allowance shall not apply to caretakers.

4. Clause 20.—Special Rates and Conditions: Delete subclause (15) of this clause and insert in lieu thereof the following—

(a) five closets or greater but less than ten closets per day	3.10
(b) ten closets or greater but less than 30 closets per day	9.30
(c) 30 closets or greater but less than 50 closets per day	18.45
(d) 50 closets or greater per day	23.20

5. Clause 22.—Wages: Delete subclause (3) of this clause and insert in lieu thereof the following—

(a) if placed in charge of not less than three and not more than six other employees	10.10
(b) if placed in charge of not less than six and not more than ten other employees	17.90
(c) if placed in charge of not less than ten and not more than 15 other employees	22.45
(d) if placed in charge of not less than 15 and not more than 20 other employees	27.20
(e) if placed in charge of more than 20 other employees	35.00

6. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

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CLEANERS AND CARETAKERS (CAR AND CARAVAN PARKS) AWARD 1975.
No. 5 of 1975.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Kings Parking Co (W.A.) Pty Ltd and Others.

No. 903 of 1999.

Cleaners and Caretakers (Car and Caravan Parks) Award 1975.
No. 5 of 1975.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conference on it under the Industrial Relations Act 1979, hereby orders—

THAT the Cleaners and Caretakers (Car and Caravan Parks) Award 1975 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 13.—Special Rates and Provisions—

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

(a) Where it is necessary to go wholly outside a building to clean windows, an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $1.92 per day.

B. Delete subclause (10) of this clause and insert in lieu thereof the following—

(10) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than three hours an allowance of $2.19 per day shall be paid.

C. Delete subclause (13) of this clause and insert in lieu thereof the following—

(13) Cash Handling Allowance—

An employee who is required by his or her employer to collect money from the customers of that employer shall be paid an allowance of $5.35 per week.

D. Delete subclause (14) of this clause and insert in lieu thereof the following—

(14) All employees called upon to clean closets connected with septic tanks and sewerage shall receive an allowance as follows—

		Per Week $
(a)	five closets or greater but less than ten closets per day	3.00
(b)	ten closets or greater but less than 30 closets per day	9.30
(c)	30 closets or greater but less than 50 closets per day	18.45
(d)	50 closets or greater per day	23.20

For the purpose of this clause, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

2. Clause 24.—Wages: Delete subclause (4) this clause and insert in lieu thereof the following—

(4) Leading Hands: Any employee in charge of other employees shall be paid in addition to the appropriate wage prescribed, the following—

		Per Week $
(a)	if placed in charge of not less than three and not more than six other employees	10.10
(b)	if placed in charge of more than six and not more than ten other employees	17.90
(c)	if placed in charge of more than 10 and not more than 15 other employees	22.45
(d)	if placed in charge of more than 15 and not more than 20 other employees	27.20
(e)	if placed in charge of more than 20 other employees	35.00

3. Schedule A —Parties to the Award: Delete the words “The Federated Miscellaneous Workers’ Union of Australia, W.A. Branch” and insert in lieu thereof the following—

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

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD, 1975.
No. 32 of 1975.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Hon Premier of Western Australia and Others

(No. 904 of 1999)

Cleaners and Caretakers (Government) Award, 1975. No. 32 of 1975.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Cleaners and Caretakers (Government) Award, 1975 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 11.—Special Rates and Provisions: Delete paragraph (a) of subclause (1) of this clause and insert in lieu thereof the following—

(a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 52 cents per closet per week.

2. Clause 11.—Special Rates and Provisions: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) Employees called upon outside the ordinary working hours to wash towels shall be paid $3.13 per dozen for ordinary towels, and $2.34 per dozen for dusters, hand towels and tea towels.

3. Clause 11.—Special Rates and Provisions: Delete subclause (5) of this clause and insert in lieu thereof the following—

(5) Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance $2.96 per day.

4. Clause 11.—Special Rates and Provisions: Delete paragraphs (a), (b) and (c) of subclause (6) of this clause and insert in lieu thereof the following—

		$
(a)	Evenings—Monday to Friday	
	Up to 40 rooms per week	5.01
	41 rooms to 100 per week	7.63
	over 100 rooms per week	10.03
(b)	Saturday and Sunday	9.51

(c) An additional allowance of $2.97 shall be paid to a caretaker on each occasion he/she is required to open or close a school facility after 11.00 pm, Monday to Friday, or for any opening or closing required on a Saturday or Sunday after the initial opening and closing. Provided that on a Saturday or Sunday the additional allowance shall not be paid if the duty is performed less than one hour after the initial or any subsequent opening or closing.

5. Clause 11.—Special Rates and Provisions: Delete paragraph (b) of subclause (9) of this clause and insert in lieu thereof the following—

(b) Any employee performing in wood chopping duties shall be paid an allowance of $11.30 per tonne to a maximum of—

(i) 100% of the weight of bushwood supplied or 50% of the weight of mill-ends supplied for enclosed fire places such as Wonderheats.

(ii) 50% of the weight of bushwood supplied or 20% of the weight of mill-ends supplied for open fireplaces.

6. Clause 11.—Special Rates and Provisions: Delete paragraph (a) of subclause (10) of this clause and insert in lieu thereof the following—

(a) An Estate Attendent (Homeswest) who, in his/her privately owned vehicle commutes from estate to estate and is required to carry sundry cleaning and/or gardening implements and/or supplies shall be paid $5.60 per week for all purposes of this award.

7. Clause 21.—First Aid: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) The employer shall, wherever practicable, appoint an employee holding current first aid qualifications

from St. John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate—

	10 Employees or less ¢ per day	In excess of 10 Employees ¢ per day
Qualified Attendant	1.00	$1.75

8. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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COMMUNITY WELFARE DEPARTMENT HOSTELS AWARD 1983.
No. A 27 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Hon. Minister for Community Development.

No. 908 of 1999.

Community Welfare Department Hostels Award 1983.
No. A 27 of 1981.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Community Welfare Department Hostels Award 1983 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 18.—Special Rates and Provisions: Delete paragraphs (a) of subclause (1) of this clause and insert in lieu thereof the following—

(a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 51 cents per closet per week.

2. Clause 21.—Wages: Delete paragraphs (b), (c) and (d) of subclause (3) of this clause and insert in lieu thereof the following—

(b) Senior employees appointed as such by the employer shall be paid $17.35 per week in addition to the rates prescribed herein.

(c) A leading hand placed in charge of not less than three other employees shall be paid $17.35 per week in addition to the rates prescribed herein.

(d) Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours shall be paid $2.77 per day reimbursement for travelling expenses.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

CONTRACT CLEANERS AWARD, 1986.
No. A 6 of 1985.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Airlite Cleaning Pty Ltd and Others.

No. 905 of 1999.

Contract Cleaners Award, 1986.
No. A 6 of 1985.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr C. Keys on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Contract Cleaners Award, 1986 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 18.—Special Rates and Conditions: Delete paragraphs (a), (b) and (c) of subclause (8) of this clause and insert in lieu thereof the following—

(a)	Cleaners required to cleanup to seven closets per day	0.24
(b)	Cleaners required to clean eight or more toilets per day	1.23
(c)	Cleaners who for a minimum of two hours per day are engaged in cleaning closets, in lieu of the allowance in subparagraph (a) or (b) of this subclause shall receive an allowance of	4.00

2. Clause 18.—Special Rates and Conditions: Delete paragraphs (b) and (c) of subclause (10) of this clause and insert in lieu thereof the following—

(b) Where it is necessary to go wholly outside a building to clean windows, an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $1.79 per day.

(c) Where an employee is required to clean windows from a swinging scaffold or similar device, he shall be paid 32 cents per hour extra for every hour or part thereof so worked.

3. Clause 18.—Special Rates and Conditions: Delete subclause (11) of this clause and insert in lieu thereof the following—

(11) Broken Shift—

Where an employee is required to carry out the ordinary hours of duty at the same location each day in more than one shift and where the break is not less than four hours an allowance of $2.04 per day shall be paid.

4. Clause 20.—Wages: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) Leading Hands—

Any full-time employee placed in charge of other employees shall be paid, in addition to the appropriate wage prescribed, the following—

	Rate Per Hour $
In charge of up to ten Cleaners	0.63
More than ten Cleaners	1.23

5. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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CONTRACT CLEANERS' (MINISTRY OF EDUCATION) AWARD, 1990.
No. A 5 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Mastercare Property Services.

No. 906 of 1999.

Contract Cleaners' (Ministry of Education) Award, 1990.
No. A 5 of 1981.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr C. Keys on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Contract Cleaners' (Ministry of Education) Award, 1990 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 11.—Special Rates and Conditions: Delete paragraphs (a), (b) and (c) of subclause (1) of this clause and insert in lieu thereof the following—

(a)	Cleaners required to clean up to 10 closets per day	4.75
(b)	Cleaners required to clean between 11 and 20 closets per day	9.45
(c)	Cleaners required to clean 21 or more closets per day	14.25

2. Clause 11.—Special Rates and Conditions: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) Employees called upon outside the ordinary working hours to wash towels shall be paid $3.30 per dozen for ordinary towels, and $2.40 per dozen for dusters, hand towels and tea towels.

3. Clause 11.—Special Rates and Conditions: Delete subclause (5) of this clause and insert in lieu thereof the following—

(5) Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance of $3.00 per day.

4. Clause 11.—Special Rates and Conditions: Delete paragraphs (a) and (b) of subclause (6) of this clause and insert in lieu thereof the following—

(a)	Evenings—Monday to Friday	
	Up to 40 rooms per week	5.15
	41 rooms to 100 per week	7.70
	Over 100 rooms per week	10.20
(b)	Saturdays and Sundays	10.20

5. Clause 20.—Wages: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) Leading Hands—

Any full-time employee placed in charge of other employees shall be paid, in addition to the appropriate wage prescribed, the following—

Cleaner In Charge of a High School	$17.85 per week
Cleaner In Charge of a TAFE College—	
35 hours or less	$53.35 per week
35 hours or more	$71.15 per week

6. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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COUNTRY HIGH SCHOOL HOSTELS AWARD, 1979.
No. R 7A of 1979.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Country High School Hostels Authority.

No. 907 of 1999.

Country High School Hostels Award, 1979.
No. R 7A of 1979.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton 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 Country High School Hostels Award, 1979 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 21.—Special Rates and Provisions: Delete paragraph (a) of subclause (1) of this clause and insert in lieu thereof the following—

(a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 51 cents per closet per week.

2. Clause 22.—Supported Wage System: Delete paragraph (b) of subclause (3) of this clause and insert in lieu thereof the following—

(b) Provided that the minimum amount payable shall not be less than $46.20 per week.

3. Clause 22.—Supported Wage System: Delete paragraph (c) of subclause (9) of this clause and insert in lieu thereof the following—

(c) The minimum amount payable to the employee during the trial period shall be no less than $46.20 per week.

4. Clause 24.—Wages: Delete paragraphs (a) and (b) of subclause (2) of this clause and insert in lieu thereof the following—

(a) Senior employees appointed as such by the employer shall be paid $16.80 per week in addition to the rates prescribed herein.

(b) A leading hand placed in charge of not less than three other employees shall be paid $16.80 per week extra.

5. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

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CULTURAL CENTRE AWARD 1987.
No. A 28 of 1988.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

The Library Board of Western Australia and Others.

No. 909 of 1999.

Cultural Centre Award 1987.
No. A 28 of 1988.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Cultural Centre Award 1987 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

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

(a) All employees called upon to clean closets connected to septic tanks or sewers shall be paid an allowance of 50 cents per closet per week.

2. Clause 15.—Special Rates and Provisions: Delete subclause (5) and (6) of this clause and insert in lieu thereof the following—

(5) An allowance of $1.90 per day or part thereof shall be paid to an employee required to use an airlift in the course of their duties.

(6) An allowance of $7.35 per day shall be paid in addition to the ordinary rate to an attendant required to operate audio visual equipment.

3. Clause 15.—Special Rates and Provisions: Delete paragraph (a) of subclause (7) of this clause and insert in lieu thereof the following—

(a) Except as provided for in paragraph (b) of this subclause an allowance of $4.01 per day shall be paid to an employee required to carry keys and be responsible for securing the premises at the close of business.

4. Clause 15.—Special Rates and Provisions: Delete paragraph (c) of subclause (8) of this clause and insert in lieu thereof the following—

(c) An employee who commences or completes a shift at or between the hours of 11.00pm and 5.00am, shall in addition to the ordinary rate of pay for that shift be paid an allowance of $8.95 per shift.

5. Clause 16.—Wages: Delete paragraphs (a), (b) and (c) of subclause (2) of this clause and insert in lieu thereof the following—

(a)	if placed in charge of not less than one and more than five other employees	17.70
(b)	if placed in charge of more than six and not more than ten other employees	27.20
(c)	if placed in charge of more than 11 other employees	35.00

6. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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DAIRY FACTORY WORKERS' AWARD 1982.
No. A 15 of 1982.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Brownes Dairy Pty Ltd and Another.

No. 910 of 1999.

Dairy Factory Workers' Award 1982.
No. A 15 of 1982.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Dairy Factory Workers' Award 1982 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 6.—Special Rates: Delete this clause and insert in lieu thereof the following—

6.—SPECIAL RATES.

(1) An employee required to enter and clean any enclosed vat or tank shall be paid 41 cents per clean.

(2) An employee required to clean out a "powder box" or "spray drier" shall be paid $1.08 per clean.

(3) An employee shall receive 51 cents for every hour of which he/she spends 20 minutes or more in a cold chamber in which the temperature is less than 0oC.

(4) An employee shall receive 15 cents for every hour he/she spends in a cold chamber in which the temperature is between 4oC and 0oC inclusive.

2. Clause 8.—Leading Hands: Delete this clause and insert in lieu thereof the following—

8.—LEADING HANDS.

In addition to the rates prescribed in Clause 29.—Wages, of this award a leading hand shall be paid—

	Per Week $
(1) if placed in charge of not less than three and not more than ten other employees	19.05
(2) if placed in charge of more than ten and not more than 20 other employees	29.40
(3) if placed in charge of more than 20 other employees	37.60

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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DRUM RECLAIMING AWARD.
No. 21 of 1961.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Drum Services Pty Ltd and Another.

No. 911 of 1999.

Drum Reclaiming Award.
No. 21 of 1961.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms L. Avon-Smith on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Drum Reclaiming Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 20.—Shift Work: Delete subclause (5) of this clause and insert in lieu thereof the following—

(5) The loading on the ordinary rates of pay for shift work shall be $6.50 for afternoon shift and for night shift.

2. Clause 23.—Leading Hands: Delete this clause and insert in lieu thereof the following—

23.—LEADING HANDS

In addition to the appropriate rates prescribed in Clause 25.—Rates of Pay of this award, a leading hand shall be paid—

	Per Week $
(1) if placed in charge of not less than three and not more than ten other employees	19.90
(2) if placed in charge of more than ten and not more than 20 other employees	30.55
(3) if placed in charge of more than 20 other employees	39.40

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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DRY CLEANING AND LAUNDRY AWARD 1979.
No. R 35 of 1978.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Eric Dry Cleaners and Others.

No. 912 of 1999.

Dry Cleaning and Laundry Award 1979.
No. R 35 of 1978.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms A. Young on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Dry Cleaning and Laundry Award 1979 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 18.—Special Rates: Delete this clause and insert in lieu thereof the following—

18.—SPECIAL RATES

Where a worker is required to sort foul linen an extra allowance of 24 cents per hour shall be paid whilst the worker is so employed on that type of work.

2. Clause 30.—Wages: Delete sub-paragraph (iv) of paragraph (a) of subclause (2) of this clause and insert in lieu thereof the following—

(iv) Junior employed in a Receiving Depot: Notwithstanding anything hereinbefore contained any junior working alone and responsible for cash transactions and/or in charge of depot shall be paid not less than the rate prescribed for a junior '19 years and under 20 years' plus an amount of $5.05 per week.

3. Clause 30.—Wages: Delete paragraph (a) of subclause (4) of this clause and insert in lieu thereof the following—

(a) The structural efficiency increases specified below shall be added to existing actual rate of pay/base rates of pay for time employees/payment by results employees respectively and shall not be absorbed into any over award bonus payment.

GROUP	STRUCTURAL EFFICIENCY ADJUSTMENT $
F (all others)	10.30
E (rest of Group E)	12.50
D	12.50
C	12.50
B	15.00
A	15.00

4. Schedule B—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Eric Dry Cleaners and Others.

No. 912 of 1999.

Dry Cleaning and Laundry Award 1979.
No. R 35 of 1978.

7 September 1999.

Correcting Order.

PURSUANT to the powers conferred on it under the Industrial Relations Act, 1979 the Commission hereby orders:

THAT the order issued by the Commission in respect of application 912 of 1999 on the 27th day of August 1999 shall be corrected by deleting instruction 3 in the Schedule to the Order and substituting in lieu thereof:

3. Clause 30.—Wages: Delete paragraph (a) of subclause (4) of this clause and insert in lieu thereof the following—

(a) The structural efficiency increases specified below shall be added to existing actual rate of pay/base rates of pay for time employees/payment by results employees respectively and shall not be absorbed into any over award bonus payment.

GROUP	STRUCTURAL EFFICIENCY ADJUSTMENT $
F (all others)	10.00
E (rest of Group E)	12.50
D	12.50
C	12.50
B	15.00
A	15.00

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

ENROLLED NURSES AND NURSING ASSISTANTS (GOVERNMENT) AWARD.
No. R 7 of 1978.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Board of Management, Albany Regional Hospital and Others.

No. 866 of 1999.

Enrolled Nurses and Nursing Assistants (Government) Award.
No. R 7 of 1978.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Enrolled Nurses and Nursing Assistants (Government) Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 8.—Overtime: Delete subclause (5) of this clause and insert in lieu thereof the following—

(5) Where a worker has not been notified the previous day or earlier that she is required to work overtime the employer shall ensure that workers working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $6.80 each meal.

2. Clause 17.—Transfer: Delete paragraph (a) of subclause (2) of this clause and insert in lieu thereof the following—

(2) (a) In addition, she shall be allowed travelling allowance of $6.80 for any meal purchased, or the actual cost of any meal purchased, if such cost exceeds $6.80. Meal times shall be 8.00 a.m., 1.00 p.m. and 6.00 p.m. $2.50 for each morning and afternoon tea shall be allowed when travelling at 11.00 a.m. and 4.00 p.m. Reasonable porterage shall also be allowed. Claims for taxi fares must be supported by receipts.

3. Clause 19.—Laundry and Uniforms: Delete subclause (7) of this clause and insert in lieu thereof the following—

(7) All washable clothing forming part of the uniform supplied by the employer shall be laundered free of cost to the workers. Provided that in lieu of such free laundering the employer may pay the employee $1.13 per week.

4. Clause 19.—Laundry and Uniforms: Delete paragraph (c) of subclause (10) of this clause and insert in lieu thereof the following—

(c) Provided further that in lieu of providing uniforms the employer may pay an allowance of $4.80 per week, and the nurse shall wear uniforms which conform to the uniform stipulated by the employer with respect to material, colour, pattern and conditions.

5. Clause 19.—Laundry and Uniforms: Delete paragraph (e) of subclause (10) of this clause and insert in lieu thereof the following—

(e) Each nurse shall be entitled to all reasonable laundry work at the expense of the employer, but where the employer elects not to launder the uniforms, the nurse shall be paid an allowance of $1.55 per week.

6. Clause 24.—Shift Work: Delete paragraph (a) of subclause (1) of this clause and insert in lieu thereof the following—

(a) Subject to subclause (2) of this clause where on any day an employee commences his/her ordinary hours of work before 4.00 a.m. or after 12 noon, he/she shall be paid a loading of $1.75 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage.

7. Clause 24.—Shift Work: Delete paragraph (a) of subclause (2) of this clause and insert in lieu thereof the following—

(a) A loading of $2.64 per hour or pro rata for part thereof shall be paid to an employee in addition to his/her ordinary rate of wage for time worked on permanent afternoon or night shift.

8. Clause 24.—Shift Work: Delete paragraphs (a) and (b) of subclause (3) of this clause and insert in lieu thereof the following—

(a) Saturday—$7.00 per hour or pro rata for part thereof;

(b) Sunday—$14.00 per hour or pro rata for part thereof.

9. Clause 26.—Wages: Delete paragraph (c) in subclause (7) of this clause and insert in lieu thereof the following—

(c) The ordinary rate of wage prescribed for an Enrolled Nurse in this clause shall be increased by $9.97 per week when a Registered Enrolled Nurse has obtained a second post basic certificate approved by the Nurses' Board of W.A., and he/she is required to use the knowledge gained in that certificate as part of his/her employment.

10. Clause 26.—Wages: Delete paragraphs (a), (b) and (c) of subclause (11) of this clause and insert in lieu thereof the following—

(a) $16.15 per week when in charge of not less than three and not more than ten other employees;

(b) $24.25 per week when in charge of more than 10 and not more than 20 other employees; and

(c) $32.35 per week when in charge of more than 20 employees.

11. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

FUNERAL DIRECTORS' ASSISTANTS' AWARD.
No. 18 of 1962.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Bowra and O'Dea Pty Ltd and Others.

No. 870 of 1999.

Funeral Directors' Assistants' Award.
No. 18 of 1962.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms A. Young on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Funeral Directors' Assistants' Award No. 18 of 1962 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 10.—Wages: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) Leading Hands: Any employee placed by the employer in charge of three or more other employees shall be paid $19.22 per week in addition to the amounts prescribed in this clause.

2. Clause 15.—Special Rates and Conditions: Delete subclauses (1) and (2) of this clause and insert in lieu thereof the following—

(1) An employee who is required to come into contact with a body which is in an advanced state of decomposition shall be paid $13.95. No employee shall be entitled to more than one payment in respect of each such case.

(2) An employee who is required to do any work in connection with an exhumation shall receive an allowance of $43.15 or each body exhumed. No worker shall be entitled to more than one payment in respect to each such case.

3. Clause 26.—Standing By: Delete subclauses (1) and (2) of this clause and insert in lieu thereof the following—

(1) Between the hours of 5.30 p.m. and midnight (Monday to Friday)—$8.05 per night.

(2) Between 7.00 a.m. and midnight on a Saturday, Sunday or any of the holidays prescribed in Clause 12.—Public Holidays of this award—$17.45 per day.

4. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

GARDENERS (GOVERNMENT) 1986 AWARD.
No. 16 of 1983.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

The Hon Premier of Western Australian and Others.

No. 871 of 1999.

Gardeners (Government) 1986 Award.

No. 16 of 1983.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Gardeners (Government) 1986 Award No. 16 of 1983 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 16.—First Aid—Kits and Attendants: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate per day—

Qualified Attendant	$ Per Day
10 employees or less	1.02
In excess of 10 employees	1.74

2. Clause 25. – Wages—Part C: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) A Senior Gardener/Ground Attendant who is required to maintain turf wickets, bowling greens or tennis courts shall be paid in addition to the rates prescribed an amount of $4.90 per week. Occasional off-season attention shall not qualify an employee for payment under this subclause.

3. Clause 25. – Wages—Part C: Delete paragraphs (a), (b) and (c) of subclause (5) of this clause and insert in lieu thereof the following—

(a) five and not more than ten other employees shall be paid $17.10 per week extra;

(b) more than ten but not more than 20 other employees shall be paid $25.10 per week extra;

(c) more than 20 other employees shall be paid $33.30 per week extra.

4. Clause 25. – Wages—Part C: Delete paragraph (a) of subclause (10) of this clause and insert in lieu thereof the following—

(a) Employees of the Zoological Gardens Board covered by this award who are required to clean public toilets shall be paid 53 cents per closet, per week.

5. Schedule A – Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

GOVERNMENT WATER SUPPLY, SEWERAGE AND DRAINAGE EMPLOYEES AWARD 1981.
No. 2 of 1980.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Water Authority of Western Australia.

No. 915 of 1999.

Government Water Supply, Sewerage and Drainage Employees Award 1981.

No. 2 of 1980.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch; The Automotive, Food, Metals, Engineering, Printing, and Kindred Industries Union of Workers, Western Australian Branch; and The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Government Water Supply, Sewerage and Drainage Employees Award 1981 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 10.—Special Rates and Provisions: Delete this clause and insert in lieu thereof the following—

10.—SPECIAL RATES AND PROVISIONS

(1) Meter Fitters' Vehicle Allowance

A Meter Fitter who in the course of his/her duties has to ride a motor cycle or drive a motor vehicle shall receive $7.36 per week extra.

(2) An employee who regulates and controls vehicular traffic in thoroughfares shall receive an allowance of $1.49 per shift above his/her usual rate.

(3) Offensive Allowance

(a) An allowance of $3.08 per day shall be paid to each employee who comes into contact with filth during the operation of cleaning out septic tanks, sand pits, ripple chambers, suction chambers of sewerage pumping stations or in de-ragging of sewerage pumps.

(b) An employee (other than a sewerage maintenance employee) employed on offensive work in connection with working in or about old sewers or working in ground where fumes arise from decomposed material or from any other cause shall be paid an allowance of 26 per cent of his/her ordinary time rate.

(4) Dirt Money

34 cents per hour extra shall be paid to an employee when engaged on work which is agreed to be of an unusually dirty nature.

(5) Confined Spaces

An employee working in a compartment, space or place the dimensions of which necessitate working in a unusually stooped or otherwise cramped position, or without proper ventilation, shall be paid an allowance of 42 cents per hour whilst so engaged.

(6) Underground Allowance

An employee required to work underground on tunnelling or shaft sinking shall be paid an amount of $1.49 per day or shift, in addition to any other amount prescribed for such employee elsewhere in this Award. Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface. The allowance shall not be payable to employees engaged upon "cut and cover" work at a depth of 3.5 metres or less or to employees in trenches or excavations.

"Shaft" means an excavation over 1.8 metres deep with a cross sectional area of less than 13.4 square metres.

"Tunnelling" shall include all work performed in a tunnel until it is commissioned.

(7) Well Work

An employee required to enter a well nine metres or more in depth for the purpose, in the first instance, of examining the pump, or any other work connected therewith, shall receive an amount of $1.90 for such examination and 73 cents per hour extra thereafter for fixing, renewing or repairing such work.

(8) Hot Work

An employee who works in a place where the temperature has been raised by artificial means to between 46°C and 54°C shall be paid 34 cents per hour or part thereof, and to more than 54°C—40 cents per hour or part thereof, in addition to any other amount prescribed for such employee elsewhere in this Award. Where such work continues for more than two hours the employee shall be entitled to 20 minutes' rest after every two hours' work without loss of pay, not including the special rate provided by this subclause.

(9) Height Money

An employee shall be paid an allowance of 31 cents per hour, in addition to the ordinary rate, on which the employee works at a height of nine metres or more above the nearest horizontal plane.

(10) Drivers' Licences

Initial issue or additional classifications of drivers' licences required by the employer shall be paid for by the employer. In addition the employer shall allow the employee sufficient time off with pay to take the requisite test.

(11) Explosive Powered Tools Allowance

An employee qualified in accordance with the laws and regulations of the State to operate explosive powered tools shall be paid an allowance of 78 cents per day on which such tools are used.

(12) Any employee actually working a pneumatic tool of the percussion type shall be paid 28 cents per hour extra whilst so engaged.

(13) Fumes

An employee required to work in a place where fumes of sulphur or acid or other offensive fumes are present shall be paid an allowance of 31 cents for each hour worked.

(14) An employee using a steam or water cleaning unit shall be paid an allowance of 34 cents per hour whilst so engaged.

(15) Wet Places

(a) An employee required to work in a wet place or during wet weather shall be provided with rubber boots and adequate waterproof clothing, including waterproof head covering so as to protect the employee from getting wet. Such waterproof clothing and rubber boots shall be replaced as required, subject to fair wear and tear in the service of the employer.

(b) Any employee working in a wet place shall be paid an allowance of $1.58 per day in addition to the ordinary rate, irrespective of the time worked unless his/her classification expressly includes an allowance for wet pay.

(c) A place shall be deemed to be wet when it is agreed that water (other than rain) is continually dropping from overhead to such an extent that it would saturate the clothing of an employee if waterproof clothing was not provided or when the water in the place where the employee is standing is over 2.5 centimetres deep.

(d) Where the employer directs work to continue during rain, the employer may, if adequate protective clothing is supplied the employee, require the employee to continue working. For such work the employee shall be paid an allowance of 25% of the ordinary rate.

(16) Handling Lime Cement or Flyash

Any employees involved in the handling of dry cement, lime or flyash shall be paid $1.78 per day.

(17) Hot Bitumen

An employee handling hot bitumen or asphalt or dipping materials in creosote, shall be paid 412cents per hour extra.

An employee shall be provided with gloves and overalls and with oil or other solvents suitable for the removal of the above materials.

(18) Pesticides and Toxic Substances

(a) An employer who requires an employee to use a pesticide or toxic substance shall—

(i) inform the employee of any known health hazards involved; and

(ii) pursuant to the relevant Acts and Regulations, ascertain whether and, if so, what protective clothing and/or equipment should be worn during its use.

(b) Pending advice obtained pursuant to the relevant Acts and Regulations, the employer may require the pesticide or toxic substance to be used, if the employee is informed of any safety precautions specified by the manufacturer of the pesticide and instructs the employee to follow those precautions.

(c) The employer shall supply the employee with any protective clothing or equipment required pursuant to paragraph (a) or (b) hereof and, where necessary, instruct him/her in its use.

(d) An employee required to wear protective clothing or equipment for the purposes of this subclause shall be paid 42 cents per hour or part thereof while doing so unless the union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it, or in the event of disagreement, the Board of Reference so determines.

(e) An allowance is not payable under this subclause if the advice obtained pursuant to subparagraph (a)(ii) hereof in writing indicates that protective clothing or equipment is not necessary.

(19) Asbestos

An employee using materials containing asbestos or working in close proximity to any employee using such material shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority.

Where such safeguards include the mandatory wearing of protective equipment, i.e. combination overalls and breathing equipment or similar apparatus, any such employee shall be paid 43 cents per hour extra whilst so engaged.

(20) Shotfirers Allowance

An employee being a permit holder, responsible for the proper handling of explosives and the conducting of firing shall be paid an allowance of $3.63 per shift.

(21) The work of an electrical fitter shall not be tested by an employee of a lower grade.

(22) An Electronic Tradesperson, an Electrician—Special Class, an Electrical Fitter and/or an 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, 1948 shall be paid an allowance of $13.53 per week. Provided that an employee appointed to the DC classification structure as contained in Clause 38.—Wages, of this Award shall not receive this allowance as the wage rate contained in the DC classification structure includes a component for licence allowance.

(23) 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 further that this subclause shall not apply to confined space, dirt money, height money, hot work or wet work the rates for which are cumulative.

(24) Special Disability Not Otherwise Provided For in This Award

Where a union representing a particular group of employees claims the existence of special disability not otherwise provided for in this Award, representatives of the employer and the union shall confer with a view to agreeing upon an appropriate special rate. In the event of agreement not being reached, the matter may be referred to the Western Australian Industrial Relations Commission.

(25) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 41 cents per closet per week.

(b) For the purposes of this subclause, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(c) All such employees shall be supplied with rubber gloves on request.

(26) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this clause, be paid an allowance of $1.36 per hour whilst so engaged.

(27) Spray Application Painters

A painter engaged on any spray applications carried out in other than a properly constructed booth approved by the Department of Occupational Health, Safety and Welfare shall be paid 34 cents per hour or part thereof in addition to the rates otherwise prescribed in this Award.

(28) Fuel, Kerosene and Water

Electric pump attendants and pumping station assistants shall be supplied with free water and in lieu of fuel and kerosene be paid $4.39 per week or such other amount as may be agreed between the parties or determined by the Board of Reference.

(29) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 23 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces and noise.

(b) The foundry allowance herein prescribed shall also apply to apprentices and unapprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to him/her shall be decreased proportionately.

(c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit any employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(d) For the purpose of this subclause foundry work shall mean—

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials or by shell moulding, centrifugal casting or continuous casting; and

(ii) where carried on as an incidental process in connection with and in the course of production to which subparagraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with—

(aa) non-ferrous die casting (including gravity and pressure);

(bb) casting of billets and/or ingots in metal moulds;

(cc) continuous casting for metal into billets;

(dd) melting of metal for use in printing;

(ee) refining of metal.

(30) Flouride Allowance

An employee who is required to handle flouride shall be paid an allowance of $3.21 per week. This allowance shall only be payable to an employee who was formerly covered by the Government Water Supply (Kalgoorlie Pipeline) Award No. 15 of 1981.

2. Clause 12.—First Aid Attendant: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) An employee who is a qualified first aid attendant and is appointed by the employer to carry out first aid duties in addition to normal duties, shall be paid an additional rate of $1.31 per day.

3. Clause 38.—Wages: Delete subclauses (6), (7) and (8) of this clause and insert in lieu thereof the following—

(6) Tool Allowance

(a) Engineering Trades

(i) 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—

(aa) $9.43 per week to such tradesperson; or

(bb) in the case of an apprentice a percentage of $9.43 being the percentage which appears against the year of apprenticeship in subclause (5) of this clause.

(ii) Any tool allowance paid pursuant to paragraph (i) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in subclause (2) of this clause.

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

(iv) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through the negligence of the employee.

(b) Building Trades

In addition to the rate of pay prescribed in this clause for a Painter or a Signwriter, such employee shall be paid a tool allowance of $3.28 per week in accordance with the provisions of the Building Trades (Government) Award.

(7) Leading Hands

An employee placed in charge of—

(a) Metal Trades

(i) Three and not more than 10 other employees shall be paid $17.01 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $26.03 per week extra.

(iii) More than 20 other employees shall be paid $33.61 per week extra.

(iv) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees shall be deemed a Leading Hand and shall be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than 10 other employees.

(b) Building Trades

(i) Three and not more than 10 other employees shall be paid $25.60 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $34.10 per week extra.

(iii) More than 20 other employees shall be paid $42.70 per week extra.

(8) Construction Work Allowance

(a) Subject to the provisions of this clause, an employee specified in this clause shall be paid an allowance at the rate of $15.99 per week to compensate for disabilities when actually engaged on construction work on site (as defined).

(b) "Construction Work" for the purpose of paragraph (a) hereof, shall mean and include all work performed on site on the construction, alteration, repair or maintenance of roads, reservoirs and drainage works, pipelines, water and sewerage mains and services. It shall not include the following classes of work—

(i) work in, around and/or adjacent to any workshop, depot, yard, treatment works, nursery or other similar establishments;

(ii) work in, around and/or adjacent to pumping stations for less than two hours;

(iii) gardening operations; or

(iv) driving vehicles, floats or fork lifts when that driving is not directly associated with construction work (as defined) for less than four hours on the day.

(c) An employee referred to in paragraph (a) of this subclause who is employed on construction work (as defined) for less than one week shall be paid for each day so employed, 1/5th of the said allowance.

(d) Provided that an employee under this clause who is engaged in the construction, or alteration of any building, structure or other civil engineering project which is carried out in areas excluded in paragraph (b) of this subclause shall be paid a construction allowance at the rate of $7.99 per week.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Water Authority of Western Australia.

No. 915 of 1999.

Government Water Supply, Sewerage and Drainage Employees Award 1981.
No. 2 of 1980.

14 September 1999.

Correcting Order.

PURSUANT to the powers conferred on it under the Industrial Relations Act, 1979 the Commission hereby orders:

1. THAT the order issued by the Commission in respect of application 915 of 1999 on the 27th day of August 1999 shall be corrected by amending the following—

(A) At instruction 1 in the Schedule to the Order by deleting subclause (17) of the clause and inserting in lieu thereof the following:

(17) Hot Bitumen

An employee handling hot bitumen or asphalt or dipping materials in creosote, shall be paid 42 cents per hour extra.

An employee shall be provided with gloves and overalls and with oil or other solvents suitable for the removal of the above materials.

(B) At instruction 3 in the Schedule to the Order by deleting paragraph (b) of subclause (7) of the clause and inserting in lieu thereof the following:

(b) Building Trades

(i) Three and not more than 10 other employees shall be paid $26.23 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $34.95 per week extra.

(iii) More than 20 other employees shall be paid $43.76 per week extra.

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

HAIRDRESSERS AWARD 1989.
No. A 32 of 1988.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The West Australian Hairdressers's and Wigmakers Employees' Union of Workers

and

The Master Ladies Hairdressers' Industrial Union of Employers of W.A. & Others.

No. 190 of 1999.

4 October 1999.

Order.

HAVING heard Mr T Pope on behalf of the applicant and Mr L Marshall and Mr R Bath on behalf of the respondents the Commission, pursuant to the power conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Hairdressers Award 1989 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 15 October 1999.

(Sgd.) C.B. PARKS,
[L.S.] Commissioner.

Schedule.

1. Clause 11—Wages: delete this clause and insert in lieu thereof—

11—WAGES

(1) (a) The rate of wage set out in paragraph (b) of this subclause reflects a total rate for ordinary hours of work Monday to Saturday inclusive. This total rate is comprised of a notional base rate plus a 10% all purpose loading in lieu of the penalties which applied prior to the first pay period on or after 1 March, 1993 for work performed in ordinary hours on the one night of late trading and on Saturday.

(b) The minimum wage payable for ordinary hours to employees bound by this Award from the first pay period on or after 15 October 1999 shall be as follows—

		Award Rate per week	Arbitrated Safety net Adjustment Plus 10%	Total
		$	$	$
(i)		Full time –		
	Principal	537.80	15.40	553.20
	Senior	509.50	15.40	524.90

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 the 14th day or November 1997.

These arbitrated safety net adjustments 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 Decision. This arbitrated safety net adjustment may be offset against any equivalent amount in rates of pay received by employees who 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.

Further the rates of pay in this award include the $12 per week or $10 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 1 August 1999.

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 Principles prior to July 1999, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustments of $12 per week or $10 per week.

The Arbitrated Safety Net Adjustments are increased by the 10% all purpose loading in lieu of penalties as specified in paragraph (a) above.

(ii)		Part time –
	Principal	$14.56
	Senior	$13.81
(iii)		Casual
	Principal	$17.47
	Senior	$16.58

(2) Apprentices: (Percentage of the appropriate Senior rate of wage per week)

(a)	FOUR YEAR TERM	%
	First Six Months	35
	Second Six Months	40
	Second Year	50
	Third Year	70
	Fourth Year	85
(b)	THREE YEAR TERM	%
	First Year	50
	Second Year	70
	Third Year	85

(c) APPRENTICE (OFF THE JOB GRADUATE)

An Apprentice (Off the Job Graduate) is an Apprentice, as defined in subclause (2) of Clause.-5 Definitions of this Award, who has successfully completed a training program, which has been accredited by the Training Accreditation Council and which meets all the of-the-job training requirements of an apprenticeship, at a registered training provider, prior to being indentured as an apprentice

First Year	50
Second Year	70
Third Year	85

(d) Adult Apprentices

In the case of an apprentice aged twenty-one years or over, where the rate of wage determined by the application of paragraphs (a) or (b) of this subclause is less that the minimum wage for adults as prescribed by the Commission from time to time in General Orders, that minimum wage shall apply in lieu of the rates otherwise applicable by the application of this subclause.

(3) Where a permanent employee is advised that he/she will be required to work until a specified time, such employee shall be entitled to be paid until such specified time, notwithstanding that the employer may allow the employee to leave early.

(4) Apprentice Assessment

Notwithstanding that the term of the apprenticeship shall have expired, an employee shall continue to receive the wage payable in the last year of apprenticeship until the employee has been assessed as achieving the necessary trade skills outlined in the Trade Training Schedule and a final Trade Certificate has been issued.

(5) Ban on Sub-Contracting

No employer shall rent any portion of the salon to an employee or employ any employee in the hairdressing trade on a commission only basis, or in any manner other than prescribed in this award.

(6) An employer may direct an employee to carry out such duties as are within the limits of the employees' skill, competence and training

1. Clause 16—Meal Money: Delete Subclause (1) and insert in lieu thereof—

(1) The meal money required to be paid to all employees pursuant to this clause shall be $7.32

3. Clause 22—Tools of Trade: Delete from subclause (4) the sum in figures "5.00" and insert in lieu thereof $5.63

4. Clause 32—First Aid Allowance: Delete from this clause the sum in figures "$6.00" and insert in lieu thereof $6.76

HOSPITAL EMPLOYEES (HOMES OF PEACE) CONSOLIDATED AWARD 1981.
No. 26 of 1960.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Brightwater Care Group.

No. 874 of 1999.

Hospital Employees (Homes of Peace)
Consolidated Award 1981.
No. 26 of 1960.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms M. Kuhne on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Hospital Employees (Homes of Peace) Consolidated Award 1981 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 28.—Wages: Delete paragraph (a) of subclause (2) of this clause and insert in lieu thereof the following—

(a) The ordinary wages of any employee, placed in charge of three or more employees, shall be increased by $16.15 per week.

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

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WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Brightwater Care Group.

No. 874 of 1999.

Hospital Employees (Homes of Peace)
Consolidated Award 1981.
No. 26 of 1960.

14 September 1999.

Correcting Order.

PURSUANT to the powers conferred on it under the Industrial Relations Act, 1979 the Commission hereby orders:

THAT the order issued by the Commission in respect of application 874 of 1999 on the 27th day of August

1999 shall be corrected by deleting instruction 1 in the Schedule to the Order and substituting in lieu thereof:

1. Clause 28.—Wages: Delete paragraph (a) of subclause (2) of this clause and insert in lieu thereof the following—

(a) The ordinary wages of any employee, placed in charge of three or more employees, shall be increased by $16.10 per week.

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

HOSPITAL EMPLOYEES' (PERTH DENTAL HOSPITAL) AWARD 1971.
No. 4 of 1970.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

The Board of Management, Perth Dental Hospital.

No. 875 of 1999.

Hospital Employees' (Perth Dental Hospital) Award 1971.
No. 4 of 1970.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Hospital Employees' (Perth Dental Hospital) Award 1971 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 19.—Wages: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) Where an employee is designated to be Technician in Charge of one of the following dental laboratories,

Orthodontic Laboratory Clinic
North Perth Clinic
Liddell Clinic
Gustafsen Clinic
Sir Charles Gairdner Hospital Clinic
Bunbury Clinic
Albany Clinic
Warwick Dental Clinic
Rockingham Dental Clinic
Mount Henry Dental Clinic

that employee shall be paid at the rate of $17.20 per week in addition to the ordinary rate of wage prescribed by this clause.

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

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HOSPITAL LAUNDRY & LINEN SERVICE (GOVERNMENT) AWARD, 1982.

No. 36 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

HealthCare Linen and Others.

No. 879 of 1999.

Hospital Laundry & Linen Service (Government) Award, 1982.

No. 36 of 1981.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Hospital Laundry & Linen Service (Government) Award, 1982 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 12.—Allowances and Special Provisions: Delete this clause and insert in lieu thereof the following—

12.—ALLOWANCES AND SPECIAL PROVISIONS

(1) Any employee who in the course of the laundry procedure is required to come into contact with foul linen shall be paid an allowance as follows—

(a) Sorting of foul linen, 67 cents per hour.

(b) Drivers or other employees who regularly deal with bags containing foul linen, 28 cents per hour.

(2) The employer shall, when practicable, appoint an employee with either first aid knowledge or holding first aid qualifications from St. John Ambulance, or a similar body, to carry out first aid in the employer's premises. Such employee so appointed shall, in addition to first aid duties, be responsible under general supervision of the Manager, for maintaining the contents of the first aid kit.

Employees so appointed shall be paid the following rates in addition to their prescribed rate of pay—

(a) Unqualified employee, 72 cents per day.

(b) Qualified employee, $1.50 per day.

Provided that any employee holding a first aid qualification of "third year St. John Ambulance medallion" and being required by the employer to exercise that training will be paid $1.75 per day or $8.44 per week.

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

(4) Leading Hands—

Any employee who is placed in charge for not less than one day of—

(a) Not less than three and not more than ten other employees shall be paid at the rate of $17.90 per week extra.

(b) More than ten and not more than 20 other employees shall be paid at the rate of $27.57 per week extra;

(c) More than 20 other employees shall be paid at the rate of $35.49 per week extra.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

4. Schedule C—Applicant Unions: Delete this schedule and insert in lieu thereof the following—

SCHEDULE C—APPLICANT UNIONS

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

The Western Australian Clothing and Allied Trades Industrial Union of Workers, Perth.

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

Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers.

HOSPITAL WORKERS (GOVERNMENT) AWARD. No. 21 of 1966.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Board of Management, Sir Charles Gairdner Hospital and Others.

No. 880 of 1999.

Hospital Workers (Government) Award. No. 21 of 1966.

27 August 1999.

Order.

HAVING heard Mr N. Whitehead on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Hospital Workers (Government) Award No. 21 of 1966 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 16.—Shift Work: Delete subclauses (1) and (2) of this clause and insert in lieu thereof the following—

(1) Subject to subclause (2) of this clause, a loading of $1.68 per hour or pro rata for part thereof shall be paid for time worked on afternoon or night shift as defined hereunder—

(a) Afternoon shift—commencing between 12.00 noon and 6.00 p.m.

(b) Night shift—commencing between 6.00 p.m. and 4.00 a.m.

(2) A loading of $2.50 per hour or pro rata for part thereof shall be paid for time worked on permanent afternoon or night shift.

2. Clause 17.—Weekend Work: Delete subclauses (1) and (2) of this clause and insert in lieu thereof the following—

(1) In addition to the ordinary rate of wage prescribed by this award an employee shall be paid a loading of $6.70 per hour or pro rata for part thereof for ordinary hours worked between midnight on Friday and midnight on Saturday.

(2) In addition to the ordinary rate of wage prescribed by this award an employee shall be paid a loading of $13.40 per hour or pro rata for part thereof for ordinary hours worked between midnight on Saturday and midnight on Sunday.

3. Clause 19.—Allowances and Provisions: Delete this clause and insert in lieu thereof the following—

19.—ALLOWANCES AND SPECIAL PROVISIONS

In addition to the rates prescribed in Clause39.—Wages of this award, the following allowances shall be paid—

(1) (a) Employees handling foul linen in the course of their duties shall be paid 78 cents per hour or any part thereof, to a maximum of $2.28 per day.

(b) Employees handling materials such as carpet tiles, curtains, sealed bags or fabrics, which have become soiled in the same manner as foul linen as defined in Clause 5.—Definitions, shall be paid an allowance according to subclause (1)(a) of this clause.

(2) Orderlies employed on boiler firing duties—$1.57 per day.

(3) Orderlies required to handle a cadaver—$1.34 per hour with a minimum payment of one hour.

(4) Orderlies—Sir Charles Gairdner Hospital, sterilising sputum mugs—$1.57 per day.

(5) (a) A storeman required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk-beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 34 cents per hour whilst so engaged.

(b) A storeman required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 44 cents per hour whilst so engaged.

(6) A Food Service Attendant who is required to reconstitute frozen food and/or reheat chilled food, in addition to or in substitution of their normal duties, shall be paid an allowance of 54 cents per hour or part thereof whilst so engaged.

4. Clause 21.—Public Holidays: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) Any employee who is required to work on a day observed as a public holiday shall be paid a loading of $19.03 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage or if the employer agrees be paid a loading of $6.34 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage and be entitled to observe the holiday on a day mutually acceptable to the employer and employee.

5. Clause 22.—Public Holidays—Graylands and Selby Lodge/Lemnos Hospitals: Delete paragraph (c) of subclause (3) of this clause and insert in lieu thereof the following—

(c) Any employee who is required to work on the day observed as a holiday as prescribed in this clause in his/her normal hours work or ordinary hours in the case of a rostered employee shall be paid a loading of $6.34 per hour or pro rata for part thereof and be entitled to observe the holiday on a day mutually acceptable to the employer and the employee.

6. Clause 39.—Wages: Delete paragraph (b) of subclause (4) of this clause and insert in lieu thereof the following—

(b) Except where this clause specifies classifications which require the employee to be in charge of other employees, any employee who is placed in charge of—

(i) not less than three and not more than ten other employees shall be paid $15.50 per week in addition to the ordinary wage prescribed by this clause;

(ii) more than 10 and not more than ten other employees shall be paid $23.25 per week in addition to the ordinary wage prescribed by this clause;

(iii) more than 20 other employees shall be paid $31.00 per week in addition to the ordinary wage prescribed by this clause.

7. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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JENNY CRAIG EMPLOYEES AWARD, 1995.
No. A 1 of 1994.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Jenny Craig Weight Loss Centre Pty Ltd.

No. 881 of 1999.

Jenny Craig Employees Award, 1995.
No. A 1 of 1994.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr C. Keys 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 Jenny Craig Employees Award, 1995 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 9.—Special Rates and Conditions: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) In addition to the wages prescribed by this award, all employees shall be entitled to be paid the following—

(a) when facilitating workshops a minimum payment of 90 cents per client; and

(b) for the number of clients seen

1 to 14 clients	$1.85 per client
15 or more clients	$2.35 per client; and

(c) for Jenny Craig products and programs sold by the employee, a cash bonus of 3% of the sale value.

LAUNDRY WORKERS' AWARD, 1981.
No. A 29 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Alsco Linen Service Pty Ltd and Others.

No. 882 of 1999.

Laundry Workers' Award, 1981.
No. A 29 of 1981.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms A. Young on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Laundry Workers' Award, 1981 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 22.—Allowances: Delete this clause and insert in lieu thereof the following—

22.—ALLOWANCES

Where an employee is required to sort foul linen an extra allowance of 33 cents per hour will be paid whilst so employed on this type of work.

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

3. Schedule B—Respondents: Delete this schedule and insert in lieu thereof the following:

SCHEDULE B—RESPONDENTS

ALSCO Linen Service Pty Ltd
228 Great Eastern Highway
RIVERVALE WA 6103

Fremantle Steam Laundry Pty Ltd
7 Emplacement Crescent
HAMILTON HILL WA 6163

SSL Ensign
172 Abernethy Road
BELMONT WA 6104

MASTERS DAIRY AWARD 1994.
No. A 2 of 1994.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Masters Dairy Ltd and Others.

No. 844 of 1999.

Masters Dairy Award 1994.
No. A 2 of 1994.

27 August 1999.

Order.

HAVING heard Mr N. Whitehead on behalf of the applicant and Mr M. Rogers on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Masters Dairy Award 1994 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Schedule 4.—Other Allowances: Delete this schedule and insert the following in lieu thereof—

SCHEDULE 4—OTHER ALLOWANCES

(1)	Freezer Allowances—	
	(a) Van Salesperson	$1.59 per day
	(b) Storeperson	$0.77 per hour
(2)	Train Allowance	$0.57 per hour when driving B. Train
(3)	BPU Drivers	$3.52 per day for milk testing
(4)	Dryer Cleaning	$1.08 for every dryer cleaned
(5)	Dirt Money	$0.38 per hour
(6)	Confined Space	$0.44 per hour
(7)	Meal Money	$6.88
(8)	Driver (General)—over 43 tonnes all purposes of the award allowance	$0.90 for each additional tonne over 43 tonnes to be paid for all purposes of the award as part of the weekly wage.
(9)	Van Driver—Salesperson allowance per week for all purposes of the Award	$7.90 per week extra
(10)	Leading Hand allowance for all purposes of the Award	
	(a) Not less then 3 and not more than 10 other employees	$20.40 per week
	(b) More than 10 and not more than 20 other employees	$30.50 per week
	(c) More than 20 other employees	$38.10 per week

MINERAL EARTHS EMPLOYEES' AWARD.
No. 9 of 1975.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Commercial Minerals Ltd.

No. 843 of 1999.

Mineral Earths Employees' Award.
No. 9 of 1975.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms A. Young on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Mineral Earths Employees' Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 8.—Wages: Delete subclause (6) and insert in lieu thereof the following—

(6) Leading Hands: In addition to the wage prescribed in subclause (2) hereof a leading hand shall be paid—

		$
(a)	if placed in charge of not less than three and not more than ten other employees	19.85
(b)	if placed in charge of more than ten and not more than 20 other employees	30.50
(c)	if placed in charge of more than 20 other employees	39.25

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

3. Schedule of Respondents: Delete the words "Mineral By-Products Pty Ltd".

MISCELLANEOUS WORKERS' (ACTIV FOUNDATION) AWARD.
No. A 20 of 1980.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Activ Foundation.

No. 845 of 1999.

Miscellaneous Workers' (Activ Foundation) Award.
No. A 20 of 1980.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr L. Burns 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 Miscellaneous Workers' (Activ Foundation) Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 25.—Dirty Work: Delete this clause and insert the following in lieu thereof—

25.—DIRTY WORK

In addition to any other payment prescribed by this award—

(1) An employee handling foul linen shall receive $2.06 per day;

(2) An employee other than one to whom paragraph (1) applies, shall receive 38 cents per hour for work of an unusually dirty nature.

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

PARLIAMENTARY EMPLOYEES AWARD 1989.
No. A 15 of 1997, No. A 4 of 1988, No. A 7 of 1988 and No. A 7 of 1989.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

The Speaker of the Legislative Assembly and Others.

No. 848 of 1999.

Parliamentary Employees Award 1989.
No. A 15 of 1997, No. A 4 of 1988, No. A 7 of 1988 and No. A 7 of 1989.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Parliamentary Employees Award 1989 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 25.—Parliamentary Support Services Employees Wages: Delete subclauses (3) and (4) of this clause and insert in lieu thereof the following—

(3) The following allowances shall be paid to Parliamentary Support Services Employees indexed according to State Wage decisions and shall be—

(a)	Chef	
	1st year	$ 91.70 per fortnight
	2nd year	$183.50 per fortnight
(b)	Tradesperson Cook (Sous Chef)	
	1st year	$ 59.65 per fortnight
	2nd year	$ 91.70 per fortnight
(c)	Stewards to Speaker and President	$ 45.70 per fortnight

(4) An allowance of $26.60 per fortnight shall be paid to all Parliamentary Support Services Employees employed in the kitchen, dining room and bar areas.

2. Clause 28.—Uniforms and Clothing: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) Such uniforms supplied shall be laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, an employee shall be paid $5.30 per week for such laundering and/or dry cleaning, excepting any person employed as a Cook who shall be paid $8.00 per week for laundering and/or dry cleaning.

PASTRYCOOKS' AWARD.
No. 24 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Bakewell Pies (1978) Pty Ltd and Others.

No. 849 of 1999.

Pastrycooks' Award
No. 24 of 198.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr M. Beros on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Pastrycooks' Award No. 24 of 1981 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27h day of August 1999.

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

Schedule.

1. Clause 10.—Wages: Delete paragraphs (a), (b), (c) and (d) of subclause (5) of this clause and insert in lieu thereof the following—

(a)	Less than four other employees	12.00
(b)	Four or more but not more than ten other employees	19.00
(c)	More than ten but not more than 20 other employees	29.15
(d)	More than 20 other employees	37.50

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

PHOTOGRAPHIC INDUSTRY AWARD, 1980.
No. A 9 of 1980.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Illustrations Pty Ltd and Others.

No. 851 of 1999.

Photographic Industry Award, 1980.
No. A 9 of 1980.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms L. Avon-Smith on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Photographic Industry Award, 1980 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 12.—Wages: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) LEADING HANDS:

In addition to the rates prescribed herein, any employee appointed by the employer as a leading hand and placed in charge of not less than 3 and not more than 10 other employees, shall be paid $19.15 per week.

In addition to the rates prescribed herein, a leading hand placed in charge of more than 10 and not more than 20 other employees shall be paid $29.25 per week.

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

PLASTIC MANUFACTURING AWARD 1977.
No. 5 of 1977.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Jaylon Industries Pty Ltd and Others.

No. 852 of 1999.

Plastic Manufacturing Award 1977.
No. 5 of 1977.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr M. Beros on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Plastic Manufacturing Award 1977 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 22.—Classification Structure and Rates of Pay: Delete subclause (5) of this clause and insert in lieu thereof the following—

(5) Leading Hands

In addition to the rates prescribed in subclause (2) of this clause a leading hand shall be paid—

	$ Per Week
(a) If placed in charge of not less than three and not more than ten other employees	18.95
(b) If placed in charge of more than ten and not more than 20 other employees	29.00
(c) If placed in charge of more than 20 other employees	37.10

2. Clause 23.—Delete this clause and insert the following in lieu thereof—

23.—EXTRA RATES AND CONDITIONS

(1) Workers handling carbon black before processing, and workers engaged in processing free carbon black, shall be paid the sum of 38 cents per hour in addition to the rate herein fixed for the class of work performed.

(2) Workers engaged on weighing, packing and mixing in the powder room shall be paid the sum of 38 cents per hour in addition to the rate herein fixed for the class of work performed.

(3) Workers engaged in work on a construction site other than the normal place of work shall be paid an allowance at the rate of $17.13 per week for each hour or part thereof worked.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

POULTRY BREEDING FARM & HATCHERY WORKERS' AWARD 1976.
No. R 20 of 1976.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Hampton Hatcheries and Others.

No. 850 of 1999.

Poultry Breeding Farm & Hatchery Workers' Award 1976.
No. R 20 of 1976.

27 August 1999.

Order.

HAVING heard Ms. S. Ellery on behalf of the applicant and Mr M. Beros on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Poultry Breeding Farm & Hatchery Workers' Award 1976 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 9.—Wages: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) Leading Hands

	$
In addition to the ordinary rate of pay, an employee placed in charge of more than 3 other employees shall receive	19.10

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

PRIVATE HOSPITALS EMPLOYEES' AWARD, 1972.
No. 27 of 1971.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

St John of God Hospital and Others.

No. 878 of 1999.

Private Hospitals Employees' Award, 1972.
No. 27 of 1971.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms M. Kuhne on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Private Hospitals Employees' Award, 1972 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

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

(1) Orderlies assisting in autopsy—$25.45 per cadaver.

2. Clause 34.—Wages: Delete paragraph (a) of subclause (4) of this clause and insert in lieu thereof the following—

(a) The ordinary wages of any employee, placed in charge of three or more employees, shall be increased by $16.05 per week.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD, 1987.
No. A 17 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Department of Conservation and Land Management.

No. 854 of 1999.

Rangers (National Parks) Consolidated Award, 1987.
No. A 17 of 1981.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Rangers (National Parks) Consolidated Award, 1987 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 17.—Wages: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) A Park Maintenance Employee placed in charge of others shall, in addition to his/her ordinary rate, be paid the following weekly allowance—

In charge of—	$
less than three other employees	12.70
three to six other employees	22.25
more than six other employees	27.40

Casual employees shall be paid 20% in addition to the rates otherwise payable under this award.

2. Clause 20.—Special Rates and Conditions: Delete subclause (1) of this clause and insert the following in lieu thereof—

(1) All Park Maintenance Workers called upon to clean toilet closets shall receive an allowance of 46 cents

per closet per week and for these purposes one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

3. Clause 20.—Special Rates and Conditions: Delete subclause (3), (4) and (5) of this clause and insert the following in lieu thereof—

(3) A Park Maintenance Worker who is the holder of an approved First Aid Certificate shall, in addition to his/her normal rate of pay, be paid an additional allowance of $1.44 per week. This allowance shall be paid to Park Maintenance Workers on their accrued days off.

(4) Mobile Rangers shall, in addition to their normal rate of pay, be paid an allowance of $76.02 per week to offset the costs associated with living in and maintaining a caravan in accordance with an annual review operative from 1st January, 1990.

(5) All employees, excluding Ranger classifications whose rates of pay are specified in subclause (1) of Clause 17.—Wages of this award, shall be paid an allowance of $16.82 per week to compensate for the disabilities associated with the construction and maintenance industry.

4. Clause 20.—Special Rates and Conditions: Delete paragraphs (c) of subclause (6) of this clause and insert the following in lieu thereof—

(c) The employee using toxic substances or materials of a like nature shall be paid 46 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 37 cents per hour extra.

5. Clause 20.—Special Rates and Conditions: Delete paragraphs (d) of subclause (7) of this clause and insert the following in lieu thereof—

(d) An employee required to wear protective clothing or equipment for the purpose of this subclause shall be paid 46 cents per hour or part thereof while doing so unless the Union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it or, in the event of disagreement, the Western Australian Industrial Relations Commission so determines.

6. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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RECREATION CAMPS (DEPARTMENT FOR SPORT AND RECREATION) AWARD.
No. A 28 of 1985.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

The Honourable Minister for Sport and Recreation.

No. 855 of 1999.

Recreation Camps (Department for Sport and Recreation) Award.
No. A 28 of 1985.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton 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 Recreation Camps (Department for Sport and Recreation) Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

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

(3) Supervision Allowance

Employees placed in charge of other employees shall be paid the following weekly allowance, or part thereof, in addition to the rate prescribed for the employee's class of work

	$ Per Week
1 to 5 employees	7.34
6 to 10 employees	13.19
11 to 15 employees	16.42
16 to 20 employees	22.32
over 20 (for each additional employee)	0.26

2. Clause 17.—Special Rates and Conditions: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof—

(1) All employees called upon to clean toilet closets shall receive an allowance of 52 cents per closet per week and for these purposes, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(2) An employee who is the holder of an approved First Aid Certificate shall in addition to their normal rate of pay be paid an additional allowance of $1.80 per week.

3. Clause 17.—Special Rates and Conditions: Delete subclauses (4) of this clause and insert the following in lieu thereof—

(4) Mobile Wardens shall in addition to their normal rate of pay be paid an allowance of $65.16 per week to offset the costs associated with living in and maintaining a caravan. This allowance shall be reviewed on the 31st December each year. The adjustment to the rates shall be effective from the beginning of the first pay period to commence on or after the first day of January in each year.

4. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

SADDLERS AND LEATHERWORKERS' AWARD. No. 7 of 1962.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Mallabones Pty Ltd and Others.

No. 840 of 1999.

Saddlers and Leatherworkers' Award.
No. 7 of 1962.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms A. Young on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Saddlers and Leatherworkers' Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 23.—Leading Hands: Delete this clause and insert in lieu thereof the following—

23.—LEADING HANDS

Any worker placed by the employer in charge of other workers shall be paid the following rates in addition to their ordinary rates of wages—

	$
In charge of 1— 5 employees	18.20
In charge of 6—10 employees	22.95
In charge of 11 or more employees	31.40

2. Clause 24.—Special Rates: Delete this clause and insert in lieu thereof the following—

24.—SPECIAL RATES

Any worker required to repair goods which are of an unusually dirty or offensive nature shall be paid 32 cents per hour in addition to the ordinary rate.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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SALARIED OFFICERS (ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA) AWARD, 1995. No. A 5 of 1995.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Hospital Salaried Officers Association of Western Australia (Union of Workers)

and

Association for the Blind of Western Australia Incorporated.

No. 439 of 1999.

Salaried Officers (Association for the Blind of Western Australia) Award, 1995.

4 October 1999.

Order.

HAVING heard Ms C L L Thomas on behalf of the Applicant and Mr M A O'Connor 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 Salaried Officers (Association for the Blind of Western Australia) Award, 1995 as amended be varied in accordance with the following schedule and that such variations shall have effect on and from the 4th day of October 1999.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

Clause 21.—Travelling, Transfers And Relieving—Rates Of Allowance: Delete this clause and insert in lieu thereof the following—

21.—TRAVELLING, TRANSFERS AND RELIEVING—RATES OF ALLOWANCE

ITEM	PARTICULARS	Column A DAILY RATE $
	ALLOWANCE TO MEET INCIDENTAL EXPENSES	
1	W.A.—South of 26° South Latitude	8.15
2	W.A.—North of 26° South Latitude	10.50
3	Interstate	10.50
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL	
4	W.A.—Metropolitan Hotel or Motel	154.60
5	Locality South of 26° South Latitude	116.70
6	Locality North of 26° South Latitude	
	Broome	201.55
	Carnarvon	149.20
	Dampier	158.70
	Derby	148.75
	Exmouth	153.50
	Fitzroy Crossing	156.45
	Gascoyne Junction	103.00
	Halls Creek	179.20
	Karratha	232.25
	Kununurra	161.00
	Marble Bar	127.00
	Newman	204.00
	Nullagine	108.20
	Onslow	102.00
	Pannawonica	157.20
	Paraburdoo	192.50
	Port Hedland	202.20
	Roebourne	119.70
	Sandfire	103.50
	Shark Bay	134.50
	Tom Price	170.50
	Turkey Creek	109.70
	Wickham	124.40
	Wyndham	107.00

ITEM	PARTICULARS	Column A DAILY RATE $
7	Interstate—Capital City	
	Sydney	195.35
	Melbourne	190.70
	Other Capitals	158.90
8	Interstate—Other than Capital City	116.70
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL	
9	W.A.—South of 26° South Latitude	54.00
10	W.A.—North of 26° South Latitude	63.95
11	Interstate	63.95
	TRAVEL NOT INVOLVING AN OVERNIGHT STAY, OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED	
12	W.A.—South of 26° South Latitude:	
	Breakfast	10.20
	Lunch	10.20
	Evening Meal	25.45
13	W.A.—North of 26° South Latitude:	
	Breakfast	12.50
	Lunch	16.70
	Evening Meal	24.25
14	Interstate:	
	Breakfast	12.50
	Lunch	16.70
	Evening Meal	24.25
	DEDUCTION FOR NORMAL LIVING EXPENSES	
15	Each Adult	18.35
16	Each Child	3.15
	MIDDAY MEAL (Clause 19(11))	
17	Rate per meal	4.45
18	Maximum reimbursement per pay period	22.25

The allowances prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award, 1992.

SALARIED OFFICERS (ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA) AWARD, 1995. No. A 5 of 1995.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Hospital Salaried Officers Association of Western Australia (Union of Workers)

and

Association for the Blind of Western Australia (Incorporated).

No. 1479 of 1999.

Salaried Officers (Association for the Blind of Western Australia) Award, 1995.

4 October 1999.

Order.

HAVING heard Ms C L L Thomas on behalf of the Applicant and Mr M A O'Connor 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 Salaried Officers (Association for the Blind of Western Australia) Award, 1995 as amended be varied in accordance with the following schedule and that such variations shall have effect on and from the 4th day of October 1999.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

Clause 18.—Motor Vehicle Allowance: Delete subclauses (7), (8) and (9) inclusive, of this clause and insert in lieu thereof the following—

(7) Requirement to Supply and Maintain a Motor Car—

Area and Details	Engine Displacement (in cubic centimetres)		
Rate per kilometre	Over 2600 cc	Over 1600 cc - 2600 cc	1600 cc and Under
Metropolitan Area			
First 4,000 km	136.3	118.4	103.5
Over 4,000—8,000 km	56.7	49.1	43.7
Over 8,000—16,000 km	30.2	26.1	23.8
Over 16,000 km	31.6	27.2	24.5
South West Land Division			
First 4,000 km	139.4	121.3	106.4
Over 4,000—8,000 km	58.3	50.6	45.1
Over 8,000—16,000 km	31.3	27.1	24.7
Over 16,000 km	32.5	28.0	25.2
North of 23.5 Degrees South Latitude			
First 4,000 km	154.4	135.1	118.9
Over 4,000—8,000 km	63.9	55.7	49.7
Over 8,000—16,000 km	33.7	29.2	26.7
Over 16,000 km	33.4	28.7	25.8
Rest of the State			
First 4,000 km	144.1	125.2	109.6
Over 4,00—8,000 km	60.3	52.3	46.5
Over 8,000—16,000 km	32.4	28.0	25.5
Over 16,000 km	33.2	28.5	25.7

(8) Voluntary Use of a Motor Car

Area and Details	Engine Displacement (in cubic centimetres)		
Rate per kilometre	Over 2600 cc	Over 1600 cc - 2600 cc	1600 cc and Under
Metropolitan Area	63.3	54.9	48.7
South West Land Division	65.1	56.5	50.2
North of 23.5 Degrees South Latitude	71.4	62.3	55.5
Rest of the State	67.3	58.4	51.8

(9) Voluntary Use of a Motor Cycle

Distance Travelled During a Year on Official Business	Rate c/km
Rate per kilometre	21.9

SCHOOL EMPLOYEES (INDEPENDENT DAY & BOARDING SCHOOLS) AWARD, 1980. No. 7 of 1979.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Guildford Grammar School and Others.

No. 856 of 1999.

School Employees (Independent Day & Boarding Schools) Award, 1980.
No. 7 of 1979.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms A. Britto on behalf of the Catholic Education Commission of Western Australia, Dr I. Fraser on behalf of the Association of Independent Schools of Western Australia (Inc) and Mr C. Keys on behalf of St Hilda's Anglican School for Girls, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the School Employees (Independent Day & Boarding Schools) Award, 1980 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 32.—Wages: Delete paragraph (b) of subclause (3) of this clause and insert in lieu thereof the following—

(b) Senior employees other than the Head Groundsperson and leading hands appointed as such by the employer to be in charge of three or more other employees shall be paid $18.95 per week in addition to the rates prescribed herein.

2. Clause 32.—Wages: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) For all work done on any day after a break referred to in subclause (3) of Clause 7.—Hours of this award, the employee shall be paid an allowance of $1.15 per hour for each such hour worked.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

SECURITY OFFICERS' AWARD.
No. A 25 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Canine Security and Alsatian Watch Patrol and Others.

No. 858 of 1999.

Security Officers' Award.
No. A 25 of 1981.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr C. Keys on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Security Officers' Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 21.—Classification Structure and Wage Rates: Delete subclause (5) of this clause and insert in lieu thereof the following—

(5) Senior Officials—

Any officer placed in charge of other officers shall be paid in addition to the appropriate wage prescribed, the following—

	Per Week $
(a) if placed in charge of not less than 3 and not more than 10 other officer	19.25
(b) if placed in charge of not less than 10 and not more than 20 other officers	29.40
(c) if placed in charge of more than 20 other officers	37.80

2. Clause 21.—Classification Structure and Wage Rates: Delete paragraphs (a), (b), (c) and (d) of subclause (6) of this clause and insert in lieu thereof the following—

(a) Security Officers and above who are required to possess a recognised first aid certificate as a condition of employment, $7.57 per week extra.

(b) Security Officers required to drive emergency vehicles, $3.18 per day for each day that a vehicle is driven in an emergency situation.

(c) Security Officers who are required to attend and reset alarm panels, $4.75 per week or 95 cents per day in the case of employees who work part-time or casual.

(d) Security Officers who are required to carry firearms in the performance of their duties, $11.81 per week, or $2.36 per day for each day a firearm is carried.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

SOAP AND ALLIED PRODUCTS MANUFACTURING AWARD.
No. 25 of 1960.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Candle Light Co Pty Ltd and Another.

No. 861 of 1999.

Soap and Allied Products Manufacturing Award.
No. 25 of 1960.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Soap and Allied Products Manufacturing Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 26.—Leading Hands: Delete this clause and insert in lieu thereof the following—

26.—LEADING HANDS

In addition to the appropriate total weekly wage prescribed in Clause 25.—Wages of this award a leading hand shall be paid—

		$
(1)	if placed in charge of not less than three and not more than ten other employees	19.30
(2)	if placed in charge of more than ten and not more than 20 other employees	29.80
(3)	if placed in charge of more than 20 other employees	38.35

SOCIAL TRAINERS AND ASSISTANT SUPERVISORS' (ACTIV FOUNDATION) AWARD.
No. A 15 of 1984.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Activ Foundation Inc.

No. 864 of 1999.

Social Trainers and Assistant Supervisors' (Activ Foundation) Award.
No. A 15 of 1984.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr L. Burns 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 Social Trainers and Assistant Supervisors' (Activ Foundation) Award be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

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

(2) (a) An allowance of 38 cents per hour or part thereof shall be paid to employees who are place in charge of a unit during the off shift period of the Senior Social Trainer.

(b) An allowance of 91 cents per hour or part thereof shall be paid to employees who are placed in charge of a unit of 25 and under bed capacity during the off shift period of the Hostel Manager.

(c) An allowance of $1.13 per hour or part thereof shall be paid to employees who are placed in charge of a unit of 26 and over bed capacity during the off shift period of the Hostel Manager.

(d) No unit shall operate without an employee being responsible for such unit as a relieving employee during the off shift period of the Senior Trainer or Hostel Supervisor.

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

3. Schedule B—Respondents: Delete the words "The Slow Learning Children's Group of W.A. (Inc.) 1305 Hay Street, WEST PERH WA 6005" and insert in lieu thereof the following—

Activ Foundation Inc.

TRAINING ASSISTANTS' AND COMMUNITY SUPPORT STAFF (SPASTIC WELFARE) AWARD 1987.
No. A 15 of 1986.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Cerebral Palsy Association of WA (Inc.).

No. 914 of 1999.

Training Assistants' and Community Support Staff (Spastic Welfare) Award 1987.
No. A 15 of 1986.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms M. Kuhne on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Training Assistants' and Community Support Staff (Spastic Welfare) Award 1987 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 3.—Area and Scope: Delete this clause and insert in lieu thereof the following—

3.—AREA AND SCOPE

This award shall have effect throughout the State of Western Australia and shall be binding on Training Assistants and Community Support Staff employed by the Cerebral Palsy Association of Western Australia Incorporated.

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

(2) Senior Community Support Staff—

Employees who are required to co-ordinate the activities of Community Support Staff shall be designated as Senior Community Support Staff and they shall be paid an in-charge allowance of $725.60 per annum in addition to the rates of pay specified in subclause (1) of this clause.

UNIVERSITY, COLLEGES AND SWANLEIGH AWARD, 1980.
No. 7B of 1979.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

St Thomas More College and Others.

No. 857 of 1999.

University, Colleges and Swanleigh Award, 1980.
No. 7B of 1979.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Mr C. Keys on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the University, Colleges and Swanleigh Award, 1980 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 31.—Wages: Delete paragraph (b) of subclause (3) of this clause and insert in lieu thereof the following—

(b) Senior employees other than the Head Groundsperson and leading hands appointed as such by the employer to be in charge of three or more other employees shall be paid $18.80 per week in addition to the rates prescribed herein.

2. Clause 31.—Wages: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) For all work done on any day after a break referred to in subclause (3) of Clause 7.—Hours of this award, the employee shall be paid an allowance of $1.15 per hour for each such hour worked.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

WARD ASSISTANTS (MENTAL HEALTH SERVICES) AWARD 1966.
No. 35 of 1966.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

The Honourable Minister for Health.

No. 836 of 1999.

Ward Assistants (Mental Health Services) Award 1966.
No. 35 of 1966.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms N. Embleton 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 Ward Assistants (Mental Health Services) Award 1966 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 16.—Post Mortem Attendance: Delete this clause and insert in lieu thereof the following—

16.—POST MORTEM ATTENDANCE

A worker carrying out mortuary duties in connection with post mortem examinations, shall be paid an allowance of $2.50 per body provided that if a worker is assisting another worker in carrying out such mortuary duties he or she shall be paid in lieu of the foregoing allowance, an allowance of $1.70 per body.

2. Clause 21.—Uniforms: Delete paragraph (d) of subclause (7) of this clause and insert in lieu thereof the following—

(d) All washable clothing forming part of the uniforms supplied by the employer shall be laundered free of cost to the employee. Provided that in lieu of such free laundering the employer may pay the employee $1.10 per week to partly cover the cost of same.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch and insert in lieu thereof the following—

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

WATCHMAKERS' AND JEWELLERS' AWARD, 1970.
No. 10 of 1970.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Caris The Jeweller and Others.

No. 837 of 1999.

Watchmakers' and Jewellers' Award, 1970.
No. 10 of 1970.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms L. Avon-Smith on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Watchmakers' and Jewellers' Award, 1970 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 8.—Wages: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) Leading Hands—

Any jeweller or watchmaker placed in charge of not more than ten (10) jewellers or watchmakers shall be paid $18.80 per week in addition to the rates of pay prescribed by this award.

2. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

WESTERN AUSTRALIAN MINT SECURITY OFFICERS' AWARD 1988.
No. A 5 of 1988.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

The Western Australian Mint.

No. 838 of 1999.

Western Australian Mint Security Officers' Award 1988.
No. A 5 of 1988.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms A.Young on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Western Australian Mint Security Officers' Award 1988 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 14.—Wages and Allowances: Delete paragraph (a) of subclause (3) of this clause and insert in lieu thereof the following—

(a) A senior security officer or security officer who has been trained to render first aid and who is a current holder of appropriate first aid qualifications, such as a Senior First Aid Certificate from the St John Ambulance Association, will be paid a first aid allowance of $1.33 per shift with a maximum payment of $6.46 per week.

2. Clause 14.—Wages and Allowances: Delete paragraph (a) of subclause (4) of this clause and insert in lieu thereof the following—

(a) Where an officer is required to carry a firearm that officer shall be paid an allowance of $1.43 per shift with a maximum payment of $6.97 per week.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following:

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

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WOOL SCOURING AND FELLMONGERY INDUSTRY AWARD.
No. 32 of 1959.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Jandakot Wool Scouring Company Pty Ltd and Others.

No. 841 of 1999.

Wool Scouring and Fellmongery Industry Award.
No. 32 of 1959.

27 August 1999.

Order.

HAVING heard Ms S. Ellery on behalf of the applicant and Ms L. Avon-Smith on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Wool Scouring and Fellmongery Industry Award be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 27th day of August 1999.

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

Schedule.

1. Clause 21.—Special Rates and Provisions: Delete subclauses (1) and (2) of this clause and insert in lieu thereof the following—

(1) All employees handling greasy dead wool from bales for treatment shall be paid in addition to their ordinary rate of pay $1.55 per bale so handled.

(2) All employees engaged in handling dag wool shall be paid 59¢ per hour extra whilst so engaged.

2. Clause 21.—Special Rates and Provisions: Delete subclauses (7) and (8) of this clause and insert in lieu thereof the following—

(7) All employees handling pied wool (from the tanks before washing) shall be paid 59¢ per hour whilst so engaged.

(8) Pullers classing to quality and pickles pelt classers shall be paid 96¢ per hour extra whilst so engaged.

3. Schedule A—Parties to the Award: Delete the words "The Federated Miscellaneous Workers' Union of Australia, W.A. Branch" and insert in lieu thereof the following—

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

AWARDS/AGREEMENTS— Interpretation of—

METAL TRADES (GENERAL) AWARD 1966. No. 13 of 1965.

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

Hartway Galvanisers.

No. 265 of 1999.

COMMISSIONER S J KENNER.

5 October 1999.

Reasons for Decision.

THE COMMISSIONER: By this application pursuant to s 46 of the Industrial Relations Act, 1979 ("the Act") the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch ("the applicant") has sought an interpretation of the Metals Trades (General) Award 1966 No. 13 of 1965 ("the Award") in terms of two questions as follows—

1. Is the respondent by the terms of Clause 3 – Area and Scope and the Second Schedule – List of Respondents of the Metal Trades (General) Award No. 13 of 1965 ("the Award") in relation to the industries of electroplaters and anodisers bound by the Award? (Question One)
2. If the answer to Question One is yes: is an employee employed by the respondent (Mr Tim Makin) under the terms of the Award entitled to receive the rate of pay of a C12 classification prescribed in Clause 31 – Wages and Supplementary Payments after performing work and duties appropriate to that classification as prescribed by Clause 5 – Definitions and Classification Structure of the Award? (Question Two)

It was common ground between the parties that the respondent conducts a galvanising business and is involved in the galvanising of a wide range of steel products. It was also common ground that the process utilised by the respondent in galvanising steel products is as follows—

1. Ferrous metal products are firstly cleansed in a solution dipped in acid and finally cleansed again in water and dipped in a flux.
2. The metal product is then dipped into a tank of pure molten zinc, with the addition of aluminium, and left until thoroughly coated; and
3. The metal product is then lifted out, spun to remove excess coating, cooled and palletised.

It was also common cause between the parties that Mr Makin was engaged in a classification called "pickler" at the material times. I pause to observe that as at the time of the proceedings, Mr Makin was on workers' compensation. The agreed duties that Mr Makin performed as a pickler included—

1. Forklift driving;
2. Manual handling items to be galvanised;
3. Operating an overhead crane from both ground and elevated positions;
4. Preparing and slinging items to be galvanised on the overhead crane;
5. Using a wide range of hand held tools; and
6. The manual handling of items to be galvanised.

The Commission had the benefit of site inspections prior to the commencement of the hearing, which have been of considerable assistance in this matter.

Evidence was led in the proceedings from Mr Makin on behalf of the applicant, and Messrs Nash and Marjanich of the respondent. Whilst that evidence has been useful to the Commission, given the extent of the common ground between the parties, I need not refer to it any further in relation to Question One. I need only refer to the evidence in relation to Question Two, to the extent there was some dispute as to the proportions of various duties performed by Mr Makin. However, I need only refer to these matters in the event that I conclude that the answer to Question One is yes.

Principles

The questions to be answered in this matter involve the interpretation of the relevant provisions of the Award. It is well established that the principles to be applied in interpreting awards are those to be applied generally by courts and tribunals for the interpretation of statutes and other legal instruments: *Norwest Beef Industries Ltd v The West Australian Branch, Australasian Meat Industry Employees' Union* (1984) 64 WAIG 2124; *Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights Union of Western Australia* (1987) 67 WAIG 1097. That is, the construction of a provision of an award is to be considered within the context of the terms of the award when read as a whole. Furthermore, the construction of relevant provisions of an award should be consistent with the purpose or object of the instrument.

Question One

As it appears on its face, this question involves the interpretation of Clause 3 – Area and Scope and the Second Schedule – List of Respondents of the Award. Clause 3 – Area and Scope relevantly provides as follows—

"3 – AREA AND SCOPE

This award relates to each industry mentioned in the Second Schedule to this award and applies to all employees employed in each such industry in any calling mentioned in Clause 31 – Wages and Supplementary Payments (including the appendix thereto) of Part I – General or Clause 10 – Wages of Part II – Construction Work of this award but does not apply within the area occupied and controlled by the United States Navy at and in the vicinity of North West Cape in relation to Increment 1. of the construction of the Communications Centre."

The relevant provision of the Second Schedule – List of Respondents provides as follows—

"Electroplaters and Anodisers—

City Plating Company
Premier Plating Company
Dimet (WA) Pty Ltd
Dunn Bros.
Anodisers (WA)"

It is clear that the terms of Clause 3 – Area and Scope of the Award is of the type which refers to a specific industry as named in the Second Schedule to the Award and the meaning of those industries are to be determined by the description of them in the list of respondents. That is, there is no necessity to go beyond the plain words used in the headings in the List of Respondents to determine the scope of the industries covered by the Award. It is not therefore necessary to determine the common object between employee and employer, to define the limits of the industry. I note that this was the view of the clause of the Award adopted by the Full Bench of the Commission in *Eltin Open Pit Operations Pty Ltd v Metal and Engineering Workers' Union – Western Australian Branch* (1993) 73 WAIG 1466 at 1467, in which the Full Bench applied the test in *R J Donovan & Associates Pty Ltd v FCU* (1977) 57 WAIG 1317 and not the approach as set out in *WACJBSIU v Terry Glover Pty Ltd* (1970) 50 WAIG 704.

What then is meant by the words "Electroplaters and Anodisers" for the purposes of respondency? The Concise Oxford dictionary defines *"anodise"* as follows—

"Coat (metal) with protective layer (e.g. of alumina) by making it anode in electrolysis."

Furthermore, the same dictionary defines *"electroplate"* in the following terms—

"1. Coat (utensil etc.) with chromium, silver, etc., by electrolysis. 2. Objects thus produced."

Also before the Commission tendered by the respondent without objection, was an extract from a publication entitled *Aluminium Technology Book 5* by Sinclair & Associates, in particular chapter four, dealing with electrochemical finishes.

That extract makes it clear that the process of both anodising and electroplating involve the electrochemical treatment of metal. From the dictionary definitions and these materials, it is plain that the common element of both anodising and electroplating, is the use of electricity through the process of electrolysis, to create the end product.

As I have noted above, the nature of the business engaged in by the respondent was not in dispute. It was common ground that the process engaged in by the respondent involves no electrochemical process but rather, a metallurgical reaction between the zinc coating and the metal product to be coated. I pause to observe that the Concise Oxford dictionary definition of *"galvanise"* is relevantly—

> "2. Coat (iron) with zinc (usu. without the use of electricity) to protect it from rust;"

From the above, it is clear that adopting the ordinary and natural meaning of the words used to describe the industries of firstly electroplaters and anodisers, and secondly that of galvanising, the industries involve separate processes and are different. Both industries of electroplaters and anodisers involve an electrochemical treatment, which uses electric current and an appropriate electrolyte to bring about a change in the nature of the surface of a metal. This is a different process to that of galvanising as engaged in by the respondent, albeit that all three processes involve the coating of metal.

In this regard, Mr Sturman argued that the Commission should be persuaded that it is the end result which is important to distinguish the industry, in the sense that galvanising, as with electroplating and anodising, leads to a metal with a coating on it. I am unable to accept that submission. In my view, adopting the plain and ordinary meaning of the words as I have, the processes, and hence the industries, are not one and the same. This construction of the Award does not lead in my view, to any absurdity nor is it otherwise repugnant with the Award when read as a whole.

Therefore, the answer to Question One is no. It is therefore unnecessary for Question Two to be answered.

I declare accordingly.

APPEARANCES: Mr G Sturman appeared on behalf of the applicant.

Ms A Young as agent appeared on behalf of the respondent.

CANCELLATION OF AWARDS/ AGREEMENTS/ RESPONDENTS—

BUILDING TRADES AWARD 1968.
No. 31 of 1966.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

s.47

Deletion of Respondents.

No. 76 of 1980, Part 247.

Building Trades Award 1968.
No. 31 of 1966.

COMMISSIONER S J KENNER.

13 September 1999.

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 a respondent to the Building Trades Award 1968, No 31 of 1966 on the grounds that a respondent was no longer employing any employees in an industry to which the Award applies.

AND WHEREAS the Commission being satisfied that s 47(3) of the Industrial Relations Act 1979 has been complied with, is of the opinion that the respondent set out in the Schedule attached hereto is no longer employing any employees in an industry to which the Award applies.

AND HAVING heard Ms J Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch, the Western Australian Builders' Labourers, Painters and Plasterers Union of Workers and the Building Trades Association and Mr K Dwyer on behalf of Cockburn Cement Limited;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

> THAT from the date of this order Cockburn Cement Limited be struck out of the schedule of respondents to the Building Trades Award 1968, No. 31 of 1966.

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

CLEANERS AND CARETAKERS AWARD 1969.
No. 12 of 1969.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

s.47.

Deletion of Respondents.

No. 76 of 1980, Parts 226 and 248.

Cleaners and Caretakers Award 1969 No. 12 of 1969.

CHIEF COMMISSIONER W.S. COLEMAN.

20 September 1999.

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 following employers be struck out of the Schedule of Respondents to the Cleaners and Caretakers Award 1969 No. 12 of 1969

namely—

(1) Swan Portland Cement Ltd, Burswood Road, RIVERVALE WA 6103

(2) Smorgon Arc, (formerly Humes Ltd), Welshpool Road,WELSHPOOL WA 6106

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

INDUSTRIAL MAGISTRATE—Complaints before—

IN THE INDUSTRIAL MAGISTRATES COURT
HELD AT PERTH
WESTERN AUSTRALIA.

No: CP 65/99.

Date Heard : 5 & 11 August 1999.

BEFORE : Mr C. Cicchini I.M.

BETWEEN—

HAYDEN BANDY
Complainant

and

LA SALLE COLLEGE
Defendant.

APPEARANCES —

Mr R.W. Richardson and Mr A. Gill instructed by Messrs Dwyer Durack appeared for the complainant.

Mr J.F.I. Curlewis instructed by Messrs Phillips Fox appeared for the defendant.

Reasons for Decision.

THE PARTIES AND THE AWARD

Hayden Bandy was at all material times a secondary school teacher employed by La Salle College. It is not in dispute that the parties were bound by the Independent Schools' Teachers' Award No. R. 27 of 1976 as varied.

REASONS WHY MR BANDY SOUGHT AND TOOK LEAVE

In late 1996 Jonathan Bandy, the complainant's son then aged 13 years was diagnosed with a rare life threatening condition called "x-linked lymphoproliferative syndrome" (XLP) which attacks the immune system. Following diagnosis Jonathan was treated at Princess Margaret Hospital for Children by a number of doctors including Dr Price, Dr Loh and Dr Baker. Initially he was treated conservatively by use of steroids and chemotherapy. That treatment did not assist and by early 1997 Mr and Mrs Bandy received advice that the only possible curative treatment was that of a bone marrow transplant. The procedure of itself was life threatening. Dr Peter Price told the Court that the procedure was complex and susceptible to numerous risks. The procedure required a long impatient stay in hospital. During such time Jonathan was to be kept in isolation to guard against the ongoing threat of infection. The doctors treating Jonathan advised Mr and Mrs Bandy that there was a need for a parent to be with their son at all times during the transplant and post transplant procedure. Mr Bandy told the Court that he was advised that the procedure and the recovery process would take anywhere between 4 and 8 weeks. The condition from which Jonathan suffered affected his mental state. It caused him to act quite irrationally at times to the extent that he would rip out the drips from his arms and so forth. A parent was required to be with him at all times in order to prevent those types of acts being carried out. Only a parent could be sufficiently authoritative to discipline him concerning those types of actions.

CIRCUMSTANCES SURROUNDING THE TAKING OF LEAVE

Quite understandably in the light of the personal problems that affected him at the time Mr Bandy does not now have a clear or specific recollection of matters concerning his taking of leave in the early part of 1997. I accept that Mr Bandy's forgetfulness on the specifics is genuine and probably caused by the intensely difficult situation that he was then facing.

It appears from the evidence given, that the principal of La Salle College Ms P.J. Rodrigues has a better and therefore a more accurate recollection of events that transpired in the early part of 1997. Piecing together the evidence of Mr Bandy and that of Ms Rodrigues it is possible to conclude on the balance of probabilities that Mr Bandy made known to the school the circumstances of his son's illness sometime during the Christmas school holidays in 1997. About a week before school was to commence in 1997, Mr Bandy went to the school and spoke to Ms Rodrigues concerning his son's illness. As a result of the discussion Mr Bandy was told that he need not attend school for the two pupil free days which were to start his work year. He was in effect given two days unspecified leave. Immediately thereafter however he took a further 7 days leave. The 7 days were taken as "sick leave". Effectively Mr Bandy did not work for the first two weeks of the school year. The first working week comprised 4 days and the second working week comprised 5 days.

Upon returning to his employment in the third week of the school year Mr Bandy told the principal of the intended bone marrow transplant procedure. As a donor had not at that stage been found, the timing of the procedure was not known. He informed the principal of his requirement to take leave in due course in order to enable him to be with his son during the transplant and post transplant period. Mr Bandy's situation caused the principal some concern in that it was clear to her that Mr Bandy could not use his sick leave to be with his son. As to special leave Ms Rodrigues formed the view that she was unable to grant 4 weeks leave at a stretch. There was no problem with Mr Bandy starting late, finishing early or taking time off during the day if required. He was able to access time off on any single day without deduction. It must be said that the principal's and therefore the school's approach was caring. Notwithstanding that caring approach it is clear that Ms Rodrigues regarded special leave to be available for short periods only. On her view periods of extended leave could not be categorized as special leave. Mr Bandy's application to take paid leave for four weeks presented as a particular problem in that the leave sought was not on Ms Rodrigues' view available under any of the existing classifications. Consequently Ms Rodrigues, in an attempt to assist Mr Bandy, explored through the Catholic Education Office the possibility of Mr Bandy taking 4 weeks long service leave, notwithstanding the fact that his entitlement to long service leave had not yet accrued. Following Mr Bandy's conversation with Ms Rodrigues he took advice from his union and on the 4 March 1997 wrote to Ms Rodrigues indicating that the award provided for paid leave under exceptional circumstances. He formally requested 4 weeks paid leave whilst his son had a bone marrow transplant. He sought to do so by, "accessing sick leave as per the award. Clause 8.1."

In response by letter dated 10 March Ms Rodrigues confirmed that she was unable to let Mr Bandy have sick leave for the extended period sought and that she had sought permission for him to access long service leave entitlements even though he had not reached the qualifying period.

On 5 May 1997 Theresa Howe, the Assistant Secretary of the Independent Schools Salaried Officers' Association of Western Australia wrote to the Catholic Education Office on behalf of Mr Bandy seeking 4 weeks special leave. By letter dated 7 May 1997 Mr Paul Andrew of the Catholic Education Office on behalf of the defendant responded by denying the request for special leave and in so doing said interalia;

> "while the circumstances can be seen as extenuating the period of leave being requested is beyond that of special leave."

Mr Bandy in fact took leave between the 28th April and the 23rd May 1997 during which time his son underwent the bone marrow transplant. During such period he accessed his long service leave entitlement in order to receive pay whilst on leave.

For the sake of completeness it is noted that between the 20 February and the 4 April 1997 inclusive Mr Bandy took a further 5 days of sick leave. Accordingly a total of 12 days sick leave was taken by him to 4 April 1997. It is evident by virtue of the concessions made by Mr Bandy that the sick leave was not taken on account of his own illness but rather primarily for the purpose of looking after his son. Mr Bandy thereafter took a further 9 days sick leave for the year.

INTERPRETATION OF CLAUSE 8 (1) OF THE AWARD

Clause 8 (1) provides—

> Special Leave: A teacher shall on sufficient cause being shown, be granted special leave with pay.

It is submitted by the defendant that the clause is ambiguous, unreasonable and uncertain. It is suggested that the provision imports a discretion on the part of the employer. The word "shall," it is submitted, should be read as "may". To interpret it otherwise, the defendant says, would be a strict interpretation which would impose inconvenience, injustice and financial hardship on the defendant as employer.

The defendant further submitted that in interpreting clause 8 (1) the Court should look to comparable awards such as the Teachers (Public Sector Primary and Secondary Education) Award 1993 and the Public Service Award 1992 with respect to the short leave provisions there in.

In *Norwest Beef Industries and Others v. West Australian Brand, Australian Meat Employees Union, Industrial Union of Workers 64 WAIG 2129* Brinsden J. sitting in the West Australian Industrial Appeal Court said at p. 2127,

> "The principles applied in interpreting awards are the same principles as are applied in the Courts of law for the construction of deeds instruments and statutes .... If the terms are clear and unambiguous it is not permissible to look to extrinsic material to qualify the meaning."

In my view, given the clear terms of the clause it is not appropriate to look to other awards to interpret clause 8 (1). The other awards have no application. It is not possible to view such extrinsic material to qualify the meaning of clause 8 (1). The terms of clause 8 (1) are clear and unambiguous. The clause is mandatory. There is nothing discretionary about the clause at all. It clearly instructs that special leave is to be granted on sufficient cause being shown by the teacher. The provision could not be written any other way. To import discretion would make it uncertain, unworkable and open to confusion. The provision requires the employer to make an informed and objective assessment of the circumstances surrounding the application. Although accepting that "sufficient cause" imports the concept of reasonableness that of itself does not make the assessment of the employer one based on subjectivity or discretion. In fact there is a unilateral right to leave upon sufficient cause being shown. The length of leave to be taken is predicated upon an objective assessment of the requirement of the applicant. Clause 8 (1) is not limiting as to time but is subject to the period of leave sought being reasonable. Hence the use of the words "special leave" as opposed to "short leave". The words used reflect the intention of the parties to the award. Obviously each situation is different and accordingly the clause covers a myriad different possibilities and periods.

MR BANDY'S APPLICATION

The application for special leave was formally made in writing on 4 March 1997. Although there is some reference to sick leave in the application, there can be little doubt that Mr Bandy was seeking paid special leave. Even if it could be said that Mr Bandy's application was unclear as to its terms, any possibility of confusion was eliminated by the letter dated 5 May 1997 written to the Catholic Education Office by Theresa Howe on behalf of Mr Bandy. That letter confirmed that Mr Bandy's application was for four weeks special leave.

The defendant contends that Mr Bandy received paid leave to deal with his "special circumstances". He received 34.5 days in excess of his yearly entitlement of sick leave to care for his son. Over and above that he received at least 8 days extra paid leave which was in effect special leave. The defendant says that this amount exceeds more than a reasonable allocation for special leave where the norm in comparable awards is 3 days. In the circumstances Mr Bandy was not entitled to the four weeks special leave sought because special leave had been provided.

On the available evidence before me it is established that Mr Bandy took a significant amount of sick leave during 1997. It is also established that he was granted and took at least a further 8 days unspecified leave. In my view that leave is to be viewed as special leave. Even accepting that, I have formed the view that consideration of that leave taken by Mr Bandy is irrelevant. The issue is in fact quite narrow. What I am required to determine is whether the defendant has breached the Award by denying Mr Bandy's application for 4 weeks special leave. The outcome will necessarily be dependent upon my finding as to whether Mr Bandy showed "sufficient cause" to the defendant to enable him to be granted special leave.

"SUFFICIENT CAUSE"

Whether or not sufficient cause has been shown is a question of fact to be resolved objectively on a determination of what was reasonable in all the circumstances.

It is suggested by the defendant that the reasonableness of Mr Bandy's application ought to be viewed in the light of previous leave taken. I reject that contention. The leave Mr Bandy took was predicated upon his establishing the appropriate criteria in each instance. Once leave was taken with the approval of the defendant that was the end of that matter. Any future application for leave was to be treated on its own merits. Mr Bandy's application for 4 weeks special leave needed to be looked at in isolation, quite distinctly, discretely and apart from other leave already taken by him, given that the basis for his application was founded on different criteria.

Mr Bandy's application for 4 weeks special leave was founded upon a medical requirement that his son Jonathan be cared for by his parents during the course of the bone marrow transplant procedure and postoperatively. It was not a function that could properly be carried out by other family members. I reject any suggestion that other family members could have or should have assumed the role which Mr and Mrs Bandy were required to undertake. Clearly other family members could not have undertaken the role on the basis of age, other personal commitments and in particular the need that Jonathan be cared for by a parent. Dr Price's evidence overwhelmingly dictates that Jonathan needed to be looked after by a parent. Further it is also clear that as the procedure and postoperative process was likely to take up to 8 weeks that the responsibility for looking after Jonathan be shared equally between his parents. On that basis each of Mr and Mrs Bandy sought to take 4 weeks leave from their respective employment. In my view that was totally appropriate.

The factual circumstances surrounding Mr Bandy's application dictate that there was an adequate basis made out for leave. Indeed even Mr Andrew of the Catholic Education Office on behalf of the defendant conceded that the circumstances were regarded as being extenuating.

Having determined that sufficient cause was established by Mr Bandy, it remains to conclude whether his application was reasonable in all the circumstances. In my view it clearly was. All he sought was the bare minimum he needed in order to fulfill the obvious parental obligation that he had towards his child Jonathan. He attempted to minimize the impact of his taking leave upon his employer by sharing the responsibility with his wife. Further the reasonableness of Mr Bandy's application is clearly supported by the medical evidence.

Mr Bandy showed sufficient cause to the defendant to enable him to be granted special leave with pay.

CONCLUSION

The failure of the defendant to grant leave in such circumstances constituted a breach of the Award. I find that the complaint is proved.

I will now hear the parties as to the issues of penalty, costs and underpayment.

G. CICCHINI,
Industrial Magistrate.

IN THE INDUSTRIAL MAGISTRATES COURT
HELD AT PERTH
WESTERN AUSTRALIA.

Complaint Nos. 155-157/1998 &
159-160/1998 &
162/1998.

Date Heard : 5 & 6 MAY 1999 &
12 & 19 AUGUST 1999.

Date Decision Delivered : 24 September 1999.

BEFORE : MR G CICCHINI I.M.

BETWEEN —

THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS
Complainant

and

MARK DAVID PEDRINI & NATALIE MICHELE PEDRINI TRADING AS PEDRINI PAINTING & DECORATING
Defendants.

APPEARANCES —

Mr. G Giffard appeared for the Complainant.

Ms J.M. Stevens instructed by Messrs Marks Healy & Sands appeared for the Defendants.

Reasons for Decision.

THE COMPLAINTS & ISSUES

The complainant has made six complaints against Mark Pedrini. Six identical complaints have also been made against his wife and business partner Natalie Pedrini. Each complaint alleges various breaches by the defendants of the Building Trades (Construction) Award 1987 No R14 of 1978 (The Award). The complaints relate to the defendants' workers namely Dave Bullivant, Peter Corlett, Terence Doherty, Phil Grange, Stuart Hamilton and Vince Wray. The complainant alleges that each of the workers were, at various material times, the employees of the defendants and therefore subject to the Award. The defendants deny that allegation and say that in each instance the workers were subcontract painters contracted by the defendants and that therefore the Award has no application. It is evident from the outset that the pivotal issue requiring determination is whether each of the abovenamed workers were at the material times employees or alternatively subcontractors. Although the matters were conveniently heard together each complaint is separate and to be determined on its own merits.

AGREED FACTS

The parties agree that—

1. Pedrini Painting and Decorating is a business carried on by Mark David Pedrini and Natalie Michele Pedrini the defendants; and
2. Subject to some qualifications the nature of the business is painting and decorating; and
3. Payment for all people at the (relevant) time, with the exception of brush hands was a gross amount of $15 per hour amounting to $120 for an 8 hour day as against the prevailing award rate at the time of $12.75; and
4. Taxation was deducted under the prescribed payments system for Phil Grange, Vincent Wray, Stewart Hamilton and Terence Doherty; and
5. If any of the people on whose behalf the complaints were made did not attend work they were not paid for that day.

AGREED CONTENTIOUS ISSUES

1. Whether the particular Award nominated applies and whether the business carried out by the defendants is construction work as defined by clause 7 of that Award; and

2. Whether the business of the defendants is work carried out in the building construction industry; and

3. Whether all the persons nominated in the complaints were engaged as painters and decorators.

THE DEFENDANTS

Mark Pedrini is aged 29 years. Some years ago at the age of about 19 or 20 years he started out working as a self employed registered painter. His mode of operation was to carry out painting work during the day and attend to quoting after hours. At that stage his work came in mainly as a result of word of mouth recommendations. In due course the business grew. In 1990 he and his wife joined in partnership to run the business. As the business developed Mr Pedrini found it too difficult to paint and quote. He accordingly decided to engage other painters to carry out the painting work whilst he engaged himself in quoting. His wife attended to the office and financial aspects of the business. As a result of advertising the business grew considerably to the extent that it engaged anywhere between 5 and 7 painters to carry out the jobs brought in by Mr Pedrini.

In 1995 Mr and Mrs Pedrini acquired the business name "Pedrini Painting and Decorating" which had been established by Mark Pedrini's father back in 1969. The business has subsequently been run under that name. Mr Pedrini told the Court that the business is a small husband and wife operation. His role is to get the work in and keep the clients happy. His wife's role is to look after the money side of things and speak to the painters. Mr Pedrini said he had no role in engaging painters. He had no discussions with painters concerning their engagement. That was all left up to his wife. Mr. Pedrini said that his modus operandi was to go to the job in the mornings and meet with subcontractors sent there by his wife. He would give them certain basic instructions but otherwise leave them to their own devices. There was no supervision as such. He found that if there were a number of subcontractors on site that one of them would usually take the lead and that the painters would then work as a team. He supplied the paint and the subcontractors supplied their own tools. After such brief meetings Mr Pedrini would go out onto the road to carry out quoting.

According to Mr Pedrini the business had a number of painters on their books and they would be called as required. The painters were subcontractors. They would come and go as they pleased. They would work for others and were not required to give notice. Indeed in many instances the subcontractors simply failed to turn up to the jobs. Generally there was quite a bit of work around and those subcontractors who wanted to work were always given the opportunity to work. Mrs Pedrini took care of the organisational aspects as to which workers attended which job and so forth. Although initially instructed by Mrs Pedrini as to the start times, when on the job the subcontractor had to liaise with the client as to the start times.

Mrs Pedrini told the Court that she handles all the business administration on account of her qualifications and skills. She receives all incoming telephone calls. She deals directly with the public and arranges for quotes to be prepared. She attends to the typing of quotes and to the sending out of the same. She follows up on the quotes to see if the potential client has decided on the quote. As to the subcontract painters she deals with them at first instance. As a matter of course she makes it known to them that the work available is on a subcontract basis. She negotiates the hourly rate to be paid. She instructs the painters as to reporting overtime beyond the standard 8 hour day. Furthermore she attends to the payment of the subcontractors and to payment of tax under the Prescribed Payments System (PPS). The tax deducted under PPS is in accordance with the PPS forms supplied by the subcontractors. In most instances 20% tax is deducted unless there is a variation certificate produced permitting a lesser deduction. She attends to all administrative operational aspects of the business. She conducted herself in exactly the same way during the material period in 1996 and 1997.

THE WORKERS—

Peter Corlett

Peter Corlett is a painter and decorator who commenced his apprenticeship in 1976. Since qualifying he worked in a variety of capacities, sometimes as an employee and sometimes as a self employed painter and decorator.

In 1996 Mr Corlett was unemployed. Whilst at the Commonwealth Employment Services (CES) office in July of that year he saw an advertisement seeking painters. Mr. Corlett told the court that the job offered was for a month's work at the award rate. Mr. Corlett responded to the add and as a consequence met Mark Pedrini at a house at Graham Road, Menora. Mr. Corlett told the Court that Mark Pedrini questioned him about his experience and then told him to start work that next morning. Pay was not discussed. The next morning being 16 July 1996 Mr Corlett arrived at work at 7.00 am and actually commenced to work at 7.20 am upon the arrival of Mr Pedrini. He worked under the direction of the leading hand Chris. When Mr Pedrini was around he took control and directed the workers. Mr. Corlett worked for the defendants at various places during the week ending 19 July 1996. On 19 July he was required to collect his pay for the 16th, 17th and 18th July from the defendant's residence at Riverview Terrace Mount Pleasant. Following that he spoke to Mr. Pedrini concerning where he was to work next. Mr. Pedrini told him that all the work was outside and affected by the weather and that the situation would be reviewed the following Monday. The following Monday Mr. Corlett was advised that no work was available on account of the weather. No further work was subsequently offered and consequently Mr. Corlett returned to the "Dole Office". In order to obtain assistance Mr. Corlett was required to produce evidence that there was no work available for him. Accordingly he contacted Natalie Pedrini concerning the matter. She produced a letter confirming that no work was available to Mr. Corlett on account of the bad weather. In the intervening period on 24 July 1996 Mr Corlett received a cheque in the mail for $78.00 being payment for his work on 19 July 1996.

In the weeks that followed Mr. Corlett continued to see adds at the CES office placed by Pedrini Painting & Decorating. He responded to those and spoke to Natalie asking that Mark get back to him. Mark Pedrini never did. All attempts to gain employment with the defendants failed. Mr Corlett produced documentary evidence showing that the jobs advertised by the defendants at the CES indicated employment under the Building Trades Construction Award.

In July 1997 Mr. Corlett received a PPS form indicating a deduction of tax using that system. He complained about that to Natalie Pedrini saying that he was on wages in accordance with what was advertised by the CES and that he wanted a group certificate. After some discussion Mrs Pedrini agreed to go back to her accountant and that she would get back to him with respect to the issue.

In about September 1997 Mr. Corlett received a letter from the defendants which had attached to it the group certificate. (Exhibit 10). The letter suggested that Mr. Corlett had earned a gross amount of $480.00 and that he had received $22 in cash over and above other payments received. Upon receipt of the letter Mr Corlett telephoned Natalie Pedrini protesting the suggestion he had been paid in cash. Given Mrs Pedrini's intransigent approach on the issue Mr Corlett decided to do no more about the matter. At no time did he receive any pay slips from the defendants.

Mr Corlett maintained that he worked on wages as indicated by the CES. He worked under the direction of Mr Pedrini or his leading hand. Mr Pedrini supplied all materials and tools other than some basic hand tools. When employed by the defendants he did not work for anyone else. Whilst working for the defendants he used his own vehicle to get from job to job and to collect his pay.

Mr Corlett was subjected to vigorous cross examination. When cross-examined he denied the suggestion that the pay offered was $600.00 per week. He maintained that he was expecting to receive $484.87 per week for the month's work. He denied working on the basis that tax would be deducted using by the PPS. He said he was never a subcontractor. Furthermore he strongly rejected the contention that he just abandoned his employment and that he was abusive to Natalie Pedrini concerning the issue of the group certificate.

In his evidence in chief Mark Pedrini did not specifically address the allegations raised by Mr Corlett so far as they related to him. Mr Pedrini's evidence in chief concerning Mr Corlett comprised of broad generalisation without any degree of specificity. His general stance was that the firm only engaged subcontractors who were free to come and go as they pleased. Mr Pedrini said that the firm did not have supervisors and simply left it to the subcontractors to work the job out between themselves. One of them would usually take the lead. Under cross examination Mr Pedrini said that he gave and gives work to any qualified person when work is on. Inferentially he rejected Mr Corlett's evidence concerning his failure to provide him with work. He also denied in an inferential way of having spoken to Mr Corlett concerning his experience. Furthermore he rejected any notion of directing how the work was to be performed or having had a supervisor or leading hand for that purpose.

Mrs Pedrini in her evidence in chief did not directly address the allegations made by Mr Corlett. She also gave evidence in a very general form. The lack of specificity in her evidence was disconcerting. Her evidence too only inferentially contested the matters raised by Mr Corlett. When cross examined Mrs Pedrini was unable to account as to why the CES advertisements referred to the Award. When taken to explain the production of the group certificate and the accompanying letter she said that she produced the same because she had felt threatened by Mr Corlett. She was only a young female and had effectively been intimidated by Mr Corlett. When asked to describe the nature of the threat, she was unable to provide an answer. Notwithstanding the production and issue of group certificate she maintained that Mr Corlett was a sub contractor.

In assessing the evidence I found Mr Corlett to be an honest and forthright witness. His evidence was supported by documentary evidence which gave credence to his testimony. On the other hand Mr Pedrini was an extremely poor witness. He did not specifically address the issues concerning Mr. Corlett. His evidence was vague and marred by broad generalisation. Mrs Pedrini was also unconvincing in her evidence. Her evidence concerning the threat made by Mr Corlett was not credible. Indeed she was found wanting in her explanation as to the nature of the threat allegedly made. Her evidence in that regard lacks veracity and is therefore rejected.

Where there is conflict in the evidence concerning the matters relating to Mr Corlett, I far prefer the evidence of Mr Corlett to that of Mr and Mrs. Pedrini.

Dave Bullivant

Mr Bullivant is a painter and decorator who immigrated to Australia 3 years ago. He previously worked in England and Wales as a painter initially as an employee and thereafter in his own business.

Upon arrival in Australia he had one brief painting job. He was instructed with respect to that job to supply a PPS form to the person for whom he worked. He is not sure as to whether he worked as an employee or subcontractor on that first job. It was early days for him and he was unfamiliar with industry practices.

Soon thereafter on about the 7th January 1997 he saw an advertisement in the employment section of the West Australian newspaper. The add which had been placed by Pedrini Painting and Decorating sought painters with their own tools. In responding to the add Mr Bullivant spoke to Mark Pedrini. They discussed the hours and days of work as well as the pay rate. It was agreed that Mr. Bullivant would work an 8 hour day Monday to Friday at the rate of $120.00 per day.

Mr Bullivant offered to Mr Pedrini a PPS form because he believed from his previous experience that was what he was required to do. Mr. Bullivant enquired as to whether Mr Pedrini wanted an invoice at the end of each week, to which Mr Pedrini replied, no. Mr Bullivant understood that he would be paid $120.00 per day at the end of each week. He did not know whether he was an employee or a subcontractor. That was never discussed. He was just happy to have a job. Arrangements were made for Mr Bullivant's pay to be deposited directly into his bank account.

Mr Bullivant commenced painting for the defendants on Thursday the 8th January 1997. He kept a contemporaneous record of the days, hours and places he worked at. The record was kept in a diary. He completed the diary by force of habit. The diary (exhibit 11) provides a comprehensive chronology of Mr Bullivant's work for the defendants. The evidence given by Mr Bullivant as supported by his diary entries indicate that he often worked on weekends, that is start and finishing times differed, and that he would sometimes work in excess of 8 hours. He often worked on public holidays for the same rate of pay. If he did not work on public holidays he was not paid for it. He did not receive any rostered days off.

Mr Bullivant's evidence dictates that he took instructions from Mr Pedrini and from a supervisor named Darren. Mr Pedrini would determine which jobs were to be done and the supervisor would run the jobs. A few weeks before he parted company with the defendants Mr Bullivant ran jobs on behalf of the defendants. Mark Pedrini approached him to carry out that function. He was paid an extra $20.00 a week to do that. Mark Pedrini would meet Mr Bullivant on site and tell him what he wanted done. He would then leave and Mr Bullivant would run the job for him.

Mr Bullivant told the Court that during the time he worked for the defendants that he did not conduct a business. He did not advertise or quote any jobs. He worked at the direction of the defendants. Indeed he was unhappy to work weekends but was continually pressured into working on weekends. Furthermore morale amongst the workers was low on account of the lack of payment for overtime worked and by reason of the failure on the part of the defendants to produce pay slips notwithstanding repeated requests for the provision of the same.

Throughout the period that he worked for the defendants Mr Bullivant provided his own standard height ladder, dropsheets and hand tools such as brushes and rollers. If any special equipment was needed it was provided by the defendants. Mr. Bullivant wore the requisite uniform supplied by the defendants.

Mr Bullivant's relationship with the defendants came to an end in August 1997. On 11 August 1997 Mr Bullivant attempted to return to work following an illness but passed out at the wheel of his vehicle on his way to work. He accordingly did not work that day. On 12 August he told Mr Pedrini about his need to take further time off work. Mr Pedrini was quite off handed about Mr Bullivant's situation. Accordingly on 13th August he notified Mr Pedrini that he would no longer work for him. All the time that Mr Bullivant spent off work on account of illness was not paid for. Any other time taken off work was always taken with the permission of Mr Pedrini.

Mark Pedrini in his evidence in chief did not directly traverse the allegations made by Mr Bullivant. Indeed his evidence which consisted of broad generalisations related to the fact that he only engaged subcontractors and that he left all the paperwork and other relevant arrangements to his wife Natalie. Mr Pedrini only inferentially refuted the allegations made by Mr. Bullivant. In that regard he rejected the notion of directing work or employing a leading hand or supervisor for that purpose. Similarly Mrs Pedrini in her evidence did not traverse Mr Bullivant's evidence except to deny Mr Bullivant's evidence concerning adequacy of the notice of termination given. Her evidence was vague and lacked specificity generally and more particularly so far it related to Mr Bullivant.

In assessing the evidence I found myself to be most impressed with Mr Bullivant. He was an excellent honest and forthright witness who told the Court of the events with some particularity. He is clearly a meticulous man who pays great attention to detail. His diary (exhibit 11) exemplifies that. He made concessions against his interests in some instances. He was immediate in responding to all questions. Mr and Mrs. Pedrini were unimpressive. Their evidence was vague and lacking in particularity. Where there is a conflict between evidence of the defendants and that of Mr Bullivant, I have no hesitation in preferring that of Mr Bullivant.

Terence Doherty

Mr Doherty has been a painter for 16 years. Unlike Mr Corlett and Mr Bullivant he has never been a registered painter and was not registered at the material time. He has never so far as he is concerned worked as a subcontract painter and has never sought to do so.

In late January 1997 he was given the defendants' contact number by the CES. He made contact with the defendants by virtue of speaking to Natalie Pedrini. After giving her basic details concerning his qualifications, he was referred by her to Mark Pedrini or alternatively Darren Evans at a job site in Karrakatta. As a consequence of that referral Mr Doherty attended the particular job and spoke to either Mark Pedrini or Darren Evans. He cannot now recall precisely who it was that he initially spoke to. The outcome however was, that he was given a job immediately. He was directed to attend another job which he did. At that initial meeting no discussions took place concerning pay.

The next day Mr Doherty was told that he would be paid $120 per day and that he would be paid each Thursday. He was also told that he was required to work an 8 hour day. Mr Pedrini, according to Mr Doherty, told him that he was required to have his own tools such as brushes, rollers and drop sheets. Mr Doherty who was at that material time in an impecunious situation was given assistance through CES Outcare to pay for the tools he required for the job.

The evidence before the Court clearly dictates that Mr Doherty gained employment with the defendants under the Job Start Program. Consequently the defendants' completed a Wage Subsidy Agreement (exhibit 19) in order to derive a benefit from having taken on Mr Doherty. In that agreement, Natalie Pedrini certified as being true and correct that Mr Doherty was employed as a full-time painter and decorator and that his employment, which commenced on the 24 January 1997, was governed by the Building Trades Construction Award.

Mr Doherty told the Court that he operated under the direct instruction of Mr Pedrini or alternatively the supervisor employed by Mr Pedrini. He said that Mr or Mrs Pedrini would advise of the jobs that he was to attend. Whilst on the job his work was directed by Mr Pedrini or alternatively the supervisor. Start and finish times were also directed by them as were morning tea and lunch break times. The supervisor Darren over-saw the works. At all times he worked under direction. He himself eventually became a leading hand when he was asked, "to explain to the boys what to do". For that he received an extra $10 per day in pay.

Mr Doherty told the Court that he worked overtime for which he was not paid. He said that he was promised pay at increased rates for working on weekends but never received the same. He was constantly promised that such payment would be made but it never was. He did not receive any pay slips. His pay was deposited directly into his bank account. Whilst working for the defendants he drove from job to job and was not paid any allowance for that.

Mr Doherty finished working for the defendants in about early July 1997. The cessation of the relationship between himself and the defendants was acrimonious. The defendants were of the view that Mr Doherty had abandoned his job. On the other hand Mr Doherty took the view that the defendants had failed to take him on again following his taking of time off work due to illness. As a consequence of the defendants' stance Mr Doherty was unable to receive unemployment benefits following the ending of the relationship between the parties. Mr Doherty was indeed most upset about his inability to obtain unemployment benefits. For that and other reasons the situation degenerated to the extent that Mr Doherty threatened to assault Mr Pedrini and furthermore to "go to the union". As a consequence Mr Doherty received a separation certificate which enabled him to obtain unemployment benefits.

Mr Doherty complained in his evidence that the final payment made by the defendants to him was $90 short. He said that Mark Pedrini had refused all approaches made to him for the payment of that money.

In order to establish the breaches set out in the complaints Mr Doherty was taken to diary entries which he said his apprentice work-mate Julie Williams had prepared. By reference to that (exhibit 20) he attempted to reconstruct his work history. The whole exercise in that regard in my view was a failure. Mr Doherty had little recollection of the specific jobs carried out specific days. Much of his evidence was conjecture. Quite frankly his evidence was not acceptable in that regard not because of any lack of credibility on his part but rather by virtue of the fact that the passage of time had so affected his memory that his evidence with respect thereto was unreliable.

Mr Doherty was subjected to a very vigorous cross-examination. During cross-examination he strongly maintained that he was not a subcontractor, that he had never been in business and that he was unfamiliar with tax matters. Indeed his stance was that he would not have taken on the job if he knew it was that of a subcontractor's position. He was not a registered painter and therefore not able to work subcontract. On this evidence there was simply no mention made by the defendants that the job was subcontractual

When taken to exhibit 20 which is the diary summary, Mr Doherty said that he believed that had been made by Julie Williams. He conceded however that it is possible that it may have been in fact made by Mr Bullivant. Mr Doherty also refuted suggestions that he abandoned his job with the defendants in order to take up the City Waters job with another former employee of the defendant namely Phil Grange who had in effect taken over defendants' contract with respect to that job.

Mr Pedrini in his evidence in chief did not directly traverse the evidence given by Mr Doherty. His evidence was vague and general. Inferentially Mr Pedrini rejected the evidence given by Mr Doherty. His evidence lacked specificity. When specifically cross-examined Mr Pedrini alleged that Mr Doherty had left his employment in order to work with Phil Grange to do the City Waters job which the defendants had lost. Futhermore he denied the suggestion that he told Mr Doherty there was no more work for him saying that he never told anyone that there was no more work. If they had work on work would be given. He would employ any subcontractor in Perth if he had the work on.

Mr Pedrini maintained that all his workers were subcontractors who could come and go as they pleased.

Natalie Pedrini in her evidence in chief told the Court that when she was approached by CES that she told that organisation that the defendants only engaged subcontractors paid by the days and hours worked.

She also told the Court that Mr Doherty left his job one afternoon. He later rang in a threatening manner. She said that she only wrote a letter to the Department of Social Security saying that he had been terminated because of the threats that had been made by him to her.

She said that all the workers were subcontractors. An illustration of that was the fact that all workers were responsible for damage caused. In Mr Doherty's case he was made financially responsible for two mirrors that had to be repaired on account of his negligence.

When cross-examined concerning Mr Doherty with particular reference to exhibit 19 Mrs Pedrini conceded that section 3 thereof was not true and correct. She told the Court that notwithstanding what was on the face of the agreement that she told a person named Terry at the CES what the true position was. She went on to say that Terry accepted the position and accepted that Mr Doherty was a subcontractor. That communication was carried out verbally. She said that the CES was happy to pay a wage subsidy to subcontractors.

Similarly with respect to the separation certificate she told the Court that notwithstanding what appeared on its face that she telephoned the Department of Social Security to tell them that the document did not reflect the true position, that is, that Mr Doherty had left on his own accord rather than being terminated as the certificate indicated.

In re-examination Mrs Pedrini tried to explain away the problem with exhibit 19 by saying that had been completed by someone else and that she simply signed it. She suggested that the reference to the Award therein was given little significance by the person from the CES to whom she spoke concerning Mr Doherty's employment status.

In evaluating the evidence it is clear that the defendants attempted to destroy Mr Doherty's credibility by attacking his character. Although it cannot be denied that Mr Doherty has had a colourful past which includes significant breaches of the law, it is nevertheless the case that I found him to be a truthful witness with respect to the issues in dispute. Without being disrespectful to him, it is evident that Mr Doherty's approach to life is generally somewhat unsophisticated leading to his encounters with the law. However, I have no reason to doubt his evidence on the material issues in this case. Indeed I accept his evidence in being truthful. Having said that however it is evident that he does not have a clear recollection of his work history. His attempt to reconstruct his work history by reference to exhibit 20 was generally unsuccessful.

Mr Pedrini's evidence on the material issues relating to Mr Doherty was not acceptable. He was so vague that little weight can attach to his evidence. The lack of specificity draws into question his credence.

Likewise Mrs Pedrini's evidence is not accepted. Her explanation concerning exhibit 19 and the separation certification are simply incredible. I fear that Mrs Pedrini has distorted the truth in order to try and explain away the damming documentary evidence before the Court.

Where there is a conflict in the evidence between that of Mr and Mrs Pedrini to that of Mr Doherty, I prefer that of Mr Doherty.

Stuart Hamilton

Mr Hamilton is a painter and decorator with 15 years experience. For 12 of those years he worked in Scotland prior to emigrating to Perth 3 years ago.

Upon arrival in Australia Mr Hamilton telephoned those painters listed in the Yellow Pages telephone book seeking work. Within a month of his arrival he made contact with the defendants' firm. He initially spoke to Natalie Pedrini and detailed to her his experience. In due course following that contact he spoke to Mark Pedrini. Mr Hamilton was invited to attend the Pedrini residence for purpose of interview.

During the interview Mark Pedrini told Mr Hamilton that there was a job for a supervisor. Mr Hamilton told him that he did not want the supervisor's job because he had just recently moved to Perth from Scotland and was unfamiliar with paints climate and soforth. Mr Pedrini accepted that and offered him a job as a painter starting the following Monday. That was in about mid June 1996.

Mr Hamilton told the Court that during the interview wages and other entitlements were not discussed. It was only after the commencement of work that he found out from other painters that the wages he would received would be approximately $500 per week. Initially when interviewed he did not concern himself with the amount of wages to be paid because his main concern was that of securing a job. It was his evidence that subcontracting was never discussed.

Mr Hamilton told the Court that on his first day at work he was directed by Mark Pedrini as to what to do. Indeed Mr Pedrini also directed other workmen as to their duties. He continued to direct all workmen as to what to do for almost the entire period for which Mr Hamilton worked for the defendants. The situation only changed towards the end of the period during which Mr Hamilton worked for the defendants when Mr Darren Evans acted as a supervisor.

The start times were directed by Mr Pedrini as was the finish times and the location at which Mr Hamilton was required to work. Sometimes whilst in the middle of a particular job he would be pulled off that job and told to go to another job. He had no choice in the matter.

Mr Hamilton described how he and other workers were poorly treated. They would be told that if they didn't like it not to bother turning up the next day. Furthermore on occasion the workers were not paid on time. Usually the workers were paid on a Thursday but sometimes the pay was late. On one occasion being a Saturday the workers' stopped working until they spoke to Mark Pedrini concerning the failure of the defendants to pay them. On that occasion Mr Pedrini attended the job and addressed the workers in a very aggressive manner telling them to get back to work as they would be paid eventually. On that occasion Mr Hamilton acted as the workers' spokesman and consequently came into conflict with Mr Pedrini concerning the issue of lateness of pay. The next week Mr Doherty told him that he was finished and not to come back. Mr Hamilton was never told why his job was terminated.

Following his termination Mr Hamilton sought a reference from Natalie Pedrini. The reference being exhibit 23 signed by Mark Pedrini describes Mr Hamilton as having been employed by Pedrini Painting and Decorating.

Mr Hamilton was shown exhibits 24, 25 and 26 and conceded receiving the same. As to exhibit 26 regarding pay slips, he said that reference to subcontractors therein was of no significance to him. Effectively he did not understand the distinction. Whilst working for the defendants he did not quote any jobs on his own account or work for any other.

As to the PPS form, Mr Hamilton told the Court that he was provided with the form by Mark Pedrini and was told to fill it out which he duly did before he started. As a consequence tax was deducted at the rate of 20%.

Mr Hamilton also testified that he provided his own hand tools and that the defendants provided all materials. He said that he drove from job to job at the direction of the defendants. He was never paid any overtime notwithstanding having worked overtime. He conceded that on one occasion he attended to cleaning of a spillage in his own time but explained that occurred early on and that he did so because he did not want to create a bad impression with his new employer. Other clean up jobs were done in Pedrini Painting and Decorating's time.

Finally by reference to his National Australia Bank statements Mr Hamilton was able to reconstruct the history of his employment with the defendants and gave the Court evidence concerning the days and hours worked during the material period.

When cross-examined Mr Hamilton was then taken to exhibit 29. He was vigorously and aggressively cross-examined on the existence of an invoice book and the production of invoices from him to the defendants. With respect to that issue he maintained that the invoice book was produced at the request of Mr Pedrini and that he was asked to sign invoices for work that had been done. He said that he recalled having signed the first three invoices but cannot recall signing any others. It is noted that the invoice book before the Court (exhibit 29) does not contain at any place Mr Hamilton's signature. Mr Hamilton told the Court that he simply followed the instructions given to him by Mr Pedrini concerning the production of invoices. Essentially the use of the invoice book and the production of the invoices were not of his doing.

Mr Hamilton did not sway during the course of cross-examination and maintained his stance in a forthright manner.

Mark Pedrini in his evidence in chief did not address the allegations of Mr Hamilton specifically. Again as was the case with respect to all workers he only in a very general way traversed the allegations that were made. His evidence accordingly was vague and unconvincing.

When cross-examined Mr Pedrini was specifically taken to consider exhibit 29 and the PPS forms allegedly supplied by him to Mr Hamilton. In regard to the invoice book he was unable to account as to why it remained in his possession following Mr Hamilton's departure. With respect to the PPS forms he denied having handed Mr Hamilton the same. He said he never handed anyone any tax forms.

Mr Pedrini was also cross-examined as to why there was no mention in the reference given to Mr Hamilton (exhibit 23) that he was a subcontractor. In responding to that he was not able to explain the reason. Indeed his response to that question and others under cross-examination was extremely poor. His responses were not specific and quite frankly lacked credibility.

In her evidence in chief Natalie Pedrini specifically addressed exhibit 29. She told the Court that the writing on the invoices was in fact hers and that she wrote them out in accordance with information supplied by Mr Hamilton. It was done that way so she would be able to keep abreast of the work done by Mr Hamilton. After Mr Hamilton left, the invoice book was retained and was used as a purchase order book. With respect to the PPS form she said that her husband did not carry those forms with him. She was of the view that he did not even know what the forms looked like.

When cross-examined Mrs Pedrini maintained as true the evidence that she had given in chief concerning Mr Hamilton. When taken to exhibit 23 and asked to explain why she had used the word employed therein, she had said that so far as she was concerned if you give someone a job you employ them whether they be on wages or subcontract.

Again I find myself in this instance being unable to accept the evidence of Mr Pedrini. His evidence on the issues concerning Mr Hamilton was vague and expressed in very general terms. It was unacceptable. In contrast Mr Hamilton came across as being a truthful witness and a forthright witness with an accurate recall of events. Where there is a conflict between Mr Hamilton's evidence and that of Mr Pedrini I prefer the evidence of Mr Hamilton.

Turning to Mrs Pedrini's evidence concerning Mr Hamilton I find myself not accepting her evidence. Her testimony concerning the use of the word employed in exhibit 23 does not sit with her self professed attention to ensuring that all workers knew that they were subcontractor. Quite frankly I did not believe her explanation as to exhibit 23. I am afraid that I did not find her to be a credible witness. I prefer Mr Hamilton's evidence to that of Mrs Pedrini.

Phil Grange

Mr Grange is a painter and decorator with some 12 years experience. He first worked for the defendants in about 1992 or 1993. That job was obtained through the CES. In about late 1996 Mr Grange met Mark Pedrini in Fremantle and asked him if there was any work available. Mr Pedrini said that there might be some work coming up and to give him a call sometime later. About two weeks later Mr Grange renewed his inquiry and was told by Mark Pedrini that work was available and that he could start immediately. At that stage they did not talk about pay.

Mr Grange told the Court that although the usual starting time was 7.00 am that he would often be required to start work earlier. He was instructed in that regard by Mark Pedrini or the foreman. He also said that he often worked beyond 8 hours per day finishing as late 5.30 pm. He said that he would generally be told by the foreman as to what to do. The finishing times were directed by the foreman. Mr Grange said that he would normally ring up at night and speak to the defendants in order to find out which job to go to the next day. Often he was directed to leave one job and go to another. He used his own vehicle to get from job to job. He also followed the direction of Mr Pedrini or the foreman. He provided his own tools and the defendants provided the necessary materials. Rostered days off were never taken.

Mr Grange testified that at the material time although registered as a painter he did not conduct himself in business. He did not have a registered business name operating. He did not advertise or quote or carry out any contract work. He told the Court that the relationship with the defendants came to an end following his refusal to work on a weekend. What happened was that Mr Grange had been asked to do a small job for a friend of a friend. He decided to do the job on a Saturday and Sunday and therefore was unable to work for the defendants. As it transpired however Mr Grange was unable to complete that job on the weekend and consequently asked for the Monday off also so that he could finish that job. Thereafter he was not given any further work by the defendants.

Whilst Mr Grange worked for the defendants he usually received a net amount of $540 per week comprised of $120 per day for 5 days less 10% tax.

When cross-examined Mr Grange testified that he had a tax deduction variation certificate which he nominated on the PPS form which he gave to the defendants. He said that he obtained the certificate when he had previously worked for builders on a subcontract basis. When working for builders he was required to supply both labour and materials and accordingly obtain the variation certificate for that reason. He denied any knowledge of the advantages created by PPS.

Mr Grange denied receiving during the material period any other income other than that received from the defendants. He could not advise the Court however of the payment received from the friend of a friend and could not tell the Court where that had gone to.

Relevantly Mr Grange was cross-examined concerning the City Waters job. He conceded being approached to finish off that job instead of the defendants whilst he was still working for the defendants. He told those who approached him that he would not take the job unless they had decided that they did not want Pedrini Painting and Decorating to finish it (see transcript page 355). He told those who approached him that he was not prepared to put in a quote but would do the job for the same price that had been agreed to with Pedrini Painting and Decorating. Shortly after ceasing to work for the defendants Mr Grange commenced working at the City Waters job. He denied a suggestion that the issue of working for a friend of a friend was just a convenient distraction in taking over the Pedrini job at City Waters.

During cross-examination Mr Grange maintained that there was always a supervisor on site who instructed him as to what to do and as to when to start and finish.

In his evidence and chief Mark Pedrini told the court that a week after having lost the City Waters job he saw Mr Grange and Mr Doherty working at that particular site. The inference being that Mr Grange and Mr Doherty had abandoned their jobs with the defendants in order to take up that particular job. Mr Pedrini under cross-examination admitted that he could not recall circumstances under which Mr Grange left. Furthermore Mr Pedrini rejected in a general way the suggestion that jobs were run by supervisors. In her evidence Natalie Pedrini specifically addressed the evidence given by Mr Grange. As to tax deductions made for Phil Grange she said that she only deducted 10% tax on account of the variation certificate number quoted by Mr Grange.

When cross-examined Natalie Pedrini maintained that Mr Grange worked for the defendants only on Monday to Friday. He worked for others 85% of the weekends. She said that she was aware of the fact that he was doing weekend work but was unable to say for whom Mr Grange worked. She suggested that Mr Grange simply stopped working for the defendants by choice.

Mrs Pedrini like her husband refuted any suggestion that supervisors were employed. She suggested for example that Darren Evans took a lead on the jobs because he was a natural leader. He was paid a bit more because he agreed to transport a trailer around with the defendants' equipment in it but not because of the fact that he was a supervisor. On the issue of the supervision under cross-examination when taken to page 2 of exhibit 15, she was unable to adequately explain away why the memo was addressed to "all staff" and that any problems were to be discussed with the "supervisor".

On the issue of direction and supervisors the defendants were simply not credible. On those issues I prefer the evidence of Mr Grange. Mr Grange made concessions against his interests within his own testimony with respect to the City Waters job.

Vince Wray

Mr Wray has been a painter for about 5 or 6 years.

Mr Wray made contact with the defendants by virtue of information received from the CES. He initially spoke to Natalie Pedrini who told him that he could start the next day. He was asked to report to Darren at a job at Dianella Heights. When speaking to Natalie Pedrini in the early part of 1997 Mr Wray said that he made it known to her that he had a trip already booked to go to England. He was due to depart on the 1st March 1997 and that he just wanted a job to take him through to that date.

He duly worked for the defendants until his departure on 1st March 1997. He was then away for 10 weeks and rang up the defendants upon his return seeking further work. He was given further work.

During the period that he worked for the defendants his work was directed by Mark Pedrini or the foreman. They decided as to what he was to do, the start and finish times and so forth. He was not provided with any transport to go from job to job. All equipment other than basic hand tools were provided by the defendants.

Mr Wray told the court that he was never told that he was a subcontractor. He did not carry out any business whilst working for the defendants. He did not engage himself in any work for others or enter into any arrangement to carry out such work. Mr Wray's work with the defendants terminated when he was simply not given any further work to do.

Mr Wray in his evidence in chief attempted by use of his bank statements and the use of Dave Bullivant's diary summary to reconstruct a history of his employment with the defendants. It simply suffices that the task that he undertook was made difficult by the effluction of time. When cross-examined Mr Wray rejected the suggestion that he was employed as a brush hand. He said he was employed as a painter. Under cross-examination he conceded having completed a PPS form requesting that a 20% tax deduction be made from his gross payment but said that he really did not understand the form. Mr Wray said that he was given the form to sign by Mr Pedrini who had them in his car. He did not receive the document from Mrs Pedrini. In fact he never met Mrs Pedrini and he certainly did not go to the post office to obtain a PPS form.

Whilst cross-examined Mr Wray conceded that the notations made on exhibit 33 were those of his wife who had liaised with him in order to reconcile the figures and reconstruct the history of his work for the defendants.

In his evidence Mark Pedrini did not particularly refer to Mr Wray other than to suggest that like the others he had simply abandoned his job with the defendants. Mr Pedrini otherwise gave evidence in a non-specific way which generally refuted not only Mr Wray's allegations but also the allegations made by the workers.

Mrs Pedrini in her evidence in chief and also under cross-examination said with reference to Mr Wray's termination that what happened was that she gave him an address to go to and told him that he should start at 7.30 am. At 8.00 am that particular day she received a call from him informing her that he would not be going to work. She said that she was annoyed and angry because that left her in the lurch. Mrs Pedrini conceded under cross-examination that notwithstanding the fact that Mr Wray was a brush hand that he was nevertheless paid as a painter.

In evaluating the evidence I found Mr Wray to be a straight forward and truthful witness I accept his evidence. I do not accept the evidence of Mr and Mrs Pedrini where it conflicts with the evidence given by Mr Wray. In my view each of the defendants lack credibility.

OTHER WITNESSES CALLED BY THE COMPLAINANT

Apart from the relevant workers the complainant also called three other witnesses. They were, its Industrial Officer Jennifer Harrison, its Organiser Darren Smith and Vince Wray's wife namely Lorraine King-Wray.

Jennifer Harrison

Jennifer Harrison was called as an expert witness. She professed expertise in Industrial Relations. Although some aspects of her evidence were relevant and appropriately considered it is nevertheless clear that her evidence going to the issues of the interpretation of the Award and the position at law of the workers with respect to Section 4 of the Painters Registration Act 1961 was inappropriately given. To a very large extent Ms Harrison gave parole evidence going to issues of construction of the Award. Furthermore she gave evidence going to the ultimate issue. In my view such evidence offends the ultimate issue rule. Issues of construction of the Award and the position at law are matters for this Court to determine and it is not proper to consider the evidence of Ms Harrison on such issues. The remainder of Ms Harrison's evidence which was factually based was otherwise acceptable.

Darren Smith

Like Ms Harrison some aspects of Mr Smith's evidence went to the construction of the Award. His evidence in that regard in my view cannot be considered. The remainder of his evidence concerning his contact with Mrs Pedrini and in particular their discussions concerning the status of workers is relevantly considered. Also relevantly considered is his evidence concerning the creation by Mrs Pedrini of the time and wages book relating to the workers. Much of Mr Smith's evidence is not in issue. His evidence is acceptable.

Lorraine King-Wray

Mrs King-Wray's evidence was of limited assistance. The only relevant issue that she properly addressed was a contact with Mrs Pedrini concerning the deposit of pay.

WITNESSES CALLED BY THE DEFENDANTS

The defendants called their accountant Mr Leppard to give evidence concerning their business and also to give expert testimony on tax matters. They also called in Steven Cochrane a competitor to give evidence concerning his firm's employment of Stuart Hamilton, Vincent Wray and Phil Grange. Mr Cochrane also gave evidence concerning his contractual relationship with his workers. Also called to give evidence was Jason Leppard a subcontractor engaged by the defendants.

Mr R W Leppard

Mr Leppard is an accountant and registered tax agent with 30 years experience. He told the Court that the PPS of tax deduction is widely used in the building industry by self-employed subcontractors. Being a subcontractor and using PPS affords certain taxation advantages particularly with regard to deductions allowable resulting generally in greater deductions and less taxable income. He said that tax is usually deducted at the rate of 20% under PPS. In some instances the 20% deduction can be reduced further by obtaining a variation certificate. He said that it is highly unlikely that someone producing a variation certificate to vary the amount of tax deducted under PPS would not be a bona fide subcontractor. Mr Leppard told the Court that the defendants' business was a modest business carried on in partnership which rendered the defendants' personally liable for the debts of the business.

When cross-examined Mr Leppard conceded that the use of PPS is less burdensome for the payer. It is simplistic and easy to operate.

Stephen Cochrane

Mr Cochrane manages the firm A J Cochrane & Sons in Malaga. He conceded having employed Stuart Hamilton, Vincent Wray and Phil Grange. Mr Hamilton was employed as a subcontractor. Mr Cochrane said that his firm engages both subcontractors and employees. Subcontractors usually submit invoices at the end of each week for the hours worked. They are then paid the agreed hourly rate less tax using PPS. He instructs subcontractors where to go. He employs supervisors to oversee the jobs. Work usually starts at 7.00 am and usually concludes at 3.30 pm. Lunch and tea breaks are taken. T-shirts are supplied to be worn by all workers engaged by his firm.

When cross-examined Mr Cochrane agreed that he had no control over subcontractors in that they were free to come and go as they pleased. He also told the Court that in his setup subcontractors and employees worked together as a team. A J Cochrane & Sons are respondent to a Federal Award and its employees are employed under that particular award.

Jason Leppard

Mr Leppard has worked for the defendants as a subcontractor over a number of years. He continues to subcontract to the defendants.

The way in which he operates is that he phones Mark Pedrini to see if there is any work on. He is given an address and instructions and then carries out that job. He subsequently gives Mr Pedrini an invoice and is paid on that particular invoice. He said that he wears a uniform provided by the defendants for identification purposes. Whilst working for the defendants he takes breaks when he wants and is never supervised. Tax is deducted using PPS and that he is free to come and go as he pleases. He also advised the Court of the inherent advantages of being self-employed.

Mr Leppard's evidence is of little significance because it is quite clear on his evidence that he worked and works a subcontractor for the defendants under different circumstances to the workers previously mentioned. It does not necessarily follow that because he worked as a subcontractor under those circumstances that the other workers referred to in this case were in fact subcontractors.

Having reviewed the evidence and having made findings of fact thereon I now turn to consider the remaining relevant issues.

WERE THE WORKERS SUBCONTRACTORS OR EMPLOYEES?

On this issue it is made clear that I reject Natalie Pedrini's evidence that she told each of the workers prior to commencement that they would be taken on as subcontractors. I disbelieve her evidence in that regard. I find that neither she nor her husband indicated to the workers that they were engaged as subcontractors.

Counsel for the defendants during the course of submissions referred the Court to the leading High Court decisions of *Zuijsv.Worth Brothers Pty Ltd (1955) 93 CLR 56, Humberstone v.Nothern Timber Mills (1949) 79 CLR 389 and Stephens v. Bodribb Sawmilling Co. Pty Ltd (1985-6) 160 CLR 16,* in emphasising the point that control is not the only relevant factor to be considered but rather that it is the totality of the relationship between the parties that must be considered. I agree with that. I accept that the right to direct or supervise the performance of a task can not transform into a contract of service what is in essence an independent contract. Even the most independent of independent contractors is subject to direction. The decision of *Vabu Pty Ltd v. Federal Commissioner of Taxation 96 ATC 4898* was quoted to support the defendants' case. It is suggested by the defendants that there are many similarities between the courier drivers in that case and the painters engaged by the defendants in this case. Although there is no denying that there are certain similarities between the two, it is nevertheless the case that factually the cases are not on all fours. In my view, it is important in this case to assess each worker's relationship with the defendants to determine their true status. In that regard the approach taken by the Full Bench of the West Australian Industrial Relations Commission in *The West Australian Builders', Labourers, Painters and Plasters Union of Workers v. R B Exclusive Pools Pty Ltd trading as Florida Exclusive Pools 77 WAIG 4* should be followed.

It is my duty in these matters to determine what the contract in each case was irrespective of what the parties may have designated. Again it is important to reiterate that each worker's relationship with the defendants must be viewed discretely and in isolation because it is the case for it to be possible to have some workers working under a contract of service and others such as Jason Leppard working under a contract for service.

In determining this issue the Court must consider a number of indicia which include inter alia;

- Control
- Time of starting work—hours
- Whether worker was conducting his own business
- Obligation to work
- Mode of remuneration
- Taxation
- Mode of termination
- Provision and maintenance of equipment
- Organisation test

The list of indicia mentioned above is not an exhaustive list of matters to be considered.

Peter Corlett

- Control

  Mr Corlett an experienced painter worked for the defendants under the control and direction of Mr Pedrini and/or the defendants' leading hand. He was supervised. Ultimate authority resided with the defendants. He was subject to being ordered.

- Time of starting work / hours

  Mr Corlett worked regular hours and reported at times designated by Mr Pedrini or the defendants' leading hand. He reported to the place directed by the defendants.

- Obligation to work

  There was an obligation to attend the nominated work site.

- Conducting of business

  Mr Corlett at the material time was conducting his own business. However it is clear that he was not working in that particular business at that particular time because of lack of work. There is no reason why a person such as Mr Corlett cannot move from being involved in his business and working in his business to that of being an employee and thereafter returning to his business. That is what Mr Corlett did in this particular case. That explains his provisional tax liability and claim for expenses. It is absolutely clear on Mr Corlett's evidence that he simply did not work in his business whilst engaged by the defendants.

- Mode of remuneration

  Mr Corlett was paid an hourly rate. He did not quote a price for each job. He did not render invoices. He was paid in a manner consistent with a wage earner.

- Taxation

  Taxation was deducted on a PAYE basis. A group certificate was issued by the defendants.

- Mode of termination

  Mr Corlett's contract was not formally terminated. He simply was not afforded the opportunity to work again for the defendants.

- Provision and maintenance of equipment

  Mr Corlett supplied no more than tradesman's tools. All other necessary equipment was provided by the defendants.

- Organisation test

  Mr Corlett did not work for any other person other than the defendants and conducted his work for the relatively short period as a part of the defendants' business and his work was that done as an integral part of that business.

- Conclusion

  Mr Corlett was an employee working under a contract of service.

Dave Bullivant

- Control

  Mr Bullivant was clearly subject to control. His work was allocated by Mark Pedrini. He was supervised and subject to orders and directions.

- Time of starting work / hours

  The time of starting work was subject to direction of Mr Pedrini or the defendants' supervisor. He worked regular hours dictated by Mr Pedrini or the supervisor.

- Conducting business

  Mr Bullivant was not conducting his own business and he worked for no one else. He was not conducting himself for profit. He worked exclusively for the defendants and felt pressured to work even when he did not want to work.

- Obligation to work

  The defendants obligated Mr Bullivant to work even when he was unwilling to do so. There was no doubt that Mr Bullivant was required to work by the defendants at times and days they directed.

- Mode of remuneration

  Mr Bullivant was paid weekly. The quantum was regular based at the rate of $120.00 per day. He did not render invoices. He was paid in a manner which was far more consistent with the manner of payment which a wage earner might be subject to.

- Taxation

  His tax was deducted under PPS. He followed the system out of ignorance and not by reason of the fact that he was a subcontractor. Having recently arrived in Australia he was unfamiliar with the tax system and produced a PPS form to the defendants thinking that that was the required thing to do.

- Mode of termination

  Mr Bullivant gave notice to the defendants of his intention to no longer work for them. He was unlikely to have done that if he was free to come and go as he pleased.

- Provision and maintenance of equipment

  He provided no equipment other than tradesman's tools.

- Organisation test

  He was subject to supervision, instructed as to what to do and was paid in a manner more appropriate to that of an employee. He did not carry out work for others and did not conduct his own business. His work was done as an integral part of the defendants' business.

- Conclusion

  Mr Bullivant was an employee working under a contract of service.

Terence Doherty

- Control

  Mr Doherty worked subject to the direction of Mr Pedrini or the supervisor until he became a leading hand. The fact that he became a leading hand vitiates the proposition that he was a subcontractor. Mr Doherty was supervised and was subject to the orders of the defendants.

- Time of starting work / hours

  Although start times varied, he generally started at 7am. In any event his start times were subject to the direction of Mr Pedrini or the supervisor. Mr Doherty worked regular hours.

- Conducting business

  Mr Doherty has never conducted his own business and has never sought to do so. He is not a registered painter and consequently is not legally able to work as a painter other than as a bona fide employee. Without being unkind to him it is clear that Mr Doherty is simply inexperienced in business matters. Any suggestion that Mr Doherty ran is own business is contrary to the weight of the evidence. He did not work for anyone else during the relevant period nor did he seek to work for anyone else. I reject any contention that he subcontracted for the City Warters job. Significantly he was the subject of a Wage Subsidy Agreement..

- Obligation to work

  There was clearly an obligation to work for the defendants on the work selected by the defendants.

- Mode of remuneration

  Mr Doherty was paid weekly. The quantum was regular. He did not quote a price. He did not render an invoice. He was paid in a manner which was more consistent with that of a wage earner.

- Taxation

  Although tax was deducted using PPS, Mr Doherty had no idea of the significance of that. Indeed he had failed to lodge tax returns previously. He was completely unsophisticated with respect to tax matters. The PPS form was completed at the behest of the defendants.

- Mode of termination

  Mr Doherty was terminated informally. His reaction to termination was quite decisive and indicative of the fact that he was an employee. His demand for a separation certificate and production of same is supportive of his status of an employee.

- Provision and maintenance of equipment

  Mr Doherty provided no more than tradesman's tools.

- Organisation test

  Mr Doherty worked on jobs that he was instructed to work on, he was at least initially subject to supervision, he was paid in a manner more appropriate to an employee, he did not work for anyone else during the pertinent period, and had no business of his own. Taking all of those factors together with the fact that he was appointed a leading hand suggests that he was employed as part of the defendants' business and that his work was done as an integral part of that business.

- Conclusion

  There can be no doubt in my view that Mr Doherty was an employee.

Stuart Hamilton

- Control

  Mark Pedrini allocated Mr Hamilton's work. Mr Hamilton was subject to Mr. Pedrini's control or alternatively to the supervisor's control. He did his work subject to direction and control, often being asked to leave one job half way through in order to attend another.

- Time of Starting work—hours

  Mr Hamilton generally commenced work at about 7.30am. He worked regular hours. His work times were directed and controlled by Mark Pedrini or the supervisor.

- Conducting business

  Mr Hamilton was not conducting a business for profit and was providing his services exclusively to the defendants.

- Obligation to work

  There was a clear obligation to work for the defendants on the work selected by the defendants.

- Mode of Remuneration

  Mr Hamilton was paid weekly. The quantum depended on the hours worked. He did not quote a price. Although for a short period invoices were prepared, they were prepared after the payment of remuneration. The invoices were prepared by Mrs Pedrini and did not in reality represent true invoices but rather a mechanism by which she could keep a tab on the work done by Mr Hamilton. The invoices were not true invoices but rather a record prepared by Mrs Pedrini almost entirely for her benefit. In reality Mr Hamilton was paid in a manner more consistent with that of a wage earner rather than a subcontractor.

- Taxation

  Tax was deducted using PPS. It was deducted in that way by reason of the fact that Mr Pedrini required Mr Hamilton to complete a PPS form. At the material time Mr Hamilton was newly arrived to Australia and was unfamiliar with the differing taxation deduction systems. The method of tax deduction had no significance to him and certainly was not indicative of him being a subcontractor.

- Mode of termination

  Mr Hamilton's employment was terminated by Mr Doherty on behalf of the defendants. The dismissal is indicative of a contract of employment.

- Provision and maintenance of equipment

  Early in his work for the defendants the defendants supplied Mr Hamilton with all equipment, including hand tools. Later they demanded that all employees supply their own tradesman's tools, which Mr Hamilton did.

- Organisation test

  There is clear evidence that Mr Hamilton was part of the defendants' organisation as indicated by other indicia referred to above. He was an integral part of that business.

- Conclusion

  The indicia unequivocally indicates that Mr Hamilton was employed under a contract of service. The fact that he later worked for AJ Cochrane & Sons as subcontractor is irrelevant to my consideration.

Phil Grange

- Control

  Mr Grange's work was allocated by the defendants. He worked under the direction of Mr Pedrini and/or the leading hand. He was subject to orders.

- Time of starting work/hours

  Mr Grange generally started at 7am unless otherwise indicated by the defendants. He generally worked an 8 hour day, but sometimes more.

- Conducting business

  Mr Grange did not work solely for the defendants. He worked for a friend of a friend whilst working for the defendants. Furthermore he took on the City Waters job whilst still working for the defendants. In both those instances he conducted himself for profit. It seems that he saw himself as free to take on other work.

- Obligation to work

  He did not see himself as obliged to work for the defendants as required by the defendants. Indeed he sought to take a Monday off to complete the work that he was doing for a friend of a friend.

- Mode of remuneration

  Mr Grange was paid weekly. The quantum depended upon the hours worked. He did not render invoices. The manner of payment was more consistent with that of a wages employee.

- Taxation

  His tax was deducted using PPS. It was deducted on the basis of which he was aware, namely that it related to a scheme which applied to subcontractors and not to employees. He turned his mind to that when he completed the PPS form indicating that there was in existence a variation certificate. He quoted that variation certificate number. The method of tax deduction together with the evidence contained in his tax returns is indicative of the fact that Mr Grange was running a business, whether or not he had a registered business name.

- Provision and maintenance of equipment

  Mr Grange supplied no more than tradesman's tools.

- Organisational test

  Given the state of the evidence it is not possible to conclude that on the balance of probabilities that Mr Grange was part of the defendants' organisation and that he did his work as an integral part of that business.

- Conclusion—The evidence does not permit a conclusion that Mr Grange was an employee. Indeed to the contrary, given the way that he conducted himself in working for others and seeking and obtaining other work whilst working with the defendants it is possible to conclude that he was conducting his own business and was working under a contract for service.

Vince Wray

- Control

  The defendants allocated the work that had to be done. Mr Wray was subject to control. He was directed as to do specific tasks by Darren Evans variously described as a foreman or supervisor employed by the defendants. There is no doubt that Mr Wray was subject to the defendants' orders and directions.

- Time of starting work—hours

  Work generally commenced at 7.30 am. Mr Wray generally worked an 8 hour day. The hours he worked and start and finish times were directed by Mr Pedrini or the supervisor employed by the defendants.

- Conducting business

  It is clear that Mr Wray was not conducting his own business. He was not working for profit. He worked exclusively for the defendants and was providing his services to them.

- Obligation to work

  There was an obligation to work on the jobs assigned by the defendants. The fact that Mr Wray was going overseas on 1 March 1997 was well known to the defendants. He was taken on in contemplation of that. His being away for 10 weeks is accordingly of no significance.

- Mode of remuneration

  Mr Wray was paid weekly. The quantum depended on the days worked. He did not quote a price nor did he render invoices. He was remunerated on a regular basis for each week's work. He was paid in a manner more consistent with that of a wage earner.

- Taxation

  His taxation was deducted using PPS. Mr Wray was not aware of the significance of PPS and only filled in a PPS form at the request of Mr Pedrini. The mode of taxation deduction had no importance or significance to him. The use of PPS did not effect a subcontractual relationship.

- Mode of termination

  Mr Wray was terminated informally. He was simply not given further work and was asked to return a ladder and a plank belonging to the defendants. That was an indication to him that he was put off.

- Provision and maintenance of equipment

  Although Mr Wray provided his own tradesman's tools, other equipment required such as the ladder and plank (which was required to be returned upon termination), was provided by the defendants.

- Organisation Test

  There is evidence to indicate that Mr Wray was part of the defendants' organisation. The indicia referred to above indicate that Mr Wray was employed as part of the defendants' business and that his work was done as an integral part of that business.

- Conclusion—Mr Wray was as an employee.

The defendants argue that other indicators such as the failure to pay holidays, superannuation and workers compensation are all suggestive of a subcontractual relationship. I reject that contention. In my view the evidence overwhelmingly dictates that with respect to those whom I have found to be employees within the meaning of section 7 of the Industrial Relations Act 1979 (the Act) with the exception of Mr Corlett that the defendants took advantage of their vulnerability by virtue of their unsophisticated nature or alternatively by reason of their unfamiliarity with industry and tax practices in Australia, to avoid the payment of such benefits.

For reasons enunciated above the complaint concerning Mr Grange falls away. I now turn to consider whether the defendants are bound by the Building Trades (Construction) Award No. 14 of 1978 with respect to their employees.

DOES THE BUILDING TRADES (CONSTRUCTION) AWARD 1987 NO. R14 OF 1978 BIND THE DEFENDANTS?

The defendants are not named respondents to the Award. The complainant is a named party to the Award. The Award by operation of Section 37 of the Industrial Relations Act 1979 extends to bind all employees employed in the callings therein mentioned in the industry or industries to which the Award applies and all employers employing such employees. It is my task to determine which industry or industries the Award applies. The task is primarily a question of construction of the Award.

The scope clause of the Award is contained in clause 3. Relevantly the Award applies to—

"(1) to all employees usually employed on or employed as casual employees on construction work as defined in Clause 7.—Definitions of this award in any of the callings set out in Clause 8. —Rates of Pay of this award and who are employed in the building construction industry; and

(2) ....

(3) without affecting the operation of subclauses (1) and (2) hereof, to all employees including apprentices usually employed on or employed as casual employees on construction work as defined in Clause 7. —Definitions of this award in any of the callings (except) each and every builders' labourers classification) set out in Clause 8. —Rates of Pay of this award, who are employed in the construction industry (other than the building construction industry) and whose work if it had been performed on the 27th day of November 1989, was not covered by any other award of the Western Australian Industrial Relations Commission; and

(4) to all employers employing those employees and/or apprentices;

and

(5) ...."

The Award applies only to construction work as defined in clause 7. I must ascertain whether the work in question meets the definition before determining the industry or industries to which the Award applies.

"Construction Work" for the purpose of the Award is defined as—

"(a) all work "on site" in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or other structures of any kind whatsoever; or

(b) all work which the union and the employer concerned agree is construction work but only if the agreement is approved by the Board of Reference; or

(c) all work which, in default of an agreement as aforesaid, is declared by the Board of Reference to be construction work."

I accept that the relevant employees all worked "on site" with respect to repair renovation maintenance or ornamentation of buildings. The calling of each employee was that of a painter as provided for in clause 8 (2) (a) (i) of the Award.

Painter is defined in clause 7 (9) (a) of the Award which provides—

"(a) 'Painter' means an employee who applies paint or any other preparation used for preservative or decorative purposes—

(i) to any building or structure of any kind or to any fabricated unit forming or intended to form part of any building or structure; or

(ii) to any machinery or plant."

There can be doubt that each of the employees including Mr Wray were painters. Mr Wray was engaged as a painter and was paid as a painter. None of the employees were brush hands. The evidence overwhelming dictates such a finding.

The Award applies to all those engaged in the building construction industry. There can be no doubt that the defendants are engaged in the building construction industry. The only sensible conclusion to be drawn is that all material times each of the employees carried out building construction work in the calling of painters and that the work was done in the ordinary course of the defendants' business within the building construction industry that being an industry to which the Award applies.

The Award clearly applies to all the relevant employees of the defendants.The defendants are bound by the Award.

THE AMOUNTS CLAIMED ON BEHALF OF EMPLOYEES

The complainant bears the onus of proof on the balance of probabilities to establish each alleged breach and claim with respect to each relevant employee employed by the defendants. I will deal with each employee on an individual basis. However, before proceeding to do so, I note that the arrangements made by the defendants with the workers outside of the Award cannot now be used in satisfaction of award entitlements. I follow the decision of *Jose .v. Geraldton Resource Centre Inc. 75 WAIG 2316* in that regard.

Peter Corlett CP 156/1998 Counts 1—3

The evidence from Mr Corlett clearly establishes a failure to pay overtime. The amount claimed in that regard is maintainable having a regard to the evidence. Similarly the claim for travel allowance is also successfully maintained having regard to Mr Corlett's evidence. Accordingly the sum of $47.20 is appropriately recoverable a way of travel allowance. That amount is calculated on the basis of 4 days at $11.30 per day. Waiting time is also claimed and in my view appropriately recoverable being the weekly rate less certain allowances not payable. It is clear from the evidence that the defendants had failed to pay Mr Corlett his appropriate wage and kept him waiting with respect thereto.

I am satisfied that each of the breaches relating to Mr Corlett have been made out and that he is entitled to recover from the defendants the total amount of $540.95.

Dave Bullivant CP 155/1998 Counts 1—45

As a consequence of the admissions made by Mr Bullivant during cross-examination is clear that he did not work on the weekend of the 15th and 16th of February 1997. Accordingly the alleged breach and the claim in count 1 is not maintainable. Each of the other claims with respect to the breaches are maintainable based on the record kept by Mr Bullivant (exhibit 11). The evidence overwhelmingly establishes each breach other than count 1. The claims made as to the amounts due to Mr Bullivant with respect to each breach is maintainable except with respect to count 45 which must be adjusted to have regard of the failure of count 1. Accordingly $11.80 is to be deducted from the amount claimed with respect to count 45. The total amount recoverable with respect to count 45 is $1958.80.

Mr Bullivant is accordingly entitled to recover the amounts claimed less $146.80.

Terence Doherty CP 157/1998 Counts 1—28

As previously discussed Mr Doherty's attempts at reconstructing his work history was unsatisfactory. Although I am satisfied that he was honest in his attempt to reconstruct what he did on certain days the reality is that his evidence consists of little more than an educated guess based on records kept by others. His recollection was poor. Accordingly the only proper basis to establish the alleged breaches is by reference to exhibit 36 created by the defendants. That record concerning Mr Doherty has gaps in it. There is no entry for the weeks ending 6 March 1997 and 29 May 1997. Furthermore some of the dates contained within the record are wrong. Given that Mr Doherty's evidence does not stand up as to specifics and also given that there is no entry in exhibit 36 concerning counts 2, 20, 21 and 22 it is evident that those counts are not made out. Having said that however I am nevertheless satisfied on the evidence as a whole that Mr Doherty worked during those weeks as part of his continuos employment with the defendants. I just cannot be satisfied that he worked on a holiday and that he worked on weekends and that he worked overtime. Therefore his claim for annual leave remains unaffected by the failure of counts 2, 20, 21 and 22. An adjustment must however be made for the claim for travel allowances by making a deduction for 3 days being 3 March, 24 and 25 May 1997. A total of 3 days at $11.80 per day totalling $35.40 is therefore deducted from the amount claimed in count 28.

With respect to every other count the evidence establishes the alleged breaches and the amounts claimed therein.

The total shown on the complaint is wrong. It should be $5480.17. From that is to be deducted $371.65 leaving a total underpayment of $5108.52.

Stuart Hamilton CP 160/1998 Counts 1—42

Mr Hamilton unlike Mr Doherty made a very good fist of reconstructing his work history with the assistance of exhibit 27. I am satisfied that Mr Hamilton's evidence is accurate. Accordingly each of the breaches alleged have been made out. It is noted that the total amount due set out in the complaint is wrong.The total amount should in fact be $8246.02. That is the total amount recoverable by Mr Hamilton.

Vince Wray CP 162/1998 Counts 1—22

Mr Wray was undoubtedly a truthful witness. The effluction of time made it difficult however for him to recall his work history with any degree of accuracy. Having said that his claims are nevertheless with respect to his pre-trip period supported by the defendants' own records (see exhibit 36). The post trip claims are on balance supported by exhibits 33 and 34. Exhibit 33 with respect to payments received in June and July is suggestive of overtime work and work carried out on weekends. If such is taken together with exhibit 34 conclusions can be reached in that regard. I am also satisfied that Mr Wray recalls the events just prior to his resignation and accordingly I accept his evidence with reference to exhibit 34 relating to his work for the weeks ending the 3rd July and the 10th July 1997 respectively. I am satisfied that the breaches alleged are made out and that the underpayment alleged is recoverable.

The total underpayment alleged in the complaint is wrong and should in fact be $3,452.80.

CONCLUSION

Complaint 159 of 1998 is not proved on the basis that Mr Grange is found to be a subcontractor. Breach 1 in complaint 155/98 is not proved. Similarly breaches 2, 20, 21 and 22 in complaint 157/98 are not proved. All other alleged breaches in each of the other complaints are otherwise proved.

G. CICCHINI,
Industrial Magistrate.

IN THE INDUSTRIAL MAGISTRATE'S COURT
HELD AT PERTH
WESTERN AUSTRALIA.

Complaint No. 50 of 1999.

Date Heard : 9 September 1999.
Date Decision Delivered : 24 September 1999.

BEFORE : MR G. CICCHINI I.M.

BETWEEN —

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA
Complainant

and

CHIEF EXECUTIVE OFFICER, DEPARTMENT OF PRODUCTIVITY AND LABOUR RELATIONS
Defendant.

APPEARANCES —

Mr David Newman appeared for and on behalf of the Civil Service Association of Western Australia Inc the complainant.

Mr M.G.Lundberg instructed by Peter Apostolos Panegyres Crown Solicitors for the State of Western Australia appeared for the defendant

Reasons for Decision.

The complainant alleges that the defendant has committed three breaches of the Public Service Award (PSA). It is alleged that between 25 September 1998 and 19 March 1999 the defendant breached subclauses 46(1)(a), 46(2)(a) and 46(2)(c) of the PSA.

I set out the alleged breaches—

1. On and between 25 September 1998 and 19 March 1999, the Chief Executive Officer, being the employing authority of the Department of Productivity and Labour Relations, failed to notify the Civil Service Association of a definite decision to introduce major changes in organisation and structure that are likely to have significant effect on officers, contrary to clause 46(l)(a) of the Public Service Award 1992;

And further;

2. On and between 25 September 1998 and 19 March 1999, the Chief Executive Officer, being the employing authority of the Department of Productivity and Labour Relations, failed to discuss with the Civil Service Association the introduction of the changes referred to subclause (1) of clause 46 of the Award, the effects the changes are likely to have on officers, measures to avert or mitigate the adverse effects of such changes on officers, contrary to clause 46 (2)(a) of the Public Service Award 1992;

And further;

3. On and between 25 September 1998 and 19 March 1999, the Chief Executive Officer, being the employing authority of the Department of Productivity and Labour Relations, failed to provide the Civil Service Association all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on the officers and any other matters likely to affect officers, contrary to clause 46(2)(c) of the Public Service Award 1992.

It is not in dispute that the parties are both bound by the PSA. The defendant denies each of the alleged breaches. The complainant bears the onus of proving each of the alleged breaches on the balance of probabilities.

Clause 46 of the PSA provides :

46.—NOTIFICATION OF CHANGE

(1) (a) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have significant effects on officers, the employer shall notify the officers who may be affected by the proposed changes and the Association.

(b) For the purpose of this clause "significant effects" include termination of employment; major changes in the composition , operation or size of the employer's workforce or in the skills required; elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work, the need for retraining or transfer of officers to other work or locations and restructuring of jobs.

Provided that where this Award or any other Award or Agreement makes provision for alteration of any of the matters referred to in this clause an alteration shall be deemed not to have significant effect.

(2) (a) The employer shall discuss with the officers affected and the Association, inter " the introduction of the changes referred to in subclause (1) of this clause, the effects the changes are likely to have on officers, measures to avert or mitigate the adverse effects of such changes on officers and shall give prompt consideration to matters raised by the officers and/or the Association in relation to the changes.

(b) The discussion shall commence as early as practicable after a firm decision has been made by the employer to make the changes referred to in subclause (1) of this clause, unless by prior arrangement, the Association is represented on the body formulating recommendations for change to be considered by the employer.

(c) For the purposes of such discussion an employer shall provide to the officers concerned and the Association all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on officers and any other matters likely to affect officers. Provided that any employer shall not be required to disclose Confidential information, the disclosure of which would be inimical to the employer's interests.

It is evident that clause 46 is aimed at the employer being required to notify affected employees and the union when a major change is to be introduced in the workplace. In this case the defendant is alleged to have failed to notify the union of a major change in contravention of clause 46(1)(a). The complaints alleging breaches of subclauses 46(2)(a) and 46 (2)(c) simply follow the alleged pivotal breachof clause 46(1)(a).

The parties have agreed the facts in this matter. I set out those facts:

1. The Department of Productivity and Labour Relations' ("the Department") is a department of the Public Service of the State of Western Australia, established under section 35 of the *Public Sector Management Act* 1994 (WA).
2. The Defendant (Mr John Lloyd) is the Chief Executive Officer of the Department, and is the "employing authority" of the Department within the meaning of section 5(l) of the *Public Sector Management Act* 1994 (WA).
3. The Defendant is a party named in Schedule L to the *Public Services Award* 1992 (PSA A4 of 1989) ("the Award").
4. *The Department of Productivity and Labour Relations Enterprise BargainingAgreement* 1996 (PSA AG162 of 1996) was registered in the Western Australian Industrial Relations Commission on 22 October 1996 ("the Agreement"). The Agreement has expired, but remains in force.
5 .The Department currently employs 114 people in total. 107 staff are located in the Perth metropolitan region. 7 staff members are located in the Department's regional offices at Albany, Kalgoorlie, Geraldton, Bunbury and Karratha. As at I March 1999, 113 people were employed by the Department in total.
6. The Department is divided into six (6) divisions, namely—
   (a) Labour Relations Services;
   (b) Policy & Legislation;
   (c) Fair Workplaces;
   (d) Corporate Services;
   (e) Building & Construction Industry Task Force;
   (f) Censorship Office.
7. There are approximately 42 staff currently employed by the Department within the Fair Workplaces Division. As at 1 March 1999, approximately 49 staff were employed by the Department in that Division.
8. The Executive Director of the Fair Workplaces Division is Jenet Connell. Jenet Connell commenced in that position in early June 1998. The Fair Workplaces Division is further divided into two areas : Employee Entitlement Protection and Public Awareness. The Assistant Director of Employee Entitlement Protection is Elizabeth Ducasse. The Assistant Director of Public Awareness is Malcolm Timmins.
9. At all material times, each of the Department's regional offices (except those at Albany and Karratha) has been serviced by a level 4 Departmental employee holding a position as a Regional Inspector. The Regional Inspector would report to a level 6 Manager Industrial Services located in the Perth metropolitan region.
10. Prior to I March 1999, the Department's regional offices in Albany and Karratha were serviced by a level 4 Departmental employee holding a position as a Regional Inspector. From I March 1999 the Department implemented a 3 month trial program at the Albany and Karratha regional offices whereby each office was to be serviced by a level 5 Departmental employee holding a position as an acting Workplace Liaison Officer.
11. Attached hereto are the Department's job description forms for the level 4 and level 5 Departmental positions referred to above. The key responsibilities for the level 4 position are stated in the job description form as follows—

    "Responsible for the efficient functioning of the regional office in its day to day operations in the securing of observance of the Industrial Relations Act, Awards, Agreements, Orders and the Minimum Conditions of Employment Act and raising awareness on Industrial Relations issues in the community."

    The key responsibilities for the level 5 position are stated in the job description form as follows —

    " This position contributes to the Public Awareness sub program which assists the Government in developing fair workplaces through actively introducing employees and employers, especially those in small business, to choices, obligations and rights. The prime functions are, with a moderate degree of independence, to—

    - to provide direct assistance to small business to raise their understanding of legal obligations and their choices in the current labour relations environment, and to assist in identifying the most appropriate option to suit needs.
12. In all of the Departmental regional offices the Department has shared support service arrangements with other government agencies. In Albany, Bunbury and Geraldton support services are shared with the Ministry of Fair Trading. In early 1999, support services were also shared with the Ministry of Fair Trading at the Department's regional office in Karratha and Kalgoorlie. As at September 1999, the Department has a shared support service with WorkSafe WA at the Karratha regional office. As at September 1999, there are no shared support services at the Kalgoorlie regional office.
13. Departmental employees holding positions as Industrial Inspectors and Regional Inspectors are appointed as Industrial Inspectors pursuant to section 98 of the *Industrial Relations Act* 1979 (WA) and Part of the *Public Sector Management Act* 1994 (WA).
14. Early in 1998 the Department commissioned a review of its regional operations through Consultants, Doug McGhie & Associates. Those Consultants provided their report to the Department in or about March1998.Attached hereto are the terms of reference for that review, together with the Consultants' conclusions and recommendations.
15 On 8 April 1998, the Corporate Executive Board of the Department gave in principle support to the following recommendations—
    (a) regional officers provide an information and liaison service;
    (b) regional compliance and award advisory function be primarily delivered from Perth;
    (c) the Ministry of Fair Trading and the Department's support arrangements be split from I January 1999- and
    (d) the regional offices network be reviewed to ensure a more efficient allocation of resources to implement recommendations (a)—(c).
16. On 1 May 1998, the Corporate Executive Board of the Department noted that additional information was to be provided to the Board on the funding and implementation issues associated with the review of the Department's regional offices. Attached hereto are the minutes of the Corporate Executive Board meeting on I May 1998.

17. On 26 May 1998, a formal presentation of the review of the Department's regional offices (with detailed cost savings) was provided by Tony Caccamo to the Corporate Executive Board.
18. On 10 June 1998, Jenet Connell provided the Minister for Labour Relations with a memorandum detailing the proposed upgrade of regional services. Attached hereto is a copy of that memorandum.
19. On and between 15—17 June 1998 a conference for the Department's regional officers was held in Perth. The Department's proposal regarding regional offices was presented to the regional officers at this conference. All regional officers were invited to make formal submissions on the proposal. Senior members of the Corporate Executive Board also confirmed they would be conducting visits to all regional centres to consult further on proposed changes to service delivery.
20. On 17 June 1998 Jenet Connell briefed the Corporate Executive Board on her observations regarding the regional officers' conference. Attached hereto is a copy of the minutes of the Corporate Executive Board meeting on 17 June 1998.
21. On 15 July 1998 a revised proposal regarding the review of regional offices was presented to the Corporate Executive Board. That revised proposal was noted by the Board. The Board also resolved that finalised costings and recommendations for the regional review were to be presented at the next Corporate Executive Board meeting on 29 July 1998. Attached hereto are copies of the minutes of the Corporate Executive Board meeting on 15 July 1998 and a memorandum from Jenet Connell to the Defendant dated 13 July 1998 which sets out the revised proposal.
22. On 29 July 1998 the Corporate Executive Board was provided with an update of the review of regional offices. Attached hereto are copies of the minutes of the Corporate Executive Board meeting on 29 July 1998 and the update paper presented by Jenet Connell.
23. On 23 September 1998, Jenet Connell submitted a memorandum to the Corporate Executive Board containing recommendations for the review of the Department's regional offices. Those recommendations are set out in the attached agenda item document and memorandum dated 23 September 1998.
24. On 23 September 1998 the issue of the review of the Department's regional offices was deferred by the Corporate Executive Board until the implementation of zero based budgeting. Attached hereto is a copy of the minutes of the Corporate Executive Board meeting on 23 September 1998.
25. On 25 September 1998, the Defendant and Jenet Connell met to discuss the review of the Department's regional offices. At the conclusion of that meeting the Defendant and Jenet Connell agreed to implement a trial or pilot workplace liaison service at the Department's regional offices located in Albany and Karratha. Attached hereto is a copy of Jenet Connell's file note of that meeting.
26. In October 1998, the Department conducted a regional officers conference and briefed all Departmental Inspectors as to the proposed trial workplace liaison service in the Albany and Karratha regional offices.
27. On 9 November 1998, Jenet Connell provided a written overview of the pilot proposal to the Hon. Minister for Labour Relations. Attached hereto is a copy of Jenet Connell's memorandum to the Hon. Minister for Labour Relations dated 9 November 1998.
28. On 25 November 1998, Jenet Connell circulated within the Department, including to regional officers, a document titled Regional Service Delivery 1999—Introducing Workplace Liaison. Attached hereto is a copy of that document.
29. On 11 December 1998, Malcolm Timmins sought expressions of interest within the Department for two level 5 Regional Workplace Liaison Officer positions, to be situated in Albany and Karratha. Those positions were for a 3 month period commencing I March 1999. Attached hereto is a copy of Malcolm Timmins' email message dated 11 December 1998 and the job description form for the level 5 Regional Workplace Liaison Officer positions.
30. On or about 11 December 1998, the Defendant caused to be distributed within the Department a paper titled Department of Productivity and Labour Relations—Restructure of Regional Service. Attached hereto is a copy of that document.
31. During January and February 1999, in the Great Southern and Pilbara/Kimberley regions, the Department conducted an extensive advertising and promotional campaign through radio interviews, newspaper advertisements, and letters to businesses, with the intention of informing the communities in those regions of the trial program which was to be implemented from 1 March 1999.
32. In February 1999, the Hon. Minister for Labour Relations, the Defendant, and Jenet Connell wrote to Members of Parliament, various Government agencies, and to employer organisations (respectively) advising those persons and bodies of the proposed trial program in the Department's regional offices in Albany and Karratha. Attached hereto is a copy of the Defendant's letter dated 16 February 1999.
33. On 1 March 1999, the trial program commenced at the Department's Albany and Karratha regional offices.
    (a) <u>Albany regional office</u>
    Prior to the commencement of the trial program, one level 4 Departmental employee holding a position as a Regional Inspector was located at Albany (Mr David Hanson). Mr Hanson successfully applied for the acting level 5 Regional Workplace Liaison Officer position offered by the Department for the trial program at Albany. However, Mr Hanson resigned from the Department prior the commencement of the trial program. Accordingly, the Department advertised the position externally to the Department. The successful applicant for that acting position did not commence in the position prior to 22 March 1999. Between 1 March 1999 and 22 March 1999 the level 5 position at the Albany regional office was filled by level 5 Workplace Liaison Officers from the Perth metropolitan region on one week rotations. Each of those Workplace Liaison Officers has at all material times been employed with the Department pursuant to workplace agreements.
    (b) <u>Karratha regional office</u>
    Prior to the commencement of the trial program in Karratha, one level 4 Departmental employee holding a position as a Regional Inspector was located at Karratha (Mr David Graham). Mr Graham applied for, and was appointed to, the acting level 5 Regional Workplace Liaison Officer position offered by the Department for the trial program at Karratha. Mr Graham commenced as the level 5 officer in mid-February 1999. Mr Graham has at all material times been employed with the Department pursuant to the Award and Agreement.
34. On 19 March 1999, Jenet Connell met with representatives from the Trades and Labour Council and the Civil Service Association. During that meeting, Jenet Connell briefed the representatives in relation to the trial program which had commenced at the Department's Albany and Karratha regional offices.

Apart from the evidence contained in the agreed facts set out above the Court has also received into evidence, by consent, a statement made by Mark Finnegan. Mr Finnegan, the complainant's Acting Senior Industrial Officer, outlined his involvement in this matter. Of particular note was his evidence concerning the meeting he held on 19 March 1999 with Tony Cooke, Secretary of the Western Australian Trades and Labour Council and Ms Jenet Connell an Executive Director of the Department. He said that during the meeting Ms Connell advised broadly of the changes implemented in Albany and Karratha and further advised that should the arrangement prove successful that a Workplace Liaison Officer would be placed in all other regional offices of the Department and that Industrial Inspectors would be withdrawn and allocated to Perth.

Although the facts are non contentious there was some suggestion during the course of submissions that the defendant and the Department's position with respect to the implementation of Workplace Liaison Services in regional offices amounted to more than a trial or pilot program. However the facts agreed to generally, and in particular the facts outlined in paragraph 25 of the statement of agreed facts indicate clearly that the decision made on 25 September 1999 was to implement a trial program as opposed to a phasing in of the regional office proposal. Having agreed the facts the complainant is now estopped from resiling therefrom.

In considering these matters I am called upon to interpret the Award. It will no doubt be evident that the final outcome of these complaints will be very much dependent upon the construction of the relevant subclauses.

The interpretation of the Award is a matter of law. The Full Bench of the Western Australian Industrial Relations Commission in The Federated Miscellaneous Workers' Union of Australia, Hospitality, Service and Miscellaneous WA Branch *v.* Wormald International (Australia) Pty Ltd 70 WAIG 1287 set out at 1289 the principles to be applied in interpreting an award. The Full Bench said;

The principles which we must apply are clear—

(1) The interpretation of an award is a matter of law [see per Kennedy J. in RRIA v. AMWSU and Others (op. cit.) at page1101]

(2) To interpret this award. one must read the document itself and give to the words used their ordinary commonsense English meaning [see Norwest Beef Industries Ltd and Another v. AMIEU (op. cit) at page 2133]

(3) Thus, the first task in interpretation is to ascertain whether the words used are capable in their ordinary sense of having unambiguous meaning [see Norwest Beef Industries Ltd and Another v. AMIEU(op cit.)]

(4) If the meaning of the language read in its ordinary and natural sense is obtained then it is not necessary or indeed permissible to look to the intention of the parties or other extrinsic evidence [see Norwcst Beef Industries Ltd and Another v. AMIEU op. cit.) at pages 2127 and 2133].

(5) In the event that an award is genuinely capable of two or more meanings. then it is obvious that the primary rule of construction cannot be applied

(6) Should a consideration of the whole of the terms of the award expose an ambiguity in construction of the clause, then resort may be made to extrinsic material, and in certain circumstances any trade, custom or usage [see RRIA v. AMWSU and Others (op. cit) at pages 1098, 1100 and 1101].

(7) The award should be interpreted with allowance made for the fact that it may have been drafted by industrial rather than skilled draftsmen so that there should not be too literal adherence placed on the strict technical meaning of words. but the matter should be viewed broadly to give the agreement a meaning consistent with the intention of the draftsmen [see RRLK v. AMWSU and Others (op. cit.) at page 1100].

I follow and apply those principles in these matters.

To succeed with respect to these matters the complainant has to establish interalia that the defendant made a definite decision to introduce major changes that were at all material times likely to have significant effects on officers.

Dealing firstly with the issue of whether or not a definite decision was made by the defendant, the Court must give meaning to the phrase "definite decision". Unfortunately the authorities do not provide any relevant pronouncements on the meaning of the phrase. Accordingly it is appropriate for this Court to give meaning to the phrase by reference to the common accepted meanings of the words comprising the phrase.

The Oxford English Dictionary second edition defines the word "definite" to mean " having fixed or exact limits; clearly defined, determinate, fixed, certain, exact, precise." The word "decision" is defined as meaning—

"1. (a) The action of deciding (a contest, controversy, question etc); settlement, determination.

(b) The final and definite result of examining a question; a conclusion, judgment: esp. one formally pronounced in a court of law.

2. The making up of one's mind on any point or on a course of action; resolution, determination."

The plain and natural meaning given to those words indicate that the phrase is to be read to mean "a certain and final conclusion".

The evidence before the Court does not suggest a certain and final conclusion having been reached by the defendant. The decision was at all material times subject to trial, review, assessment and final decision. The changes may never have eventuated after evaluation of the trial. The changes may have taken another form. The issue of change was fluid. There was no certainty with respect thereto. I am fortified in taking that approach by what O'Loughlin J. said in F.W. Hercus v Short (1990) 43 IR 241 at 243

" It seems to me that, unaided by authority or precedent, a neutral reading of the paragraph emphasises that it relates to those cases where, an employer has made a final commitment(that is, a definite decision) as a consequence of the personal wish of the employer".

The Full Bench of the Australian Industrial Relations Commission in Construction, Forestry, Mining and Energy Union Furnishing Trades Award 1981 (1994) Print L5424 considered a variation to the particular award by replacing the phrase "the employer has made a definite decision to introduce major changes" to " the employer is planning to introduce major changes". The Full Bench said at page 5—

The proposed variation of subclause 32(a)(i) also deals with the circumstance wherein an employer should give notice of possible changes which are likely to have significant effects on employees. Under the present provision, notice must be given when the employer "has made a definite decision to introduce major changes . . .. ". The variation would replace "has made a definite decision" with "is planning to introduce". This variation is consistent with the expanded role of consultation noted above, for it envisages that those who are consulted will have opportunities to express opinions and put suggestions while there is still time to take them into account. The union points out that it may wish to suggest alterations in work arrangements (for example, reduced working time) as an alternative to retrenchments. It led evidence of having done so in the past. We think that the purpose of the proposal is commendable and we grant the application in this respect".

In my view, the Full Bench took the view that there is a very clear distinction between the process leading to a certain and final conclusion being reached during which the process is fluid and the situation arising upon a final definite decision having been made. Clearly the two are distinguishable and are not one and the same as suggested by the complainant in this matter.

Clause 46(1)(a) imposes an obligation upon the employer to notify its employees and the relevant union only when a definite decision is made. Definite decision must be read to mean final decision. Until the final decision is made there is nothing permanent about its decision. It seems on the facts that the obligation imposed upon the defendant to notify the complainant had not arisen by 19 March 1999, given that no final decision had been made by the defendant to implement the Regional Workplace Liaison Service.

Given my findings above it is not necessary for me to consider the issue of " major changes likely to have significant effects"

A breach of subclause 46(1)(a) has not been established. Accordingly it follows that breaches of subclauses 46(2)(a) and 46(2)(a) have also not been made out.

G. CICCHINI,
Industrial Magistrate.

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Bailey

and

S.D. and H.G. Burke.

No. 431 of 1999.

COMMISSIONER A.R.BEECH.

11 October 1999.

Reasons for Decision.

MR Bailey was employed by the respondent as a truck driver. His employment commenced at the beginning of November 1998 and he was dismissed on either 20 or 22 March 1999. He claims that his dismissal was unfair. The respondent is a cartage contractor who employed Mr Bailey to drive a truck which delivered fruit, vegetables and groceries. Sixty percent of the respondent's business is done through Foodland Australia Ltd. Mr Bailey took the truck home with him and was responsible for ensuring it was refuelled before he commenced work. Fuel was obtained at the local Mobil service station near the Canning Vale markets where the respondent had an account for approximately 2 years.

On 18 March 1999 Mr Bailey pulled into the service station at approximately 6.30 am. He was not able to drive to the bowser which supplied diesel because of a vehicle already at the bowser. Mr Bailey sat in the truck and waited for the vehicle to leave. When it departed, but before Mr Bailey could drive forward to the bowser, another vehicle cut in front of him and stopped at the bowser. The other vehicle was driven by an older man. On Mr Bailey's evidence, Mr Bailey leaned out of the truck and abused the other driver and received abuse in return. Mr Bailey sought to take the matter further and walked over to the other driver. On Mr Bailey's evidence the other driver threw a locking petrol cap and his keys at Mr Bailey which struck him in the left shoulder. Mr Bailey states that he then punched the driver and received punches in return. The driver then fell to the ground and bit Mr Bailey on the right thigh. Mr Bailey punched the driver again and may have kicked him in an effort to free the man's bite. At this time, the proprietor and his son, together with another person, restrained Mr Bailey and pulled him away. The driver's wife slapped Mr Bailey who turned towards her with his arm raised.

The respondent does not agree with those parts of Mr Bailey's evidence that the driver threw the locking petrol cap and keys and punched Mr Bailey. The respondent called evidence from the service station proprietor's son, Mr Parasiliti. Mr Parasiliti's evidence is that whilst the body of Mr Bailey's truck was between him and Mr Bailey, the truck obscured only from chest height downwards. He is firm in his evidence that he saw the incident and did not see the other driver throw the petrol cap and keys. From what he saw, Mr Bailey started striking the other driver, punching him to the head quite a few, perhaps a dozen times and that the other driver was "defenceless". Where there is a conflict in the evidence, I generally prefer the evidence of Mr Parasiliti. I regard him as being an independent observer of the events whilst the recollection of Mr Bailey, given that he had been upset by the other driver cutting in front of him and had become angry, may not be as accurate.

As a result of the incident, the service station proprietor directed Mr Bailey to leave the service station and told him that he was not to return.

Approximately 15 minutes later Mr Burke, who is effectively the active part of the partnership which is the respondent, himself arrived at the service station to fuel his vehicle. The proprietor asked to see him. Mr Burke met with the proprietor who had with him the other driver and his wife. Mr Burke observed that the other driver had cuts to his face and was bleeding. The proprietor informed Mr Burke that "your driver did this" and told Mr Burke what had happened.

On Mr Burke's evidence, Mr Burke then attended the FAL cold stores where Mr Bailey was working and asked Mr Bailey what had happened. According to Mr Burke, Mr Bailey said that he had had an argument with an old bloke at the fuel station and "belted him". Mr Burke said that Mr Bailey did not mention any issue of "self-defence". After speaking with Mr Bailey and getting Mr Bailey's understanding of what had occurred Mr Burke informed Mr Bailey that the police were being called to the service station regarding the incident.

The next day, whilst routinely speaking with the FAL manager, the manager asked Mr Burke what had happened at the service station and, according to Mr Burke, said that he was not too pleased with this sort of thing happening. The manager informed Mr Burke that the other driver's two sons had come onto FAL's premises looking for Mr Bailey. Mr Burke's evidence, which I accept on this point, is that the FAL manager said to Mr Burke that FAL could not ban Mr Bailey, but they were not very pleased with Mr Bailey's behaviour.

Mr Burke decided to dismiss Mr Bailey because of his assault on the other driver. There is a conflict between the evidence of Mr Bailey and Mr Burke whether he was dismissed on the following Saturday or the following Monday. However, I need to find only that Mr Burke contacted Mr Bailey on the Saturday and informed him that he, Mr Burke, would be picking up the truck from Mr Bailey on the Saturday to either refuel it and return it, or to do the run on the Monday which Mr Bailey would otherwise have done. Regardless of whether Mr Bailey was dismissed on the Saturday or the Monday, it is clear that the preceding Friday was the last day Mr Bailey worked. Mr Bailey was not paid in lieu of notice. I find that the rate of wage which Mr Bailey was paid was regarded by Mr Bailey and Mr Burke as sufficiently high such that Mr Bailey would not be paid for annual leave, public holidays or sick leave. He was regarded as a "casual" by Mr Burke, although it is agreed that Mr Bailey worked regularly Monday to Friday every week and was expected to do so. I find that Mr Bailey's dismissal was a summary dismissal.

Mr Bailey claims that his dismissal was unfair essentially for two reasons. Firstly, he argues that his ordinary starting time on the day in question was 7.00 am. The incident occurred at 6.30 am and therefore it could not be said that it occurred whilst he was an employee on the job. On the evidence, however, Mr Bailey was certainly an employee of the respondent at the time the incident occurred. He was travelling from his home to work at the time. Further, he accepts that as a truck driver it was a part of his duties to fuel the vehicle so that it is ready for work and the incident occurred whilst he was at the service station used by his employer for fuelling the employer's vehicle. The only reason Mr Bailey was at the service station at approximately 6.30 am on the Thursday was in furtherance of his employment. Whilst his working hours may not have commenced, the work that he was then performing, that is driving to work and refuelling his employer's vehicle in preparation for work, was done as part of his employment even though his hours of work were not due to commence for a further 30 minutes. I therefore find that Mr Bailey's actions occurred whilst he was an employee.

Even if I came to a contrary conclusion, it is unlikely to assist Mr Bailey. If I assume for the moment that Mr Bailey's conduct did not occur whilst he was an employee, on the evidence before the Commission, there was certainly a sufficient connection between Mr Bailey's employment and the incident which occurred. An employee's conduct out of hours is a matter of legitimate concern to the employee's employer if there is a sufficient connection between the conduct and the employer's business. The connection between Mr Bailey's conduct and his employer's business is that he was attending the service station in the course of his employer's business and he was known to the proprietor of the service station and his son as Mr Burke's employee. That is illustrated in the words used by the proprietor to Mr Burke: "Your driver did this". Further, the truck Mr Bailey was driving was the employer's truck. For all of those reasons, there was certainly a sufficient connection between the incident which occurred and Mr Bailey's employment. Mr Bailey would be on far stronger ground in his argument if, for example, he had been driving his own vehicle to work and called in at a service station where he was quite unknown and then was involved in an incident. That was simply not the case here.

The second reason why Mr Bailey claims that his dismissal was unfair is he states that he acted in self-defence. I have not found Mr Bailey's argument persuasive. Whilst I accept that merely "having words" with another driver who cut in front of him at the service station might have been understandable, it goes too far to suggest that it was reasonable to have a physical incident over the matter. The situation is analogous to fighting in the work place. It is accepted that employees may have arguments, even heated arguments, in the workplace. That conduct does not, without more, warrant dismissal. However, courts and industrial tribunals have traditionally taken a harsh view of employees fighting in the workplace. Usually, both participants in a fight will be dismissed and it is not usual for the tribunal to interfere unless one of the participants was wholly innocent of wrongdoing. Here, Mr Bailey was involved in what can be described as a fight. It may not have been with a fellow employee in the workplace but it was while Mr Bailey was performing a function connected with his employment. Mr Bailey could not be said to be wholly innocent of wrongdoing. In fact, he admits that he could have walked away from the incident. Mr Bailey did not do so.

Mr Bailey claims that he acted in self-defence. I am not persuaded that this argument is of help to him. There is firstly the evidence that he did not act in self-defence but rather that he threw the first blow and that the other driver was essentially a defenceless old man. I am inclined to believe that that was the case, in which case Mr Bailey can hardly be heard to say that he acted in self-defence. However, even if I was to accept Mr Bailey's version of the events, Mr Bailey's response to having the petrol cap and keys thrown at him (which I doubt occurred as Mr Bailey described) was wholly disproportionate to that event. Whilst I might accept that it is both good law and good sense that a person who is attacked may defend himself or herself the person may do only what is reasonably necessary for that defence. Even if I accepted Mr Bailey's evidence that the other driver had thrown the petrol cap and car keys at Mr Bailey which struck him, I cannot accept that Mr Bailey was therefore entitled to rain blows on this man sufficient to cause the injuries described and to the extent where he had to be restrained by 3 people. Indeed, I find on the evidence that they also had to stop him from threatening to retaliate against the other driver's wife, such was his anger. That reaction is quite disproportionate to merely defending himself. I therefore cannot see that Mr Bailey is able to claim self-defence as any justification for what occurred.

Accordingly, I find that Mr Bailey assaulted a member of the public during the course of his employment and did so in the capacity of an employee of the respondent. He was identified in the incident as Mr Burke's employee by the proprietor of the service station. Word of the incident reached the local FAL manager who raised it with Mr Burke. Mr Burke formed the view, and was entitled to do so on the evidence before the Commission, that FAL which constituted such a high proportion of his business, was unhappy with Mr Bailey being present. That is a sufficient connection with his employer's business and was sufficient for Mr Burke justifiably to dismiss Mr Bailey.

I cannot see that the dismissal can be said to be unfair. Mr Bailey's wholly disproportionate response to whatever provocation, if any, which occurred, reflected poorly upon him. It is the kind of conduct which might affect the confidence that an employer needs to have in the public relations aspect of his employee's work. I accept the truth of Mr Burke's belief that if Mr Bailey "could do it once, he could do it twice".

Mr Burke had spoken to Mr Bailey and had given Mr Bailey an opportunity to explain his side of what had occurred. There was no aspect of procedural unfairness.

For all of those reasons I do not believe that Mr Bailey has made out his claim. Accordingly, an order will issue which dismisses his application.

Appearances: Mr P. Bailey on his own behalf as the applicant.

Mr R. Kelly (of counsel) for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Bailey

and

S.D. and H.G. Burke.

No. 431 of 1999.

11 October 1999.

Order.

HAVING HEARD Mr P Bailey on behalf of himself as the applicant and Mr R. Kelly (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 dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Grace Bolin

and

W.A. Retailers Association.

No 87 of 1999.

COMMISSIONER A.R. BEECH.

4 October 1999.

Reasons for Decision.

THE applicant in this matter, Grace Bolin, claims that she was unfairly dismissed by the respondent, W.A. Retailers Association and further that she has not been paid for all of the hours that she worked. The respondent denies the claims. Indeed, it even goes so far as to characterise the claims as vexatious because it claims that Ms Bolin's employment was subject to a probationary period of one month and that her dismissal occurred at the conclusion of that one month.

Ms Bolin's first association with the respondent commenced on 10 November 1998 when, through the assistance of a family friend who knew Mr Catania and was on the Board of the respondent, Ms Bolin performed work experience in the respondent's office. Ms Bolin was aged 18 years and had no previous experience in a clerical position. Both parties agree that Ms Bolin's period of work experience does not form part of any employment relationship.

The first issue which arises between the parties is the date that her employment commenced. An understanding was reached between the parties that they would enter a traineeship training agreement. Ms Bolin agrees that in the absence of a traineeship training agreement she would not have been offered employment. To that end, an agreement form was completed by the parties on 20 November 1998 (Exhibit A and 2). Ms Bolin's claim is that her employment commenced on 20 November 1998 because that is when the traineeship training agreement was signed. It is the date inserted in section 1.15 of her copy of the agreement which is the date she "first commenced work with the employer who is signing this agreement". Mr Catania, however, states that when the agreement was signed, section 1.15 was left blank. When he was advised on 9 December 1998 that the traineeship training agreement had been processed, he was asked what date the traineeship would commence. He nominated 30 November 1998 and understood that the traineeship commenced from that date, and not 20 November 1998. Therefore, Mr Catania regarded Ms Bolin's employment as commencing on 30 November 1998.

I am satisfied from the evidence overall that when Ms Bolin filled out section 1 of the form, she did leave blank the date to be inserted in paragraph 1.15. Although the date has since been inserted, it is clear, and Ms Bolin herself agrees, that the date was not completed by her because it is not in her handwriting. As Mr Catania's cross-examination of Ms Bolin showed, Ms Bolin admits that she does not recall whether paragraph 1.15 was completed or not at the time she signed the form. Her main recollection is that she signed the form and dated it, together with Mr Catania. It seems clear from the evidence that after Ms Bolin and Mr Catania completed the form on 20 November, the forms were sent away and not returned to Ms Bolin and Mr Catania through the post until at least after 24 December 1998 (Exhibit B). The fact that clause 1.15 was completed later and that Ms Bolin's recollection of completing the form changed under cross-examination, in my view support the submission made by Mr Catania that Ms Bolin's employment would not commence until the traineeship agreement had at least been processed. That conclusion is quite consistent with Ms Bolin's own evidence that her employment would not have occurred at all unless there had been the traineeship training agreement. I therefore accept Mr Catania's submission that on or around 9 December (the date the training agreement was processed according to Exhibit A) he was asked by the relevant authority when the respondent wanted the starting date approved and he chose the 30 November because that was a date convenient for the respondent. I therefore find as a fact that the traineeship training agreement which the parties signed on 20 November was not processed until 9 December and not registered until 24 December and that Ms Bolin's employment under it commenced on 30 November 1998.

There is no doubt that Ms Bolin was unaware of the starting date of her employment that Mr Catania chose. She had been attending the respondent's office on work experience prior to the signing and she continued to attend the office after the signing. I accept that as a result of the signing of the traineeship training agreement on 20 November she believed it would operate from that date and that her employment therefore commenced from that date. Mr Catania did not tell her otherwise. There can be little doubt that it would have been prudent for him to have told her formally. The traineeship training agreement is not the contract of employment between Ms Bolin and the respondent. The two are quite different. Ms Bolin therefore did not have any written terms and conditions of employment given to her by the respondent at all. Any confusion which then followed, and which undoubtedly lead to this application, is hardly her fault. In her mind, her employment commenced on 20 November and when she had not been paid within a reasonable time from that date, she asked her brother to speak to Mr Catania. He did so on 18 December. Ms Bolin's brother agrees that Mr Catania stated to him that Ms Bolin had not been paid because the traineeship had not been approved. Mr Catania gave Ms Bolin's brother a commitment that he would investigate the traineeship and if it had been approved, the respondent "would pay her on the spot". As a result of that discussion, Mr Catania did in fact pay Ms Bolin a fortnight's wages on 18 December. I conclude from the evidence that Ms Bolin's concern that she had not been paid was a direct result of her and Mr Catania having a different understanding of when her employment commenced. Nevertheless, Ms Bolin's brother's evidence supports Mr Catania's submission during the hearing regarding the starting date of her employment.

Once the date of Ms Bolin's employment has been determined, it is possible then to determine the balance of the claims that she has made. It is convenient to deal next with Ms Bolin's claim that she was unfairly dismissed. It is agreed that Ms Bolin's employment was subject to a one month probationary period. It is also agreed that Ms Bolin was dismissed when the respondent delivered to her a letter of termination. The letter is dated 3 January 1999 (Exhibit 1) and Ms Bolin's evidence is that she received it on Saturday 2 January 1999. I find that Ms Bolin's employment came to an end when she received that letter on 2 January 1999. The letter states—

> Please be advised that the traineeship with our office has terminated. Unfortunately your presence has not resolved our office needs. Enclosed is a cheque for 2 weeks' pay. We have enjoyed your company. Best wishes for the future.

The letter does not, in its wording, terminate Ms Bolin's employment. It advises the termination of the traineeship. The traineeship training agreement is separate from Ms Bolin's contract of employment, as I referred to earlier in these Reasons. Nevertheless, I accept that Mr Catania's intention in writing the letter and Ms Bolin's understanding when she received it, was that her contract of employment had been terminated with 2 weeks' wages in lieu of notice. Given, as I have found, Ms Bolin's contract of employment commenced on 30 November, her probationary period continued until 31 December. Although Mr Trainer is accurate when he points out that Ms Bolin's termination occurred after 31 December, I do not regard the 3 day difference as significant. I do not understand Ms Bolin's evidence to be that she understood that she was a permanent employee and indeed, there is no evidence to suggest that she became one merely due to the passage of time after 31 December. I have little doubt that a person who is retained in employment for a significant period after the expiry of a probationary period will be deemed to be no longer on probation. However, I do not regard the 3 days involved here, one of which was a public holiday, to have that conclusion in this case. I therefore find that Ms Bolin's contract of employment was terminated at the effective conclusion, if not the literal conclusion, of her period of probationary employment.

The reasons why Ms Bolin's employment was terminated are set out in a letter to Mr Trainer from Mr Catania dated 14 June 1999. Four reasons were given and they are, in summary—

1. unreliability and lack of punctuality and attendance at work;
2. Ms Bolin needed constant supervision from other staff and had very poor word processing skills;
3. on numerous occasions office staff were forced to direct Ms Bolin to undertake duties as she preferred to sit around and observe others at work;
4. staff advised Ms Bolin was not a willing and able trainee and was not contributing to lessen the workload on other members of the small office staff.

Ms Bolin rejects the validity of these reasons. She also states that during the course of her employment, which was effectively only until 24 December when she commenced a period of leave from which she was destined not to return, she was not warned that her employment was in jeopardy and none of these allegations were put to her. Indeed, the respondent concedes that Ms Bolin was not given any warnings as such prior to the decision to dismiss her.

If a person can be dismissed, she or he can be dismissed unfairly even whilst on probation (*Hutchinson v Cable Sands (WA) Pty Ltd* (1999) 79 WAIG 951 at 953). An employer should be able to terminate the employment of a probationary employee more easily (in the sense of the process which follows from the terms of the contract which provide for probation) than that of an employee whose employment is not subject to probation. However, probation is not a licence for harsh, oppressive, arbitrary capricious or unfair treatment of a probationer (*ibid.*). Simple fairness to an employee requires that if an employer believes that the employee's work performance is such that it might warrant the termination of her or his employment, the employer is obliged to warn the employee and give the employee an opportunity to improve (*Lumsden v Woodroofe Pty Ltd* (1979) 46 SAIR 211; *Margio v Fremantle Arts Centre Press* (1990) 70 WAIG 2559 at 2561).

The decided cases on the subject, however, do not concern circumstances where the employee is on probation, particularly where the period of probation is relatively short. The existence of the probationary period is one factor in the consideration whether the employer's right to terminate the employment has been exercised so harshly, oppressively, or unfairly against an employee as to amount to an abuse of that right.

The nature of Ms Bolin's employment, underpinned as it was by a traineeship training agreement, is that Ms Bolin was to be supervised and trained. She was, after all, to learn the skills that will assist her in commencing her working life. Ms Bolin's evidence is that she received little if any supervision and was not informed of any dissatisfaction with her work performance. However, her evidence is countered by the submission of Mr Catania, which is in turn supported by statutory declarations of 2 other employees of the respondent who worked with Ms Bolin. The 2 statutory declarations were received in evidence and Mr Trainer, very properly, pointed out that in the absence of any opportunity for him to cross-examine the 2 employees, their statutory declarations should be accorded little weight where they conflict with the evidence of Ms Bolin. Mr Trainer is quite right in his submission. Nevertheless, on the evidence before me, certainly some weight is able to be attached to the statutory declarations. For example, Ms Bolin's evidence is that she was not spoken to about late timekeeping. The statutory declaration of Donna Clark (Exhibit D) who acted as the supervisor for Ms Bolin, was that on numerous occasions she had to advise Ms Bolin that she must arrive at work at 9.00 am on her work days and could leave at the appropriate time within the 20 hour work time. Ms Clark's statutory declaration refers to one occasion when she had to ring Ms Bolin's mother who became upset when she learned that Ms Bolin had not turned up for work. That event is, in turn, supported by the evidence of Ms Bolin's mother who recalled receiving the telephone call from Ms Clark. For another example, Ms Bolin admits that on occasions she had to rewrite letters. Ms Clark's statutory declaration is that Ms Bolin had to rewrite letters up to 6 times after they were corrected. I therefore attach a greater weight to Ms Clark's statement than Mr Trainer would submit that I should. I therefore find that within her period of probationary employment Ms Bolin was given feedback that some aspects of her work were not to the employer's satisfaction. I am unable to find on Ms Bolin's evidence and the case presented to the Commission as a whole by both parties, that the absence of a formal warning is, in the circumstances of this case, determinative of whether or not Ms Bolin's dismissal was unfair.

I also take into account Ms Bolin's evidence that the unfairness about which she really complains is her allegation that Mr Catania's attitude towards her changed after she had requested her brother to speak to Mr Catania. She was unable to give specific examples to support her evidence, however, and Mr Catania's cross-examination of her did reveal that his offer to her, which was made after Ms Bolin's brother had visited him, to take the week from 24 December onwards off as leave (to which she was not entitled as of right) was hardly the action of a person whose attitude towards her had changed. Even though Mr Catania himself did not give evidence, I have not been persuaded from Ms Bolin's evidence that her dismissal was harsh or unfair. Whilst I am sure that she was disappointed by what happened and indeed did not accept what had happened, within the context of her employment for one month on a probationary period, I do not believe she has shown that the dismissal which occurred was such as warrants the intervention of the Commission. Therefore, to the extent that her claim is that her dismissal was unfair, I find it has not been made out.

The final issue to be determined is her claim that she has not been paid correctly. To a significant extent, this claim is not made out given that Ms Bolin's employment commenced on 30 November and not 20 November. The balance of this part of her claim goes to the hours which she says she worked and for which she was not paid. Ms Bolin's employment with the respondent was on a part-time basis. Ms Bolin's evidence, supported by the diary which she kept, is that she worked for far more hours than the 20 part-time hours that she was due to work. Her evidence is that she was instructed in the hours she was to work by Ms Clark. Mr Catania's submission is that no instructions were given regarding additional hours worked and he disputes the additional hours that Ms Bolin claims were worked.

On balance, I am not persuaded by Ms Bolin's evidence regarding her hours worked. The only instruction given to her by Ms Clark which Ms Bolin referred to in her evidence concerned starting at 9 o'clock in the morning. Although Ms Bolin has times recorded in her diary, the evidence in Ms Clark's statutory declaration which I have referred to earlier and which I accept in relation to Ms Bolin starting late, leads me to have reservations that Ms Bolin's diary entries are in each case exact. I am not satisfied, on balance, that Ms Bolin has made out her claim that she was underpaid.

An order will issue which dismisses her application.

Appearances: Mr K. Trainer on behalf of the applicant.

Mr N. Catania on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Grace Bolin

and

W.A. Retailers Association.

No. 87 of 1999.

4 October 1999.

Order.

HAVING heard Mr K. Trainer on behalf of the applicant and Mr N. Catania 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.

Stephen Carmody

and

Kingsline Pty Ltd trading as Rocket Couriers

No. 2194 of 1998.

COMMISSIONER P E SCOTT.

17 September 1999.

Reasons for Decision.

Extempore

THE COMMISSIONER: This is an application made pursuant to s.29(1)(b)(i) of the Industrial Relations Act 1979 by which the Applicant claims that he has been unfairly dismissed from his employment with the Respondent.

The Commission has heard evidence from the Applicant. However, there has been no appearance for or by the Respondent. The Commission's records indicate that the only communication which would have indicated any difficulty on the part of the Respondent was a telephone conversation between my associate and Mr Uraturio for the Respondent on 7 September 1999, when he indicated that the company was no longer trading because it was insolvent. Further, he said that he would not be able to attend the hearing today because he would be in Melbourne and that there was no one in Perth to represent the Respondent, and he is the only director. My associate advised him that if he wished to request that the hearing be postponed he should put that in writing and he said he would do so. However, there has been no communication received from the Respondent seeking to postpone the hearing and accordingly it has proceeded.

On the basis of having observed Mr Carmody as he gave his evidence, I am satisfied that Mr Carmody's evidence is to be accepted. That evidence was that in 1992, he commenced working for a former owner of Rocket Couriers. In November 1996, the business, as a going concern, was sold to Kingsline Pty Ltd and continued to trade as Rocket Couriers. The former owner of the business stayed on as an employee of the company. All of the Applicant's conditions of employment remained the same. There was no change in any of the arrangements relating to his employment.

In May 1998, the Applicant was asked to agree to a change to his payment arrangements, to reduce the monthly retainer and increase his commission payments. He put forward a schedule, which is Exhibit 1, which did a comparison of possible arrangements which he provided to his employer. Mr Uraturio made changes to his proposal and the Applicant agreed to those changes. They resulted in him receiving a retainer of $37,000 per annum plus commissions. He says that this change in his payment arrangements caused him to make additional efforts to achieve sales and it was agreed that he should undertake less of the non-direct sales related duties, so that he could pursue sales more vigorously, and he did so.

The evidence before the Commission shows that between November 1997 and October 1998 the Applicant's sales increased each month. The Applicant says that he received no oral or written complaints about his work or performance and there was no expression of dissatisfaction with him. He says that in the last months of his employment the company was not experiencing any difficulty with sales and Exhibit 3 supports that the company was making sales which were gradually increasing. The Applicant says, however, that he has no knowledge of the costs incurred by the company and he was not aware of any difficulties associated with the costs of the company.

A week prior to the termination of his employment, the Applicant was advised by Mr Priestman, to whom he reported, that Mr Priestman had been meeting with Mr Uraturio who had decided that the Applicant's employment was to terminate and that he was to have one week's notice. The Applicant asked if this was negotiable and was told that it was not. The only reason that he was given for the termination of his employment was that the company could no longer afford to pay him. He has given evidence that no one else was to be dealt with in this way. He indicated to his employer that a week's notice was insufficient, but this was rejected.

Following his discussions with Mr Priestman, the Applicant spoke with Mr Uraturio seeking to be given 4 weeks notice, particularly as the time of year was not conducive to him finding alternative employment. He says that Mr Uraturio scoffed at him and maintained that he would finish that Friday. However, one concession was made and that was to allow him to keep his company car for an extra week. The Applicant's employment terminated on the 27th of November 1998.

I have heard the Applicant's evidence as to his loss and the efforts he made to mitigate that loss. I am satisfied that those matters are in accordance with the Applicant's evidence. The Applicant did not obtain paid alternative employment until 1 April 1999. On that basis, apart from a week's training with a telecommunications company, the Applicant was unemployed for 4 months. His current employment provides him with less remuneration than he had enjoyed in his employment with the Respondent.

The basis upon which the Commission is to consider claims of unfair dismissal is that an employer has a lawful right to terminate employment. However, if that lawful right is so abused as to constitute a harsh, oppressive or unfair dismissal, then the Commission is entitled to intervene and deal with that unfairness.

I am satisfied that there was no particular reason given for the Applicant's dismissal, other than that the company could no longer afford to pay him. There was no forewarning given to him, no discussion about any alternatives that might be available. There is no indication that his employment was in jeopardy until the week before that termination took effect. There is no indication that his performance was inadequate or that there were any other problems with the Applicant's performance.

In all of these circumstances, I am satisfied that the dismissal has been unfair and the question remains as to the remedy. The Applicant does not seek reinstatement. The Respondent's advice to the Commission is that the company is no longer trading and is insolvent. That seems to me to make reinstatement impracticable. On that basis, compensation is the appropriate remedy.

The Applicant seeks 3 months pay as compensation for his loss. I am satisfied that he has suffered that loss and more and, bearing in mind his length of service and the circumstances of his termination of employment, I find that compensation for that loss of an amount equivalent to 3 months pay is appropriate.

The Applicant is to advise the Commission, within 24 hours, of the basis on which 3 months pay ought to be calculated.

APPEARANCES: Mr B Walker appeared on behalf of the Applicant.

There was no appearance on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Stephen Carmody

and

Kingsline Pty Ltd trading as Rocket Couriers.

No. 2194 of 1998.

COMMISSIONER P E SCOTT.

17 September 1999.

Supplementary Reasons for Decision.

THE COMMISSIONER: At the conclusion of the hearing of this matter on 14 September 1999, the Commission, having issued Reasons for Decision which concluded that the Applicant had been unfairly dismissed, that reinstatement was impracticable and that compensation was appropriate, the Commission sought clarification from the Applicant's representative as to the amount of compensation which was sought. The Applicant had sought payment of the weekly retainer of $711.54, however, the Applicant's income also consisted of commissions based on sales revenue.

Section 23A(4) of the Industrial Relations Act 1979, provides that the compensation may be calculated by reference to "an average rate received during any relevant period of employment." The Applicant was to provide to the Commission details of the commissions paid to the Applicant for the last six months of his employment which happened to coincide with the implementation of the new remuneration structure.

The Commission was advised that during the period from June to the date of termination being 27 November 1998, the Applicant received a total of $7,914.00 in commissions. The period concerned constituted 25 weeks. Accordingly, the average weekly figure for commissions was $316.56. Together with the weekly retainer, the weekly rate for the Applicant is therefore $1,028.10. Pay for 13 weeks (ie 3 months) equals $13,365.30.

Order accordingly.

APPEARANCES: Mr B Walker appeared on behalf of the Applicant.

There was no appearance on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Stephen Carmody

and

Kingsline Pty Ltd trading as Rocket Couriers.

No. 2194 of 1998.

COMMISSIONER P E SCOTT.

23 September 1999.

Order.

HAVING heard Mr B Walker 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—

(1) DECLARES that the Applicant was unfairly dismissed from his employment with the Respondent.

(2) ORDERS that the Respondent shall pay to the Applicant the amount of $13,365.30 no later than 14 days from the date of this Order.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Susan Joy Casey

and

Compass Ford.

No. 968 of 1999.

COMMISSIONER P E SCOTT.

13 September 1999.

Reasons for Decision.

THE COMMISSIONER: This is a claim of harsh, oppressive or unfair dismissal made pursuant to s.29 of the Industrial Relations Act 1979.

The Applicant's employment commenced in June 1998 as a casual car cleaner and detailer in the Respondent's Busselton branch of its motor vehicle retailing business. Originally the Applicant worked from 8.30am to 4.30pm three days per week but gradually those hours increased until for some time prior to her termination, she was working 5 days per week, Monday to Friday from either 8.00am or 8.30am to 4.00pm or 4.30pm as her regular hours, and as late as 7.00pm on some days. The Applicant was initially paid $12.80 per hour however, this was increased to $13.29 by the time of her termination of employment. During the period of her employment the Applicant's duties expanded to take account of a range of duties.

When the Applicant commenced employment, the branch was managed by Mr Basil Georgio. The Applicant says that she asked Mr Georgio if it was acceptable for her to receive and make telephone calls while she was at work and he approved of this.

The Applicant says that the only time that there was any complaint or dissatisfaction expressed about her work was when the acting manager, who was in charge of the branch between Mr Georgio's departure and the arrival of the new branch manager, Kenneth John Semmens, told her that she was not drying the cars' grilles properly. She said that she rectified this to her employer's satisfaction.

In response to the Respondent stating that one of its grounds for dismissal was that the Applicant wrote letters of complaint against other employees, the Applicant described how another employee told her that she was going to claim payment for hours which she did not work. The Applicant wrote to the company's management in Bunbury. She says that she was simply acting in the manner she had been told was expected when she started work – ie that the company valued honesty. She believed that it was appropriate that she advise her employer when she saw a fellow employee acting dishonestly. This was the only letter of complaint written by her.

The Applicant says that she approached Mr Bryce, the Respondent's dealer principal to ask to be made permanent. She says that at one stage he told her that that would be no problem, however, nothing formal eventuated. She also wrote a letter to him about this matter.

The Applicant says that she had good reason to believe that her employment was to be on-going, notwithstanding that she was termed a casual and paid as such. The first reason is that a few weeks prior to the termination of the employment, a notice was circulated to say that there may be some lay offs within the company. She asked the manager a couple of times if this was to effect her and she says that she was told that it would not. The second basis for her belief that her employment was to be ongoing was that a few weeks before her termination, she was told that the company wanted car cleaners to wear shirts with the company's logo, and shirts were sent down for her to try on.

On Monday 14 June 1999, the Applicant was absent from work. The next day, when she arrived at work, the Applicant left a worker's compensation medical certificate on Mr Semmens's desk. At the end of the day, Mr Semmens called her into his office. He told her that her services were no longer needed. When she asked the reason, Mr Semmens declined to give a reason, said that there was no reason, and then said that they did not need her. She told him that if there was a problem with her work, he should tell her and she would rectify it. Mr Semmens told her that the decision had not been his, that it had been made the previous day and that he hated doing it, which was why he had left it to the end of the day to speak to her. When the Applicant asked again why the decision had been made, he told her to "leave it".

The Applicant says that the dismissal was unfair—if she had been told that she had not been doing the right thing, she would have rectified the situation.

The Respondent does not disagree with much of what the Applicant has said however, it says that—

1. The Applicant was a casual and was paid as such;
2. The Applicant's work was not up to the required standard, that although she was not the worst cleaner the company had had, she was not the best;
3. The Applicant appeared to have difficulty in working co-operatively with other female employees including two car cleaners sent from Bunbury to help and to show her how to do the job, and with the receptionist about whom she wrote the letter of complaint;
4. The appropriate way for the Applicant to have raised the issue of the receptionist claiming pay for hours not worked was to have done so directly with Mr Semmens, that if she had done so, he could have explained that he had decided that the receptionist should be paid for the whole of the day even though she had worked for only part of it, because she had made the effort to come in and do essential work even though she was ill;
5. The Applicant spent a large amount of time on the telephone. On one occasion about a week prior to the termination of her employment she spent 45 minutes on the telephone, followed immediately by 20 minutes spent talking to a wholesaler.

The Respondent says that in the circumstances of the Applicant's casual employment and her unsuitability for long term employment, termination was appropriate. The Respondent called evidence from Mr Semmens.

The Full Bench in *Serco (Australia) Pty Limited and John Joseph Moreno (76 WAIG 937 at 939)* noted in respect of the definition of a casual employee, that the parties—

> "cannot by the use of a label render the nature of a contractual relationship something different to what it is *(see Stewart vs Port Noarlunga Hotel Ltd (op cit) per Haese DPP at pages 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 provisions 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 the roster published in advance, whether there was a reasonable mutual expectation of continuity of employment, whether the notice is required by an employee prior to the 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."

In *Squirrell vs. Bibra Lakes Adventure World Pty Ltd trading as Adventure World, (64 WAIG 1834 at 1835)* Fielding C noted that—

"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 of particular work requirements of an employer, rather than under a single and on-going contract of indefinite duration."

It is more likely than not that the Applicant's employment was covered by the terms of the Motor Vehicle (Service Stations, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980. The definition of "casual" contained in that Award is—

"(3) Casual: means an employee who is engaged and advised as such at the time of employment. Casual employment shall include circumstances where the expected duration of employment is for a short term or is irregular."

This definition recognises casual employment by the words "as such" in similar if not the same terms as those described by Fielding C in *Squirrell vs. Bibra Lakes Adventure World Pty Ltd trading as Adventure World* (supra). This is reinforced by the specific inclusion of "circumstances where the expected duration of employment is for a short term or is irregular".

The Applicant's employment could not be described as casual. Although the Applicant's employment was described initially as casual and she appears to have been paid as a casual, the actual operation of the contract of employment was not of a casual nature.The Applicant had regular employment and her hours were worked in such a manner that it could not be said that her contract was anything other than ongoing. She had been employed regularly by the Respondent for approximately one year. For some period prior to the termination of her employment, the Applicant worked 5 days per week for a minimum of 35 hours each week with regular starting and finishing times. There was no evidence that the Applicant was engaged on a series of contracts of employment. When the Applicant became aware that there may be some potential lay offs she was assured that this would not affect her. She was entitled to conclude that at that time her employment was not under threat. The Applicant was also given to believe that she would continue in employment when the Respondent provided shirts for her to try on, which were to form part of what could be described as a uniform. This occurred in the weeks prior to her termination. In all of these circumstances I am satisfied that the Applicant was entitled to assume that she had ongoing employment. The end of the employment relationship came about by a decision of the Respondent to terminate, not by the expiration of any specified term. This termination constituted a dismissal. Accordingly, the Applicant is entitled to claim that her termination was harsh, oppressive or unfair, and to have the Commission determine that matter.

As to whether the dismissal was harsh, oppressive or unfair, and the grounds for dismissal, it may be that the Applicant's work was not to the standard required by the Respondent, that she may have had difficulty in her relationships with certain other employees of the Respondent, and she may have spent a lot of time on personal telephone calls. However, natural justice requires that the Respondent advise the Applicant that her performance, her working relationships, or the making of telephone calls or any other matter associated with her performance, was placing her employment in jeopardy, and to give her an opportunity to rectify those matters. I am satisfied from the evidence of the Applicant that if she had been told these things she would certainly have attempted to rectify the problems associated with her employment. She had every reason to want to continue in employment. Whether any change was possible in respect of the Applicant's performance, particularly her working relationships with other employees, will never be known because the Applicant was given no opportunity to rectify what the employer saw as a difficulty in that regard.

Accordingly, I am satisfied that the Applicant has not been given a fair go in the termination of her employment by the Respondent. (*Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous, WA Branch (1985) 65 WAIG 385).*

In considering the remedy which might by appropriate in these circumstances, I am satisfied that reinstatement would not be practicable as relationships between the parties would be strained to say the least. Accordingly, it is appropriate to consider what compensation ought be awarded to the Applicant. The Applicant's loss has been described by her. She has lost the wages she would have received had she continued in employment. At the time of the hearing of this matter, the Applicant had been unemployed for a period of 11 weeks and 2 days. Her efforts to mitigate her loss were described in evidence before the Commission and I have no doubt that she has made such efforts to find alternative work.

In awarding compensation, the Commission is to take account of all of the circumstances of the termination. In doing so, I note the Applicant's length of employment was for approximately one year. I note, too, that there may have been grounds for the Respondent's concerns about her performance. The unfairness in the dismissal arose from the Respondent's failure to afford natural justice. There is no way of knowing whether, given procedural fairness, the Applicant could have performed and behaved to the Respondent's reasonable satisfaction. However, as noted before, I am sure she would have tried. In all of the circumstances, I conclude that the Applicant ought to have been afforded a reasonable period to improve and to rectify the areas of unsatisfactory performance. The demonstration of skills and of not making or receiving excessive telephone calls would not require a significant period. However, the sustained demonstration of improved working relationships would take a little longer. In that regard, I conclude that the Applicant ought to have been given four weeks to demonstrate improvements. Beyond that point, there is no knowing whether her employment would have continued. Accordingly, I find that the loss appropriate to be compensated is four weeks pay, calculated at the Applicant's rate of pay applicable at the time of termination, for 35 hours per week.

Order accordingly.

APPEARANCES: The Applicant appeared on her own behalf

Mr R Bryce appeared on behalf of the Respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Susan Joy Casey

and

Compass Ford.

No. 968 of 1999.

COMMISSIONER P E SCOTT.

23 September 1999.

Order.

HAVING heard the Applicant on her own behalf and Mr R Bryce on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby—

1. DECLARES that the Applicant was unfairly dismissed from her employment with the Respondent;

2. ORDERS that the Respondent shall pay to the Applicant the amount of $1,860.60 no later than 21 days from the date of this order.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

L Gundry

and

D M Oliver.

No. 2122 of 1998.

7 October 1999.

Reasons for Decision (extempore).

SENIOR COMMISSIONER: The Respondent, at all material times, carried on business as a telemarketer under the style and firm name of "Access Australia Telemarketing". The business was carried on from premises owned by the Applicant's then fiancé, who is also the Respondent's brother. The business appears to have commenced in or about June 1994 with capital provided by the Applicant, her then fiancé, and by the Respondent and her husband. Shortly before the business commenced the Applicant and her then fiancé sold the interest they had in another telemarketing business. It was a term of that sale that they were not to own or operate another business of that kind until September 1997 although, as the agent for the Applicant has said, there were some qualifications to that. The Respondent says (but the Applicant denies) that it was for this reason that the business was registered in the Respondent's name rather than in the name of all of those who provided capital to establish the business.

It is common ground that apart from general financial direction neither the Applicant's fiancé nor the Respondent's husband had anything to do with the day to day operations of the business. That was left to the Applicant and to the Respondent. The extent to which the Applicant was involved in those matters is at the heart of these proceedings. It is common ground that the Applicant worked in the Respondent's business as an employee from its inception until on or about 31 July 1995 or it may have been, on the basis of the Respondent's evidence, the first week of August, but nothing turns on that. By that time, that is to say by the end of July, the Applicant had fallen out with the Respondent. As a consequence the Applicant and her then fiancé, through the medium of a company, acquired the business name from the Respondent.

The Applicant says she worked long and hard for the Respondent with little remuneration. She says that a typical working day was 9am until 4pm Monday to Friday inclusive. She says that she spent most of her time acquiring new business for the Respondent. The remainder of the time was spent supervising staff or otherwise performing telemarketing herself. She says that early in October 1994 she approached the Respondent saying that as she was spending so much time working for the business some arrangement should be made for her remuneration. She asserts that on that occasion the Respondent agreed that she should be paid at the rate of $12.00 per hour up to and including 37.5 hours per week. Any work in excess of those hours was to be without remuneration. Nothing was apparently said about the frequency with which she was to be paid her remuneration. The Applicant says that she was to be paid as and when the Respondent had sufficient funds. The Applicant says that in accordance with the agreement reached early in October she completed weekly a "generic" timesheet which she gave to the Respondent periodically. She says that from time to time when the Respondent had sufficient funds the Respondent requested the Applicant to complete another timesheet (or the Respondent herself completed the timesheet on the Applicant's behalf) setting out hours of work to the extent necessary to utilise the funds then available to the Respondent.

It is common ground that the Respondent paid the Applicant $1,983.00 during the period of employment as and by way of remuneration excluding the recoup of expenses. The Applicant asserts that she is entitled to a further sum of $14,943.00 from the Respondent as and by way of wages for the work she performed for the Respondent in the period from October 1994 until 31 July 1995. By these proceedings she seeks to recover that sum as a benefit denied to her under her contract of employment with the Respondent.

The Respondent concedes that at all material times the Applicant was an employee of the Respondent. The Respondent asserts that at the Applicant's own request she was employed on a casual basis and came and went much as she pleased. She did not have any specific hours of work. The Respondent disputes that there was any agreement to pay the Applicant $450.00 per week. Instead, the Respondent says agreement was reached that the Applicant was to be paid at the rate of $12.00 per hour up to $192 per fortnight, as and when requested by the Applicant. The Respondent says the Applicant was concerned not to reduce the single parent pension she was then receiving. The Respondent denies the existence of any generic timesheet and contends that the Applicant was paid for the hours she worked according to the timesheets submitted by her, and thus there is nothing further owed to her. Furthermore, the Respondent also challenges the veracity of the record of hours worked now relied upon by the Applicant to substantiate her claim on this occasion. The Respondent contends that many of the hours for which the Applicant now seeks payment did not involve work for the Respondent's business. The Respondent asserts that on some of the occasions the Applicant claimed to be working she was either playing sport, employed by an employment agency as a telemarketer or otherwise attending to social activities. The Respondent also contends that on other occasions the Applicant often insisted on staying at the Respondent's premises even when there was little or no work for her to do, because the Applicant was preparing herself to take over the business with her then fiancé.

A good deal of evidence was adduced during the course of these proceedings, much of it conflicting. There is little to be gained from reciting the evidence. The parties obviously have little respect for each other and this manifested itself in the evidence adduced by and on their behalf. As the Applicant rightly acknowledged one of the parties is telling an untruth or otherwise is horribly mistaken about the events.

It is very difficult to know where the truth lies in this matter. From what I have heard from and seen of both the Applicant and the Respondent in the course of the proceedings and heard from the witnesses called on their behalf I am far from confident, even on the basis of probabilities, that the version of events advanced by the Applicant is accurate and reliable. The Applicant did not impress me as being a very reliable witness. Putting aside any question of her being involved in activities contrary to the spirit of the restraint clause as to which I pass no judgement, I find it difficult to accept the Applicant's protest that the arrangements whereby the Respondent was named as the sole proprietor of the business now in question was not done as a means of avoiding those restraint obligations having regard for the evidence of the Respondent and a number of the other witnesses, I have great difficulty in accepting that not to be the case. I note that the Applicant testified that though she was engaged as a casual she felt like and was treated as "a partner" in the business. Indeed, the written proposal initially put to the Respondent was that the Applicant would be a "partner" in the business, to use the words used in that agreement, albeit registered in the Respondent's name. Significantly, when the period of the restraint of trade was due to expire the business was, to use the terms of a document that was never converted to an agreement, to be "re-established" as a single partnership of all four persons. Perhaps more significantly in these proceedings I feel bound to note, as the counsel for the Respondent has mentioned in his submissions, that the Applicant appeared somewhat slow in indicating that the "bookkeeper" to whom she made frequent reference in her examination in chief was her mother. I consider that there is much to be said for the submission of counsel for the Respondent that at least initially she preferred to convey the impression that the bookkeeper was an independent person when clearly that was not the case.

I am prepared to find on the basis of the evidence adduced in these proceedings that some time after the business was established agreement was reached between the Applicant and the Respondent for the Applicant to be paid at the rate of $12.00 an hour for some of the work she performed at least up until 30 June 1995. Beyond that I am unable to ascertain with any confidence what were the details of the arrangement between the parties. In particular, I am not convinced in face of the Respondent's evidence and to a lesser extent that of her husband and her brother that I should accept the Applicant's evidence that she was to be paid at the rate of $450.00 per week as she claims. Whilst I confess to finding some aspects of the Respondent's evidence less than convincing, in other respects she was most convincing and I am not prepared to reject her testimony outright. What she says regarding the arrangement for remuneration being that the Applicant would be paid at the rate of $12 an hour up to the sum of $192 per fortnight has some support from the fact that seven of the nine payments made to the Applicant as and by way of remuneration were made on that formula. Moreover, as counsel for the Respondent has said most, if not all, contemporaneous notes give little support for the proposition that the Applicant was to receive $450 a week as if she was in full time employment. Rather, they suggest as the Respondent suggested, that she was entitled to something considerably less than that.

Although the Applicant's version was to some extent supported by the testimony of her mother their versions are not entirely consistent. The Applicant's mother suggests that the agreement was reached between the Applicant and the Respondent in the Respondent's office before they came to her. On the Applicant's mother's testimony they simply came out to her in order to request her to give effect to the agreement. The Applicant, however, testified that the agreement was reached in the office in the presence of her mother. Moreover, her mother was, to say the least, unsure of what was said by the parties. To use her words she was "unable to say who said what about the arrangement". It might not be without some significance that when preparing the Respondent's account for the periods ended 30 June 1995 and 31 July 1995 the Applicant's mother only pencilled in accrued wages for the Applicant "for discussion purposes".

Having heard and observed the Respondent she impressed me as being very business like and I have great difficulty in accepting that she would agree to an arrangement of the kind that the Applicant now suggests is the case. In particular, I find it difficult to accept that payment would be based on a "generic timesheet" which entitled the Applicant to be paid for 37.5 hours work per week irrespective of whether the work was performed or not. In addition, I find it odd that the Applicant made no mention of the arrangement to her then fiancé as I find to be the case, particularly given the differences which in time arose between her and the Respondent. It is perhaps noteworthy in this context that the Applicant testified that she did not disclose the arrangement to the Department of Social Security or in her tax returns because, as she said in her testimony, the agreement was "not watertight" and one that she took on "trust". In the circumstances I am left to wonder whether the arrangement, if it existed at all, had the legal significance that the Applicant now claims it had.

Moreover, I find it odd that if the arrangement was as the Applicant now says it was, that she should wait for at least two years if not more, before making a demand on the Respondent for the debt. Even then the demand was only made, it seems, after the Respondent instigated proceedings against the Applicant to claim the return of property alleged to have been wrongly detained by her. It might have been the case that the Applicant had insufficient funds to pursue the matter but insufficiency of funds is no reason not to make a demand or raise the matter before she did. In addition, it is noteworthy that when the Applicant claimed maintenance from a former husband she said that she was being employed on a different basis, as counsel for the Respondent has mentioned, from that which she now claims to be the case. Also, as already mentioned, no mention was made of the remuneration in her claim for a supporting mother's pension.

Furthermore, I am not convinced by any measure that the Applicant in fact worked the hours for the Respondent that she said she did. The Applicant calculated her claim based on hours she says she worked, relying on her diary, her timesheets and from her "recollections". The diary for the year 1995 tendered by the Applicant does not show any starting or finishing times but simply shows a number of appointments which she says were work related. The Applicant admitted during the course of the proceedings that there may be some errors in the summary which she prepared based on the diary, amongst other things. For example, I refer to 12 December 1994 when she apparently attended one of her son's graduation ceremonies but on the face of it, no allowance appears to have been made for that. Apart from diary entries her calculations were not based on contemporaneous notes but by her own admission, on recollections well after the event, principally on the basis of her normal day being from 9.00am until 4.00pm. Yet in that time, by her own admission, she also worked for another employer and attended to a range of social activities. Whilst some of the witnesses, notably Miss Allen suggested that the Applicant worked long and hard, a number of the other witnesses namely Messrs Broome, Cook, Oliver and Miss Ackrill, each of whom impressed me as being reliable witnesses, cast considerable doubt on the assertion of the Applicant that she put in the hours of work for the Respondent that she claims she did. What they say to some extent supports the evidence of the Respondent.

In all, I am left with the distinct impression that the Applicant's calculations were at best an estimate. In determining whether or not a liability in the form of an accrued debt exists, something more precise and definite than that is required. As counsel for the Respondent rightly said, the onus is on the Applicant to establish, on balance, that she in fact did the work claimed, and for the reasons indicated I am simply not satisfied that she did the work.

In summary, I am far from convinced that the Applicant has made out her case. I am not convinced that the agreement was in the terms in which the Applicant says it was, and I am not convinced in any event, that she worked the hours which she said she did. It follows that the application must be dismissed.

Appearances: Mr A J Thompson as agent for the Applicant.

Mr T H Brickhill as counsel for the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

L Gundry

and

D M Oliver.

No. 2122 of 1998.

7 October 1999.

Order.

HAVING heard Mr A J Thompson as agent for the Applicant and Mr T H Brickhill as counsel 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.

Lorna Rae Hoogland

and

NL Tucker & Associates Pty Ltd.

No. 1573 of 1998.

COMMISSIONER S J KENNER.

5 October 1999.

Reasons for Decision.

THE COMMISSIONER: At all material times Lorna Rae Hoogland ("the applicant") was employed by NL Tucker & Associates Pty Limited ("the respondent") performing work in relation to general office duties, internal sales and accounts. The employment of the applicant commenced on or about 29 January 1991 and terminated on 10 August 1998. The circumstances surrounding the termination of the applicant's employment are controversial and have led to this application pursuant to s 29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act"), alleging that the respondent dismissed the applicant harshly, oppressively or unfairly.

The applicant does not, by this application, seek reinstatement as she asserts that the working relationship between herself and the respondent has so broken down that it should not be restored. Accordingly, the applicant seeks compensation by way of an order from the Commission. The respondent wholly opposes the applicant's claim.

Ms Crawford of counsel represented the applicant and Mr Morrison of counsel represented the respondent.

The hearing of this matter was lengthy and the evidence alone occupied five days of hearing and some 616 pages of transcript. Additionally, counsel for both the applicant and the respondent submitted closing submissions in writing, which submissions were very detailed and of considerable assistance to the Commission.

Background

The respondent is an importer, wholesaler and distributor of various types of electrical and electronic products. The respondent is a family business which the applicant joined in January 1991, performing general office duties, internal sales and accounting work. At the time that the applicant joined the respondent's staff, the business was quite small and it was common ground that as at the time of the applicant's dismissal, the business had grown considerably.

The circumstances surrounding the dismissal of the applicant by the respondent are in contest but in short, relate to an incident that occurred on or about 10 August 1998 involving the use by the applicant of a vacuum cleaner belonging to the respondent and an altercation that took place between the applicant and Mr Tucker, a director of the respondent ("the Incident"). This led to the effective summary dismissal of the applicant.

Up to this time, it was the applicant's submission that the working relationship between her and the directors of the respondent had been a good one and, the events which occurred on 10 August 1998 took the applicant by surprise and left the applicant in a state of shock. The respondent said that the conduct of the applicant on 10 August 1998 during the course of the Incident justified it in summarily dismissing the applicant and, moreover, it relies upon other performance and conduct issues which were alleged to have occurred prior to the date of the Incident, in support of its defence of the applicant's claim.

The Contentions of the Parties

Counsel for the applicant submitted that the reason for the applicant's dismissal was as a direct result of the Incident. It was submitted that Mr Tucker dismissed the applicant for having threatened the respondent that if she were to be dismissed, she would bring a claim against the respondent for unfair dismissal. Counsel for the applicant submitted that the dismissal of the applicant for conduct that took place during the Incident was unfair, harsh or oppressive. As to the various allegations raised by the respondent going to matters which had occurred prior to the applicant's dismissal and known of by the respondent the applicant said they could not be relied upon. Furthermore, insofar as the respondent sought to rely upon matters which it submitted had only come to it's attention following the applicant's dismissal, those matters could only be relevant to the respondent's case if those matters could not have been discovered by the respondent prior to the applicant's dismissal, by proper enquiry. In any event, it was submitted that these matters, if they were to be considered, could only go to the question of remedy.

Alternatively, and in any event, counsel for the applicant submitted that even considering these matters, taken either individually or collectively, they would not support in law, the dismissal of the applicant. The applicant submitted that these other allegations advanced by the respondent should be viewed by the Commission as formulated, exaggerated or fabricated for the sole purpose of bolstering the respondent's defence of this claim.

In summary, counsel for the applicant said that the dismissal of the applicant was harsh, oppressive or unfair when regard is had to the following matters—

1. The manner of the dismissal;
2. The fact that the dismissal was effected for a relatively minor issue that being the return of the respondent's vacuum cleaner;
3. That there had been no demonstration by the applicant of an unwillingness or refusal to comply with the respondent's request to return the vacuum cleaner or it's accessories;
4. That the applicant more than likely misunderstood the respondent's direction in relation to the vacuum cleaner on the morning of the Incident;
5. The length of service of the applicant with the respondent;
6. That the applicant was reasonably well regarded by the respondent up to and at the time of the Incident; and
7. The fact that the applicant was denied procedural fairness in relation to the dismissal.

Counsel for the respondent submitted that the conduct of the applicant on the day of the Incident constituted a refusal by the applicant to obey a lawful and reasonable direction from Mrs Tucker, a director of the respondent, for the return of the remainder of the respondent's vacuum cleaner. Furthermore, it was submitted that during the Incident, the applicant behaved in an aggressive and overbearing manner, thereby repudiating her position as an employee subject to the lawful direction and control of the respondent. It was also submitted by the respondent that prior to the Incident, the applicant by her conduct had demonstrated disobedience and untrustworthiness which taken as a whole, constituted a fair and proper basis for the respondent to dismiss the applicant.

Given the scope of the allegations against the applicant raised in the respondent's amended notice of answer and counter proposal, I set out the allegations raised in the amended notice of answer and counter proposal as follows—

"5. In relation to the letter attached to the applicant's particulars of claim, the respondent denies the allegations made by the applicant and says—

5.1 Approximately three months ago the applicant removed a vacuum cleaner belonging to the respondent from the respondent's business. The respondent had on many occasions asked the applicant to return the vacuum cleaner, however these requests were ignored.

5.2 Further requests were made by the respondent during this period but to no avail.

5.3 On 3 August 1998 the vacuum cleaner was returned to the respondent's premises by the applicant, minus the vacuum cleaner attachments.

5.4 The applicant was requested on 8 August 1998 to return the requested attachments of the vacuum cleaner.

5.5 On 10 August 1998 the attachments had not been returned and it was clear that this request had again been ignored. The applicant was then requested by a director of the respondent, Susan Tucker ("S Tucker") to collect the attachments from home immediately. The applicant refused to do so and said that she "had had enough of this".

5.6 Another director of the respondent, Wayne Tucker ("W Tucker") overheard this conversation and advised the applicant that she had continually ignored their requests to return the vacuum cleaner. The applicant became aggressive and was advised to stop shouting. As this continued the applicant was advised to stop shouting or she would need to leave the company. The applicant replied, "I'll have you for unfair dismissal". The respondent viewed the actions of the applicant as serious and threatening and therefore asked her to leave.

5.7 The applicant received all of her outstanding entitlements in addition to one weeks pay in lieu of notice.

6. The respondent says that there were other issues, some of which have only come to light since the applicant's termination, relating to the performance and conduct of the applicant and says—

6.1 The applicant knowingly used vehicles belonging to the respondent in a manner which was unauthorised and contrary to directions given by the respondent. It is alleged that on numerous occasions the applicant used a company vehicle for her own personal use without permission. It is alleged that the applicant had knowingly misled another employee of the respondent so as to gain access to the vehicle by advising that she had permission to use the vehicle when no such permission had been given

6.1A The respondent says that on 1 June 1998 a vehicle belonging to the respondent which was under the supervision of the applicant was photographed exceeding the speed limit. The identity of that person driving the vehicle is unknown to the respondent.

6.2 The applicant allowed family members and friends to drive the vehicle allocated to her by the respondent which was in breach of company policy and specific directions given to her by the respondent.

6.3 The applicant had whilst employed by the respondent entered into discussions with a large supplier of the respondent about taking a job with that supplier in Perth. The applicant refused to divulge the nature of the conversation to the respondent, even though it had occurred whilst at work.

6.4 The applicant attempted to bypass security passwords on the respondent's computer system by contacting the software provider and misrepresenting herself as a director of the respondent. The applicant was advised that such action cease immediately.

6.5 The applicant had continuously refused requests from the respondent to cease making personal calls and conducting private business during work time. The respondent says that the applicant continuously made telephone calls regarding the building of her house and the purchase of antiques. These other activities resulted in the applicant not completing her duties as required by the respondent.

6.6 The applicant used the respondent's import agent to ship and clear her own personal goods and made such arrangements during work time.

6.7 The respondent formed a suspicion that the applicant was removing stationary for her own personal use and for that of her family. The respondent says that stationary levels were monitored and it appeared that the applicant had removed items without authority. The respondent says this matter was to be discussed with the applicant however her employment was terminated beforehand for other reasons.

6.8 The respondent says that the applicant falsely obtained a "BP Card" for the account of the respondent and used it without authority and for personal use. It is further alleged that the applicant's daughter used this card for her own personal use or signed for it on behalf of her mother.

6.9 The respondent alleges, that the applicant represented herself in her antique business as principal of NL Tucker & Associates.

6.10 The respondent says that the applicant's behaviour was inappropriate towards another member of the respondent's staff in that she made remarks about the applicant's appearance which were unwarranted and not appropriate for the workplace.

6.11 The respondent says that the applicant was sent to Germany for a training course on the basis that she would provide training and full details of the course on her return. The respondent says that on her return no details were provided after being asked by the respondent as she claimed that she did not recall any of the details. The respondent also says that the applicant was given the opportunity to improve her knowledge but chose not to.

The Issues

The issues that appear to arise in relation to this matter include—

(a) The nature of the conduct of the applicant during the course of the Incident and whether the Incident was a sufficient basis to have founded the respondent's decision to dismiss the applicant and if so, whether in all other respects the dismissal on that ground was harsh, oppressive or unfair;

(b) Whether the respondent could rely upon the other allegations made against the applicant as to her performance and conduct which occurred prior to the Incident; and

(c) Whether in or about November 1997 the applicant and the respondent entered into a fixed term contract of employment for a period of 12 months. This is a matter which bears upon the issue of relief, in the event that the applicant is successful in persuading the Commission that her dismissal was harsh, oppressive or unfair.

Principles

Principles relevant to applications such as these are well established in this jurisdiction. As a general proposition, the well established test as to whether a dismissal is harsh, oppressive, or unfair, is whether the right of the employer to dismiss an employee has been exercised so harshly or oppressively such as to constitute an abuse of that right: *Miles v The Federated Miscellaneous Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385. Additionally, in assessing a claim such as the present matter, it is not the province of the Commission to assume the role of the manager, but to consider the dismissal objectively and in accordance with the obligations imposed on the Commission pursuant to ss 26(1)(a) and 26(1)(c) of the Act: (see also *North West County Counsel v Dunn* (1971) 126 CLR 247 at 262). In objectively assessing the circumstances of the case, the practical realities of the workplace need to be considered and a common sense approach to the application of the statutory provisions should be adopted: *Gibson v Bosmac* (1995) 60 IR 1.

Furthermore, in the case of a dismissal which is summary in nature, the respondent employer bears the evidential burden in establishing the grounds for the dismissal: *Newmont Australia v AWU* (1988) 68 WAIG 677 at 679.

The question of the extent to which if at all, events occurring or coming to light after a dismissal of an employee may be relevant to the question of whether the dismissal was harsh, oppressive or unfair has been subject to some divergence of judicial opinion. A number of decisions of the Federal Court in relation to this issue have adopted somewhat differing positions as to the extent to which "after acquired knowledge" may be relied upon to justify a dismissal. In *Gregory v Philip Morris Ltd* (1988) 80 ALR 455, a majority of a Full Court in relation to this issue said—

> "The question whether a decision is harsh, unjust or unreasonable must be determined in the light of the facts as they appear at the relevant time. We accept that, if the relevant facts are not clear, it is the obligation of an employer bound by a provision such as clause 6(d)(vi) to establish those facts before dismissing an employee...
>
> But provided that the employer discharges the obligation to investigate the facts, a dismissal does not contravene the provision merely because it later appears that the true facts differed from those which appeared at the date of the decision to dismiss."

This decision was interpreted by Gray J in *Wheeler v Philip Morris Limited* (1989) 32 IR 323 to mean that it was not open to an employer to justify a dismissal retrospectively by reference to facts not known to the employer at the time of the dismissal, but discovered subsequently, or by reference to a correct analysis of facts which were known, but which were analysed incorrectly at the time of the dismissal.

This issue was further considered by von Doussa J in *Lane v Arrowcrest Group Pty Ltd* (1990) 43 IR 210. In *Lane*, von Doussa J considered earlier Federal Court decisions in *Gregory* and in *Wheeler* and observed at 237 as follows—

> "In my opinion, it is still open to an employer to justify a dismissal by reference to facts not known to the employer at the time of the dismissal, but discovered subsequently, so long as those facts concern circumstances in existence when the decision was made. Whether the decision can be so justified will depend on all the circumstances. A circumstance, likely to favour the decision to dismiss, would be that fraud or dishonesty of the employee had caused or contributed to the employer's state of ignorance. A circumstance likely to weigh against the decision would be that the employer had failed to make reasonable enquiries which would have brought existing facts to its knowledge before the dismissal occurred. I am unable to agree with Gray J that the reasoning in the Full Court in Gregory v Philip Morris does not permit this sort of approach".

von Doussa J gave the example of an embezzling accountant and further said at 237—

> "In the example given of the embezzling accountant, the circumstances as they existed at the date of dismissal were that embezzlement had occurred but by reason of the concealment and falsehood of the accountant that fact had not yet come to the knowledge of the employer. On a later review of the decision, after the embezzlement has come to light, the circumstances as they existed when the decision was made would include the embezzlement".

Subsequent authority has followed the approach adopted by von Doussa J in *Lane*. For example, in *Byrne and Frew v Australian Airlines Limited* (1992) 45 IR 178 Hill J, after agreeing with the observations of von Doussa J in *Lane* and disagreeing with the conclusion of Gray J in *Wheeler* on the question of the significance of events occurring after dismissal, said at 199—

> "von Doussa J in Lane v Arrowcrest Group Pty Limited (1990) 43 IR 210 at 236-237; 99 ALR 45 at 74-75 saw an absurdity in the example given by his Honour of an accountant dismissed for embezzlement where the circumstances, as they existed at the time of dismissal, were that embezzlement had occurred but by reason of the concealment and falsehood of the accountant that fact had not yet come to the knowledge of the employer."

Further, Hill J commented at 200 as follows—

> "With respect, I would agree with von Doussa J. In so saying however, I should not be thought to be assenting to a proposition that a dismissal, unfair when it was undertaken, could later be justified by an ex-post facto rationalisation."

It is of note that the approach of von Doussa J appears to have received support from the High Court in it's decision in *Byrne v Australian Airlines Limited* (1995) 61 IR 32 at 73.

The decision of the Federal Court in *Lane* has been followed in other decisions of state tribunals. For example, in *Hospital Employees' Federation of Australia v Western Hospital* (1991) AILR 249 Lawrence DP observed that it would be open for a tribunal to have regard to subsequent evidence in finding that a dismissal would have resulted even if the employee had been granted procedural fairness prior to the dismissal. (See also *Appeal by Department of Social Security* (1998) AILR 3-707; *Bi-Lo Pty Ltd v Hooper* (1992) AILR 283).

However, the Full Bench of the Industrial Relations Commission of South Australia in *Wormald Australia Pty Ltd v Harward & Venning* (1993) AILR 33 expressed a somewhat tentative but contrary view, without finally deciding the matter. The Full Bench observed as follows—

> "There is a weight of authority which establishes that at common law an employer is entitled to rely on evidence of misconduct during the employment, which comes to light after the dismissal, to determine whether the dismissal is lawful. See Boston Deep Sea Fishing and Ice Co v Ansell (1888) Ch. 339. Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 309 at 377-378. Moreover, a lawful dismissal for misconduct will go a long way towards repelling an allegation that a dismissal, based upon the employee's misconduct was harsh, unjust or unreasonable. R. v Industrial Court of SA, Ex-parte Mount Gunson Mines Pty Limited 30 SASR 504. But the concepts of whether a dismissal is lawful or whether it may be properly characterised as harsh, unjust or unreasonable are not identical. What use may therefore be legitimately made of information or facts ascertained by an employer after the dismissal has taken place raises complex issues. I tend to the view that after acquired knowledge can be properly taken into consideration of the question of what relief (if any) should be granted a dismissed employee, but that it may not be relevant to decide whether the dismissal falls within the statutory criteria. However, in the present case I do not think it necessary to resolve whether that approach adopted by the learned trial judge in relation to what use may be properly made of information ascertained after the dismissal, is correct, I prefer to leave that issue for a more appropriate occasion. For present purposes I am content to proceed on the basis that the approach adopted by the learned Deputy President is correct."

In a subsequent decision of the Industrial Relations Court of Australia in *Voula Savvidis v Privilege Clothing Pty Limited trading as Promises Clothing* (1995) AILR 3-043 Parkinson JR, in an unlawful termination case under the terms of the then Industrial Relations Act 1988 (Cth), considered the issue of after acquired knowledge in the following terms—

> "It was submitted by counsel for the applicants that allegations of facts relating to conduct or performance of the applicants discovered subsequent to the termination could not be relied upon by the respondent to establish that the reason for the termination was valid, nor that it was not harsh, unjust or unreasonable. The respondent contends that such factors are relevant for consideration by the court, and in this regard relies upon the decision of von Doussa J in Lane v Arrowcrest Group Pty Limited (1990) 43 IR 210.
>
> The apparent conflict which arises between such lines of authority as Wheeler v Philip Morris Limited (1989) 97 ALR 282, Lane v Arrowcrest and the Western Hospital Case (1991) 4 VIR 310 (the latter cases suggesting that such material is admissible), arose in the context of the application of the term "harsh, unjust or unreasonable" to the termination of employment.
>
> I do not take either of those latter decisions to extend to the proposition that subsequent allegations of facts unrelated to those which were said to be the reasons for the termination of employment can be relied upon to justify subsequently a termination which was without merit. It is apparent from the example given by von Doussa J in Lane

v Arrowcrest that the nature of the subsequent facts under consideration by his Honour were facts that went fundamentally to the specific allegations of misconduct alleged against the employee, and were facts which could not have been reasonably discovered by the employer prior to a dismissal had an adequate investigation been undertaken."

Further, the question of after acquired knowledge was adverted to but not finally determined by Sharkey P in a decision of this Commission in *Robe River Iron Associates v The Construction Mining and Energy Workers Union of Australia, Western Australia Branch* (1989) 69 WAIG 1027 at 1030.

In my opinion with respect, the approach of von Doussa J in *Lane* is persuasive and is to be preferred. I also adopt the view of Hill J in *Wheeler* set out above. From the authorities to which I have referred, I consider the following propositions can be distilled as to this issue, which I apply in dealing with this case—

1. There is no prohibition on an employer seeking to rely on after acquired knowledge to support its decision to dismiss an employee.
2. The extent to which an employer may rely on after acquired knowledge to support such a decision will be a question of fact in each case.
3. The matters relied upon by the employer must relate to facts in existence at the time the decision to dismiss was made.
4. Circumstances supporting such reliance will be cases where the employee has, by reason of his or her conduct, contributed to a state of affairs such that the employer could not have, by reasonable endeavour, discovered the matters in issue and sought to be relied on by the employer to, ex post facto, justify the dismissal.
5. Circumstances negativing such reliance will be cases in which the employer could have reasonably discovered the matters relied on but did not take any steps to do so.
6. There must be some nexus between the conduct complained of and discovered after the event and the actual reason for which the employer dismissed the employee.
7. That a dismissal, demonstrably harsh oppressive and unfair when it was effected, cannot be subsequently rendered fair by a process of ex post facto rationalisation.

In other words, I do not consider that there is able to be *carte blanche* reliance placed by an employer on conduct subsequently discovered by the employer, totally unrelated to the issue giving rise to the dismissal or not able to be discovered based upon reasonable enquiry prior to the dismissal.

I now turn to consider the various factual issues arising in the instant application, with the above principles in mind.

Facts and Issues

The Incident

The issue which was the focus of much of the evidence in this matter was the Incident.

The applicant testified that, and it was common ground, that the applicant's daughters had over some years cleaned the respondent's offices and were paid for doing so. It was also common ground that for a period of time prior to the Incident, the applicant's daughters had been using the respondent's vacuum cleaner for this purpose and, had taken the respondent's vacuum cleaner to the applicant's home because part of the equipment was damaged. There was a dispute between the applicant and the respondent as to how this came about and how long it took for the applicant to return the respondent's vacuum cleaner to the respondent's premises.

The applicant said that in about May 1998, her daughters brought the vacuum cleaner to her home as it had a broken hose. She said that she tried to repair the broken hose by using tape. However, this repair was not successful. In the interim, the applicant said that because she personally owned a vacuum cleaner of the same type as the respondent's, she told her daughters to use her hose for the vacuum cleaning required to be done on the respondent's premises. This was done and the applicant's hose appears to have been used for some time.

In or about July 1998, specifically the second week, the applicant testified that both the respondent's vacuum cleaner and the hose attached to it were on the respondent's premises. The applicant then proceeded on three weeks annual leave. Apparently, in the meantime, the applicant's daughters again took the respondent's vacuum cleaner to the applicant's home where it was kept. The applicant said that whilst she was on annual leave she had occasion to call into the respondent's offices and no one raised with her the absence of the vacuum cleaner. Her evidence was that relations between her and the directors of the respondent were friendly as usual.

After the applicant returned from annual leave she said that on or about 2 August 1998 Mrs Susan Tucker, one of the directors, approached her and asked her about the vacuum cleaner and said that it was not on the premises and it should be. It was the applicant's evidence that she understood that the vacuum cleaner and hose were on the respondent's premises but that she knew that one of her daughters had by mistake, taken the vacuum cleaner nozzle home to her house. She said that when she returned from annual leave, she forgot to bring the nozzle back to the respondent's premises.

On the day in question, that being 10 August 1998, the applicant said she was at the respondent's reception desk undertaking her duties. Mrs Tucker approached her and a discussion took place about the vacuum cleaner. The applicant's version of the events was that Mrs Tucker requested of her the whereabouts of the vacuum cleaner and this subsequently turned into a demand for its return. The applicant said that she was on the telephone at the time answering a call from a customer. As a part of this process, she said she had to go to the respondent's storeroom to obtain a product catalogue. Her evidence was that whilst she went down the respondent's passageway from the reception to the storeroom, Mrs Tucker followed her and repeatedly requested the request she made earlier, for the return of the vacuum cleaner. According to the applicant, Mrs Tucker was becoming aggressive in her manner towards the applicant and her demands that the vacuum cleaner be returned. The applicant said that this was difficult to understand, as she knew that the vacuum cleaner and hose were on the respondent's premises but not the nozzle. The applicant was emphatic that Mrs Tucker requested the return of the vacuum cleaner and not the nozzle and this was her interpretation of Mrs Tucker's request.

It was common ground that by this time, the applicant and Mrs Tucker had moved down the passageway to the rear of the ground floor of the respondent's office close to the respondent's storeroom. It was also common cause that at that time, Mr Tucker and another employee of the respondent, Mr Ahrens, were in that area and were returning from the storeroom and had been discussing other matters.

What occurred next was also in dispute. It was the applicant's evidence that the attitude of Mrs Tucker, demanding the return of the vacuum cleaner and following her up the passage towards the store room whilst she was demanding it, was making her feel uneasy and angry. She said in evidence that she told Mrs Tucker to the effect "your attitude is making me angry". The applicant denied in her evidence that it was she who followed Mrs Tucker down the passageway in an aggressive manner.

The applicant then said that at about the point where both she and Mrs Tucker reached the end of the passageway close to the storeroom, Mr Tucker intervened in the discussion she was having with Mrs Tucker. She said that Mr Tucker "burst in" to the conversation and was shouting and out of control. She said that Mr Tucker bellowed at her. He said words to her to the effect that "no lady we have had enough" and thereafter in a very loud and angry tone made a number of accusations to the applicant about her conduct such as that she had used the respondent's vacuum cleaner to clean the offices of Australian Electrical Services ("AES"), a company run by a Mr Coverley, a former employee of the respondent which was now a competitor, and that she had "bled the company dry" and other matters. The applicant testified that when she tried to respond to these allegations in an attempt to defend herself, Mr Tucker told her that if she were not quiet he would dismiss her. The applicant responded in words to the effect that if you do dismiss me "I will have you up for unfair dismissal". She then said that Mr Tucker then immediately dismissed her and she was required to leave the premises. The applicant said that she telephoned her daughter who came and picked her up some 30 minutes later.

It was the applicant's evidence that whilst Mr Tucker was shouting at her and making the accusations that he did, she could hardly get a word into the conversation to defend herself. She also said that Mr Tucker used profane language when speaking to her, which was for him, most unusual. The applicant was adamant that she was not aggressive during the course of this incident, but did admit that she raised her voice in an attempt to defend herself from the allegations and the manner of conduct of Mr Tucker.

Mr Tucker said that at the time of the Incident, he was in the passageway in the office with Mr Ahrens. He said that he heard Mrs Tucker and the applicant talking. Mrs Tucker asked the applicant for the vacuum cleaner. He said that he heard the applicant say to Mrs Tucker's that her attitude was making her angry. At that point, Mr Tucker said he intervened as he was concerned as to the applicant's conduct towards Mrs Tucker and said that he had enough of the applicant's conduct. He said that he spoke in a firm tone and may have raised his voice but denied shouting. Mr Tucker said that he was not happy with the fact that the applicant had not returned the respondent's vacuum cleaner. He admitted that he told the applicant that he knew that the respondent's vacuum cleaner was being used to clean the offices of AES. Mr Tucker testified that the applicant told him that he had had the opportunity earlier to get rid of her but did not. He said that as the applicant continued to shout during this incident, and pointed her finger at him and acted in a threatening manner, he acted on his earlier threat and dismissed her. There was a passage in the evidence in the cross-examination of Mr Tucker when dealing with the Incident which, in my opinion, is quite critical to the disposition of this matter. That passage is as follows at 601 of the transcript—

> "MS CRAWFORD: You did threaten to fire her though, didn't you?— No, I did not. I have never, ever threatened to fire her until such time as she pointed her finger at my face and said, "I'll have you for unfair dismissal". That is the only occasion that I then terminated her employment. At no other stage during that conversation had there been any threat to her employment.
>
> Her sacking wasn't planned, was it?—No, it wasn't planned.
>
> You hadn't sat down before the incident and considered her performance and decided to sack her?—No, I hadn't sat down and done that. *In fact, I - - even to the point prior to when Lorna Hoogland pointed her finger at my face and said, "I'll have you for unfair dismissal" her - - employment wasn't in question.*
>
> *Her dismissal occurred on the spur of the moment, didn't it?—It only occurred after she threatened me with unfair dismissal.*
>
> That was the moment at which her fate was sealed?—I think Mrs Hoogland was sealing her own fate during that conversation. If she had responded - -
>
> The critical point in your evidence is when she said she will have you for unfair dismissal?—And she pointed her finger at my face in a threatening manner with gritted teeth and the way she said it, yes, that is when I decided that I couldn't put up with her behaviour any longer." *(my emphasis)*

Mrs Tucker gave evidence in relation to the Incident. She said that she had had various discussions with the applicant over about three months prior to the Incident concerning the return of the respondent vacuum cleaner to the respondent's premises. Her evidence was that she had repeatedly asked for its return. On the day of the dismissal, she said that she had a discussion with the applicant for the return of the vacuum cleaner with its attachments. It is of some note that Mrs Tucker agreed that during the course of the initial discussion with the applicant, the applicant was answering telephone calls from customers. She said that at the time that she first raised the matter, the applicant was on the telephone. This is, I pause to observe, at odds with the evidence of Mr Tucker in cross-examination, who was emphatic that during the time that all of this occurred, the respondent's telephone was not ringing.

Mrs Tucker further testified that both she and the applicant moved down the passage towards the respondent's storeroom. She said that the applicant was following her. The applicant, according to Mrs Tucker, raised her voice at her. Mrs Tucker conceded that she was unhappy about the vacuum cleaner issue.

Mrs Tucker described the circumstances of Mr Tucker intervening in the discussion between the applicant and herself. She said that both Mr Tucker and Mr Ahrens were present. When Mr Tucker intervened in the discussion, she testified that both he and the applicant had raised voices and both were angry. However, she denied that Mr Tucker was shouting when pressed as to this issue in cross-examination. Mrs Tucker further said that a point was reached in the exchange between the applicant and Mr Tucker, whereby the applicant was told by Mr Tucker that if she said anything further "she can leave the company". Thereafter, the applicant said that she would "take the respondent for unfair dismissal", following which Mr Tucker dismissed the applicant.

In cross-examination, Mrs Tucker said that at the time of the Incident, there was litigation on foot between the respondent and Mr Coverley, the principal of AES. As I have observed earlier in these reasons, Mr Coverley was formerly an employee of the respondent. The significance of this issue, is a matter to which I will return later in these reasons. In cross-examination, Mrs Tucker conceded that whilst the respondent had some concerns about the applicant's performance and conduct prior to the date of the Incident, she agreed that it was not appropriate to raise these matters as Mr Tucker did in the corridor of the respondent's premises. Additionally, Mrs Tucker confirmed in evidence that the vacuum cleaner itself was on the premises of the respondent on the morning of the Incident.

Mr Ahrens gave evidence about the Incident. He was an employee of the respondent at the time. He testified that he saw both the applicant and Mrs Tucker having a discussion about what he understood to be the respondent's vacuum cleaner. He said that at the time, he was with Mr Tucker at the end of the respondent's office passage by the amenities area and they moved into the storeroom. They came out of the storeroom and he said that it was at this point that Mr Tucker "took control" of the discussion between the applicant and Mrs Tucker. Mr Ahrens said Mr Tucker accused the applicant of using the respondent's vacuum cleaner to clean the offices of AES and made other allegations against the applicant to the effect that the applicant had taken advantage of the respondent and had, for example, built her own house in the respondent's working time.

It was Mr Ahrens' evidence that Mr Tucker was very annoyed and flustered. He said that he was shouting and that he occasionally swore at the applicant using profane language, when raising these allegations against her. As to the applicant's response, he testified that he could see that the applicant was getting agitated in attempting to respond to Mrs Tucker's questions. After Mr Tucker intervened, Mr Ahrens said that the applicant tried to respond to his allegations but Mr Tucker shouted over her. It was Mr Ahrens' evidence that Mr Tucker "let it rip" against the applicant and that he found it quite shocking.

As to the final part of the Incident, Mr Ahrens said that Mr Tucker said to the applicant in words to the effect that "one more word from you and that's it". The applicant then tried to further speak in her defence and she was then dismissed. Mr Ahrens testified that during the course of the Incident, he did not see the applicant point her finger at Mr Tucker, as he said in his evidence.

Mr Barker was also called as a witness on behalf of the applicant in relation to the Incident. He was an electronics technician and had been employed by the respondent for about three years. He was in the respondent's electronics room, which was located upstairs from the area in which the Incident took place. The door to the electronics room was closed and he was in the room with a customer of the respondent. He said that he heard raised voices coming from downstairs and in the main, he heard Mr Tucker's voice. He also heard the applicant's voice. According to Mr Barker, he heard Mr Tucker use profane language during the Incident at least once and he said that Mr

Tucker was very loud. This was so much the case that he said that he was endeavouring to get the customer's attention away from the Incident as it was occurring. According to Mr Barker, the noise was certainly loud enough for it to be heard through the closed door of the electronics room located upstairs in the respondent's premises.

The applicant argued that it was the Incident that was the reason for the applicant's dismissal. Furthermore, counsel submitted that the Commission should regard the dismissal of the applicant as a summary dismissal given the evidence of the applicant, Mr Ahrens and Mr Barker and additionally, the terms of exhibit A16. Exhibit A16 was the separation certificate provided to the applicant which states that the applicant's employment was terminated due to misconduct. It was the applicant's submission that it was Mr Tucker who intervened in the discussions between the applicant and Mrs Tucker and escalated the incident by shouting at the applicant and accusing her of various acts of misconduct towards the respondent.

Counsel for the applicant submitted that the respondent's version of the events, through the evidence of Mr and Mrs Tucker, that the Incident was only a "discussion" with raised voices, should not be accepted. Having regard to the evidence of independent witnesses to the Incident, that being the evidence of Mr Ahrens and Mr Barker, it was submitted that the Commission should find that Mr Tucker was the protagonist in relation to the Incident and that all the applicant sought to do was to defend herself by answering the allegations made against her by Mr Tucker. The applicant submitted that the conduct of the applicant, whilst it may have been regarded as somewhat unwise in that the threat of an unfair dismissal action was made, fell far short of conduct warranting dismissal, let alone summary dismissal. For this reason alone, counsel submitted that the Commission should find the applicant's dismissal harsh, oppressive and unfair.

As a general submission, going to all of the respondent's allegations and the evidence led in support of them, counsel for the applicant submitted that in the event of a conflict in the evidence between the applicant and Mr and Mrs Tucker, the Commission should prefer the version of events as outlined by the applicant.

I should also mention that in support of the applicant's case on this issue and others, evidence was sought to be adduced by way of statutory declarations from the applicant's two daughters Ms Serai Hoogland and Ms Shey Hoogland. Those statutory declarations were exhibits A12 and A13 respectively. Counsel for the respondent opposed their tender. Whilst the statutory declarations went to issues other than the Incident, I pause to observe that despite the earlier opportunity to do so, neither of the deponents to the statutory declarations were available for cross-examination. In my view, the respondent could not properly test the evidence contained in the statutory declarations and accordingly, I have placed no weight on it.

The respondent submitted that in relation to the vacuum cleaner, the applicant had, notwithstanding previous directions from the respondent, deliberately and wilfully removed company property from the respondent's premises and failed to comply with reasonable directions for its return. Furthermore, it was submitted that the conclusion was reasonably open on the evidence, that the respondent's vacuum cleaner had been used by the applicant's daughters to clean the offices of a competitor of the respondent, that being AES, without the respondent's knowledge or consent. As to the conduct on the day in question, it was submitted by the respondent that the attitude and conduct of the applicant in her exchange with Mrs Tucker was such as to constitute a repudiation of the applicant's duties as an employee, in that the applicant acted in an aggressive and overbearing manner towards a director of the company. Counsel submitted that this conduct alone was sufficient to justify summary dismissal for misconduct. The respondent also submitted, that on the evidence, the applicant should have well known that Mrs Tucker was demanding the return of the complete vacuum cleaner, in circumstances when the applicant knew that the vacuum cleaner nozzle was at her residence. Therefore, it was submitted that the applicant continued to fail to comply with the respondent's direction. Whilst the respondent conceded that it was never Mr Tucker's intention to dismiss the applicant prior to the Incident, it was submitted that the applicant's attitude and conduct at the time demonstrated that she had held the employer in contempt by reason of her conduct. In these circumstances, it was submitted that a warning of impending dismissal would have served no purpose.

I now turn to my findings in relation to the Incident. Having seen and heard the witnesses give their evidence in this case over the course of many days and having regard to the responses of various witnesses to the very large range of issues canvassed in the evidence, in the event of a conflict between the evidence of the applicant and that of Mr and Mrs Tucker, I prefer the evidence of the applicant. In particular, I observe that at various stages of the proceedings, when matters adverse to the applicant were raised with her in evidence, she was in my view honest in her responses even though a number of issues raised with her involved admissions against interest. For example, the applicant conceded that she did, in 1995, make a false statement in an insurance claim arising from an accident, which her partner had when driving the respondent's motor vehicle. Additionally, the applicant also gave evidence that may have been regarded as adverse to her in relation to her manner of remuneration concerning declarations to the Department of Social Security. Furthermore, I am satisfied that the applicant endeavoured to answer questions put to her both in evidence in chief and in cross-examination as best she could without exaggeration or embellishment.

On the other hand, I found aspects of the denials by Mr and Mrs Tucker of various matters put to them in evidence as to the applicant's conduct and their knowledge of her conduct more specifically, as somewhat unconvincing. Whilst I deal with these issues in more detail later in these reasons when considering the other various allegations against the applicant, on many occasions both Mr and Mrs Tucker were somewhat evasive in their answers to questions, particularly in cross-examination and, on several occasions, the Commission had to direct them to the specific questions put to them in order to elicit an answer. More particularly in relation to the Incident, the Tucker's version of the events is in stark contrast to the version of the events as described by the applicant and as supported, at least to a substantial degree, by independent witnesses, they being Mr Ahrens and Mr Barker. I accept the evidence of Mr Ahrens and Mr Barker as independent observers of the Incident.

I am satisfied on the evidence that there was a dispute between the applicant and the respondent as to the location of the respondent's vacuum cleaner. I accept that the applicant's daughters had removed the respondent's vacuum cleaner from the respondent's premises on occasions when using it to clean the respondent's offices. I find that the first occasion on which the respondent raised the absence of the vacuum cleaner with the applicant, was in or about July 1998. Thereafter, the applicant endeavoured to ensure that it was returned to the respondent's premises. I am satisfied that in so far as the applicant was aware, from after in or about the second week of July 1998, before proceeding on annual leave, the vacuum cleaner had been returned to the respondent's premises. I also accept on the evidence, that despite requests by the applicant to her daughters to return the vacuum cleaner to the respondent's premises, those requests were not complied with. In the final analysis, in the time leading up to the Incident, the nozzle to the respondent's vacuum cleaner was not on the respondent's premises as it should have been.

As to the Incident, I am satisfied that at the time that the matter was raised by Mrs Tucker with the applicant, the applicant was engaged in duties attending to customers on the telephone in the respondent's office. I accept that there was a discussion between the applicant and Mrs Tucker whereby Mrs Tucker raised the issue of the respondent's vacuum cleaner. I also accept the applicant's evidence that there may have been some confusion as to what Mrs Tucker was referring to, given the applicant's understanding that the vacuum cleaner was on the premises. The applicant and Mrs Tucker then proceeded down the respondent's passage way towards the respondent's storeroom and Mrs Tucker continued to raise the issue with the applicant. I find that it was the vacuum cleaner that was being requested by Mrs Tucker and not specifically the nozzle as an attachment to it. I find that the applicant did indicate to Mrs Tucker that her persistent questioning in relation to this issue led her to indicate in words to the effect that Mrs Tucker's attitude towards this issue was making her angry. I do not accept the respondent's evidence that it was the applicant who was acting at this stage, in an overbearing or aggressive manner. I find however, that the applicant's daughters had been using the respondent's vacuum cleaner to clean the offices of AES, without the respondent's knowledge, on occasions indeterminate on the evidence.

Furthermore, I find that at no stage during the course of the exchange between the applicant and Mrs Tucker, did the applicant refuse to comply with the respondent's request. Also, at no stage prior to the Incident, did the respondent ever tell the applicant that the issue in relation to the vacuum cleaner was such as to place the applicant's employment in jeopardy. Indeed, based on the evidence of Mr Tucker that I have extracted above, it was clear that the respondent never intended to dismiss the applicant prior to the specific exchange that took place between the applicant and Mr Tucker. In my opinion, this places all of the evidence in relation to matters other than the specific conduct of the applicant when responding to Mr Tucker, in context. I will return to the significance of this when dealing with the other issues later in these reasons.

In particular, in my opinion, it was no longer open for the respondent to rely upon the applicant's alleged failure to return the vacuum cleaner to the respondent's premises, and the alleged misconduct occasioned thereby, when it was clear that the respondent knew about this issue at all material times leading up to the Incident. Furthermore, the person responsible for the decision to dismiss the applicant, namely Mr Tucker, made it clear in his evidence that despite his knowledge as to the vacuum cleaner issue and indeed the other issues which he raised as allegations against the applicant during the Incident, none of those matters were in his mind, and therefore in the mind of the respondent, to warrant the termination of the applicant's employment.

On the evidence, I am satisfied and I find that it was indeed Mr Tucker who intervened in the discussion between the applicant and Mrs Tucker, and escalated the situation by raising a number of allegations against the applicant, in a very agitated manner including shouting and using profane language, in the passageway of the respondent's office premises. I also find that Mr Tucker was overbearing as against the applicant during the course of this exchange and that the applicant did attempt to answer the allegations but was not permitted to do so by Mr Tucker. Whilst I am satisfied that the applicant did raise her voice during the course of this exchange, I consider that that issue must be taken in the context of the events as they unfolded, in particular the intervention by Mr Tucker in the discussion and his escalation of the whole issue. I am not satisfied on the evidence, that the applicant was aggressive and threatening as the respondent said.

On the evidence I also find that when the applicant did continue to attempt to respond to Mr Tucker's various allegations against the applicant, including saying that if she were dismissed she would commence a claim for unfair dismissal, this led to the summary dismissal of the applicant. I also find that what the applicant asserted she would do in her response to Mr Tucker, was no more than an assertion of the pursuit, by lawful means, of a remedy in the event that the employer exercised its legal right to terminate the employment relationship. I deal with this matter later in these reasons, when dealing with my conclusions as to the applicant's claim.

Other Allegations

In support of its position, as outlined above in the particulars of the respondent's amended notice of answer and counter proposal, the respondent relied upon many other allegations as to the conduct of the applicant over the course of her employment. As correctly identified in my view, in the applicant's written submissions, a number of these allegations were made by the respondent against the applicant for the first time during the course of the hearing. In particular, those allegations included—

(1) The applicant off- setting income to her daughters without any authority to do so;

(2) Making a false declaration on an insurance claim in relation to an accident involving the respondent's motor vehicle in the care of the applicant (to which reference has already been made above);

(3) That the applicant was in some way connected with the disappearance of cleaning products and photocopying paper from the respondent's office premises; and

(4) That the applicant permitted access too, or alternatively, failed to report to the respondent, Mr Coverley's alleged computer access to confidential information regarding the respondent's operations.

It was the submission of counsel for the applicant, that these allegations raised by the respondent for the first time during the course of the hearing in the Commission, ought not be able to be relied upon by the respondent to, ex-post facto, justify the dismissal after the event.

As noted above, it was submitted that matters such as these, involving allegations of fact going to work performance or conduct of the applicant, should only be taken into account by the Commission, if it was demonstrated that the matters the subject of this evidence were not reasonably available to the respondent prior to the termination of the applicant's employment, by proper enquiry. Further, counsel for the applicant submitted that if these matters were to be taken into account by the Commission, then they should only be considered in terms of the appropriate remedy in the event that the applicant's claim was successful.

In my opinion, in light of the authorities to which I have referred to above, and the propositions which in my opinion are applicable to circumstances coming to the knowledge of an employer after termination of employment, the submissions by counsel for the applicant in this regard are correct.

It was clear on the evidence adduced by the respondent through Mr and Mrs Tucker, and others, including the applicant, all of which I have considered carefully, that these matters were all either known of by the respondent or alternatively, in my view, were discoverable by the respondent by reasonable enquiry. I do not propose to traverse all of the evidence in detail in relation to these particular allegations. In my opinion, having regard to the stated reason for dismissal, as made very clear by Mr Tucker in his evidence that up to the point the applicant said she would pursue an unfair dismissal action, the respondent simply was not considering dismissing the applicant. This must be taken as being the mind of the respondent, with the full knowledge and indeed the acquiescence, of the alleged conduct the subject of these allegations. In my opinion, these allegations are not able to be relied upon by the respondent.

There were other allegations made against the applicant in relation to various matters of conduct that occurred before the dismissal. Those matters were set out in detail by counsel for the respondent in his written submissions. In summary, those additional allegations as to pre-termination conduct included—

(1) A telephone conversation between the applicant and a Mr Pydde, from a company by the name of Insul 8, in which it was alleged that the applicant was offered a job by Mr Pydde with the applicant delaying telling the respondent about this discussion for some weeks;

(2) That the applicant failed to furnish to the respondent a written report and provide follow-up training following a trip that she took to Germany with Mr Ahrens for product training with Murrplastics;

(3) That the applicant and Mr Ahrens persistently engaged in conversation and banter in the workplace that had sexual connotations and that the applicant was warned to stop doing so;

(4) That the applicant failed to complete a quality assurance course and program which program the respondent said was delegated to the applicant to complete;

(5) That the applicant took an excessive amount of time on occasions or alternatively, failed to send out product catalogues to customers on time; and

(6) That the applicant, over the course of her employment, engaged in excessive personal business during the course of working hours, thereby interfering with the performance of her duties.

In my opinion, these additional allegations raised by the respondent, which were the subject of quite extensive evidence, suffer the same fate as the allegations to which I have referred above. On any fair view of the matter, all of these matters were clearly, on the evidence, when taken as a whole, either known to the respondent or at the very least, ascertainable by the respondent by reasonable enquiry. Furthermore and in any event, as with the earlier allegations referred to above, in the context of Mr Tucker's evidence as to his state of mind on the day of the Incident and the reason he gave for the applicant's dismissal, these matters formed no part of his decision-making process. From his evidence, including what he said to the applicant during the Incident, it was clear in my view, that Mr Tucker was well aware of these matters at the time of the applicant's dismissal. It is in my opinion, critically important to observe that but for the statement by the applicant during the Incident, the respondent had no intention of dismissing the applicant. On this basis alone, in my view, the respondent cannot now rely upon all of these issues when, although some of them were the subject of some counselling at some stage during the course of the applicant's lengthy employment, those matters were not and moreover, were never intended to be taken further by the respondent. Certainly on any fair view of the evidence, there was certainly no intention to visit upon the applicant the employer's ultimate sanction of dismissal, by reason of these issues, let alone effectively summary dismissal for misconduct.

Accordingly, in my opinion, these matters cannot be relied upon by the respondent to justify, ex-post facto, the dismissal after the event.

Matters Discovered after the Applicant's Dismissal

It was submitted by counsel for the applicant, that when regard is had to all of the evidence, taken at its highest the following matters could be seen as truly coming to light after the dismissal of the applicant, they being—

(1) The unauthorised use by the applicant of the respondent's motor vehicles, in particular its Mazda one-tonne ute;

(2) That the applicant misled an employee of the respondent in relation to permission to use the respondent's motor vehicles;

(3) That the applicant falsely obtained a BP fuel card and used that without authority for personal use, in particular, to charge petrol to the respondent's account used by the applicant's daughters;

(4) That the applicant represented herself as a director of the respondent company in dealings with others; and

(5) The applicant failed to properly record chargeable working hours of technicians employed by the respondent.

I agree that in the context of all the evidence that I have considered, these matters could properly be regarded as coming to light after the dismissal. I turn now to consider the evidence in relation to these matters.

Unauthorised Use of Motor Vehicles—One-Tonne Ute and others

As to this matter, the respondent submitted that the applicant repeatedly borrowed the respondent's one-tonne Mazda utility without obtaining the appropriate permission from Mr Tucker, when the applicant knew that this permission was required. It was further submitted that the applicant, in order to obtain access to this vehicle, misrepresented to the respondent's storeman, Mr Stokes, that she had obtained the respondent's permission. In connection with this same issue, it was also alleged that the applicant was driving this vehicle on or about 1 June 1998 when a speeding infringement was issued against the vehicle. It was said that it was open to infer from the evidence, that it was the applicant who was driving the vehicle at this time. It was also said by the respondent that the applicant had, contrary to the direction of the respondent, used and permitted the use of it by others, of the respondent's Mazda 121 vehicle, which was allocated to her.

As to the allegation in relation to the utility vehicle, the applicant testified that she knew that the Mazda one-tonne utility vehicle remained in the control of Mr Stokes and her evidence was to the effect that when she wanted to borrow the vehicle, she requested permission from either Mr or Mrs Tucker. When she did so request to use the vehicle, it was the applicant's evidence that this permission was not refused. She further said in evidence, that when this vehicle was used, she put some petrol into the vehicle to cover its use. When pressed in cross-examination on this issue, the applicant's evidence was that she borrowed this vehicle approximately three or four times per year.

In relation to the speeding infringement, it was the applicant's evidence that whilst she was aware that a speeding infringement notice had been received by the respondent in or about July 1998 whilst the vehicle was in use over the previous Foundation Day long weekend (which document was tendered as exhibit R3) the applicant said she did not have the vehicle on the weekend concerned. Furthermore, she testified that at the time of the receipt of the notice, she went to view the photo which had been taken by the speed camera and said that the photo was not clear enough to determine who was either the driver or passenger in the vehicle at the time. I pause to observe that this evidence was not contested.

Mr Ahrens also gave evidence about this matter. He testified that the respondent also raised the issue of the speeding ticket (exhibit R3) with him and he also went to view the photograph, to try and ascertain who was driving the vehicle. His evidence was also that it was not clear but it was not in his view, at the time that he had the vehicle. Mr Ahrens also gave evidence that it was the usual procedure that if this vehicle was sought to be used by an employee, permission of Mr Tucker was required. It was Mr Ahrens' evidence that he was in the utility with the applicant on the weekend prior to the applicant's dismissal. This was consistent with the evidence of the applicant that the applicant borrowed the one-tonne utility on this weekend, and Mr Ahrens needed some goods to be collected from a hardware shop, so the applicant assisted him in this regard.

Mr Stokes, the respondent's storeman, said that in his view, the applicant borrowed the respondent's utility vehicle more than three or four times per year as said by the applicant. When the applicant did borrow the vehicle, Mr Stokes said that it was generally returned in an acceptable condition. However, Mr Stokes did say that on one occasion that he could recall, the vehicle was returned in an unclean state and Mr Tucker saw this. As to the speeding infringement, Mr Stokes gave evidence that on the weekend in question, he did not have the utility vehicle. Generally, he said that it was not his practice to use the vehicle for his private purposes. Mr Stokes testified that he believed that the applicant did borrow the utility vehicle approximately six weeks prior to her dismissal but in cross-examination, he could not be sure that the applicant borrowed the utility vehicle on the long weekend in question.

At its best in my opinion, the evidence in relation to who was in charge of the one-tonne utility vehicle when the speeding ticket was issued is equivocal. It has not been established on balance, that it was the applicant who was either driving the vehicle nor was indeed a passenger in the vehicle. I accept however, that the applicant may have borrowed the utility vehicle on more occasions than three to four times per year. However, this matter must be seen in the overall context of the applicant's employment, which is a matter to which I return further below in these reasons. Furthermore, whilst I accept that on the odd occasion the applicant may have borrowed the vehicle without permission from Mr Tucker, I have doubts as to the respondent's evidence as to the extent to which it said that it had knowledge of the use of these vehicles. In particular, I refer to the fact that at least Mr Stokes, the respondent's foreman, was aware that the applicant was using the utility vehicle on occasions.

As to the Mazda 121 vehicle, the applicant's evidence was that this vehicle was purchased by the respondent in or about late 1993 and provided to her in early 1994. She said that she understood that it was purchased primarily for her use, which included unrestricted private use. The applicant said that business use of this vehicle was minimal, and comprised of a few trips to the post office in the working week and some banking. After Mrs Tucker resumed in the business full time, in or about 1996, the applicant said that this business use almost stopped completely, as Mrs Tucker took over these duties. The applicant said that from the time she first received the vehicle from the respondent, up until her dismissal in August 1998, the vehicle had only been used on a minimal basis by other staff members.

The applicant admitted that prior to Mrs Tucker resuming in the respondent's business full time, there had been a few occasions on which she had let her daughters use the Mazda 121 vehicle. Also, she said that her partner had used it on one occasion, in which the accident occurred, to which I have referred above. It was the applicant's evidence that up until this time, she had received no specific direction from the respondent as to the use of the motor vehicle. On one occasion when the applicant mentioned to Mrs Tucker that her daughter had used the vehicle, she was told by Mrs Tucker that permission was necessary from the respondent, because of insurance requirements.

The applicant gave evidence that there were a few occasions, after this discussion with Mrs Tucker, when her daughters again used the vehicle. The applicant said that she recalled clearly one occasion when her daughter was given permission by Mrs Tucker and on the other occasions, her daughter went into the respondent's office to collect the keys from the applicant, to use the vehicle. The applicant said that her office was next door to Mr Tuckers', and whilst she could not specifically recall whether she or her daughter sought permission on these occasions, she could see no reason why it would have not been sought. The applicant said she had no intention or no reason to deceive or mislead the respondent about these matters.

I also note that when the applicant was presented with exhibit A1 (the alleged 12 month contract which I deal with below) she said that when attention was drawn to the clause relating to the Mazda 121 motor vehicle restricting its use to business use only during business hours, Mrs Tucker said to her to not worry about it as it was for taxation purposes.

Mr Ahrens also gave evidence about this matter. He said he was also provided with a motor vehicle by the respondent. He said this was for both business and personal use. Mr Ahrens' evidence was that whilst personal use was inconsistent with what was written in his employment contact, when he questioned this with both Mr & Mrs Tucker, he was told that this was for insurance or taxation purposes and he could use the vehicle for personal use. He said that this was the situation throughout his employment with the respondent.

Mrs Tucker said that the responsibility for these matters was with her husband Mr Tucker. She was aware for insurance purposes, there needed to be nominated drivers for vehicles, and in the case of the Mazda 121, they were the applicant and Mr Tucker. Mrs Tucker gave evidence of a couple of occasions when the applicant's daughters used the Mazda 121 without her permission. She could not recall other occasions.

Mr Tucker said that the issue of the applicant's motor vehicle arose when her remuneration was renegotiated in mid 1996. This arose after the applicant had obtained an offer of other employment (which is dealt with below). He said that on the basis that the offer of employment that the applicant received did not include a motor vehicle, he saw no reason initially to retain the vehicle. After discussion with the applicant, Mr Tucker said that it was agreed that the vehicle would only be used by the applicant to travel to and from work and for business purposes, with the vehicle to be kept at the applicant's home out of hours. When the terms of exhibit A1 were put to him, he conceded that the reference to the "motor vehicle will be available for business use only during office hours" could on its face, mean there was no restriction to out of hours use of the vehicle. In relation to Mr Ahrens, Mr Tucker flatly denied that Mr Ahrens raised with him his concerns about the restriction on the use of the motor vehicle in his employment contract, and that he said that the clauses were for taxation purposes only. He said that if Mr Ahrens was using the vehicle for private purposes, it was without his knowledge and consent.

As to this issue, Mr Coverley also gave evidence. He said that Mr Tucker presented to him written conditions of employment, one of which referred to a motor vehicle for business use only. He said that this concerned him as he assumed that he would be able to drive the vehicle to and from work, which would technically be in breach of that condition. Mr Coverely testified that when he discussed this matter with Mr Tucker, he was told by Mr Tucker that this provision in the proposed agreement was for taxation purposes only. Mr Coverley declined to accept the conditions of employment set out in the document and did not continue with the company.

In relation to this issue, I find that the applicant was supplied with a motor vehicle, namely a Mazda 121, in or about January 1994 for both business and personal use. Whilst the respondent suggested in evidence that the vehicle was to be used by the applicant out of business hours for shopping only, I have some difficulty in accepting that evidence. That is clearly personal use. I prefer the applicant's evidence that there were no real restrictions placed on the use of the vehicle out of business hours.

As a result of the renegotiation of the applicant's remuneration package in mid 1996, I do not accept the respondent's evidence that this situation materially changed. I accept the applicant's evidence that she continued to use the Mazda 121 vehicle out of business hours as she had done previously. I also note the evidence of Mr Ahrens in this regard, when reference was made to the terms of his employment agreement and the fact that he continued to use his vehicle out of business hours on an unrestricted basis. I accept that evidence. I also refer to and accept the evidence of Mr Coverley that he raised the issue of motor vehicle use when discussing his proposed written terms of engagement and formed the impression from Mr Tucker that the written restrictions were to reflect taxation issues.

Whilst neither counsel for the applicant nor the respondent referred to it, the terms of exhibit A17, they being the BP Booragoon account summaries, disclose that on a monthly basis over the relevant periods, the applicant was expending anywhere up to approximately $90 per month for fuel consumption for her vehicle. These are records of the respondent company. In my opinion, it defies belief that if the situation was as Mr Tucker maintained, that there would not have, at the least, been questions asked as to the applicant's consumption of fuel over this period, it being after the alleged termination of her entitlement to use the vehicle for other than travelling to and from work. In that regard, I note that the applicant resided in Leeming and the respondent's business was located in Booragoon.

As to the unauthorised use by others of the applicant's vehicle, I accept, as admitted by the applicant, that there were a few occasions when the applicant's daughters used the applicant's vehicle without the permission of the respondent. However, I accept that this occurred prior to the applicant being specifically instructed that for insurance purposes, this could only occur with the express permission of the respondent. On all the evidence I am not satisfied that this did not occur on the few occasions when the applicant's vehicle was used by her daughters.

Misleading Employee as to Use of Motor Vehicle

This matter is linked to the matter dealt with immediately above. In evidence, the applicant testified that she did not mislead Mr Stokes as to permission to use the utility vehicle. It was Mr Stokes' evidence that the applicant had told him that when seeking to use the utility vehicle, she had obtained Mr Tucker's permission to do so. As I have noted above, I am however prepared to accept that on the evidence, the applicant may have used the respondent's utility vehicle on occasions, without expressly obtaining Mr Tucker's permission. I do not consider this issue to be of such gravity however, to warrant dismissal.

BP Card

The applicant testified that she and her daughters were supplied with BP fuel cards in order that they may purchase petrol on the respondent's account. It was common ground that the account was held at the BP petrol station in Booragoon. The applicant said that in or about 1994, she reached agreement with Mr Tucker for one of her daughters to receive approximately $20-$25 per week of petrol. This was to be regarded as a part of the applicant's remuneration package.

Thereafter, in approximately 1996, at the time that there was a renegotiation of the applicant's salary, following the applicant indicating to the respondent that she intended to take up other employment (a matter which I deal with below) the arrangement for the purchase by the applicant's daughters of petrol on the respondent's account was renegotiated. The applicant testified that it was agreed with Mr Tucker that this fuel purchase would thereafter only occur each two to three weeks and not weekly as previously. This was said by the applicant to reflect the amendment to her remuneration package that was renegotiated at this time. In recognition of this, the applicant said that she then let her other daughter access this arrangement, in order that the benefit could be fairly spread between both daughters. She said that her daughters were given a BP card and were to sign for the petrol using the applicant's name. It was the evidence of the applicant, that this was done at the suggestion of the applicant in order that to use the applicant's words "the respondent would not get into any trouble". The applicant said that Mr Tucker willingly agreed to this arrangement.

In terms of reconciling petrol purchases, receipts issue by the BP Booragoon service station were handed in to the respondent. The applicant said that Mrs Tucker, who by this time was responsible for the accounts of the respondent's business, was well aware of this. Tendered in evidence as a bundle, were BP Booragoon account statements in the period June 1997 to July 1998 with attached receipts. Those documents were exhibit A17 in the proceedings. I pause to observe that on the BP Booragoon statements, are hand written notations which on the evidence, were notes made by an employee of the respondent, allocating money amounts as against persons who used the respondent's vehicles. Notably, both of the applicant's daughters appear on the statements, as using various dollar amounts of fuel on a regular basis.

A photocopy of the BP fuel cards were tendered as exhibit A3 and additionally, exhibit A4 was an application credit form to the BP Booragoon service station, signed by the applicant and Mr Tucker. It was the applicant's evidence, that Mrs Tucker arranged for the re-issue of the BP fuel cards.

The applicant also called a Ms Cook to give evidence in relation to this issue. Ms Cook was an employee at the BP Booragoon service station from 1991 to in or about September 1998. She confirmed that the respondent opened an account at the service station and confirmed the terms of exhibit A4. Ms Cook also confirmed in her evidence, that the applicant was an authorised signatory on the account.

In terms of her dealings with the respondent, Ms Cook said that she dealt primarily with either Mr or Mrs Tucker. Her evidence also was that the use of the petrol account was not linked to the registration number of any particular motor vehicle. Importantly, Ms Cook testified that she was aware that the applicant's daughters did get petrol from the service station and put the petrol on the respondent's fuel account. According to Ms Cook, she recalls that this occurred up to in or about July 1998. She said that she recalled that Mr Tucker had told her that he had allowed one of the applicant's daughters to use the petrol account. In cross-examination, Ms Cook said that it was also possible that the applicant's daughters accessed the fuel account in 1996 or even before this. She was somewhat puzzled by the terms of exhibit A3, in that she thought that if there was more than one BP card issued, then there should be two separate numbers, rather than two fuel cards with the same number. However, the witness was not able to take this matter any further.

Mrs Tucker, in cross-examination, said that it was the applicant who told her that her daughters could have access to the fuel account in accordance with the arrangement that the applicant said she had with Mr Tucker. Mrs Tucker conceded that the daughters' names appeared on the BP reconciliation statements.

Mr Tucker said that he and the applicant had an arrangement prior to 1996, whereby an allowance of approximately $20 per week was given to the applicant for fuel usage. He said that this was because the applicant had requested this form of arrangement, in lieu of a salary increase, because any salary increase at that time may have affected maintenance payments from the applicant's former husband. Mr Tucker testified that on the renegotiation of the applicant's remuneration in 1996, this arrangement was to cease. I pause to observe that Mr Tucker said that the petrol was for use in the applicant's vehicle for her use. He said in evidence-in-chief that he understood that later, the applicant "transferred" this to her daughter. Mr Tucker did not say that it was an arrangement with him, that the applicant's daughter had access to the petrol account. I note however, that this is inconsistent with the evidence given by Ms Cook and also is inconsistent with the terms of exhibit A17, they being the BP reconciliation statements. Mr Tucker also denied that he ever discussed with Ms Cook at the BP Booragoon service station, the use by the applicant's daughters of the respondent's petrol account. This is also in conflict with Ms Cook's evidence on this point.

For all of the reasons already identified, I prefer the applicant's evidence to the evidence of Mr Tucker in relation to this issue. Additionally, Mr Tucker's evidence is inconsistent with the evidence of Ms Cook, who was called by the applicant as an independent witness going to this issue. I have absolutely no reason to doubt Ms Cook's evidence. Furthermore, Mr Tucker's evidence is inconsistent with the plain terms of exhibit A17, they being the BP reconciliation statements. I find that there was, on the evidence, an arrangement between the applicant and the respondent both prior to and after 1996, that at least one of the applicant's daughters have access to the respondent's fuel account for petrol purchases. As to Mrs Tuckers' evidence that she did not know anything about this, and only relied upon what she was told by the applicant, I find that very difficult to accept. It was not in controversy that at least from the time that Mrs Tucker worked full time in the respondent's business from 1996, she had responsibility for the respondent's accounts. As a director of the respondent, I simply cannot accept that the issue of the use by the applicant's daughters of the respondent's fuel account, when the respondent's own records disclosed it, was never a matter of acknowledgment between Mr & Mrs Tucker.

The independent evidence of Ms Cook, taken with the terms of exhibit A17, confirm that there was a course of dealing on the BP account by both the applicant and her daughters almost up until the time that the applicant was dismissed. I do not accept Mr Tucker's evidence that in 1996 this arrangement was to cease. In any event, there was never any suggestion on the evidence, that the applicant endeavoured in anyway to conceal this issue from the respondent. That is a matter relevant to the extent to which this matter may, in any event, be relied upon by the respondent to justify its conduct in dismissing the applicant after the event. I also pause to observe that Ms Cook said in evidence that it was possible that the cards for the respondent's fuel account were re-issued at some time. This is consistent with the applicant's evidence.

Applicant Represented Herself as a Director of the Respondent

It was submitted by the respondent, as outlined in the amended notice of answer and counterproposal, that the applicant held herself out as a principal of the respondent in her dealings in relation to "her antique business". In support of this allegation, the respondent relied upon a bundle of documents which were facsimiles dated in or about early 1997 (exhibit A5) that concerned the purchase by the applicant of antique items from overseas, which followed the applicant's return from her trip to Germany on behalf of the respondent. I pause to observe that save for the terms of exhibit A5, this issue was not the subject of any evidence by the respondent.

The applicant denied in evidence that she had an antique business or in anyway in relation to these particular dealings, represented herself as a principal of the respondent. She admitted that she did send some facsimiles using the respondent's letterhead. It was the applicant's evidence that at the time that this occurred, she paid an amount of approximately $20 to Mrs Tucker to cover the use of the facsimile machine and for other telephone calls. The applicant also said that she had paid Mrs Tucker similar amounts previously, when she had made calls from the respondent's business telephone. Furthermore, the applicant denied that she had used the respondent's agent as the consignee for the antiques she had purchased whilst overseas.

I have considered the terms of exhibit A5. There is nothing in the documents to suggest that the applicant held herself out as either a principal or director of the respondent. It may have been somewhat imprudent for the applicant to have used the respondent's letterhead for facsimile transmissions, at least without the express permission of the respondent. However, I am satisfied on the evidence and I find that it was neither the intention nor the fact, that the applicant in any way misrepresented herself to those with whom she was dealing on these matters. I also accept the applicant's evidence that she did tender some money to cover the cost of calls associated with these matters and also did this on earlier occasions.

Technician's Hours

The respondent said that it came to its attention after the applicant's dismissal, that she had, on some occasions, failed to maintain a record book of chargeable hours worked by the respondent's technicians. It was Mr Tucker's evidence, that at some point in time which was indeterminate at least on his evidence, the respondent had become concerned that chargeable hours for technicians were not as high as they should have been. He said that the respondent set a minimum of 15 hours per week and requested that the applicant monitor this and let him know if the technicians' chargeable hours fell below this level. He said that after the applicant was dismissed, he discovered that there had been some occasions when the technicians' chargeable hours had fallen below the minimum of 15 per week. He said that he inspected the book occasionally prior to the applicant's dismissal. In cross-examination, Mr Tucker conceded that at no stage did he express any concern to the applicant about this issue generally and further said that the reporting on this matter ceased approximately five to six weeks prior to the applicant's dismissal.

As to this matter, the applicant said that the respondent was concerned during a period of low activity in the business, that the technicians were not charging out working hours as they should be. She suggested to Mr Tucker that a record be kept of the hours and what was to be charged to particular jobs or for warranty purposes. The applicant's evidence was, that when business picked up and became busier, keeping a record of these matters became less of a priority. The applicant said that she could not recall exactly when this process commenced but thought it may have been in approximately 1996 and that this was kept up for a period of approximately six months. The applicant's evidence was that this issue was never raised with her by the respondent.

Whilst I am prepared to find that the applicant may, as was suggested in evidence, not have maintained the record book for the full period, the matter does not appear to have been such a serious issue as to warrant the respondent taking any steps at all until sometime after the applicant's dismissal. Furthermore, on Mr Tuckers' evidence, any omissions from the record book that were the applicant's responsibility, could have easily been ascertained by the respondent merely checking this record from time to time. In the context of the applicant's dismissal, I place very little weight on this matter.

A further matter raised by the respondent in its defence of the applicant's claim, was that at the time of the re-negotiation of the applicant's remuneration package in 1996, the applicant entered into a 12 month fixed term contract with the respondent. I now turn to consider this issue.

Twelve Month Fixed Term Contract

The respondent submitted that the applicant and respondent entered into a 12 month fixed term contract on or about 6 November 1997. The terms of this document were exhibit A1. The circumstances surrounding the terms of exhibit A1 were in controversy. Mr Tucker says that in mid 1996 the applicant approached him and said that she had obtained another job and gave him notice of termination of employment. This was at a time when Mr Tucker was preparing to travel to the eastern states on business. It was Mr Tuckers' evidence that he asked the applicant to hold off on her decision in order that they may discuss the matter on his return. In due course, negotiations followed arising out of which Mr Tucker says there was an agreement with the applicant and the respondent that he would increase her salary package from $26,000 per annum to $38,000 per annum to match the applicant's other offer of employment. The applicant was to increase her hours to 40 hours per week (from approximately 36 hours per week) and furthermore Mr Tucker said that there was an agreement that there would be a 12 month contract and if the applicant "deviated from the arrangement" she would be dismissed. The "arrangement" was, according to Mr Tucker, that the applicant would no longer have the benefit of other aspects of her previous remuneration e.g. the use of petrol, etc.

In cross-examination, Mr Tucker conceded that there was no break in the applicant's continuity of employment. Furthermore, Mr Tucker denied that he discussed the renegotiation of the applicant's remuneration with Mrs Tucker. Additionally, when pressed as to the reason for substantially increasing the applicant's remuneration package, in view of the respondent's contentions in the proceedings that it had a number of concerns regarding the applicant's performance and conduct, he said that he wanted to prevent the applicant from moving to a competitor. When it was put to him that the terms of exhibit A1 reflected a date of 6 November 1997, over 12 months after the re-negotiation of the applicant's employment and the stated 12 month term then agreed, Mr Tucker said that he was not aware that the 12 month period had expired. Mr Tucker also testified that the terms of exhibit A1 reflected no more than the conditions agreed in mid 1996 when the applicant's conditions were renegotiated. I pause to observe that there was nothing put in evidence or in submissions, that the effect of exhibit A1 was a new or further contract to that which Mr Tucker said was entered into in mid 1996.

The applicant testified that the terms of exhibit A1 were presented to her on the afternoon prior to her departure for Germany on a training course at Murrplastics. The document was presented to her by Mrs Tucker who told her that the document was for the purposes of "protecting the respondent's investment". The applicant subsequently understood this to mean that the respondent was keen to ensure that it retained the applicant's services once she had returned from the training course in Germany.

At the time, the applicant said that she was very excited about the trip to take place the next day and was immersed in preparing for the travel overseas. Her evidence was at the time, she was in a "fluster" and, furthermore, there was little discussion between her and Mrs Tucker as to the content of the document, in particular, the purported 12 month fixed term. The applicant's evidence was she did not take it away and read it carefully as she trusted the respondent. She said that she signed it. In response to the issue raised by Mrs Tucker as to the respondent "protecting its investment" the applicant said that she told Mrs Tucker not to worry as she would be with the respondent "until retirement". It was the applicant's evidence that when she signed exhibit A1, there was no change at all to her conditions of employment. Furthermore, she said that the alleged 12 month term referred to in the document did not register with her, and she had no understanding as to its implications. Her evidence was why should she change from a permanent position in which she had been in for many years to a 12 month fixed term contract and lose access to her accrued entitlements such as long service leave. It was the applicant's evidence that it was never her intention in signing exhibit A1, that her employment would end 12 months thereafter.

As to the events which occurred in or about June 1996, the applicant said that she met with Mr Tucker and told him that she had obtained another job offer, and that as she put it "I was giving you notice". The applicant said that she had sought other employment because Mr Tucker had refused to grant her a salary increase in circumstances when she thought one was due. When the applicant told Mr Tucker that she had found other employment, she said that he told her that the respondent did not want to loose her and said he would offer the same salary as payable in the other employment, which was $33,500 per annum and in addition, she would continue to have the use of the vehicle and petrol as before. The applicant's evidence was that she accepted that. She testified that she then told the employment agency that she had decided to stay with the respondent and not take up the new position. The applicant further testified that when Mr Tucker returned from his business trip, Mrs Tucker became involved in negotiations with Mr Tucker in terms of the applicant's remuneration. The applicant said that she explained to Mrs Tucker, that because of a salary increase, her daughters would receive a reduction in "Austudy". As a result of Mrs Tuckers' involvement, the applicant's salary package was increased to $38,000 per annum, apparently to compensate for this.

The respondent's wages book was exhibit A2. The wages book for the period of June 1996 contains an entry highlighted and ruled in red pen, with the words "Resignation New Contractual Agreement". The applicant testified that it was the usual practice that she would sign the wages book when she received her salary payment each week. The terms of exhibit A2 bear this out. It was the applicant's evidence that on and after her salary increased to $38,000 per annum the notation that I have just referred to was not in the wages book and she only saw this notation, for the first time, approximately one week prior to these proceedings commencing. The inference clearly being that the respondent had, after the event, inserted this entry into the wages book. I should also observe that in subsequent evidence-in-chief, the applicant somewhat qualified her earlier evidence and said that in the discussion with Mr Tucker regarding the offer of other employment, she did not hand in a written resignation but had simply advised Mr Tucker that she had found other employment and then the discussion ensued. There was no mention according to the applicant, of any 12 month fixed term at this time.

On all of the evidence on this matter, I am far from satisfied that it was the genuine intention of the applicant and respondent to enter into a 12 month fixed term contract by the terms of exhibit A1. Furthermore, the evidence of Mr Tucker as to this issue was quite inconsistent with the evidence of Mrs Tucker. According to Mr Tucker, the terms of exhibit A1 were intended to reflect what was the agreed position in or about June 1996. However, this was not the effect of Mrs Tucker's evidence that the intention of exhibit A1 was to "protect the respondent's investment" in sending the applicant overseas. Also, it was Mrs Tucker's evidence that even given the terms of exhibit A1, it was not her understanding that the applicant's employment would automatically come to an end at the expiry of 12 months from 6 November 1997. Moreover, I accept the evidence of the applicant, that she did not appreciate the effect of signing this document, particularly given her stated intention that she would never have entered into such an arrangement if it had the effect of terminating her employment 12 months hence. As a matter of logic, it is very difficult to understand why the applicant would take such a step, after nearly seven and a half years in permanent employment. It simply does not make any sense.

In any event, even if I was to accept Mr Tucker's version of the events which occurred in June 1996, which I do not, then the intended 12 month fixed term contract had expired by the time the terms of exhibit A1 were put before the applicant. This all the more detracts from the respondent's argument as to the intention of the parties in relation to exhibit A1. This only emphasises the inconsistency between what Mr Tucker says was his intention and the agreement with the applicant, and the terms of exhibit A1 itself. Put in terms of an offer and acceptance, the "offer" did not, at least on the evidence of Mr Tucker, correspond with the stated intention of the offeror in this case. Furthermore, it could also be the case that the terms of exhibit A1 relating to the alleged 12 month fixed term, constituted an operative misrepresentation, in all the circumstances.

As to the circumstances of the renegotiation of the applicant's salary package and the purported "new contractual arrangement", I say the following. Even accepting that the applicant did tender her resignation, which I am prepared to do on the evidence, it was clear that the resignation was "withdrawn" by agreement of the parties. The applicant accepted the respondent's offer to increase her salary package. She declined to proceed with the other employment opportunity. For all practical purposes the employment continued uninterrupted. There was not, for example, a pay out of accrued entitlements at this time.

As a matter of law, the effect of a withdrawal of notice of termination by agreement is somewhat problematic. Whether or not a new contract is formed or the "old" contract continues, is considered by the learned authors Macken, McCarry and Sappideen in *The Law of Employment* 4th Ed at 177. The better view appears to be that the original contract continues in force: *Emery v Commonwealth* (1963) 5 FLR 209 at 217 per Page J. With respect, I adopt and apply that approach in this case. I therefore regard the applicant's employment as being continuous from the date of commencement to the date of termination in August 1998.

Furthermore, the fact that the respondent very substantially increased the applicant's remuneration package, by some $12,000.00 at this time, is totally at odds with the respondent's assertions as to the applicant's alleged shortcomings, even at this stage of her employment. It simply does not gel and is a further reason that I prefer the applicant's evidence to that of the respondent.

Conclusions

Having regard to all of the evidence and the issues raised in this case, which were extensive, I am of the conclusion that the applicant's dismissal was, in all of the circumstances, harsh, oppressive and unfair. It must be borne in mind, as I have observed above, that the reason for the applicant's dismissal, on the admission of Mr Tucker in his evidence, was the threat by the applicant that she would "take the respondent for unfair dismissal", in the event that she was dismissed. As I have already observed, it was Mr Tucker's evidence, that up to this time, he had no intention of dismissing the applicant. Indeed, based on the evidence of Mr Tucker and the applicant, and also to an extent of Mrs Tucker, it was apparent to me that in the main, the applicant and the respondent had a productive and harmonious working relationship for many years. The respondent's business is essentially a family business with which the applicant had been associated from its early days. On all of the evidence, I have no doubt that the true working relationship between the applicant and the respondent was quite a good one.

It was clear that the circumstances of the Incident involved an emotionally charged exchange between both Mr Tucker and the applicant. As I have already found on the evidence, in my opinion, Mr Tucker's intervention and the manner of it contributed significantly to the escalation of the Incident. I have no doubt at all that Mr Tucker was extremely upset on the day of the Incident and put a number of allegations to the applicant in public, in a most inappropriate way. In my opinion, whilst it may have been somewhat imprudent for the applicant to have said what she did to Mr Tucker, I am far from satisfied that it was in any way an intended repudiation of her employment with the respondent but rather, was an emotional attempt to defend herself against what she considered to be unfair and unwarranted allegations.

Furthermore, it would have been a far more appropriate course for the respondent to have at some more convenient time, counselled the applicant as to concerns that it had regarding the applicant's conduct on the day of the Incident. In my opinion, it was inappropriate for Mr Tucker to behave in the way that he did in front of other employees of the respondent.

Whilst the matter was not the subject of much evidence, I consider that the break down in the relationship between the respondent and Mr Coverley, which subsequently led to litigation in which the respondent was engaged at the time of the Incident, contributed to Mr Tucker's state of mind at the time. The evidence was that the applicant's daughters were cleaning the premises of Mr Coverley. It also was the case on the evidence, which evidence was not controverted, that Mr Tucker had previously requested the applicant to instruct her daughters to cease performing cleaning work at Mr Coverley's premises at AES. Given Mr Tucker's evidence as to the threat posed by Mr Coverley to the respondent's business, I have no doubt that there was a simmering discontent by, in particular Mr Tucker, with the perceived relationship between the applicant and Mr Coverley, in view of the tensions between the respondent and Mr Coverley. It is open to draw an inference that this tension contributed, at least in some part, to Mr Tucker's conduct towards the applicant and I draw such an inference.

In my opinion, the respondent's decision to effectively summarily dismiss the applicant because she chose to continue to defend herself during the Incident, and threatened to pursue an unfair dismissal action if she was dismissed, was a wholly disproportionate response to the applicant's conduct. Whilst both Mr Tucker and the applicant were clearly emotional at the time, the applicant's conduct falls far short in my view, of a flouting of a fundamental condition of the applicant's contract of employment so to warrant summary dismissal: *Laws v London Chronicle (Indicator Newspapers) Limited* (1959) 2 All ER 285 at 289-9 per Denning MR. Furthermore, in relation to the vacuum cleaner matter, which led to the Incident, there was never at any time any indication by the respondent that by reason of the applicant's conduct concerning this matter, her employment was, in anyway, in jeopardy. As has been noted, the evidence of Mr Tucker was quite to the contrary.

In my view, a statement by an employee that he or she may exercise a course of action sanctioned by lawful means, such as to claim redress in a court or tribunal by reason of an employer's conduct, could never be, without more, a valid reason to dismiss an employee in circumstances which would not be harsh, oppressive or unfair. An employee's statutory right to bring an action for unfair dismissal in a court or tribunal of competent jurisdiction, is well established. In this case, stripped of the emotional content, all the applicant really did, in essence, was to say to the respondent that this was the course she would follow in the event she was dismissed. I pause to observe that Moore J in *Sherman v Peabody Coal Limited* (1998) 88 IR 408 expressed a similar view in a termination of employment case arising on review under the Workplace Relations Act 1996 (Cth).

As to the allegations raised by the respondent concerning other matters not related to the Incident, I have dealt with those matters above earlier in my reasons. In my opinion, based upon the authorities to which I have referred, all of the allegations dealt with in the evidence relating to matters which were either known of or discoverable by the respondent on reasonable enquiry, cannot be used to, ex post facto, justify the applicant's dismissal. To do so would be to attempt to justify, after the event, a dismissal that was plainly unfair when effected. This would also be contrary to s 26 of the Act.

I pause to observe that of these matters, some were, on the evidence, the subject of the prior counselling. These issues included the applicant making excessive personal phone calls and attending to personal matters which were alleged to have interfered with her duties; the use of motor vehicles (which I have dealt with above); and the making of inappropriate comments in the workplace. The applicant said that these matters were dealt with and nothing further came of them. These were matters raised, in some cases, years ago, and moreover, as I have repeatedly said above, were known to the respondent at the time of the dismissal.

In any event, even considering those allegations that could be regarded as only coming to light after the applicant's dismissal, which I have dealt with in my reasons above, it is relevant to observe that none of those allegations related to the reason for the dismissal of the applicant, on the respondent's own admission, which was her alleged conduct and behaviour on the day of the Incident: *Savvidis v Privilege Clothing Company* (1985) AILR 3-043.

When considering all of the evidence as a whole, in the context of the history of the applicant's employment over nearly seven and a half years, I had the overwhelming impression, after having heard and observed the witnesses during the course of many days of evidence, that had the Incident not occurred when it did, there was every prospect that the applicant would still be employed.

With these conclusions in mind I now turn to the question of remedy for the purposes of s 23A of the Act.

Remedy

By the terms of s 23A of the Act, it is clear that reinstatement is the primary remedy in the event of a finding by the Commission that an employee has been harshly, oppressively or unfairly dismissed. Compensation is only payable in the event that the Commission is satisfied that reinstatement is impracticable or that the employer has agreed to pay compensation, instead of reinstating an unfairly dismissed employee.

In this matter, as I have noted above, the applicant does not seek reinstatement but rather an order of compensation. The applicant submitted that the relationship between her and the employer had so broken down that it should not be restored.

Whether or not reinstatement is impracticable for the purposes of s 23A of the Act, requires the Commission to consider all of the circumstances of the particular matter and to evaluate the practicability of a reinstatement order in a commonsense fashion: *Nicholson v Heaven and Earth Gallery Pty Limited* (1994) 126 ALR 233; *Liddell v Lembke* (1995) 127 ALR 342; *Gilmore v Cecil Brothers FDR Pty Limited* (1996) 76 WAIG 4434.

Having considered the evidence in this case, in my opinion, reinstatement would be impracticable. Not only does the applicant not seek reinstatement (which I observe should not be regarded as a bar to such an order as it is for the Commission, in the exercise of its discretion, to determine this matter), but also the relationship has clearly been very strained and, in my opinion, a reinstatement order would be likely to impose unacceptable problems or embarrassments or even effect harmony within the respondent's business: *Nicholson (supra).*

I therefore consider the issue of compensation.

The most recent statement of principle by the Full Bench of this Commission in relation to the assessment of compensation in an unfair dismissal claim, is to be found in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8. I adopt and apply the principles set out in *Bogunovich* for the purposes of assessing compensation in this matter. The applicant was earning $38,000 per annum as at the date of her dismissal, that being 10 August 1998. According to the schedule of loss tendered by the applicant, this equates to a weekly amount, including the value of her motor vehicle, in the sum of $759.61 cents. The applicant gave evidence that after her dismissal, she sought alternative employment. Tendered in evidence was a bundle of job application letters and extracts from newspaper advertisements, evidencing the applicant's attempts in this regard (Exhibit A7). I am satisfied on the evidence and find, that the applicant took reasonable steps to mitigate her loss.

It was the case that the applicant commenced employment with a new employer on or about 28 January 1999. Over a 12 week period from on or about 3 February 1999 to 27 April 1999 the applicant earned a gross amount of salary in the sum of $8139.38. This was some $975.96 less than what the applicant would have received by way of remuneration from the respondent, had her employment not been terminated unfairly. Additionally, the applicant received a sum of $3511.92 by way of unemployment benefit payments in the period 10 August 1998 to 27 January 1999.

On the evidence before the Commission, I am satisfied that the applicant has established that in the period between her dismissal and her re-employment she has suffered a loss of income in the sum of $18,534.48 gross. Furthermore, the applicant has also suffered an ongoing future loss in terms of the difference between her earnings in her new employment and the earnings she would have received but for the unfair dismissal by the respondent.

Whilst the respondent, as dealt with above, raised many allegations as to the applicant's conduct, and I have considered all of the evidence and submissions in relation to those allegations, I am far from satisfied that those matters would have warranted dismissal or led to dismissal by the respondent in any event. As I have observed above, it was plain on Mr Tucker's evidence, that he had no intention of dismissing the applicant, but for the Incident. Viewed objectively, I see no reason on all of the evidence, to conclude that employment would not have been ongoing in this case. This is a material consideration as to a finding by the Commission as to loss incurred by an unfairly dismissed employee.

I therefore find that the applicant's total loss is approximately $19,500. That is only taking into account what is, in effect, a sample period of 12 weeks in terms of ongoing future economic loss sustained by the applicant.

In terms of the unemployment benefits received by the applicant, I do not propose to take those into account in determining the applicant's loss: *Swan Yacht Club (Inc) v Bramwell* (1998) 78 WAIG 579. In the circumstances of this case, I see no reason not to compensate the applicant as fully as possible, to reflect her loss. This of course, must be subject to the maximum compensation payable under the Act which is six months remuneration, as prescribed by s 23A(4). That amount in this case is $19,749.86. I propose to therefore order that the applicant receive $19,500 from the respondent as just and fair compensation for loss which has been established by the applicant, as a result of her unfair dismissal.

Minutes of proposed order now issue.

Appearances: Ms C Crawford of counsel appeared on behalf of the applicant.

Mr I Morrison of counsel appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lorna Rae Hoogland

and

NL Tucker & Associates Pty Ltd.

No. 1573 of 1998.

COMMISSIONER S J KENNER.

8 October 1999.

Order.

HAVING heard Ms C Crawford of counsel on behalf of the applicant and Mr I Morrison of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant was harshly, oppressively and unfairly dismissed from her employment by the respondent on or about 10 August 1998.

(2) DECLARES that reinstatement of the applicant is impracticable.

(3) ORDERS the respondent pay to the applicant within 21 days of the date of this order the sum of $19,500 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Leslie Kirkby

and

Brunel Energy Pty Ltd.

No. 10 of 1999.

COMMISSIONER A.R. BEECH.

29 September 1999.

Reasons for Decision.

THE applicant in this matter, John Kirkby, commenced employment as General Manager with Brunel Technical Workforce Pty Ltd on 2 March 1998. His duties were the day to day and long-term management, administration and business development of that company. In general terms, the company was engaged in the business of supplying contract labour to the oil and gas industry. In November 1998 Brunel Technical Workforce Pty Ltd changed its name to Brunel Energy Pty Ltd. On 11 December 1998 the respondent terminated Mr Kirkby's employment. He has brought a claim to the Commission alleging that his dismissal was harsh, oppressive or unfair. As amended, he also claims that the payment given to him of 3 months' salary in lieu of notice should have included the value to him of the use of the company motor vehicle, plus the provision of Providential life insurance and single private medical insurance for that 3 month period. He also claims that an amount of approximately $242.00 (as further amended) was wrongly deducted by the respondent from his entitlements.

Mr Kirkby's dismissal arose out of the following event. One of the respondent's major clients is Woodside Energy Ltd. Mr Kirkby wanted to promote the respondent's change of name to Woodside, and other customers, in a way that demonstrated the respondent's technological proficiency. He believed that sending an e-mail to Woodside advising of the name change and the respondent's services would send a technologically positive image of the respondent compared to, for example, merely sending a pamphlet. He obtained an internal Woodside address book of Woodside's employees, constructed a formula which would allow an e-mail to be sent to each Woodside employee and sent an e-mail to each employee. There were, it seems, somewhere between 2000 and 2500 Woodside employees. Each of them, including its Managing Director, received an e-mail from the respondent, under the name of Mr Kirkby, which stated, in summary—

1. Brunel Energy world-wide vacancies are now online;
2. the new name of the respondent and its address, telephone, fax number and postal address;
3. that the respondent now publishes all its vacancies on the Internet and the list is updated every 4 hours; if you have an Internet connection and wish to view the vacancies now please follow the attached hyperlink and bookmark it for future use.

The receipt of the e-mails caused complaints to be made by Woodside to the respondent. Those complaints included—

1. That the e-mail was considered an imposition by a large number of Woodside staff who phoned other senior staff to ask who authorised its circulation.
2. That Woodside's information management and technology staff complained about a large number of wrongly addressed e-mails coming to them thus creating unnecessary work and blocking the system.
3. That Woodside was concerned that somebody had accessed its internal mailing system.
4. That its internal mailing system had been accessed for the purpose of enticing Woodside's employees to leave their employment; in other words, attempting to steal Woodside's personnel.

As a result, Mr Kirkby sent an apology to Woodside. I add that I am satisfied that Mr Kirkby did not intend to cause any damage to the relations between his employer and Woodside. Indeed, I am also prepared to find that he acted with the best of intentions in that regard.

However, a number of issues arise from his decision to send the e-mails. First, it is important to note that Mr Kirkby was in the position of a General Manager within the respondent's organisation. It is a position of seniority and of responsibility. These issues need to be seen within that context. His action in sending the e-mails, even though well-intentioned, was an extremely bad error of judgment. The content of the e-mail clearly invites Woodside's employees to look at the vacant positions advertised by the respondent. Indeed, Mr Kirkby now concedes as much. It was certainly not unreasonable for Woodside to conclude that the e-mail might entice its own employees to leave Woodside. Next, the sending of between 2000 and 2500 e-mails, a significant number of which were apparently incorrectly addressed in any event, caused disruption to Woodside. Mr Kirkby cannot claim any ignorance that his action would have this effect because his evidence is that he was well aware that sending that many e-mails could cause a problem in Woodside's computer system. He therefore sent the e-mails progressively in a total of 13 blocks. Further, it is one thing to send an e-mail to those human resources staff at Woodside with whom the respondent usually dealt. It is quite another to send the e-mail to every Woodside employee, many of whom would not have heard of the respondent and who, apparently, immediately queried why the e-mail had been sent to them.

Furthermore, I find on the evidence that Woodside was, both directly and indirectly, the respondent's biggest potential client. It represented in excess of 50% of the respondent's business. Mr Kirkby admits that he would not be doing his job as a General Manager if he put 50% of his employer's business at risk. Yet that is precisely, on the evidence before the Commission, what he did do. The evidence is that Woodside spoke to Mr Duce, who is currently the Managing Director of the respondent and who was effectively acting in that position at the time the e-mails were sent although he was not officially confirmed in that position until 1 January 1999. As a result of Mr Duce's conversation with a senior person at Woodside, Mr Duce became quite concerned at the potential loss of business to the respondent as a result of the incident. He believed that a number of senior and other human resource staff at Woodside had commented that they should cut off contact with the respondent and not have further business with it. He regarded Mr Kirkby's conduct to be a serious matter. I therefore conclude that Mr Kirkby certainly was not doing his job as a General Manager because of his ill-thought out initiative in sending the e-mails as he did to Woodside.

Secondly, as I find, he made no steps whatsoever to inform the Managing Director of Brunel International, South-East Asia, Mr Pursley, to whom Mr Kirkby reported, of the potential damage he had caused. Mr Pursley is based in Singapore but happened to be visiting Perth at the time of the Woodside complaint. Although he had discussions with Mr Kirkby, Mr Kirkby did not mention the incident to him. Indeed, the first Mr Pursley heard about the incident was when Mr Duce contacted him after Mr Duce in turn had found out about the incident from Woodside. Mr Pursley gave evidence in this matter and I unhesitatingly accept his evidence. I accept that he was astonished at the incident. He acknowledged immediately that Woodside, as the principal client in WA, viewed the incident seriously such that an apology had been requested from the respondent by Woodside. There was therefore a potential great loss of business to the respondent. Further, and significantly, Mr Kirkby had had the opportunity, a few days before Mr Pursley had been informed of the incident, to tell Mr Pursley of it himself but he had not done so. It concerned Mr Pursley that the respondent itself found out about the incident from Woodside rather than from Mr Kirkby. These concerns weighed heavily in Mr Pursley's considerations. It was quite proper that they did so. Mr Pursley's perception of the serious threat to the respondent is in marked contrast to the perception of Mr Kirkby that he believed the incident would have little on-going effect and would "blow over". I find that Mr Kirkby made a further significant error of judgment in not assessing the potential damage he had in fact caused and in failing to keep the respondent, through Mr Pursley, appraised of the incident and its consequences. I have no hesitation in reaching the conclusion that Mr Kirkby's failure to act in this regard severely damaged the trust that Mr Pursley needed to have in Mr Kirkby.

It is also the case that Mr Kirkby did not discuss the matter with Mr Duce. I accept that Mr Kirkby was under no obligation to report to Mr Duce as such. Nevertheless, given Mr Duce's position and his own dealings with Woodside, it is, in my assessment, significant that Mr Kirkby did not do so. It is significant because it is a further indication that Mr Kirkby failed to assess the potential damage he had caused to the respondent's business. Indeed, his lack of any attempt to inform his employer is quite consistent with an intention to cover up the incident. Such an intention is not consistent with his duty to look after the interests of his employer.

Thirdly, when, in response to a request from Mr Duce that Mr Kirkby supply to him a copy of the e-mail he had sent to Woodside, Mr Kirkby sent Mr Duce an e-mail which of itself contained some comment derogatory of Woodside. I agree with both Mr Duce and Mr Pursley that this is a display of a negative attitude by Mr Kirkby towards the respondent's biggest potential client. I accept that Mr Pursley found Mr Kirkby's attitude unacceptable and that it reinforced the loss of trust Mr Pursley then had in Mr Kirkby.

As a result, Mr Pursley decided to terminate Mr Kirkby's employment. He did so by letter which he caused to be couriered to Mr Duce. Mr Duce was required to deliver it to Mr Kirkby. The dismissal took effect upon receipt of the letter by Mr Kirkby which happened on 11 December 1998. Mr Kirkby's employment therefore ended on that date. Mr Kirkby's contract of employment states—

> 12. Notice
>
> Employee/employer is entitled to terminate this contract by giving 3 (three) months' written notice of termination. The company has the option at its sole discretion to provide settlement in lieu of notice given by either the employee or the company. The company reserves the right to deduct any monies outstanding to the company from the termination pay. We reserve the right to terminate this agreement without notice should the employee be guilty of misconduct or dishonesty or become of unsound mind.

Mr Pursley decided that he would pay Mr Kirkby 3 months' salary in lieu of notice. It is Mr Pursley's evidence that he did not believe that the respondent was under any obligation to pay salary in lieu of notice given Mr Kirkby's misconduct. He therefore regarded the 3 months' salary in lieu of notice as an *ex gratia* payment. During the course of the hearing there was some debate about whether Mr Kirkby's dismissal was summary or not. In fact, very little turns upon this issue, in my view. I have little doubt that Mr Kirkby's conduct was sufficiently serious to be misconduct and warrant his dismissal without notice. Although his actions constitute a single act of misconduct, a single act of misconduct will justify dismissal if it is such that it goes to the heart of the contract of employment and demonstrates that Mr Kirkby regards himself as no longer bound by one of the essential conditions of his contract of employment. The potential damage to his employer's business was such that his act in sending the e-mails went to the heart of the contract of employment between him and the respondent. It is essential that a person in Mr Kirkby's position not place his employer's interests in jeopardy. He did so. To the extent that there was an onus on the respondent to prove the misconduct upon which it relied to dismiss Mr Kirkby, that onus is certainly discharged.

Further, it is very difficult for Mr Kirkby to argue that his dismissal was unfair on substantive grounds. As I have found, his actions placed the respondent's business with Woodside in jeopardy. It is difficult to find a situation more in contrast with his responsibilities in the position he held with the respondent. Nor am I able to find any substance in the criticism that the dismissal was unfair on procedural grounds. Whilst it might well be the case that Mr Pursley did not communicate his concerns to Mr Kirkby and ask Mr Kirkby to respond to those concerns prior to reaching the decision to dismiss, I find in the circumstances of this case that there is little likelihood that there could have been any other outcome of the incident than the termination of Mr Kirkby's employment. Any absence of procedural fairness did not render Mr Kirkby's dismissal unfair (*Stead v. SGIO* (1986) 161 CLR 141). A procedural irregularity is only one matter to be taken into account in deciding whether a dismissal is fair or unfair (*Shire of Esperance v. Mouritz* (1991) 71 WAIG 891. In any event, Mr Pursley is to be given credit for the fact that he took into account Mr Kirkby's domestic circumstances and the fact that Christmas was imminent in his decision to pay the 3 months' salary in lieu of notice. In my view that is to his credit and is an effective counter to any procedural irregularity which may have occurred.

Finally, in relation to the claim that the dismissal was unfair, mention needs to be made of the following. After Mr Kirkby's dismissal the respondent became aware that on 18 September 1998 Mr Kirkby had sent an instruction to the person in charge of the payment of his salary at the respondent's Perth office. Mr Kirkby, who was on a salary of $100,000.00 per annum, sent the following instruction—

> Subject: Splitting my salary.
>
> As of this Monday, please make the following changes—
>
> > Reduce my salary to $70,000.00 pa.
> >
> > Re-initialise Sheila Kirkby on a salary of $30,000.00 pa.
> >
> > Please keep this confidential between you and I and do not report it to Singapore as there is no extra cost to the company. I will complete a weekly timesheet for myself and Sheila to satisfy any audit purposes.

I find from the evidence before the Commission that Mr Kirkby initiated this change to his salary arrangements in order to reduce his taxation liability. I find on the evidence that whilst his wife, Sheila Kirkby, had previously been employed for a 2 month period by the respondent, she was not an employee at the time that Mr Kirkby issued this instruction. On its face, Mr Kirkby instructed the recipient to "re-initialise" his wife as an employee of the respondent when she was not in fact an employee and to pay her $30,000.00 of his salary. This was, in fact, done and as a consequence, I am satisfied that there is a sufficient irregularity in the arrangement to warrant this matter being referred to the Australian Taxation Office for its information and action. In doing so, I find that the respondent was not aware of Mr Kirkby's instruction. I find from Mr Kirkby's own evidence that he instructed the recipient of his message not to tell Singapore (that is, the respondent) because he knew that the respondent would not agree with his action. Furthermore, Mr Kirkby now concedes that he considers the arrangement illegal and that in doing so he exposed the respondent to possible breaches of the relevant taxation legislation. I agree wholeheartedly with Mr Duce's evidence that had the respondent known of this arrangement whilst Mr Kirkby had been employed, a most serious view of it would have been taken and his dismissal would have been considered. I also find that Mr Kirkby's actions are totally inconsistent with his position as an employee of the respondent and would have justified his immediate summary dismissal. While there may have been some debate in the authorities whether an employer may retrospectively justify a dismissal by relying on events which have occurred during the employee's employment it is I think unarguable that facts which existed at the time of dismissal and which came to life only subsequently may justify the dismissal *(Byrne and Frew v. Australian Airlines Limited* (1995) 185 CLR 410 per McHugh and Gummow JJ at 430; *Department of Social Security v. Uink* (1997) 77 IR 244 at 256). In this case I have little difficulty in reaching the conclusion that in any event the respondent is quite entitled to justify retrospectively its dismissal by reason of Mr Kirkby's conduct in relation to the splitting of his salary.

In conclusion, Mr Kirkby's conduct fell well short of the standard of professional and ethical behaviour expected of him in his position. His actions were destructive of the necessary confidence which needs to exist between an employer and an employee, particularly at such a senior level (*Blythe Chemicals v. Bushnell* (1993) 49 CLR 66). He has not shown, nor could he have shown, that his dismissal was harsh, oppressive or unfair and his application will be dismissed.

Claim for denied contractual benefits

There are two bases upon which Mr Kirkby's claim for denied contractual benefits is able to be determined. The first of those bases is that if, as I have found, Mr Kirkby's actions merited his dismissal for misconduct then he has no entitlement to be paid the 3 months' "settlement" in lieu of notice under his contract. His claim for that "settlement" to recognise the motor vehicle, life insurance and medical insurance components of his total employment package would similarly fall away, because he had no entitlement under his contract of employment to 3 months' "settlement" in lieu of notice. The second basis is to assume that Mr Kirkby did indeed have an entitlement to 3 months' "settlement" in lieu of notice. Whether Mr Kirkby has an entitlement to the 3 matters claimed is a question of the construction of his contract of employment. That involves a construction of the words used within it. It is only after, not before, it is determined that an employee is entitled to a benefit under his or her contract of employment, and that the benefit has been denied by the employer, that issues of equity or fairness are considered (*Perth Finishing College v. Watts* (1989) 69 WAIG 2037). According to Mr Kirkby's contract, the use of the motor vehicle, the payment of his life insurance policy and his private medical insurance was during his employment. He would have been entitled to the use of the motor vehicle and the payments, if had he been given 3 months' notice. However, he was not given notice and his employment in fact terminated on 11 December and he thus does not have any entitlement to receive those benefits after termination. Those claims are therefore not made out.

The final consideration under this heading is for the sum which Mr Kirkby claims was wrongfully deducted from his entitlements. The claim arises because Mr Kirkby had the use of a corporate American Express credit card. I am quite satisfied from the evidence that Mr Kirkby was entitled to use the card for both private and business-related expenses. However, the respondent would only pay for the business-related expenses and he was required to substantiate to the respondent those expenses which he claimed as business expenses. The respondent has accepted Mr Kirkby's claim expenses form in relation to the final account for all but the sum now in question. On the evidence, the onus is upon Mr Kirkby to demonstrate that this expense was business-related. He has not done so in these proceedings, indeed he has not attempted to do so. In any event, given that he conceded only in the closing stages of these proceedings that an amount of $340.00 for BOCS tickets which he had previously stated to the respondent as business expenses were, in fact, personal expenses leads me to treat this claim with suspicion. I reach this conclusion also from his attitude regarding the ownership of the mobile telephone handset supplied to him by the respondent. Whilst I accept that Mr Kirkby may have received the mobile telephone handset as replacement for his own handset which had been damaged, his failure to recognise that the handset was nevertheless the respondent's property until forced to recognise it under cross-examination was not to Mr Kirkby's credit. Accordingly, this claim is similarly not made out. An order will therefore issue which dismisses the contractual benefits claims.

Order accordingly.

Appearances: Mr R. Kelly (of counsel) on behalf of the applicant.

Mr D. Parker (of counsel) on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Leslie Kirkby

and

Brunel Energy Pty Ltd.

No. 10 of 1999.

29 September 1999.

Order.

HAVING HEARD Mr R. Kelly (of counsel) on behalf of the applicant and Mr D. Parker (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 dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kenneth Charles Landwehr & Mark Leonard Peterson

and

Wynnes Pty Ltd & Another.

No. 366 & 367 of 1999.

COMMISSIONER S J KENNER.

21 September 1999.

Reasons for Decision.

THE COMMISSIONER: These two applications are brought pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act, 1979 ("the Act") alleging that both applicants were unfairly dismissed by the respondents and were denied contractual benefits.

At the commencement of the hearing of the matters on 14 September 1999 counsel for the respondent moved a motion that both applications be adjourned on the grounds that the respondents' solicitors had been instructed in the matters only the evening before the commencement of the hearing. The agent for the applicants opposed this application.

After considerable argument from both counsel for the respondents and the agent for the applicants, the Commission, most reluctantly, granted the application to adjourn the proceedings with reasons for so deciding to be published in due course. These are my reasons.

To put the respondents' application in context, a brief history of this matter is as follows. Both applications were filed on 16 March 1999. Notices of answer and counter proposal in respect of the applications were filed on 6 April 1999. The applications were allocated to Scott C and were the subject of conciliation proceedings pursuant to s 32 of the Act on 7 May

1999. The applications were reallocated to the Commission as presently constituted on 11 May 1999. Further conciliation proceedings were held before the Commission as presently constituted, pursuant to s 32 of the Act, on 28 June 1999. At those proceedings, the parties informed the Commission that negotiations were continuing between the parties, with a view to trying to resolve the matters in issue by agreement. On that basis, the conciliation proceedings were adjourned for a period of 28 days. This was on the basis however, in order to preserve the applicant's positions, the matters would be allocated a hearing date in the event that the negotiations were not successful. Accordingly, notices of hearing in respect of the applications, listing both matters for hearing on 14 September 1999 were sent to the parties on 28 June 1999. The Commission received no advice from either of the parties that the hearing date allocated was unsuitable to either party or otherwise there were any difficulties with it.

Counsel for the respondent submitted to the Commission that the respondent was not in a position to proceed on the merits of the applications because the respondent had only instructed its solicitors, Messrs Freehill Hollingdale and Page, on the evening before the date of hearing. It was submitted in these circumstances, that given that the solicitors for the respondent had not received adequate instructions, that the respondent would suffer serious injustice in the event that the applications were not adjourned. Counsel for the respondent submitted that whilst it appeared that the respondent was aware of the date of the hearing listed by the Commission through the respondent's previous representative, Mr Darcy, it had the impression that the proceedings were "still at the conciliation stage" as it was described.

The agent for the applicants opposed the respondent's application to adjourn the proceedings. Furthermore, the agent for the applicants told the Commission that due to recent negotiations between the parties, he was of the understanding that both applications had been settled by agreement between the parties. He remained of that view as late as the afternoon prior to the hearing. He said that it was only at approximately 5pm on the evening of 13 September 1999, that the respondent advised him that there was no agreement to settle. It was the agent for the applicants' contention, that there were only some formalities to be undertaken to conclude the settlement. I say nothing further about that matter, as it appears this will be the subject of other proceedings before the Commission.

Whilst the agent for the applicant opposed the respondent's application to adjourn the substantive applications, during the course of submissions in relation to the application it became clear to the Commission that by reason of the understanding of the applicants that the matters had been settled, the agent for the applicants was not in a properly prepared position to proceed with the merits of the applications in any event.

The principles in relation to applications to adjourn proceedings before courts and tribunals are well established. Those principles are firstly, that to grant or refuse an adjournment is a matter for the discretion of the court or tribunal to whom the application is made. Secondly, where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party: *Myers v Myers* (1969) WAR 19; *Vick v Drysdale and Robb and Thomas v Drysdale and Robb* (1981) WAR 321.

In this case the position is as follows. Both applications have been on foot in the Commission for a considerable period of time. Conciliation proceedings had taken place in relation to the applications and those proceedings were adjourned to enable further negotiations to occur. In the interim, it was clear to the parties that the applications would be listed for hearing at a future date in the event that negotiations failed and accordingly notices of hearing were sent to both parties on 28 June 1999, some two and a half months before the date of hearing of the applications. The respondent in my view was aware of this fact, albeit further negotiations were proceeding. This is a circumstance I observe, which is not unusual in the Commission or indeed other jurisdictions, in relation to litigation. Mr Darcy, an experienced industrial representative, was acting for the respondent at all material times and Mr Chadd the agent for the applicants, confirmed that he was in ongoing dialogue with Mr Darcy on behalf of the respondents.

I also pause to observe that there was no attendance by the respondents at the conciliation proceedings before the Commission as presently constituted. It is also clear to me from the submissions from the bar table, that it was the respondent's decision to withdraw its instructions to Mr Darcy to act for and on behalf of the respondents in these proceedings and to instruct their present solicitors, on the eve of the hearing.

Having considered the matter, in my opinion, the position in which the respondents find themselves in these proceedings is entirely of their own making. It was the respondents who elected, at the last moment apparently, to withdraw their instructions to Mr Darcy and to brief their present solicitors to appear on the matters. There was no other substantive reason advanced by the respondent as to why it was not ready and prepared to proceed with the merits of the applications.

Were it not for the admission by the agent for the applicants that by reason of his impression that an agreement had been reached, the applicants were not properly prepared to proceed in any event, I would not have granted the respondents' application to adjourn the proceedings. In my opinion, the circumstances advanced by counsel for the respondent fall far short of justifying a conclusion that the respondent would suffer serious prejudice. Any prejudice to be suffered by the respondents would be, for the reasons I have noted, entirely of the respondents' own making. As I pointed out during the course of the proceedings, given the nature of the Commission's jurisdiction, matters such as these should be heard and determined expeditiously. That is what the objects of the Act require and the Commission also has a duty to ensure that in the public interest, its resources are used as efficiently as possible. Very late applications which are unmeritorious, such as the present application, mean that valuable time to hear other matters is lost.

One other matter needs to be dealt with. In connection with the proceedings two summonses to witness were issued by the Registrar of the Commission, on application by the applicants, one of those being issued to Mr Graham Laitt. It was common ground that the summons to witness in respect of Mr Laitt was not served upon him personally as required by Regulation 83(4) of the Industrial Relations Commission Regulations 1985. Furthermore, it appears that no declaration of service, evidencing service of the summons to witness, had been filed by the applicants as required by Regulation 83. Further and in any event, it appears that Mr Laitt was overseas at the time of the purported service of the summons to witness. There was also nothing before the Commission to suggest that conduct money had been tendered with the summons to witness. In my view, the summons to witness directed to Mr Laitt was not served in person as the Regulations require and is incompetent. Accordingly, the summons to witness to Mr Graham Laitt issued through the Registrar of the Commission on 8 September 1999 will be set aside.

APPEARANCES: Mr C Chadd as agent appeared on behalf of the applicant.

Ms D White and Mr S Penglis of counsel appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kenneth Charles Landwehr & Mark Leonard Peterson

and

Wynnes Pty Ltd & Another.

No. 366 & 367 of 1999.

COMMISSIONER S J KENNER.

22 September 1999.

Order.

HAVING heard Mr C Chadd as agent on behalf of the applicants and Ms D White and Mr S Penglis of counsel on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the summons to witness directed to Mr Graham Laitt issued by the Registrar of the Commission on 8 September 1999 be and is hereby set aside.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Billy Cristian Martinez

and

Wentworth Australia Pty Ltd.

No. 442 of 1999.

COMMISSIONER S J KENNER.

19 August 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the proceedings, taken from the transcript as edited by the Commission)

THE COMMISSIONER: This is an application pursuant to s 29(1)(b)(ii) of the Industrial Relations Act ("the Act") by which Mr Billy Martinez ("the applicant") claims against Wentworth Australia Pty Ltd ("the respondent") a contractual benefit in the sum of $2,000.00 in respect of the sale of a property, that being 109 The Avenue, Alexander Heights ("the Property"). It is common ground that the claim of $2,000.00 represents 50 per cent of the total commission payable when the sale was effected.

The applicant appeared in person and the respondent was represented by Mr Wheeler, a director of the respondent. Both gave evidence in support of the claim and its defence respectively.

Facts

Turning to the evidence, the applicant said that he was engaged by the respondent as a real estate salesperson on or about 22 September 1998. He said that his duties were to list and sell properties and to engage in telemarketing functions, to obtain leads for the sale of properties for the respondent's business.

The applicant was engaged on a full-time basis and was initially paid a retainer of $400.00 per week and in addition, was entitled to receive commission payments on sales made by him. The applicant and respondent entered into a written contract of employment that is exhibit A1 ("the Contract"). The Contract was under cover of a letter from Mr Wheeler to the applicant dated 15 September 1998, and was counter-signed by the applicant.

The material terms of the Contract for the purposes of these proceedings relevantly provided as follows—

"1—Probationary Period

You will be employed for a three month probationary period during which time the contract may be terminable by either party, without giving any reason giving immediate notice, in writing or the payment or forfeiture of the pay as the case may be. At the end of the three month period and subject to satisfactory performance your contract of employment will be continued.

2—Hours of Work

Minimum 40 hours per week plus when required on Sundays. Attendance at meetings and training sessions may be held outside of these hours and all employees are to attend unless excused by the Director.

Conditions of Employment

1. Financial Benefits

1.1 Retainer

You will be paid a package of A$20,800 gross per annum ($400 per week) as a retainer (including Superannuation) and commissions earned on top.

1.2 Commission Structure

	BM/WRE
When sell a listing from an outside agent (conjunctional)	50%/50%
When sell a listing of one of the Directors	30%/70%
When sell a listing from an internal agent	40% and then 50% with WRE
Sell own listing	50%/50%
Property Management referral (full management)	$100

2. Payment of Commission is currently on Tuesday following the settlement of any property and/or from receipt of commission cheque form the Settlement Agent or Conjunctional Agent."

Furthermore, clause 4 of the general conditions of employment provided as follows—

"4. In the first three months probationary period, we require you to make four sales (with outside agents properties) and thereafter two sales per month."

It was common ground that on or about 15 February 1999 the respondent unilaterally ceased paying the applicant a retainer in accordance with clause 1.1 of the sale agreement. Thereafter, it appears on the evidence, it was agreed that the applicant receive a 50 per cent commission on all sales under the terms of the Contract.

The applicant testified that in accordance with the terms of the Contract he sold the Property on or about 16 February 1999, following a home open. In that regard I refer to exhibit A2, which was a copy of a contract for sale of land by offer and acceptance on a standard Real Estate Institute of Western Australia contract form. The content of exhibit A2 discloses that the purchase price for the property was in the sum of $209,253.00, with settlement to be effective on or before 23 March 1999. The applicant signed the offer and acceptance for and on behalf of the respondent as the salesperson responsible for procuring the offer by the prospective purchaser of the Property at that time. Subsequently the sale was effected in accordance with the sale agreement.

The evidence was that the Property was a listing given to the applicant by Mr Wheeler as a director of the respondent. I pause to observe that this was contemplated by clause 1.2 of the Contract set out above in that it provided that a commission split of 30 per cent and 70 per cent respectively was payable when a property was sold in these circumstances.

After the sale of the Property, the applicant said that for reasons not here relevant, he gave notice of his intention to leave the employment of the respondent. Subsequently, on or about 24 March 1999, settlement on the Property occurred. The applicant testified that he contacted Mr Wheeler of the respondent seeking payment of the 50 per cent commission that he said he was entitled to under the Contract, as varied. The applicant said that on doing so, Mr Wheeler indicated to him that the respondent was refusing to pay him this commission on the basis, in essence, that it was asserted by the respondent that the applicant had failed to comply with the terms of the Contract. In particular, it was said that he had failed to work the working hours required and had failed to perform in accordance with the minimum sales requirements as set out in the Contract.

I should also add at this stage that it was not in dispute between the parties that as at the time the applicant terminated his employment, the applicant had not achieved the minimum of two sales per month as set out in clause 4 of the general conditions of employment in the Contract. Despite this, the respondent had continued to pay the applicant a retainer (at least until 15 February 1999) and commissions on properties sold. The significance of this is a matter to which I will return shortly in these reasons.

On behalf of the respondent, Mr Wheeler said in evidence that the respondent paid the applicant his remuneration by way of a retainer and a sales commission in accordance with the terms of the Contract. He said that the retainer payment was subject to a requirement in essence, that certain minimum sales be achieved as an incentive to performance. As I have indicated, it was common ground that the applicant did not achieve the minimum sales of two sales per month after the expiry of the initial three- month probationary period.

Further, the respondent said that the applicant was only required to work on one Sunday during the course of his employment, which incidentally, appeared to have led to the sale of the Property. Mr Wheeler also said in evidence that he had concerns that the applicant was not working the minimum hours as required by the terms of the agreement, which allegation I should add was disputed by the applicant. There was really no evidence adduced by the respondent to support this allegation.

Mr Wheeler also said that the applicant did not actually sell the Property but merely took what he described as an "order" for its sale. Another director of the respondent presented that offer to the vendor for the vendor's acceptance. It appears on the evidence that this was the practice adopted by the respondent in matters such as these. I pause to observe that if Mr Wheeler's view of this was accepted, it is hard to imagine how a sales representative of the respondent could ever earn a commission under the Contract.

I should add also in relation to the sale process, that it was not in dispute that the applicant did take other steps following the procurement of the offer to purchase the Property, such as assisting with finance and completing settlement documents.

I turn now to my findings in relation to this matter.

Findings

I am satisfied on the evidence and find that the applicant was at all material times employed by the respondent as a real estate sales person. I am also satisfied that the applicant was employed pursuant to the Contract under cover of the letter of 15 September 1998. Under the Contract the applicant was to be remunerated by way of payment of a retainer of $400 per week plus commission payments in respect of properties sold by him on a varying scale, depending upon the basis of the sale made.

I find also that on or about 15 February 1999, there was a variation to the terms of the Contract, by which the respondent declined to pay any further retainer to the applicant with the applicant only being remunerated by way of commission payments on an increased 50 per cent and 50 per cent basis to the applicant and the respondent respectively.

On or about 16 February 1999, by way of a contract for sale of land by offer and acceptance, the applicant procured the purchase of the Property by way of his attendance at a home open. I am also satisfied that the applicant assisted in the execution of the sale of the Property. On this basis, I am satisfied on the evidence that the applicant was the effective cause of sale of the property, as that proposition was discussed by the Full Bench of the Commission in *Royal International v Valli* (1998) 78 WAIG 1010. I am also satisfied on the evidence that the sale of the Property was effected on or about 24 March 1999.

The question that ultimately arises for determination in this matter in view of these findings of fact, is the construction of the relevant terms of the Contract, as varied by the subsequent dealings between the parties.

It is a well established principle of contract law, that in the interpretation of the terms of a written contract, reference is to be had to the plain and ordinary meaning of the words used in the contract and this is the basis upon which the intention of the parties is to be determined. The provisions of a contract which are in issue, are to be interpreted having regard to the terms of the contract as a whole. In my view, having considered the terms of the Contract in this matter, the provisions of it are clear and unambiguous and I am able to interpret its terms in accordance with the ordinary and natural meaning of the words used.

By the terms of clause 1.1 it is clear that a retainer was payable to the applicant in the sum of $400 per week and by the terms of clause 1.2, a commission payment structure was payable in addition to that retainer. As I have observed already, on the evidence there was a change to those arrangements. On or after around 15 February 1999, the applicant was to be only paid by way of commission on all sales at the rate of 50 per cent to himself and 50 per cent to the respondent. No further retainer was payable beyond that time.

By the terms of clause 4 of the general conditions in the Contract, as I have already mentioned, there was what may be described as a performance incentive type of provision, which required a sales representative to achieve certain minimum sales. In the case of the probationary period of three months, there was a requirement to make four sales in that period and thereafter two sales per month.

What is the relationship between these two provisions of the Contract, when read in the context of the Contract as a whole? In my opinion, when so read, clause 4 is not a condition precedent to payment of commissions for properties sold pursuant to the terms of clause 1.2 of the agreement. Clause 4 is clearly intended to be a performance requirement that appeared to be based upon the payment of the retainer in clause 1.1 of the Contract. As a matter of commonsense, it required a minimum level of performance from a sales representative, to warrant the payment in return by the respondent, of a retainer unrelated to actual sales achieved.

Although it is not necessary to refer to it in this case, I note the evidence of Mr Wheeler in this regard, which tends to confirm my view of the operation of these provisions of the Contract. In my opinion, the failure by the applicant to meet this level of performance may well have justified the respondent in dismissing the applicant by reason of poor performance. However, it did not disentitle an employee to payment in accordance with clause 1.2, for a property sold by an employee such as the applicant. In my opinion, it would need plain words in the Contract to this effect, to make it a condition precedent for payment of commissions that the terms of clause 4 be satisfied in full.

Furthermore, and in any event, the variation to the Contract fundamentally changed in my view, the operation of clause 4 in that the retainer payment was no longer payable from in or about February of this year. Because of this, the respondent can no longer rely upon the terms of clause 4 when the obligation on the respondent to pay a retainer had been removed. The fact that the respondent continued to pay to the applicant commissions on property sales raises the possibility of estoppel. However, it is not necessary for me to determine this issue.

Based upon all of the evidence and having regard to the terms of the Contract, I am satisfied that the applicant had a benefit by way of a commission payment in respect of the sale of the Property in the sum of $2,000.00 and the respondent, on termination of the applicant's employment, denied the applicant that benefit.

I should say however by way of conclusion, that in reaching this conclusion I do have some sympathy for the position of the respondent. I have no doubt that the respondent sought to do what it considered to be the right thing by the applicant, to assist him in his career to encourage him to make sales. As I have said, perhaps the respondent should have taken steps to bring the employment to an end at an earlier time. However, that was not the matter before me. I must interpret the Contract on the facts as I find them to be and that is a judicial process, which is the nature of this aspect of the Commission's jurisdiction.

Minutes of proposed order will issue to the effect that the respondent pay to the applicant within 14 days hereof, the sum of $2,000.00 as a benefit denied to him under his contract of employment on its termination on or about 2 March 1999.

APPEARANCES: The applicant appeared in person.

Mr P Wheeler appeared on behalf of the respondent.

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WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Billy Cristian Martinez

and

Wentworth Australia Pty Ltd.

No. 442 of 1999.

COMMISSIONER S J KENNER.

9 September 1999.

Order.

HAVING heard Mr B Martinez on his own behalf and Mr P Wheeler 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 $2,000.00 as a contractual benefit within 14 days of the date of this order less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Amanda McDougall

and

Universal Trade Exchange Pty Ltd.

No 1049 of 1999.

COMMISSIONER A.R. BEECH.

7 September 1999.

Reasons for Decision.

Given extemporaneously at the conclusion of the proceedings as edited by the Commission.

THE Commission has before it an application by Amanda McDougall which claims that she has been denied by Universal Trade Exchange Pty Ltd benefits to which she is entitled under her contract of service. It has already been noted that the respondent has not appeared and the Commission therefore needs to be satisfied that Ms McDougall has proven each of her claims.

I note by the Notice of Answer and Counter Proposal that it is not denied that Ms McDougall was an employee of Universal Trade Exchange. She has given evidence in this matter and I have no reason to disbelieve her evidence and I find that Ms McDougall was indeed an employee of Universal Trade Exchange Pty Ltd for the period from the 22 February 1999 to 17 May 1999 and during that period she worked in the reception area answering telephones and other related activities.

Ms McDougall's claim relates to unpaid wages and as a result of payments made to her by cheques which were dishonoured, not only has she been underpaid but she has also incurred further expenses as a consequence of the non-payment. I am satisfied in relation to the first claim, indeed as I have already indicated that Ms McDougall is due to be paid for the period from 12 April to 23 April and then the 26 April to 7 May, the sum of $882.00 not $883.00 as she has claimed. And that is clearly evidenced by the cheque that was handed to her which is part of Exhibit 1.

I am satisfied that the drawer of the cheque, that being Cargroomers WA is, particularly, on the evidence of Mr Evans, a part of the respondent's business operations and certainly it does seem to me that the signature on the cheque is the same signature on the Notice of Answer and Counter Proposal. Further, I accept Ms McDougall's evidence that the cheque was handed to her by the person who was effectively her employer. Furthermore, I accept her evidence that for her final payment taking her to 17 May, she was owed a further $51.00 as payment for wages earned for that period but which have not been paid to her.

I also am prepared to accept that there are 2 dishonoured fees of $10.00 each which the respondent has undertaken to repay and that undertaking is, in my view, a benefit to which she is entitled under her contract of employment.

In relation to the question of the interest on her overdraft, Ms McDougall has given notice that she wishes to amend her claim so that the amount of $15.00 is replaced by an amount of $51.74. I am prepared to allow the claim to be amended even though the respondent has had no notice of the amendment, if only because the amendment merely updates the claim that was made, it does not in fact introduce a new claim. So even in the absence of the respondent I am prepared to allow the claim to be amended.

I am also satisfied that she has demonstrated that the amount of $51.74 has been an amount that she has been obliged to pay or will be obliged to pay as a result, a direct result of the payments due to her by the respondent not having been paid. As such, the direct relationship between the $51.74 and the amounts that are due seem to me to fall within the benefit that is due to her under her contract of employment.

Ms McDougall has also then introduced a new claim, that being payment for two Saturdays that she has worked. Again I am satisfied on the evidence that they are not ordinary working days and that she was nevertheless obliged by her employer to attend work on those two days for the purposes of the employer's business. The evidence is that she was to attend a training course on those two days and I see no reason that that would not be the respondent's business. She has given evidence that the payments to be made to her would be at an overtime rate for the weekend. In the absence of any evidence to the contrary I am prepared to accept that that is the case and agree with her mathematics that the amount of $256.00 is due to her for those 2 days. And I accept her evidence that she has requested payment but that it has not been made.

I am prepared to allow Ms McDougall to amend her claim even though it is a new claim if only because the failure of the respondent to attend not only the conference but these proceedings gives me no confidence that if I was to adjourn these proceedings and require Ms McDougall to advise the respondent that she intended to amend her claim for the additional $256.00 that in a practical sense the respondent would appear or would attempt to defend the matter. So for that reason I will allow the claim to be amended.

By my estimation the sum of the matters that Ms McDougall is claiming is the amount of $1260.74. Ms McDougall, that is a calculation that you should check. On the face of it then, Ms McDougall has established that she is due that amount of money from the respondent.

The respondent however, has lodged a Notice of Answer and Counter Proposal which purports to show that Ms McDougall owes the respondent a greater sum of money or at least a sum of money such that, as I anticipate, the respondent would say that no order should issue from this Commission because Ms McDougall owes money to the respondent. However, I am satisfied from the explanation given under oath by Ms McDougall that the correct construction of the letter that is dated 17 May 1999 which is attached to the Notice of Answer and Counter Proposal and indeed the Answer and Counter Proposal itself is such that Ms McDougall has paid for the motor vehicle that is referred to and I am not satisfied that I should disregard her evidence merely based upon the Notice of Answer and Counter Proposal.

The Notice of Answer and Counter Proposal identifies the respondent as Universal Trade Exchange Pty Ltd and I intend to change the name of the respondent to reflect that. Ms McDougall, the claim that you lodged was merely against Universal Trade Exchange. If the correct name is Universal Trade Exchange Pty Ltd then I will change it to reflect that name.

The change will be made. Now I propose to issue an order in the following form. Firstly, I will declare that you have been denied a benefit to which you are entitled under your contract of service by Universal Trade Exchange Pty Ltd and secondly I will order that Universal Trade Exchange Pty Ltd forthwith pay you the sum of $1260.74 by way of a benefit due to you under your contract of employment.

An order will now issue and will take effect from tomorrow's date.

Appearances: Ms A. McDougall as the applicant.

No appearance by the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Amanda McDougall

and

Universal Trade Exchange Pty Ltd.

No. 1049 of 1999.

8 September 1999.

Order.

HAVING HEARD Ms A. McDougall 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—

1. DECLARES that Amanda McDougall has been denied benefits to which she is entitled under her contract of service by Universal Trade Exchange Pty Ltd.
2. ORDERS that Universal Trade Exchange Pty Ltd forthwith pay Amanda McDougall the sum of $1260.74 by way of benefits to which she is entitled under her contract of service.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michael Leslie Meek

and

Buttermere Nominees Pty Ltd.

No. 173 of 1999.

3 September 1999.

Reasons for Decision.

COMMISSIONER C.B. PARKS: The respondent sells new and used motor vehicles, trades under more than one name, and conducts business from a number of premises. Mr Meek had two periods of employment with the respondent, the last being from in or about August 1997 to 5 February 1999 at which date he was dismissed, he claims unfairly. Throughout the material period the applicant worked as a used vehicle sales person at premises devoted to the sale of vehicles described as "budget" and are priced within a selected range, and where he served under a manager, Mr Weston, and then, from around January 1998, under the successor Mr Gary Pearce Vaughan who dismissed him.

On 5 February 1999 Mr Meek was called to the office of Mr Vaughan where an oral exchange took place, there was conflict between them, and the applicant departed the office and proceeded into the sales yard. After a short time lapse Mr Vaughan addressed the applicant in the sales yard and there dismissed him. Each of these persons has a different version of what transpired between them, the demeanour of the other, the content of what was said, whether there was abuse involved, and whether a threat was made against Mr Vaughan.

The dismissal was effected orally and confirmed in writing on the same date and in the following terms —

> "In the past I have requested you to cease the practise of trying to solicit staff for your after hours job of network marketing. This has obviously been to no avail as Richard Luker has made several complaints to me of your harassment to attend meetings.
>
> Coupled with your veiled threats this morning, I have no option but to dismiss you for gross misconduct.
>
> The payroll department will forward you all commissions and entitlements you are due early next week.."

The Notice of Answer and Counter Proposal filed regarding the matter asserts that the applicant threatened Mr Vaughan. It is also said that upon dismissal the applicant was paid "…. 2 week's pay in lieu of notice, his accrued annual leave entitlements and all outstanding wages and commissions". That these payments have been received by Mr Meek has not been denied. I therefore conclude that such is the case and that the payments made have been accepted in satisfaction of applicable termination rights.

Whilst employed by the respondent Mr Meek also engaged in the network marketing of an oil additive to his private benefit. At the time that Mr Weston was the manager he suggested to a customer of the respondent that the marketing scheme may interest him. Mr Meek also spoke of the scheme to Mr R. Luker, another sales person employed by the respondent, and handed him a related leaflet and videotape recording. A network marketing related videotape recording was also handed to Mr Vaughan. None of these actions the applicant considers to be soliciting, notwithstanding however, upon an objection from Mr Weston regarding his approach to the customer, he undertook not to do so again and has not done so since. According to the applicant mention of his network marketing interest arose from time to time in general conversation with Mr Luker, he did not promote the scheme to Mr Luker but when, he, Mr Luker, expressed an interest, he provided him with the leaflet and videotape recording. After several inquiries to Mr Luker, said to have been limited to asking whether he had viewed the videotape, he made no attempt to promote the scheme to Mr Luker and requested the return of the videotape recording. No attempt was made to promote the scheme to Mr Vaughan, it is said, and the videotape recording was given to him so that he might consider the sales related knowledge it contained. The applicant denies that Mr Vaughan ever complained with regard to the scheme, or accused him of any related conduct and warned him that it would not be tolerated.

On the Sunday prior to his dismissal Mr Meek travelled past the residence of Mr Vaughan and there sighted two garaged motor vehicles he recognised as vehicles from the stock of the respondent. The following Wednesday he is said to have been told that a utility motor vehicle purchased by the respondent had been consigned for wholesale disposal and not retained in stock for sale from the yard. In the opinion of Mr Meek the interests of the respondent would have been better served had the utility been retailed through the yard and therefore he considered the method of sale to be odd. On Thursday the applicant accessed the motor vehicle stock records located on the desk of Mr Vaughan, and when his actions were questioned by Mr Luker and another, he told them he was inquiring about the two vehicles he had seen at the residence of Mr Vaughan.

Mr Vaughan was informed by Mr Luker on the Thursday that the applicant had accessed information about two motor vehicles and that he had done so because of where he had seen them. The meeting between Mr Vaughan and Mr Meek which was followed by the dismissal of Mr Meek occurred the next day, Friday 5 February 1999.

According to Mr Vaughan on the Thursday Mr Luker informed him that Mr Meek had been spying on him. That annoyed him, however he decided not to confront the applicant immediately but to reflect on the matter overnight. Mr Luker is also said to have complained about the applicant's attempts to interest him in his network marketing scheme, however Mr Vaughan did not indicate how recent that had been. Mr Vaughan decided to address matters with Mr Meek on 5 February 1999 and on that day called him to his office for that purpose.

It is plain that at the meeting between Mr Vaughan and Mr Meek there was comment upon a number of matters. The fact that the applicant had been in the vicinity of Mr Vaughan's residence, taken note of the motor vehicles present, and then made inquiries about them, was raised by Mr Vaughan and probably referred to by him as "spying". Mr Meek offered the explanation that it was by chance he found himself in the vicinity of the residence, such having happened by accident when he visited the suburb for a different purpose. For reasons which are not presently relevant, Mr Vaughan did not believe Mr Meek, and concluded that the applicant had acted with purpose because he suspected him of some impropriety. Mr Vaughan concedes that he remained annoyed with the applicant. The subject of commissions on motor vehicle sales paid by the respondent was a topic mentioned. There was also the suggestion from Mr Vaughan that the applicant leave the employment, ie resign. The subject of network marketing was raised by Mr Vaughan, and although he and Mr Meek differ on what was said, the thrust of Mr Vaughan had been that network marketing and related activity was to cease at the workplace. And finally, the applicant made a comment in which he used the expression "belt" (or a derivative), with the meaning to hit or strike, and in direct reference to Mr Vaughan.

According to Mr Meek, Mr Vaughan opened the meeting with him and spoke of spying and another matter and described him as pathetic. At some stage Mr Vaughan spoke of him having a gripe in relation to the commissions payable. There was the suggestion by Mr Vaughan that he resign, and this, says the applicant, was followed immediately with the threat of dismissal to which he responded and said the respondent would have a need of a good solicitor. After an exchange regarding network marketing, Mr Meek says he moved to leave the office of Mr Vaughan but was confronted by him at the door, face to face, where Mr Vaughan again referred to him as pathetic. It is following this that he, Mr Meek, stated to the effect that the approach taken by Mr Vaughan would not goad him to belt him and then he departed the office. Mr Meek asserts that he acted in a firm manner throughout and denies he swore, or was loud, or aggressive.

Mr Vaughan denies that he called Mr Meek pathetic at any time, or that he confronted him face to face at the door of the office. He says that Mr Meek was aggressive, loud, and engaged in swearing, whereas he had been calm but strong. On the version given by Mr Vaughan, following comments made in relation to commission payments, he stated to the effect that if Mr Meek was unhappy he ought resign. He was not asked whether he also threatened the applicant with dismissal. Mr Vaughan says that their meeting was ended by Mr Meek leaving the office. Mr Vaughan described Mr Meek to have said "something about belting" as he departed and he therefore called for Mr Meek to return but he did not. According to Mr Vaughan, Mr Luker had been in the vicinity of the office when he met with Mr Meek and he speculated that Mr Luker would have heard the loudness and aggression involved but he doubts that Mr Luker would have heard any of the content of what was said. Mr Vaughan, who is no longer an employee of the respondent, believes that Mr Luker has continued his employment with the respondent.

Mr Vaughan conferred with his superior by telephone regarding what had transpired, the decision regarding what action would be taken thereafter resided with Mr Vaughan and he decided to dismiss the applicant.

On the occasion that the applicant handed a videotape recording to Mr Vaughan, which appears to have occurred at some time in January 1999, the response of Mr Vaughan was a smile. No exception to this conduct of Mr Meek was expressed by Mr Vaughan. There is no evidence before the Commission to show that prior to 5 February 1999 there was an occasion when Mr Vaughan informed the applicant that his conduct in the workplace regarding network marketing was not acceptable. Mr Vaughan told the Commission that he had not "officially warned" the applicant regarding his network marketing related activities prior to the day of dismissal, nor did he issue a "final warning" to him in relation thereto at the meeting on that day because he did not have the opportunity to do so. The meaning I take from this statement of Mr Vaughan is that whatever may have been said by him, to Mr Meek, in relation to network marketing, such was not identified to be, and delivered in the form of, an express warning to him that he was to cease the related conduct. And further, that at the time the meeting commenced on 5 February 1999 the prior conduct of Mr Meek had not been such that it had caused Mr Vaughan to conclude that dismissal was warranted. Plainly the intention of Mr Vaughan had been to address the future conduct he required of Mr Meek and warn of the consequence if he did not comply.

Mr Vaughan has told the Commission that Mr Meek said "something about belting". No more accurate recollection of what he understood Mr Meek had said was provided, nor was there an explanation of why the description given by Mr Vaughan should be interpreted as a threat, or a veiled threat. At the time of dismissal Mr Vaughan did not conclude there had been a direct threat. Mr Vaughan lacked a clear understanding of what the applicant said and therefore he was not reasonably entitled to conclude that a veiled threat had been made, he could have no more than a suspicion. No doubt has been cast upon the applicant's version of what he said at the time, I therefore accept it to be accurate and find the words used do not contain a direct threat, or a veiled threat, to Mr Vaughan.

The reasons given for the dismissal of the applicant, and hence the justification for it, is the particular conduct described in the letter to the applicant. That conduct was not shown to have occurred. It follows there is no apparent justification for the dismissal of Mr Meek and hence it is in the opinion of the Commission that the respondent unfairly exercised the right to dismiss.

The remedy of monetary compensation is claimed by the applicant to the full extent that the Commission may grant ie a sum equivalent to what had been the usual remuneration of the applicant for a period of six months. Although there is minimal argument before the Commission regarding the practicability of Mr Meek being reinstated or re-employed by the respondent, given that six months have passed since the employment relationship between the parties was ended, that in the meantime Mr Meek has commenced a business venture, and in addition gained a limited licence to operate as an auctioneer, and he now wishes to pursue them, I am satisfied that reinstatement or re-employment would be impracticable. Were it practicable to order the reinstatement or re-employment of the applicant the need would remain for the Commission to consider what loss or injury the applicant may have experienced in consequence of his unfair dismissal, and in the period between the dismissal and any reinstatement or re-employment.

In the time which has elapsed since his dismissal, Mr Meek has not sought alternative employment. It is his view that his dismissal by the respondent, and the comments he anticipated would be made about him in relation to that, would have made it difficult to gain employment as a motor vehicle sales person elsewhere in the industry. Mr Meek is a trained butcher however he did not consider it an appropriate alternative because he had not worked in that field for many years and he was not confident he would be able to cope with it. The applicant embarked upon a business venture promoting and selling a door mounted security camera device which, although he believes the venture has a good potential for success, that has not been the situation to date and the expenses have exceeded the income from the venture. The absence of his prior remuneration as an employee and the absence of profit has, according to the applicant, required him to liquidate personal assets to obtain the funds needed to supplement the earnings of his wife.

It was submitted on behalf of the respondent that the absence of any attempt by Mr Meek to find alternative employment is to be viewed as a failure by him to take reasonable steps to mitigate his loss, and therefore any award of monetary compensation ought be minimal. Counsel for the applicant rightly pointed out that the obligation of his client to mitigate his loss did not require him to obtain employment but to actively pursue a course, in this case a business venture, with the intention and prospect of achieving an income and thereby reduce his loss. The onus lies with the respondent to show that the applicant failed to actively attempt the mitigation of his loss and that has not been discharged.

The uncontested evidence of Mr Meek is that he had been remunerated by way of a $300 per week retainer, and in addition, a 10% commission calculated on the profit realised upon motor vehicle sales achieved by him, according to which arrangement his averaged earnings were $780 per week, and further, he was allowed the use of a motor vehicle from the stock of the respondent, subject to him paying the respondent in the vicinity of $47 per week, and finally, he was provided with a card to purchase petrol to the value of $140 per month for his personal use. Plainly the $47, or thereabouts, per week which Mr Meek paid for the use of a motor vehicle is not an element of his remuneration, it is a sum he paid to the respondent for the benefit he received. Whatever value the applicant may have derived from the motor vehicle arrangement, to the extent it exceeded the sum he paid to the respondent weekly, is that which would form an element of his remuneration, however no such element of value was demonstrated to the Commission.

The average remuneration Mr Meek would have reasonably expected to receive in the six month period from his dismissal to the date of hearing, I find to be $20,280 (retainer and commission) plus a $840 (petrol allowance), a total of $21,120. That is the loss of remuneration that Mr Meek has suffered in consequence of his unfair dismissal. He will therefore be awarded that sum which is equal to the statutory limit.

Appearances: Mr D. Schapper, of Counsel on behalf of the applicant

Mr M. Jensen, of Counsel on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michael Leslie Meek

and

Buttermere Nominees Pty Ltd.

No. 173 of 1999.

9 September 1999.

Order.

HAVING heard Mr D. Schapper, of Counsel on behalf of the applicant and Mr M. Jenson, 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 Buttermere Nominees Pty Ltd pay to Michael Leslie Meek compensation in the sum of $21,120.

(Sgd.) C.B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michelle Newport

and

Trax Music.

No. 1106 of 1998.

COMMISSIONER J F GREGOR.

9 September 1999.

Reasons for Decision.

THE COMMISSIONER: On 17 June 1998, Michelle Newport (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 she had been unfairly dismissed from her employment with Trax Music (the Respondent).

The applicant in these proceedings commenced an employment relationship with the respondent on 30 June 1997. By letter dated that day, an offer of employment was made. The applicant signed the letter of offer and accepted the terms and conditions of employment. Paragraph 8 of the document relates to staff purchases and is relevant to these proceedings.

Paragraph 8 reads as follows—

<u>Staff Purchases</u>

When making purchases you are required to complete the transaction in the presence of the store manager, and in the case of a store manager purchasing they are required to <u>complete the transaction in the presence of another staff member</u>. [emphasis added].

The discount applicable to all stock is 25.00% off the recommended retail price (subject to change), or if the item is on sale then whichever price point is lower.

Under no circumstances can any stock be removed from the store by any staff member whatsoever, unless the above procedure has been completed and therefore payment in full has been received.

(Exhibit 1)

In the offer of employment, the respondent offered the applicant the position of sales assistant. When the applicant made the arrangement she discussed some matters with the respondent's Marketing Manager, Mr Paul Cook. The applicant alleges that Mr Cook agreed that she could obtain leave, at times agreed, to pursue membership of a national level sporting team. This arrangement worked well in the initial stages of the engagement.

The applicant had been working at the respondent's premises in Rockingham and in late 1997, she was transferred to Mandurah. On 24 March 1998, she received a warning (Exhibit T2). This warning was delivered to her by Mr Cook, in the presence of the Area Manager, Mr Paul Tyrell. The warning was given on a seat in a shopping mall in front of the respondent's Mandurah premises. According to the applicant, Mr Cook told her that she was going to get a written warning for stealing. Mr Cook alleged that two weeks prior to Christmas she improperly used staff discount procedures for the purchase of two Sony Playstations. The applicant explained this incident; the senior in the store told her she was entitled to discount at one level, while the manager, Ms Sandy Vodanovich, told her that she was entitled to 25% discount. The applicant completed the purchase and another worker signed the authorisation. According to the applicant, this was not inconsistent with the entitlements set out in her offer of employment (*Exhibit T1*). Mr Cook rejected her explanation. He stated that her explanation did not matter because the respondent had proof. The applicant signed the warning because she felt that there was no point doing anything else.

In May 1998, some issues arose over the applicant obtaining leave to go on a tour with her sporting team. There was a discussion between Ms Teresa Richardson, the Area Manager and Manager of the Retail Division of the respondent. The applicant was asked to write a letter setting out what she wanted. Ms Richardson would then try and sort something out.

According to the applicant, Ms Richardson attended the store the following day. She took Ms Vodanovich outside, came back in, took the applicant outside into the mall and told her that she has been accused of stealing and this would result in instant dismissal. The accusation related to an incident on 19 May 1998, when the applicant sold goods to a male person who used the respondent's club credit card. She was accused of selling a male a $30.00 compact disc (CD) and not charging him full price. The applicant did not remember the incident and denied that it had occurred. Ms Richardson said that she had proof. The conversation ended with the applicant being told to get her belongings and leave. The applicant's evidence was that she did not remember doing what she was accused of but if she had done so, she would make restitution. This was not an admission by her but a genuine attempt to resolve the problem.

The respondent argued that the applicant allegedly boasted to Ms Vodanovich and Ms Fullerton about stealing. One of these events was alleged to have occurred on 21 February 1998. Ms Vodanovich and Ms Fullerton, assistant manager of the respondent's Mandurah business, alleged that the applicant said that she had swapped price tags on a gift basket enabling her to save $20.00. In March 1998, the applicant was able to take a product through shop security without paying for it. Ms Fullerton's evidence in relation to the play station was that she instructed the applicant to wait until the store manager returned so confusion over the staff discount applicable could be clarified. Instead the applicant had a junior staff member sign off the purchase. Ms Fullerton signed off the applicant's previous purchase. The applicant should have waited for the store manager to return. It was alleged that the applicant was in clear breach of clause 8 of the Employment Contract.

The respondent alleged that the applicant either deliberately undercharged the purchaser or was intentionally reckless with the correct change when processing discounted sales. The applicant should have known that the correct amount was between $25.00 and $30.00. It was unlikely that the applicant could have used the 'rounded dollar key' inadvertently because of the way the tills are set up. The purchaser testified that he knew that he received a bargain.

According to the respondent, the applicant's conduct taken as a whole demonstrates a pattern which, more likely than not, indicates that she had engaged in misconduct when making the sale. The reasonableness of the respondent's conduct in not believing the applicant's denial and deciding to dismiss her should be assessed in the context of her earlier conduct.

Before I discuss the law to be applied, I need to make findings on witness evidence. The Commission heard from the applicant. I have carefully reviewed all of the evidence she gave to the Commission. I cannot find any inconsistency or confusion which might lead me to conclude that she has not told the truth. That is not to say that in the event that led to her dismissal, it could be held that she was blameless in the way she conducted the sale. There is sufficient confusion regarding how the respondent's club credit scheme worked to conclude, on the balance of probabilities, that it is not unlikely that the applicant either inadvertently misapplied the rules or made a plain error. Experienced Counsel cross-examined the applicant. In my view, the evidence given during cross-examination did not call in to question her examination in chief. I conclude that there is no reason not to accept her evidence.

Anthony Frisina, who was a client of the respondent and purchased the CD's which led to the applicant's dismissal gave evidence. It would be wrong to say that Mr Frisina was a comfortable witness. On the contrary, he made it clear that he would rather be somewhere else than be in the Commission. However, this did not detract from the quality of his evidence. He had seen nothing untoward in the transaction. The repercussions where of more concern to him.

I now consider the respondent's evidence. Mr Cook gave a precise recitation of his involvement in the matters. Evidence was also taken from Ms Fullerton and Ms Vodanovich. Their evidence appeared to me to be honest and forthright. Evidence was taken from Ms Kelly Scott, who initiated the complaint about the applicant. She related her involvement in the CD discounts. She thought that they were incorrect. She expressed an opinion that she genuinely held and I regard her evidence in that light.

Finally, the Commission heard from Ms Richardson who had dismissed the applicant. Ms Richardson appeared to be a confident witness who precisely related her involvement in the matter. I see no reason why her evidence should not be accepted.

In cases where all witnesses have related the events truthfully from their prospective, the Commission is required to make its findings and conclusions upon the facts. I have dealt with my findings regarding witness creditability and before I proceed to analyse the evidence, I need to discuss the law to be applied.

The test for determining whether a dismissal is unfair or not is now well settled. The question is whether the respondent acted harshly, unfairly or oppressively in its dismissal of the applicant. This is outlined by the Industrial Appeal Court in *Undercliff Nursing Home v. Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385*. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. 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 needs to be determined. 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. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (*see Shire of Esperance v. Mouritz (1991) 71 WAIG 891* and *Byrne v. Australian Airlines (1995) 65 IR 32*). In *Shire of Esperance v. Mouritz,* Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether the dismissal was harsh or unjust.

There are allegations by the respondent that the applicant is guilty of theft, particularly in relation to the sale of CD's to Mr Frisina. However, the other allegations concerning the applicant's involvement in theft in other stores are issues that need to be dealt with.

I therefore need to examine the law relating to theft in the workplace. In *British Home Stores Limited (BHS) v. Burchell* (1978) IRLR 379. Arnold J held at 380 that—

> *"…what the Tribunal have to decide every time is, broadly expressed, whether the employer who has charged the employee on the ground of the misconduct in question (usually, though not necessarily dishonest conduct) entertained reasonable suspicion amounting to a belief in the guilt of the employee of the misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. <u>First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer at the stage at which he formed that belief on those grounds, at any rate at the final state at which he formed that belief, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating these three matters, we think, who must not be examined further</u>"*
>
> *[emphasis in original].*

The principles in the decision of *BHS v. Burchell* have been followed in this jurisdiction in *TWU v. Tip Top Bakeries (1993) 73 WAIG 1632.*

In the *Tip Top Bakeries* case at p 1632, the Commission cites a lengthy extract from Fielding C in the Full Bench case of *"C" v Quality Pacific Management Pty Ltd* (which adopts the *BHS* principles) and goes on to say at p 1633 *"… the Commission, presently constituted, respectfully accepts and adopts, for the reasons given by Fielding C. (op cit), <u>that a reasonable belief of theft by an employer after a proper consideration of all the circumstances by the employer, constitutes sufficient grounds for dismissal of the employee</u>…"*

[emphasis added].

It is well settled that the task of the Commission is to assess whether the dismissal was industrially fair irrespective of whether there was a breach of contract. That assessment is to be made not according to technical rules but according to equity, good conscience and the substantial merits of the case, as provided in s. 26 of the Act. The employer is not required to act as a police officer or lawyer but as a reasonable employer in the same circumstances.

The respondent alleges that it reasonably formed a belief that the applicant had engaged in misconduct. This misconduct related to the intentional or reckless under charging of a 'friend' who purchased two CD's and then a failure to tell the truth about the transaction. In considering whether she conducted herself in that way, the respondent is entitled to look at other conduct of the applicant. The respondent asserts that this other conduct can be ascertained from the evidence of Ms Vodanovich and Ms Fullerton. They say that the applicant boasted about shop stealing to them on two occasions. One occasion concerned a claim by the applicant that she swapped price tags on a gift basket in a store other than the respondent's. The second was that she managed to get a product through a shop security system without paying for it. Before I turn to the dismissal itself I will deal with the respondent's propositions.

The applicant categorically denies that she boasted to her two workmates that she had managed by illegal means to gain advantages from two shops. It must be remembered that those allegations were recorded only when subsequent behaviour needed to be dealt with. Both of the women concerned wrote the notes from their memory. The notes are self-serving to the extent that they were written reasonably contemporaneously to each other but not to the events to which they relate. It is important that an investigation was not conducted when those matters were first raised with the respondent. The applicant's denials were never investigated nor was it put to her that her conduct was regarded as dubious by the respondent. She never had a chance to answer the charges that were made against her. Additionally, there was no reasonable attempt to ascertain the truth of the allegations made by Ms Vodanovich and Ms Fullerton. The respondent alleges that the applicant made some admissions about her conduct. Therefore it was concluded that the applicant behaved in the way that the letters of Ms Vodanovich and Ms Fullerton allege. However, the proposition omits that the applicant denied that the behaviour occurred when it was initially raised with her and continued to deny it, with explanations, in evidence before the Commission.

Whether I am right or wrong in the proceeding analysis is irrelevant. Ultimately, the applicant was not dismissed for either of the shop incidents nor were they taken into account in the dismissal. The evidence of Ms Richardson is crystal clear in this respect. She said without equivocation, under cross examination, that she did not take into account any matter other than the allegations concerning the CD's. She said that she took the applicant into the pedestrian thoroughfare where there were some chairs. She put the allegation to the applicant and she was able to tell that the applicant was guilty of the offence by her body language. Ms Richardson says the applicant started to shake and blush. The applicant's immediate reaction was that she did not recall the incident but she would pay for it any loss. Ms Richardson claimed that she could read body language and she based her decision to dismiss the applicant on that alleged skill.

The clear evidence of Ms Richardson is that she did not rely on any other matter. The reliance on the single matter gives great concern about whether the applicant was given natural justice in this circumstance. There was no real investigation into the incident. There was some confusing explanation about how the club credit scheme works. The applicant admitted that she could have made an error. It appears from the evidence that she did. Additionally, the applicant said that if she had made an error she would make restitution. In the absence of any other behaviour of the applicant contrary to the respondent's interest, it is hard to see that the dismissal could be justified on this single incident alone. She was dismissed because Ms Richardson thought from her body language that she was guilty of deliberately giving Mr Frisina a discount to which he was not entitled. There is no factual basis upon which Ms Richardson based her decision to terminate. In the circumstances, it was an arbitrary decision. It was also harsh and it was unfair.

It is common ground between the parties that reinstatement is impracticable because of the breakdown of their relationship. The Commission was told that the applicant pursued the matter because of her career and ambitions in the Western Australian Police Service. It is submitted that as a result of the unfair dismissal the applicant was out of work for 3 weeks. Whilst employed by the respondent she worked 38 hours per week at $9.35 per hour and received $355.45 per week. The loss of income amounted to $1,066.35. The applicant also submits that in accordance to s. 23 A(1)(ba) of the Act, compensation should be made for loss or injury and asks for legal costs of $5,000.00.

It is clear that the Commission has no power to make an award of legal costs. In *Ramsay Bogunovich v. Bayside Western Australia Pty Ltd (1999) 79 WAIG 8* His Honour, The President P J Sharkey, has reviewed the case law relating to compensation in detail. This Commission is obliged to apply those principles. Fundamentally, the Commission must make a finding of the loss or injury. It must assess the proper amount. It considers whether the amount is in excess of the maximum allowable. If this is the case, the Commission must reduce the amount equal to the permissible maximum. If the amount is within the cap, no reduction in the amount of compensation is necessary. The decision to compensate must not be arbitrary. Importantly the aim and indeed the requirement of an award of compensation is to put the unfairly dismissed person, who has not been reinstated, in the same situation she would have been if she had not been unfairly dismissed. If the Commission does not do that, it will be in error and will act contrary to equity, good conscience and the substantial merits of the case.

The applicant claims, and I accept, that she was unemployed for 3 weeks and that she suffered a loss of income amounting to $1,066.35. The respondent says that the amount ought to be reduced by any payments of social security. As I understand the case law that is not appropriate. Whether the applicant, having been compensated for loss of earnings arising from an unfair dismissal, is in debt to the Department of Social Security is a matter between the applicant and that Department.

The Commission cannot consider an expenditure of legal costs as an injury that would directly contradict provisions of the Act and in the absence of evidence concerning other compensatable injury I am unable and do not make any findings in respect of that head of claim.

This decision will be completed by orders which will consolidate the reasons for decision in the following way. The applicant was unfairly dismissed. It is common ground that reinstatement is not an option and compensation should be fixed. Compensation of $1,066.35 will be awarded to the applicant against the respondent.

Appearances: Mr K Prunty appeared on behalf of the applicant

Mr M Thronhill appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michelle Newport

and

Trax Music.

No. 1106 of 1998.

COMMISSIONER J F GREGOR.

9 September 1999.

Order.

HAVING heard Mr K Prunty, of Counsel, on behalf of the applicant and Mr M Thornhill, of Counsel, on behalf of the respondent, the Commission pursuant to orders vested in it by the Industrial Relations Act, 1979 hereby orders—

1. THAT the applicant was unfairly dismissed.
2. THAT reinstatement is not viable and compensation should be fixed.
3. THAT the respondent pay to the applicant compensation in the sum of $1,066.35.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Stephen K O'Grady

and

Quality Assurance Testing Engineers a Division of Travaglini Nominees Pty Ltd.

No. 1494 of 1998.

COMMISSIONER P E SCOTT.

28 September 1999.

Reasons for Decision.

THE COMMISSIONER: The application, as originally filed, was a claim of unfair dismissal and for the enforcement of outstanding contractual entitlements. At the hearing, the Applicant clarified that the application being pursued at that time was simply the claim for pay in lieu of notice in accordance with the terms of the contract of employment.

The Applicant commenced employment with the Respondent on 23 March 1998, in the capacity of sales engineer. His letter of appointment attached "General Terms And Conditions Of Employment". Clause 1 provided a salary of $52,000 per annum payable in 12 equal payments. The clause relevant to the matter before the Commission is clause 7. Termination which provided "One months notice in writing by the either employee or QATE."

The Commission heard evidence from the Applicant that on 24 April 1998, he had a discussion with the company's managing director, Mr Wilton and following that discussion he confirmed in his own mind that he would resign because he was not happy with the business's management style. On 27 April 1998, the Applicant tendered his resignation to Mr Wilton in a letter dated that day. The essential parts of this letter which is headed "Ref: Resignation" says—

> Further to our meeting and detailed discussions on Friday the 24th April, I wish to formalise my resignation and give you a weeks notice as from the 24th April.
>
> I feel this is (a) necessary step to make for both of us and I feel the Company QATE has a good future."

(Exhibit 2)

The Applicant says that Mr Wilton was not happy to receive his resignation due to the volume of work involved in the business. He says that Mr Wilton asked him to stay until someone else was employed. He says that he understood that a month's notice would apply or that if there was to be a shorter period then it would be by negotiation. This conflicts with Mr Wilton's evidence. He says that what he put to the Applicant was that as the Applicant had no job to go to but that he was aware that the Applicant had put his resume around, that the Applicant stay in employment with the Respondent until either the Respondent found a replacement for him or until the Applicant found another job. He says that if the Applicant found another job, the Applicant could leave forthwith and vice versa. Mr Wilton also says that this arrangement superseded the terms of Clause 7. – Termination of the contract of employment. He also says that as the Applicant had given less than a week's notice, and denied any obligation to give a month's notice that he would have found it unrealistic to anticipate that the Applicant would want to give a month's notice if he found alternative employment.

The Applicant denies that Mr Wilton said that on either of the two alternatives occurring there would be immediate termination. The Applicant asserts that the terms of the written contract between the parties set out in Exhibit 1 continued to apply.

Mr Wilton gave evidence that following the discussion at the end of April, Mr Wilton thought that as the Applicant had only been employed for a short time, it might be worth his while approaching some of the people who had been applicants for the position which the Applicant had obtained. He approached at least one of those people who indicated an interest in the position. However, this person did not take up the position as he received an offer from his then current employer which made it unattractive for him to take up employment with the Respondent. On this basis, the Respondent advertised the position on three occasions in the West Australian newspaper. An offer of employment was put to an applicant and this applicant accepted the offer on 29 July 1998. He was to commence employment on Monday 3 August 1998. On this basis, Mr Wilton approached the Applicant on Thursday 30 July 1998, and advised him that a replacement had been found. He advised the Applicant that he would not be required after 31 July 1998. However, he asked the Applicant to attend on 31 July to debrief Mr Wilton. The Applicant says that he advised Mr Wilton that he was entitled to a month's written notice. He had one particular job that he was doing at that time being the preparation of a catalogue. Mr Wilton asked the Applicant how long he thought it would take to do that job on the basis that if the Applicant had said that it would take him another couple of weeks then Mr Wilson would have been likely to have agreed to that period. However, when the Applicant said that it would take him a month, Mr Wilton would not accept this on the basis that the Applicant had already taken an inordinate period of time to undertake this work. Mr Wilton advised the Applicant that their agreement did not require one month's notice to be given to the Applicant. The agreement was that as soon as it was suitable to either party then the employment would come to an end.

On the next day, being Friday 31 July, the Applicant was due to attend for his last day of work. The Applicant said in his evidence that he rang Mr Wilton about 7.30am or 8.00am and asked him if he had thought about the notice period. He says that Mr Wilton was ranting and raving and so he, the Applicant, said that he would not attend for work that day because he believed that it would not be conducive to the proper negotiation of the arrangement between them and that he would speak to Mr Wilton on the Monday. He thought that a cooling off period over the weekend would be useful and when Mr Wilton was ranting and raving, he hung up the telephone. Mr Wilton, on the other hand, says that the Applicant phoned him at around 7.30am/8.00am and said that he would not be coming in, he would not be doing the debriefing. Mr Wilton said that he hardly had time to talk to the Applicant before the Applicant put down the phone. He says that the Applicant did not say that he would come in on the Monday. Mr Wilton says that he was concerned that the Applicant had the company's motor vehicle and soon after their telephone conversation, he phoned the Applicant back to discuss this matter with him. However, the Applicant's answering machine was on and he did not speak to the Applicant. On this basis, Mr Wilton thought that the Applicant's employment was finished and he had a letter couriered to the Applicant. This letter says, in its essential parts—

> "Dear Steve
>
> TERMINATION
>
> With reference to your letter of resignation dated 24 April '98 and our discussions of 30 July '98 we confirm your termination date with Q.A.T.E. as 31 July '98.
>
> It was unfortunate that you did not feel it courtesy to debrief today as arranged. This obviously puts Q.A.T.E. in an awkward position for handing over to a replacement.
>
> Just to put the record straight you will recall when you commenced this job that number one priority was to produce a price list. Until this document was produced it was impossible for me to set up agencies throughout the country. It has been nearly 5 months since this priority was made and I still do not have a completed price list. This is seriously holding up company progress and your comments that it would take another month to complete are totally inacceptable.(sic)
>
> In addition to the pricelist the company continues to lose money with no new markets identified and I have not seen a monthly sales report since March 1998.
>
> Without going further into this situation I would remind you that you resigned on 24 April 1998 giving me one weeks notice. Our agreement was that you would stay until you got another position <u>or</u> until your job had been filled by a replacement.
>
> All that remains is for me to settle your pay which is here waiting for you. You need to return the company vehicle, office keys and anything else you may have.
>
> I would have preferred to part on a more professional note and despite this communication I have no hard feelings and wish you well in your search for suitable employment.
>
> Yours sincerely
>
> signed
>
> P.S.Wilton
>
> MANAGING DIRECTOR"

(Exhibit 3)

The Applicant's evidence was that on Monday 3 August 1998, early in the morning he telephoned the Respondent however, in cross examination, when it was put to him that it was Mr Wilton who telephoned him, he accepted that this was so. It was agreed that Mr Wilton asked the Applicant to bring the vehicle back and Mr Wilton would pay a taxi fare for the Applicant to return home. This occurred. The Applicant was paid up to 30 July 1998 plus 7 days annual leave and superannuation pay.

I have considered all of the evidence in this matter. The question before the Commission is quite simple. Was the Applicant entitled to four week's pay in lieu of notice when his employment was to be terminated by the Respondent on 31 July 1998, in accordance with the terms of the contract of employment entered into by the parties when the Applicant first commenced employment? The onus lies on the Applicant to demonstrate that the terms of the contract are as he says. Having observed the Applicant as he gave his evidence, I am not sure of the veracity of that evidence. This is on the basis that the Applicant acknowledged on a number of occasions that he did not have a recollection of certain things which were put to him but said that he accepted that they may have occurred. Further, I note that it was the Applicant's intention when he telephoned Mr Wilton on Friday 31 July 1998 at the commencement of the day, not to attend for work. I draw an inference that the Applicant's purpose in telephoning was to advise his employer of this intention but also to apply pressure to the Respondent to agree to paying him in lieu of notice, without which agreement the Applicant was not intending to return to work to meet his obligations.

I also note that in April 1998, although his contract, on which he now relies, obliged the Applicant to give four weeks written notice, the Applicant gave his employer less than a week's notice of his intention to resign. It seems quite unlikely that the Applicant, having given less than a week's notice to his employer when he decided to leave his employment, when he did not have a job to go to, would agree to give the Respondent one month's notice in accordance with the terms of the original contract, when he found alternative employment.

On these bases, I find that the Applicant's evidence is not to be accepted. I conclude on the balance of probabilities that agreement was reached in April 1998 to vary the terms of the contract between the parties to provide that upon either the Applicant finding alternative employment or the Respondent finding a replacement for the Applicant, that the Applicant's employment would terminate forthwith. It would be quite unlikely that the original arrangement was still in place, based on the conduct of the parties. Accordingly, the application is to be dismissed.

Appearances: Mr G Sturman appeared on behalf of the Applicant

Mr D Jones appeared on behalf of the Respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Stephen K O'Grady

and

Quality Assurance Testing Engineers a Division of Travaglini Nominees Pty Ltd.

No. 1494 of 1998.

COMMISSIONER P E SCOTT.

28 September 1999.

Order.

HAVING heard Mr G Sturman on behalf of the Applicant and Mr D M Jones on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be, and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Sheena Irvine Crosby Parker

and

Roadway Express Holdings Pty Ltd.

No. 350 of 1999.

COMMISSIONER A.R. BEECH.

15 September 1999.

Reasons for Decision.

Given extemporaneously at the conclusion of the proceedings as edited by the Commission.

I find that there are 2 reasons why Ms Flendt decided to dismiss Ms Parker. One is that Ms Flendt believed that she felt threatened by Ms Parker consulting an industrial relations department or firm, (it is not clear what that expression meant), and secondly the degradation that she felt at being referred to by the use of the word "bitch". In my view, whether or not the dismissal was fair or unfair turns upon those incidents that occurred on 10 March. The issue of whether or not Ms Parker was, or was not, offered the full-time job has no relevance to the dismissal which occurred other than as background. I turn then to consider the reasons for the dismissal.

Firstly, it is clear from the evidence of Ms Parker that she denies that she consulted an industrial relations department or firm, and second she denies that she used the word "bitch". Ms Flendt's evidence is not helpful in this regard because it is also quite clear, as she herself admits, these two allegations were not said to her but rather, they were, according to her own evidence, drawn to her attention by third persons, those being 2 people, Ms Mellor on the one hand and Ms Cherry on the other. The first issue that the Commission has to decide is whether as a matter of fact Ms Parker did or did not contact an industrial relations department or firm or used the word "bitch". In this regard the Commission obviously is faced with some difficulty. The difficulty arises from the direct evidence of Ms Parker, the direct evidence of Ms Mellor and the indirect evidence of Ms Cherry. It is somewhat unfortunate that although during the course of the proceedings both Ms Flendt and Ms Parker thought that Ms Cherry could give some evidence to support their respective positions, Ms Cherry was not called. She may not have been able to be called but the fact is she is not here and therefore I do not have the advantage of hearing her understanding of what occurred. It is not unusual for the Commission to be faced with a situation where 2 or more people view a particular incident and have slightly different recollections of the event. It does not mean that one person is not telling the truth. It may well be that each person is telling the truth as he or she recalls it; it is merely that each has seen slightly different things or heard slightly different things. So in the conclusion I have come to it is not a question of preferring one person's evidence to the other.

I therefore approached the matter this way. If I assume for the moment that Ms Parker did contact an industrial relations department or firm, would that act of itself warrant or contribute to a decision to dismiss? I have little doubt that it would not. As a matter of principle an employee is able and entitled to seek professional industrial advice whether from a government body or otherwise, and although I appreciate that Ms Flendt might have preferred Ms Parker coming to speak with her about her concerns, I am unable to objectively see that the fact that she had sought industrial relations advice could validly lead to a decision to dismiss Ms Parker.

I adopt a similar process in relation to the word that is alleged to have been used. If Ms Parker did not use that word then clearly she is not able to be validly dismissed for having done so.

I therefore assume, for the purpose of my reasoning, that she did refer to Ms Flendt as a "bitch". Indeed, given that she acknowledges Ms Mellor as an honest witness, there is certainly evidence that she did as Ms Mellor herself says. So if I assume then that she did refer to Ms Flendt as a "bitch" then does that justify the dismissal which occurred? I think it is clear that the use of a particular word, be it an insult or otherwise, depends on the context. If such words are frequently used in a workplace then the use of the word again will not warrant anything by way of disciplinary action because that kind of language is used commonly. Here, however, there is no evidence that such words are regularly used in the workplace, certainly not in the workplace where Ms Parker frequently worked. I can therefore understand that the use of that word would stand out far more than if it was a word in regular use. I also take into account Ms Mellor's evidence that if the word was used, it was said in a nasty or vicious way and that also goes to the context.

I have also taken into account that if the word was used it was not used directly to Ms Flendt but rather said between 2 people. To that extent the comment may merely have been made in a private setting in the sense that the word would have never been repeated. The most that can be said if Ms Parker did use the word is that she referred to her supervisor in that way to another person. I accept that Ms Flendt felt degraded by that word. That is her evidence. However, a dismissal is not to be judged as fair or unfair merely based upon the employer's subjective reaction, rather it is to be viewed objectively in all of the surrounding circumstances.

I do find that if Ms Parker did use that word in the context in which it was used, it was misconduct. However, not all misconduct justifies dismissal. Further, the employer should put the alleged misconduct to the employee in order to get the employee's response and the employer is to take into account the response and all mitigating circumstances before taking the decision whether or not to dismiss. That did not happen in this case. The mitigating circumstances that could have been taken into account include the previous good working relationship and the dealings each had with the other. The effort Ms Flendt put in to finding alternative employment for Ms Parker is certainly evidence of a good working relationship previously existing. Ms Parker repeated on a number of occasions that she regarded Ms Flendt as the "best boss" she had come across. Ms Parker has a good employment record. She has no previous bad employment history. Furthermore, a legitimate fact to be taken into account is the effect the dismissal had upon Ms Parker and from her evidence the effect of the dismissal was devastating upon her family. These are all factors to be weighed in deciding whether or not the employer's right to dismiss Ms Parker was exercised fairly or unfairly. Mrs Flendt's evidence does not make clear whether she took all of those factors into account in making her decision. I suspect that she did not, because I also note her evidence that she herself was angry when she heard of the allegation. But the Commission's function is not to assess whether or not the dismissal is fair based only on whether Ms Flendt took everything into account, rather the Commission is now to take everything into account and decide whether there was fairness and a fair go.

I have no difficulty in reaching the conclusion that if Ms Parker did use that word, dismissal for that offence was harsh and unfair, and I do so for the reason that it was a single incident, a single incident when it may well have been when Ms Parker was herself upset. The dismissal certainly occurred when Ms Flendt was upset and taking into account the matters I have referred to earlier and the working history for the period from 1995 to 1997, and that Ms Flendt did not give Ms Parker an opportunity to put any explanation or denial, that the dismissal was unfair. If Ms Parker had said the word Ms Mellor alleges that she heard, it did warrant in these circumstances, a warning or a reprimand falling short of dismissal. That is not to say the industrial relations law allows an employee to refer to her senior in derogatory terms. It does not. But it does say that to summarily dismiss an employee for doing so especially where the employee is given no chance to explain, may be unfair, and I find it is unfair in this case. I therefore find that Ms Parker was unfairly dismissed.

Having found that, the Commission is required to consider reinstating Ms Parker. For the reasons that have been discussed I find that this is impracticable to do so. The Commission is then to consider what compensation is to be ordered and the Commission is to take into account the loss or injury suffered by Ms Parker. In assessing compensation I have taken the following issues into account. If Ms Parker had not been dismissed, would she have been likely to have remained in employment for any length of time? I think the answer to that is "yes", relying particularly on Ms Flendt's evidence that in all probability she would have remained there on relief work. I take into account that Ms Parker is now due to leave the State, but that is a decision that has only occurred recently, and I find it is more likely than not that Ms Parker's employment would have continued at least up until this time. I have not found it necessary to determine whether or not Ms Parker was correct in her evidence that she was offered a permanent job because that issue would only arise if reinstatement was in question. The fact that it is not means that it is an issue that I do not need to decide.

Furthermore, I agree with the submission of Mr Crossley that if compensation is to be awarded it will be done at the average rate that Ms Parker received up to the time of her dismissal rather than the notional rate she may have received had she been permanently employed. I also take into account that Ms Parker actively sought alternative employment following her dismissal. I accept the family circumstances which she described left her with no practical alternative but I do accept her evidence that she looked for alternative employment albeit unsuccessfully. I also note Ms Flendt believed that Ms Parker was looking for full-time employment even whilst she worked for the respondent. That may be so, although there is no evidence directly on that point. However, even if she was looking for full-time employment whilst she was working there as a casual, she was unsuccessful in finding full-time employment from the date of her dismissal onwards.

The issue that I next have to decide is how long is it likely Ms Parker would have remained in employment. The evidence before me is not particularly exact on that point. The limit to the Commission's compensation powers is a period of some 6 months. However, I am not confident that Ms Parker would have worked full-time over that 6 month period because the evidence of the time sheets shows that whilst she had fairly regularly employment it was not week after week without fail. In my estimation she is likely to have worked there in total for less than a 6 month period because of that. From my reading of the time sheets I think a fair estimate of the time she is likely to have worked between the date of the dismissal and today's date is a period of 5 months. The decision that I make therefore is that Ms Parker should be paid compensation at the average rate that is contained in Exhibit No 1 at the rate of $325.58 for a period of 5 months as compensation for the loss suffered by her due to her dismissal, the total being $6,511.60. An order will issue to that effect.

Appearances: Mr T. Crossley for the applicant.

Ms R. Flendt for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Sheena Irvine Crosby Parker

and

Roadway Express Holdings Pty Ltd.

No. 350 of 1999.

16 September 1999.

Order.

HAVING heard Mr T. Crossley on behalf of the applicant and Ms R. Flendt on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

1. DECLARES THAT:
   (a) The dismissal of Sheena Irvine Crosby Parker by the respondent was unfair; and
   (b) Reinstatement is impracticable.
2. ORDERS THAT Roadway Express Holdings Pty Ltd, within 14 days, pay Sheena Irvine Crosby Parker the sum of $ 6,511.60 by way of compensation for the dismissal which occurred.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Russell Pearn

and

K M Lunt and G Lunt trading as Juice-Time Distributors.

No. 702 of 1996.

30 September 1999.

Reasons for Decision.

COMMISSIONER C.B. PARKS: The applicant, Mr Pearn, a former employee of the respondents who was dismissed from that employment, claims the dismissal was not justified and unfair.

The respondents sell and distribute bottled drinking water, cordial, juice, and aerated waters, through a business purchased some twenty months prior to the dismissal of the applicant. Mr Pearn had been employed by the previous owner and his services were retained by the respondents with whom he continued as of a motor truck driver delivering the bottled products to their customers. Mr K. Lunt dismissed the applicant without notice and with the payment to him of one hour's pay in lieu thereof. The parties are agreed that their employment relationship had, for the latter part, involved four days work per week and been designated "casual", and was terminable by the respondents either giving the applicant one hour's notice, or by paying him one hour's pay in lieu thereof.

On the morning of the dismissal Mr Lunt separately questioned Mr Pearn, and Kenneth Graham Bell another employee, whether either knew the whereabouts of a carton of 5 litre bottles of drinking water missing from storage. A carton which both employees knew had been stored aside with others because they had become wet but which had since been sold. Mr Bell was the first questioned, he denied knowing the whereabouts of the carton but informed Mr Lunt that he had seen a number of 5 litre bottles of drinking water in the pantry of Mr Pearn's home. It appears that when Mr Pearn was questioned he may have suggested there was a normal operational reason for the absence of the carton however Mr Lunt believed Mr Pearn had taken the carton of drinking water. Mr Lunt informed the applicant of his belief and indicated that although he could not prove his culpability, he had lost trust in him, and he was dismissed. At the time Mr Lunt also indicated that his belief was influenced by an earlier incident in which he believed the applicant had obtained cigarettes from a delicatessen in exchange for providing bottled ginger beer to the owner without charge. Again, Mr Lunt indicated he was unable to prove such had been the case and declined to interview the delicatessen owner when that was suggested by the applicant.

A little more than two months prior to the dismissal, Mr Lunt had stated to Mr Pearn to the effect that he was not to act alone when making future deliveries to the delicatessen in question. No express accusation appears to have been directed to the applicant at the time however the gist of what was said indicated to him that Mr Lunt believed he had engaged in unacceptable conduct which, if it were repeated, would place his future employment in jeopardy. It appears that the applicant did not seek any explanation of, nor did he raise any challenge to, the stance taken by Mr Lunt. That is probably so because Mr Pearn had supplied the delicatessen owner with bottled ginger beer in excess of the number the owner ordered and the excess was supplied without charge. Mr Pearn denies that he did so to his personal benefit. It is common ground that such an arrangement had previously operated as a marketing strategy of the respondents but had been terminated by them. Mr Pearn says that he took it upon himself to continue the arrangement because the delicatessen owner had questioned the absence of the additional ginger beer and had also indicated he would cease ordering other products.

From an exchange between Mr Lunt and Mr Pearn during the cross examination of the latter, it is evident that Mr Lunt is satisfied that Mr Pearn had purchased only one 19 litre container of drinking water from the business and had never purchased a carton of 5 litre bottles. Whereas, Mr Pearn, although conceding there had been 5 litre bottles stored in his pantry asserts they are the remainder of a carton he purchased directly from Mr Lunt and were intended for use on a long-weekend of camping, probably at Easter. Easter occurred three weeks prior to the dismissal, I find.

There was evidence before the Commission that Mr Lunt had, on many occasions, taken issue with Mr Pearn with regard to the hours he claimed he had worked. According to Mr Lunt it was his concern with regard to the hours Mr Pearn claimed he worked, and his wish to be confident that the hours worked by the applicant were better controlled, that led to the introduction of the "casual" employment arrangement.

After the dismissal, and in consequence of Mr Pearn commencing his action before the Commission, Mr Bell informed Mr Lunt that 16 days prior to the dismissal he and Mr Pearn had taken a 45 minute lunch break at the home of Mr Pearn and had watched a television movie. Mr Lunt ascertained that Mr Bell had recorded the break to be such whereas the applicant had recorded a 15 minute break was taken and hence he was paid wages as though he had worked the balance of the break. Mr Pearn conceded that he watched the television movie with Mr Bell however he was not pressed to answer the remainder of the accusation directed to him. Mr Bell gave evidence to the Commission but was not questioned on this point.

There was evidence from Mr Pearn that the hours he worked from day to day did not always align with the hours he recorded as worked ie some days he worked longer than he claimed and on others he worked less, and in his opinion, one balanced the other so that the wages he claimed and were paid to him were appropriate. Mr Pearn admitted that he had been directed to take a lunch break each day and that regularly he elected not to take, and did not take, such a break. Mr Pearn was plainly very cavalier in his approach to his responsibilities as an employee however it is also plain that he and the employment relations of the parties required additional management.

Mr Bell has since also informed Mr Lunt that there had been occasions of dubious conduct by the applicant. One such occasion had been when he accompanied the applicant to the residence of a customer who regularly purchased a 19 litre container of drinking water and the sequence of events that followed caused him to doubt the honesty of the applicant. The usual practice was said to be that Mr Pearn would leave the motor truck, proceed to the residence and ascertain whether a container of drinking water was required, return to the motor truck with any empty container and payment for a replacement if such was required, store the empty container on the motor truck and while at the motor truck prepare an invoice recording the payment received. Upon Mr Bell being made aware a replacement was required he would remove a full container of drinking water from the motor truck and carry that replacement to the residence. The invoice, when issued by Mr Pearn, would then be taken to the residence. On the occasion in question Mr Bell says he delivered a replacement container of drinking water to the residence and was returning to the motor truck when he encountered Mr Pearn on route from the motor truck to the residence with an invoice to be placed with the newly delivered container, Mr Pearn having previously taken to the motor truck an empty container and the payment which the customer had left for them to find. Mr Bell relieved Mr Pearn of the invoice and returned to place it with the full container he had delivered however, in the course of doing that, he says that he noticed the invoice was crumpled and crinkled and that prompted him to partially open the invoice (which I take was folded) and look at the date of it as he placed it underneath the container. According to Mr Bell, the applicant had reluctantly relinquished the invoice to him, he then arrived behind him at the residence and was felt to be looking over his shoulder when he partially opened the invoice, at which point, he Mr Pearn, twice exclaimed that the invoice was an old one, and then, while they were returning to the motor truck, he commented that he would prepare a new invoice. Two other occasions had been when Mr Pearn was said to have taken a bottle of cordial, and then subsequently bottles of blue "splash" aerated water, without paying for them knowing they had not attained a state at which the respondents allowed products to be taken without payment. The cordial bottle was said not to be damaged, nor had the contents exceeded the date of its shelf life, the applicant having commented at the time it was approaching that date, and the "splash" bottles were found beneath other items collected together by the applicant, and it is said that none of the "splash" bottles had lost their labling nor had their contents lost aeration and they appeared to have been covered to hide them and their conditon.

Mr Pearn denies that on the occasion described by Mr Bell when the old invoice was discovered, he purposely did not prepare a new invoice but acted to give the appearance that he had done so, and that, through a reuse of the old invoice he intended to retain for his own purposes the payment he had collected. The old invoice, according to the applicant when cross examined, had been present in the meter box of the residence and he had collected it together with the empty container, then in error he acted to leave that same invoice for the customer to find. The applicant conceded the usual practice of delivering drinking water and the issue of an invoice is that described by Mr Bell however he says that is not always followed and was not followed on the day in question. On his return to the motor truck with the empty container Mr Pearn says he did not remain there but obtained a full container of drinking water and carried it to the residence, with the old invoice still in hand, and he was alerted to it being the old invoice by Mr Bell. Mr Pearn did not explain where, and how it was, that Mr Bell came to discover that it was the old invoice. The applicant does not deny that he took a bottle of cordial and that he may have commented upon its shelf life. However he described the bottle to have come from a damaged carton and was itself damaged and therefore such was an item he was authorised to take without payment. Additionally the bottles of "splash" aerated waters which Mr Bell had found, in a box, beneath a number of other products of the type allowed to be taken without payment and which he, Mr Pearn, had collected together for that purpose, according to him, were not meant to be hidden and the bottles were either damaged or without labels and also qualified to be taken without payment.

It is plain that on the day of dismissal Mr Lunt knew that Mr Pearn had supplied ginger beer to the delicatessen owner without charge, and without authority, and in an oblique way he had addressed that with the applicant on an earlier date. Furthermore Mr Lunt knew there were days that the applicant did not work the full period he claimed, and that there were also days on which he did not comply with the direction to observe lunch breaks and continued working so as to finish work on those days at an earlier time. The catalyst for the dismissal was the belief of Mr Lunt regarding the missing carton of 5 litre bottles of drinking water. Mr Lunt was wrong to have concluded that Mr Pearn had 5 litre bottles of drinking water in his pantry on the word of Mr Bell alone and without first directly stating to him he was said to possess bottles of that kind and without affording him an opportunity to admit or deny he possessed them, and thereafter give explanation if necessary. Now however it is an established fact that the applicant was in possession of 5 litre bottles of drinking water at the time. That error aside, at the time Mr Lunt was sure he had not sold a carton of 5 litre bottles to the applicant. He remembered the applicant had purchased one 19 litre container of drinking water from the business at a discount price shortly after they acquired the business, and although purchase on that basis had remained available to the applicant he made no further purchases, leaving aside for a moment the disputed purchase. Given that Mr Lunt elicited from the applicant in proceedings that he had not made purchases because the drinking water was considered too expensive by his wife, and given the nature of the questions asked of the applicant, I believe that at the time of the dismissal Mr Lunt had understood that to be the case and had concluded therefrom that the applicant would not have purchased a carton of 5 litre bottles from another source because that would be more expensive than one from the business, and furthermore the purchase of such a carton from any source would also be illogical because a 19 litre container could have been purchased from the business at less expense.

Mr Lunt maintains that the applicant did not purchase the carton from him whereas the applicant asserts that he did. No independent corroborative evidence was produced to the Commission on this point. Mr Pearn said he paid cash for the purchase of both the 19 litre container and the carton, he also said he had no invoices and inferred none were issued because they had been cash transactions. An exchange occurred between Mr Lunt and Mr Pearn on this point and in that Mr Lunt indicated that invoices are issued for cash transactions and the business records confirmed that one had issued in relation to the 19 litre container purchase but there was no record regarding the carton of 5 litre bottles, and impliedly the absence of such a record meant no invoice had issued and hence the purchase had not been made. Given that the parties represented themselves in the proceedings and failed to adequately present their cases to the Commission it would be unsafe to conclude either way whether the applicant did or did not take the carton in question without payment. I am however satisfied that there was reasonable evidence before Mr Lunt for him to conclude that the applicant had taken the carton. It is also apparent from the conduct of the respondents' case that although Mr Lunt made comment upon his loss of trust in connection with the missing carton and the ginger beer incidents, at the dismissal, his state of mind was derived from those incidents and the other of occasions when the appicant was known to have acted contrary to his duty to the respondents ie the likes of knowingly recording and claiming hours to have been worked which were not correct and purposely not taking breaks from work as he had been directed. Mr Lunt had justifiable reason to terminate the employment of the applicant in the lawful manner allowed by the contract of employment.

I have earlier recorded some aspects of the evidence directed to the conduct of Mr Pearn which is said to have occurred prior to the dismissal but advised to the respondents by Mr Bell after that date, and upon which the respondents also seek to rely . In the matter of the Minister for Police and Commissioner of Police v. Desmond John Smith (73 WAIG 2311 at 2326) Fielding C (as he then was) observed —

> "(I)t is now settled that in seeking to justify a dismissal, an employer may rely on any misconduct on the part of the employee, even if it was unknown to the employer at the time of the dismissal (see: Finch v. Sayers (1962) 2 NSWLR 540; Tullner v. Alston (1987) 22 IR 326; but cf: Wheeler v. Phillip Morris (1989) 32 IR 323). As pointed out in Gregory v. Phillip Morris (1981) 24 IR 397, albeit in a different context, the embargo on unfair dismissals is to be viewed in a practical rather than technical way."

In the matter of, Lane and Others v. Arrowcrest Group Pty Limited (t/as ROH Alloy Wheels) 27 FCR 427 von Doussa J considered the Judgement of the Full Court in the matter of Gregory v. Phillip Morris (1988) 80 ALR 455 and said —

> "In my opinion it is still open to an employer to justify a dismissal by reference to facts not known to the employer at the time of the dismissal, but discovered subsequently, so long as those facts concerned circumstances in existence when the decision was made."

and hence I find that to the extent there may have been conduct by the applicant prior to his dismissal which would have justified the mistrust of him had it been known, but which has become evident after that date, the respondents are entitled to rely upon that conduct in a review of the fairness of the dismissal.

The incident in which Mr Bell discovered the old invoice was to be provided to the customer, and the related sequence of events, I believe had been more accurately described by him. That is, that following usual practice Mr Pearn returned to the motor truck with the empty 19 litre container, and at or about the same time Mr Bell proceeded to the residence with the replacement full container, not the applicant. Mr Bell deposited the container and commenced his return to the motor truck when he met with Mr Pearn on route with what came to be identified as the old invoice in hand. Given the time taken by Mr Bell to deliver the full container and to partly return to the motor truck, it was a reasonable assumption on his part that, in accordance with usual practice Mr Pearn had stored the empty container and also prepared an invoice while at the motor truck. That Mr Bell relieved Mr Pearn of the invoice he held, and the manner in which he says he discovered that it was an old invoice, is a plausible explanation, and is the only one provided. In the opinion of Mr Bell the reaction of the applicant when he relieved him of the invoice and later at the point when it was "discovered" to be old, after having followed him to the residence for no apparent practical purpose, was suspicious. The curiosity of Mr Bell was said to have been aroused by the crinkled and crumpled state of the invoice and as that description of it stands uncontested I conclude such was its state. That Mr Pearn had held the invoice but was not alert to the state of it, and that he mistakenly thought it to be one that had been newly prepared, something he would have had to have done only minutes beforehand, is possible, but difficult to accept and is plainly very suspicious.

I am satisfied that on the occasion Mr Pearn took the bottle of cordial without payment he commented upon the shelf life of the cordial content approaching its expiration date. Mr Pearn's actions at the time plainly conveyed to Mr Bell his intention to take the item without payment. The opinion of Mr Bell was that the outward appearance of the item was satisfactory and did not provide justification for the action of the applicant.

This opinion, together with the fact that the material comment accompanied the action, caused Mr Bell to interpret the comment as the expression of the reason the applicant had decided to take the item. I believe that Mr Bell interpreted the comment in this way because the most likely comment to accompany the action would have been to announce a reason relevant to the decision to so act and not to make comment upon a matter which, although related, was not relevant to the action. That was a reasonable conclusion for Mr Bell to reach. However, given that there is a conflict of evidence regarding whether the item qualified to be taken without payment because of the state of the bottle alone and that evidence does not deal with the factual state or appearance of the cordial bottle, it would, given the seriousness of the accusation against the applicant, be unsafe to find against his contention that the state of the cordial bottle provided the legitimate reason for him to take it without payment. The Commission is also faced with evidence that is opinion in relation to the bottles of blue "splash" aerated water where again it is unsafe to find against the applicant.

The final matter to be considered is the conduct of the applicant relating to the event of watching a television movie. The allegation was put to Mr Pearn that he purposefully claimed the length of related break taken, and the period worked by him, which he knew were wrong and would cause him to be paid wages that were not due to him. Mr Pearn evaded the allegation and did not answer it. I am satisfied on the evidence that Mr Pearn did conduct himself in the manner alleged and had such been known by the employer at the time of his dismissal would have provided additional adequate grounds for the dismissal.

Appearances: Mr R. Pearn on his own behalf

Mr K. Lunt and with him Ms G. Lunt on behalf of the respondents

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WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Russell Pearn

and

K M Lunt and G Lunt trading as Juice-Time Distributors.

No. 702 of 1996.

30 September 1999.

Order.

HAVING heard Mr R. Pearn on his own behalf and Mr KM Lunt and with him Ms G Lunt on behalf of the respondents, 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.

Parveen Kaur Rai

and

Dogrin Pty Ltd T/A Haggers Restaurant.

No. 140 of 1999.

5 July 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions, as edited by the Commissioner.)

COMMISSIONER C.B. PARKS: The applicant alleges that the respondent unfairly dismissed her from employment and failed to pay to her benefits due under their employment contract. At the outset of proceedings the respondent denied that it had had any employment relationship with the applicant. Advice of this contention was provided to the applicant on the working day prior to hearing this matter. The applicant did not take issue with that period of notice and did not object to the matter raised proceeding and to be heard and decided as a preliminary matter.

Unfortunately there is a paucity of coherent information before me. Prior to December 1998 the applicant had been employed by the previous operator of Haggers Restaurant. When a new entity commenced to operate the restaurant on 6 December 1998 her services were retained and it is her initial belief she had become employed by Mr Opel Kahn. During the time the applicant spent with her new employer she received at least 3 payslips which described Dogrin Pty Ltd to be trading as Haggers Restaurant. It is for this reason Ms Rai has commenced her action in the Commission against that corporate entity.

There is evidence that Dogrin Pty Ltd was registered on 18 December 1998. That is twelve days subsequent to the date the applicant commenced employment with the new operator of Haggers Restaurant, and her new employer. Mr Opel Kahn has told the Commission that he became involved with the restaurant then known as Haggers Restaurant in early December 1998, when he acted as manager on behalf of his wife, Julie Kahn, who owns the business which was then known as Haggers Restaurant, a business now known as Bibendum at the Colonnade, conducted at premises leased from Lyrical Holdings Pty Ltd.

That evidence of Mr Kahn is in direct conflict with the citation of Dogrin Pty Ltd on the payslips to which I have earlier referred. It is also his evidence that the payslips were produced by a Ms S King, a person who was also an employee at that time, and who, incorrectly and without his knowledge, cited Dogrin Pty Ltd thereon. The applicant advised the Commission of an intention to call Ms S King to give evidence however when she failed to attend proceedings, the applicant elected to proceed. As I understand the evidence of Ms Rai, the wage payments she received from her employer were usually made in cash however there was one occasion on which she was paid by cheque, that being the payment upon termination when the drawer was said to be Oko Investments Pty Ltd. Copies of three payslips have been tendered. The payslip bearing the date 7 January 1999 (exhibit 9), purports to record a wage payment made by cheque whereas both those for 21 January and 28 January (exhibit 8) bear the endorsement "Cash". There is no evidence disclosing the role Oko Investments Pty Ltd had in relation to the employment of Ms Rai however the applicant contends such is not a relevant consideration.

Mr Kahn is a director of Dogrin Pty Ltd. He has told the Commission upon oath, firstly that Dogrin Pty Ltd was not the employer of the applicant for the period she was employed at the restaurant, secondly that the citation thereof on the payslips was without his knowledge and was wrong, and thirdly that the purpose of the respondent company is to trade in shares. That evidence is to be preferred to that of a payslip.

The Commission received into evidence a letter dated 17 February 1999 (exhibit 7) from the firm of Barristers and Solicitors, Monaghan & Associates, wherein it is stated that Ms

Julie Kahn has been the "approved manager" of the restaurant, apparently for the purposes of the Liquor Licensing Act, since 10 December 1998. Although such is hearsay evidence, and it deals only with the status of Ms Kahn for the purposes of the aforementioned statute, I accept it to indicate that from the specified date Ms Kahn had a principal role in the operation of the business and probably that which Mr Kahn has told the Commission, ie. that of owner of the business and the employer of Ms Rai.

Exhibits 5 and 6 both came into existence after the employment of Ms Rai was terminated and have no bearing upon the period of her employment. They are therefore of no assistance.

The lease between the lessor, Lyrical Holdings Pty Ltd, and the lessee, Julie Louise Kahn, and the guarantor, Opel Kahn, (exhibit 1) does not reveal to the Commission the date at which Julie Louise Kahn became the lessee of the restaurant premises. Had it done so it would not have been probative evidence because the lease has not yet been executed by the parties.

For the reasons I have indicated, I find that the employer of the applicant was Julie Louise Kahn, a natural person, and therefore a different legal entity to the corporate body Dogrin Pty Ltd. The application is therefore wrongly made against Dogrin Pty Ltd.

Application was made by the applicant to strike out Dogrin Pty Ltd and cite Julie Louise Kahn as the respondent to the application. The law is well settled. The Commission may amend an application where the error sought to be corrected regarding a party is one of misdescription. It is not open by way of an amendment to strike out a party and cite an entirely different party as the respondent to the same matter. (see The Owners of Johnston Court Strata Plan No.5493 v. Anna Dumancic, 70 WAIG 1285).

It is not open to the Commission to strike out Dogrin Pty Ltd and join Julie Louise Kahn as the respondent to the application. The reference of any complaint against Julie Louise Kahn lies in a separate action.

I am therefore satisfied that the application is not competent and it will therefore be dismissed.

Appearances: Mr D. Clarke on behalf of the applicant

Mr A. Smetana on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Parveen Kaur Rai

and

Dogrin Pty Ltd T/A Haggers Restaurant.

No. 140 of 1999.

8 October 1999.

Supplementary Reasons for Decision.

COMMISSIONER C.B. PARKS: On 5 July 1999 the Commission announced it would order the dismissal of the application referred to the Commission on 3 February 1999 (the primary application). This primary application is one authorised by s.29 of the Industrial Relations Act 1979 (the Act) and refers two claims, one, that Ms Rai had been unfairly dismissed from employment with the respondent, authorised under sub-s (1)(b)(i) and therefore subject to sub-s (2), and the other, that benefits under her contract of employment are outstanding and due to her, and authorised under sub-s (1)(b)(ii). Oral reasons for the dismissal were given extempore however, before the written reasons for the decision, and the decision in the form of an order, were published and delivered to the parties, the applicant applied to reopen the matter. The application to reopen was called on for hearing before the Commission on 27 August 1999 and on that date the Commission also published in writing the edited extempore Reasons for Decision together with a minute of the proposed order. For reasons not presently relevant, the lastmentioned hearing was adjourned to a date to be fixed and proceeded on 1 October 1999.

These are the reasons of the Commission in relation to the application to reopen the hearing of the matter. However, before such are disclosed it is appropriate to record the earlier findings and rulings of the Commission ie firstly, that the respondent, Dogrin Pty Ltd, the entity which the primary application alleges had traded as Hagger's Restaurant and was the former employer of Ms Rai, had not been her employer, secondly, that Julie Louise Khan had so traded and had been the employer, thirdly, the action against the corporate entity was wrongly made, and finally, in relation to an oral application (the application to amend) to strike out the name of the corporate entity and cite Julie Louise Khan as the respondent in place thereof, such was not open to the Commission.

At the outset I record that it is common ground that the Commission has not perfected its earlier Decision in the matter and is therefore not functus officio and able to entertain the application to reopen which is before it.

The Notice of Application to reopen lodged in the registry of the Commission states that —

* it seeks an order pursuant to "Section 27 (1) (j) (m) and/or (v) of the Act"
* the grounds on which the application is made are "Confusion as to the correct identity of the Respondent Employer (See attached Schedule)"

The Schedule of Grounds attached to the Notice of Application states the following —

"1. The Respondent named in the original application was served on the 3rd February 1999 and chose not to respond until the day of the hearing.

2. The Principal Officer of the named Respondent (Mrs Julie Louise Khan) has been named in the evidence of the named Respondent as the correct Respondent entity.

3. The Principal Officer of the named Respondent would not suffer prejudice as a result of the amendment. A direct link between the named Respondent and Mrs Julie Louise Khan has been shown in evidence.

4. Evidence given on the 5th of July 1999 shows that Dogrin was not the owner of the premises nor was it the owner of the liquor licence. The identity of the actual entity operating the business at the time of the dismissal was never fully proven, even though as the entity challenging jurisdiction the Respondent had a clear responsibility to do so.

5. As there has been no order issued in this matter the Commission is clearly not *functus officio* in this matter and as such has a right under Section 28 of the Industrial Relations Act 1979 to allow correction where necessary.

6. The Commission is bound under Section 26 of the Industrial Relations Act 1979 to "act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms".

7. It was the unchallenged evidence of the Applicant in this matter that the payslips given to her were clearly marked "Dogrin Pty Ltd t/a Hagger's Restaurant". The same payslips are also clearly marked A.C.N. Number 085 560 167 (see exhibits 3, 8 and 9). The Applicant therefore clearly had reason to believe that Dogrin Pty Ltd t/a Hagger's Restaurant was in fact the applicable entity in the absence of any evidence to the contrary.

8. New evidence has come to light in the shape of a Group Certificate covering the employment of the Applicant. The named Employer on this Group Certificate was in fact not in existence at the time of Ms Rai's dismissal.

9. It was the evidence of the Applicant that Dogrin Pty Ltd did not in fact trade. It is also however the unchallenged evidence of the Applicant that her final payment was by a cheque drawn on a company called "Oko Investments". Evidence has come to light that this was a company owned by Mr Opel Khan, which

> was de-listed by the ASC in July 1998 for lack of annual returns. It may be said that it didn't therefore trade. If that had any semblance of truth it also wouldn't have a working bank account."

The Notice of Application to reopen does not specify the substance of the order sought by Ms Rai were the matter reopened and further heard, nor does the Schedule of Grounds assist in that regard. The grounds numbered 2 and 3, refer to Julie Louise Khan and contend that she "would not suffer prejudice as a result of the amendment", words which are opinion upon the consequence of an amendment to the primary application that cites Ms Khan as the respondent thereto. What is not plain is whether the opinion is provided in reference to the application to amend which was earlier refused or is provided in support of a new and different plea to amend. Grounds numbered 8 and 9 each respectively state "New evidence has come to light …." and "Evidence has come to light …….", which evidence provides the apparent foundation for the application to reopen. Taken on its face, ground 8 states that the new evidence relied upon, ie a taxation "Group Certificate" issued to Ms Rai in relation to the material period of employment, names as her former employer one that was not in existence at the time of her dismissal. Julie Louise Khan existed, and continues to exist, and hence that ground does not appear to have an object in common with, grounds 2 and 3. Ground 9 refers to "a company called 'Oko Investments'"and the purported ownership of it by Opel Khan however, on its face, it also does not appear to have an object in common with grounds 2 and 3. Ground 4 contends that the identity of the former employer of Ms Rai "was never fully proven" and that the respondent, Dogrin Pty Ltd, "had a clear responsibility to do so".

Tendered to the Commission by the agent for the applicant were, a 1999 Group Certificate issued to Ms Rai regarding her material period of employment, a business names extract provided by the Ministry of Fair Trading, and a company extract provided by the Australian Securities and Investments Commission. These documents the Commission inadvertently marked exhibits 1, 2, and 3 respectively notwithstanding documents tendered in the earlier proceeding had been allocated the same identifying numbers. In order to avoid confusion the Commission has reidentified the three latest exhibits as 1A, 2A, and 3A. The information contained therein, upon which the applicant relies to secure a reopening of the matter, is the following—

Exhibit 1A — states to the Australian Taxation Office that the applicant had been employed for the period from 7 December 1998 to 29 January 1999 by "JULIE + OPEL KHAN T/A BIBENDUM", and was issued on 14 July 1999.

Exhibit 2A — states that Lyrical Holdings Pty Ltd registered the business name "Bibendum at the Colonnade", a restaurant cafe, on 5 February 1999.

Exhibit 3A — states that Oko Investments Pty Limited, a proprietary company, had as its sole director a person named Opu Opel Khan, and was deregistered on 3 July 1998.

Ground 8 in its mention of "the named Employer" and that such was "not in existence" at the time of the dismissal, the Commission has been told is in reference to "Bibendum", which according to the documentary evidence has, from 5 February 1999, been a name registered to the corporation identified in exhibit 2A and therefore could not have been the employer of Ms Rai as is purported to be the situation by exhibit 1A, "Bibendum" being a different entity and having come into existence after her period of employment and the date of her dismissal. Hence the content of exhibit 1A is wrong, and as I understand the argument, impliedly ought be viewed as an attempt to disguise the true identity of the employer.

Plainly "Bibendum" could never have been the employer of Ms Rai, or any other person, at any time, it not having a legal persona and such being no more than a trading name for a restaurant. Exhibit 1A names Julie Khan and Opel Khan to have been the employers of the applicant at the material time, and according to the evidence provided in both proceedings before the Commission, the trading name in use at that time was "Hagger's Restaurant" and the trading name "Bibendum" came later. Exhibit 1A records the wrong trading name in relation to the employment period, however the use of the symbol "T/A" expressly indicates the name to be a trading name and therefore, viewed at its worst may confuse, but such does not alter or disguise the legal personae of the employer there described.

There was equivocation regarding what the applicant would have the Commission order should the matter be reopened and should the evidence show that a different conclusion to that reached previously is warranted. Ultimately it was indicated that the applicant no longer maintains that the respondent to the primary application had been the employer and orders are sought to strike out that party and, in light of the new evidence (exhibit 1A), to cite in place thereof the natural persons Julie Khan and Opel Khan. The Commission is asked to pierce what has been described as the corporate veil.

Julie Louise Khan and Opel Khan are the directors of Dogrin Pty Ltd (exhibit 3). In the earlier proceeding this respondent company was represented partly by counsel, instructed by Opel Khan, and partly by Opel Khan who also gave testimony in the matter. Opel Khan continued to instruct counsel and was present in the latest proceeding. Counsel submitted from the bar table that as previously evidenced before the Commission Julie Louise Khan, acting alone in the capacity of a natural person, had been the employer of Ms Rai and that exhibit 1A is wrong to the extent it names Opel Khan and also refers to "Bibendum"in the same regard. Hence there is the denial that Opel Khan had been an employer in partnership with his wife. It was further submitted that the reference to "Bibendum" is an easily understood and obvious error arising from the fact that Julie Louise Khan has, since the change of name of the restaurant to "Bibendum at the Colonnade" which occurred shortly following of the dismissal, traded under that name with the authority of Lyrical Holdings Pty Ltd the owner of that name and lessor of the restaurant. There was evidence at the earlier proceeding that Julie Louise Khan was the employer operating as "Bibendum". The contents of exhibit 1A, and the denial of Opel Khan submitted through counsel, are both hearsay however because the exhibit has been created after the event and the denial aligns with the testimony previously given by Opel Khan I am persuaded that Julie Louise Khan alone had been the employer. However, if the Commission be wrong in this conclusion and it is that the two natural persons claimed to have been the employers, were the employers, the nature of the order sought is the same in principle, that is, a different legal person or persons would be summoned to answer the claims made. It is upon that premise that the Commission denied the earlier application to cite a new respondent to the primary application and for the same reasons is compelled to do so again. Firstly, this case does not involve a corporate veil. Secondly, it is not simply a case of getting the proper respondent's name right; it is a case of naming the wrong respondent (see The Owners of Johnston Court Strata Plan No 5493 v. Anna Dumancic, 70 WAIG 1285@1287). Thirdly, an amendment of the nature sought operates retrospectively to the original filing of the application (see WABAMAMIEUIEUW v. Michael William Harris, 74 WAIG 214@217, and Wiggin v. Edwards, 47 ALJR 586@596), the effect of which would deprive the new party of a defence which has already accrued (Weldon v. Neal, 19 QBD 394). A defence has accrued upon part of the application made by operation of s29 (2) of the Act. Prosecution of an allowable claim lies in the reference of a separate action against the true employer.

The commission would be remiss if it did not address further some aspects of the matter. Throughout proceedings Opel Khan has said that an employee, the book-keeper, has been responsible for the erroneous descriptions of the employer. An employer has an obligation to correctly administer a business and must actively supervise the administration process. That obligation was not met in relation to the employment of Ms Rai. There has plainly been a complete lack of care by management of the respondent, and of the employer, which caused her to embark upon a futile course of action, and to incur unnecessary costs, in an attempt to exercise her rights and have allowable complaints reviewed by the Commission.

Appearances: Mr D. Clarke on behalf of the applicant

Mr A. Smetana on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Parveen Kaur Rai

and

Dogrin Pty Ltd T/A Haggers Restaurant.

No. 140 of 1999.

8 October 1999.

Order.

HAVING heard Mr D. Clarke on behalf of the Applicant and Mr T. Smetana 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,
Commissioner.

[L.S.]

SECTION 29 (1)(b)—Notation of—

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Addinall D	Summertime Refreshments	890/1998	Beech C	Discontinued
Adjie F	Aker Unirig Pty Ltd	827/1999	Gregor C	Discontinued
Anderson JPT	Crystal Brook Dental Centre	591/1998	Beech C	Discontinued
Anderson S	Mount Edon Tarmoola Operations Pty Ltd	587/1999	Beech C	Discontinued
Anthony B	Automotive Industrial Mining Supplies	728/1999	Gregor C	Discontinued
Apergis K	Jo-Anne’s Avenue of Beauty	676/1999	Beech C	Discontinued
Atkins ML	Boral Construction Materials Group	1236/1999	Beech C	Withdrawn
Baldwin AE	Marvel Loch Hotel	750/1999	Beech C	Discontinued
Banks JA	The Distribution Group Ltd t/a Repco	1202/1999	Beech C	Discontinued
Bate CM	Rostrata Avenue Hair Design	724/1999	Gregor C	Discontinued
Begley T	Workpac (WA) Pty Ltd	1190/1999	Kenner C	Discontinued
Blanch MG	Herless Pty Ltd ACN 007 321 860	546/1999	Kenner C	Discontinued
Bourne NM	Perth Theatre Trust	1058/1994	Parks C	Dismissed
Braham ZL	Goodyear Australia Ltd	703/1999	Beech C	Discontinued
Brown A	Western Geophysical	208/1999	Kenner C	Discontinued
Brown GC	Boral Contracting Pty Ltd	943/1999	Gregor C	Consent Order
Brown T	Crustacian Holdings t/a G & C Crane Hire	577/1999	Beech C	Discontinued
Bruce TR	Centaur Mining and Exploration Ltd	960/1999	Kenner C	Discontinued
Bull C	MTC Consultancy Pty Ltd as Trustee for the Morton Family Trust t/as Tarcoola Supermarket	413/1999	Gregor C	Discontinued
Cartlidge D	Austcom Tele Services Pty Ltd	784/1999	Beech C	Struck Out
Casserly NG	Union Furniture & Fine Furnishing Pty Ltd	1014/1999	Scott C	Dismissed
Chandler J	Total Corrosion Pty Ltd	1975/1998	Gregor C	Discontinued
Chapple CE	Hansley Holdings Pty Ltd (Administrator Appointed)	447/1998	Beech C	Discontinued
Ciric N	Bunbury Health Service	370/1999	Fielding SC	Discontinued
Coe MD	New Breed Security Guards & Patrols Pty Ltd	1098/1999	Scott C	Withdrawn
Cooke B	Insight Business Systems Pty Ltd	295/1999	Scott C	Dismissed
Cosgrove SJ	Salmat	765/1999	Gregor C	Consent Order
Cox A	Prestige Property Service	1633/1998	Scott C	Dismissed
Culshaw A	Jackson McDonald Barristers & Solicitors	693/1999	Kenner C	Discontinued
Curnow K	Ashton Read Liquidators	758/1999	Scott C	Dismissed
Darrington MJ	Burswood Resort (Management) Ltd	1191/1998	Beech C	Discontinued
Davies R	Carbine Nominees Pty Ltd t/a Bates Horseland	1505/1998	Beech C	Discontinued
Davies R	Rohanna Pty Ltd t/a Skipper Mitsubishi	1039/1999	Scott C	Withdrawn
De Rozario SM	Sakura Ya Nominees Pty Ltd t/a Nippon Café	2154/1998	Beech C	Discontinued
Deasley JA	Copperart/Homeart Pty Ltd	934/1999	Beech C	Withdrawn
DeBrito S	United Construction Pty Ltd	663/1999	Kenner C	Discontinued
Double B	Newman Steel Metaland Pty Ltd	462/1999	Gregor C	Discontinued
Eastwood KN	L & J Bricklaying Contractors	777/1999	Beech C	Consent Order
Elliott CJ	Ridley Agri Products	1011/1999	Kenner C	Dismissed
Galloway J	Teravin Group	684/1999	Beech C	Discontinued
Gill RC	George Weston Foods Ltd t/as Weston Foods (WA)	526/1999	Gregor C	Discontinued

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Glasby RA	Kimberley Super Value	2262/1998	Kenner C	Discontinued
Gouault XG	SS & S Langdon	1159/1999	Coleman CC	Dismissed
Grant R	BGC Contracting	1201/1999	Fielding SC	Discontinued
Grubelich A	Nilsen Electric (WA) Pty Ltd	1070/1999	Gregor C	Discontinued
Gundry L	DM Oliver	2122/1998	Fielding SC	Dismissed
Hackford K	Wesfarmers Transport Limited	1040/1999	Scott C	Withdrawn
Hamann R	Preston Parker, Lee's Hire	673/1999	Gregor C	Discontinued
Hare JT	Crushing Services International Pty Ltd	1115/1999	Kenner C	Discontinued
Harrison PE	CTS Engineering	1134/1999	Fielding SC	Discontinued
Hawkins PG	Buswest	1031/1999	Kenner C	Dismissed
Helmers DM	WIN Television WA Pty Ltd	719/1999	Gregor C	Consent Order
Hervey ME	Ratten & Slater Nominees Pty Ltd	1023/1999	Beech C	Discontinued
Hopkins KM	Maddington City Cars & Commercials	1072/1999	Scott C	Dismissed
Huntley A	The Great Escape	1815/1998	Beech C	Discontinued
Ierace A	Random Access (WA) Pty Ltd	2063/1997	Coleman CC	Dismissed
Jamet A	W.J. Moncrieff Pty Ltd	488/1999	Gregor C	Discontinued
Joyce MA	Autoclass Pty Ltd Beaurepaires Moora	966/1999	Gregor C	Dismissed
Kallawk DJ	Ausboard Corporation Pty Ltd	809/1999	Beech C	Dismissed
Kelmar S	The Australian Marketing Institute	1187/1997	Beech C	Discontinued
Lennox L	WA Consolidated Power Pty Ltd ACN 086 788 436	1279/1999	Fielding SC	Discontinued
Limb PJ	Omega-Star Pty Ltd ACN 078 579 110	1108/99	Kenner C	Discontinued
Linklater P	Ashton Read, Liquidators	924/1999	Scott C	Dismissed
Litherland W	Newman Steel Metaland Pty Ltd	463/1999	Gregor C	Discontinued
Lucas S	McCoy Lawnmower and Chainsaw Centre	1198/1999	Fielding SC	Discontinued
Mackie CJ	Brian Russell	749/1999	Beech C	Discontinued
Maddox B	Sunset Strip Entertainment	636/1999	Beech C	Discontinued
Malcolm ND	Madic Pty Ltd t/a Briskleen Supplies	736/1999	Beech C	Discontinued
Marks SD	Geraldton Region Tourist Association Inc	1165/1999	Gregor C	Discontinued
Marrinan J	Basefield Contracting and Hire Services	468/1999	Coleman CC	Dismissed
Mazalevskis GF	Rimblue Pty Ltd	1080/1999	Parks C	Consent Order
McCabe MJ	Sandy Cover Tavern Pty Ltd	770/1999	Gregor C	Discontinued
McDonough J	Skilled Engineering Limited	438/1999	Gregor C	Discontinued
McKeagg DS	Stylish Wrought Iron	154/1999	Gregor C	Discontinued
Mitchell SJ	Flanders Investments Pty Ltd ACN 003 627 101	782/1999	Kenner C	Discontinued
Newcombe SL	Dr Peter R Dawson	1306/1999	Fielding SC	Withdrawn
Outtram MR	Richard Denton of Nor-West Seafoods Pty Ltd	444/1999	Coleman CC	Dismissed
Pedersen KP	Bogdanis Nominees T/as Portofinos	922/1999	Kenner C	Discontinued
Perrine FDB	Lyrical Holdings Pty Ltd	524/1999	Beech C	Discontinued
Phillips B	MMI Services Pty Ltd	49/1999	Gregor C	Discontinued
Pinkerton PE	Western Australian Institute of Sport Inc	1383/1998	Beech C	Discontinued
Pitt A	Happy Hockers	682/1999	Beech C	Discontinued
Pollin R	Newman Steel Metaland Pty Ltd	464/1999	Gregor C	Discontinued
Randall G	Blue Gum Engineering WA Pty Ltd	1385/1999	Kenner C	Discontinued
Rasyid AR	Western Pacific Holdings Pty Ltd t/a Diesel Motors	660/1999	Kenner C	Dismissed
Reading CE	Tri Ocean Australia	1139/1999	Scott C	Dismissed
Reeves RJ	Parkway Enterprises Pty Ltd t/a Eurolite Lighting Imports	759/1999	Beech C	Discontinued
Royle A	The Chamber of Fruit and Vegetable Industries in Western Australia, Fruit and Produce Agents Association	574/1999	Beech C	Discontinued
Ryan A	Riverview Church Incorporated	1163/1999	Gregor C	Discontinued
Scrimshaw AC	Objective Holdings Pty Ltd	594/1999	Kenner C	Discontinued
Securo LC	Spotless Services Australia Limited	391/1999	Beech C	Discontinued
Sewell QJ	Smith Brook Wines Pty Ltd	626/1999	Scott C	Dismissed
Sharman B	Crane Distribution Limited Trading as Tradelink Plumbing Supplies	1233/1999	Scott C	Withdrawn
Smart KL	Liberty Orelia Service Station	812/1999	Gregor C	Consent Order
Steele SF	Satoka Pty Ltd T/as Poly Pools ACN 087 311 242	1210/1999	Kenner C	Discontinued
Sullivan CK	Esperance Rural Properties	926/1999	Gregor C	Consent Order
Tsilivis I	Tamsity Pty Ltd t/as Dr 7 Medical Centre	1325/1999	Gregor C	Discontinued
Tuohy G	Transfield Pty Ltd	2271/1998	Fielding SC	Withdrawn
Valberg L	Proper-T-Care	1832/1996	Parks C	Discontinued
Vallance D	Rimblue Pty Ltd	1082/1999	Parks C	Consent Order
Weinert HA	Narrogin Bowling Club Inc	1245/1999	Gregor C	Withdrawn
Williams EV	Bega Garnbirringu Health Service	1211/1999	Parks C	Dismissed
Williams PC	Monty's Restaurant t/a Kal Holdings Pty Ltd	1001/1999	Kenner C	Dismissed
Williams WA	Wiscombe Pty Ltd t/as Ezyplus	1213/1999	Gregor C	Discontinued
Wilson J	Ionut Sica t/as Navada Computer Systems	231/1999	Gregor C	Discontinued

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Wilson V	Faulkner R	256/1999	Coleman CC	Dismissed
Wojcicki SBA	Kwinana Transport Services Pty Ltd	752/1999	Beech C	Discontinued
Wotherspoon DB	Henry Walker Eltin Contracting Pty Ltd	1298/1999	Fielding SC	Dismissed
Wyatt AT	Unique Auto Panel & Paint	707/1999	Beech C	Discontinued
Wyatt KJ	Fremantle Club (Inc)	1007/1999	Scott C	Withdrawn
Yenema MR	Goomburrup Aboriginal Corporation	1104/1999	Fielding SC	Discontinued

CONFERENCES—
Matters arising out of—

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

Lamberta Pty Ltd.

C 229 of 1999.

COMMISSIONER S J KENNER.

29 September 1999.

Recommendation.

WHEREAS on 21 September 1999 the applicant applied to the Commission for a compulsory conference pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS on 28 September 1999 the Commission convened a conference between the parties pursuant to section 44 of the Industrial Relations Act, 1979;

AND WHEREAS at the conference the Commission was informed that the matters the subject of the application were related to application C 229 of 1999 concerning the terms and conditions of employment of employees employed by the respondent. One of those issues being whether instruments signed by employees of the respondent were properly to be regarded as workplace agreements under the Workplace Agreements Act 1993 or alternatively, were common law contracts of employment;

AND WHEREAS the Commission was informed by the applicant that subsequent to proceedings in C 229 of 1999 the respondent had reduced the wages and conditions of employment to those provided for in the Metal Trades (General) Award 1965, and as a consequence the applicant sought a status quo order preserving the rates and conditions of employment of the affected employees until such time as the Commission hears and determines application C 229 of 1999;

AND WHEREAS the Commission, having considered all of the issues declined to issue a status quo order but instead resolved to issue a recommendation;

NOW THEREFORE, the Commission, having regard for the public interest and the interests of the parties immediately involved and to prevent any further deterioration of industrial relations in respect of the matters in question and pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby recommends—

THAT the respondent take no further steps to actively promote or otherwise encourage the acceptance of offers of workplace agreements by employees of the respondent who have not already accepted such offers pending the hearing and determination by the Commission of application number C 229 of 1999.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

CSR Building Materials

and

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

C 278 of 1999.

COMMISSIONER S J KENNER.

5 October 1999.

Recommendation.

WHEREAS on 29 September 1999 the applicant applied to the Commission for a compulsory conference pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS on 5 October 1999 the Commission convened a compulsory conference pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS at the conference the Commission was advised that the applicant was in the process of introducing an afternoon shift in its Cornice Plant as a second shift, with four employees to be worked on each shift including a senior hand for each of the two shifts;

AND WHEREAS the Commission was advised that the applicant and respondent are in dispute as to the appropriate rate of payment to be made to the senior hands to work in the Cornice Plant with the respondent contending that the work performed by employees presently in this classification involves duties and responsibilities similar to or the same as those employees of the applicant occupying the position of shift boss who are in receipt of an additional allowance pursuant to clause 9(1)(b) of the Building Materials Manufacture (CSR Limited – Welshpool Works) Award 1982 No. A10 of 1982 ("the Award");

AND WHEREAS the Commission was informed that in support of this claim members of the respondent employed at the applicant's Cornice Plant have taken industrial action from on or about 29 September 1999 in the form of overtime bans and the applicant contends that such overtime bans are seriously affecting the applicant's operations and its ability to introduce the second shift in the Cornice Plant;

NOW THEREFORE, the Commission, having regard for the interests of the parties directly involved and to prevent the deterioration of industrial relations in respect of the matter in question and in accordance with the provisions of the Industrial Relations Act 1979 hereby recommends—

(1) THAT the applicant as an interim measure and without prejudice to the ultimate outcome of the dispute pay to the Cornice Plant senior hands, they being Mr Pedro Oporto and Mr John Trainer, an allowance at the rate of 50% of the current shift boss allowance as prescribed by clause 9(1)(b) of the Award until such time as the present dispute is finally determined;

(2) THAT each of the employees members of the respondent employed by the applicant at the applicant's Cornice Plant who are engaged in industrial action concerning the matter the subject of these proceedings, cease such industrial action as soon as may be, but in any event, no later than commencement of

shift on Wednesday 6 October 1999 and thereafter work in accordance with there respective contracts of employment and refrain from commencing or taking part in further industrial action in respect of this matter until this Recommendation is revoked;

(3) THAT each of the employees members of the respondent employed by the applicant at its Cornice Plant do all things necessary to assist in the immediate implementation of the second shift by the applicant at its Cornice Plant;

(4) THAT the respondent and each of its officials take all such reasonable steps as may be necessary to comply with the terms of paragraph (1) of this Recommendation, including, but without limiting the generality of that obligation, the obligation to—

(a) Call a meeting of the employees members of the respondent at the applicant's workplace no later than 6.00 am Wednesday 6 October 1999;

(b) Advise the employees of the terms of this Recommendation; and

(c) Counsel the employees to cease all industrial action in accordance with the terms of paragraph (1) of this Recommendation and to thereafter refrain from engaging in any further industrial action in respect of the dispute the subject of these proceedings;

(5) THAT the applicant and respondent engage in further negotiations as to the respondent's claim with the applicant undertaking any necessary investigation as it sees fit as to the work performed by senior hands in the Cornice Plant and that the parties confer as to those issues as soon as practicable thereafter;

(6) THAT in any event, the parties report back to the Commission by 19 October 1999 as to their progress in further negotiations with the Commission to convene further conciliation conferences pursuant to s 44 of the Industrial Relations Act, 1979 as may be appropriate.

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

CONFERENCES—
Matters referred—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers

and

MacMahon Contractors.

No. CR 82 of 1999.

COMMISSIONER S J KENNER.

16 September 1999.

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 Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Wirralie Gold Mines Pty Ltd.

No. CR 361 of 1998.

COMMISSIONER S J KENNER.

29 September, 1999.

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 Civil Service Association of Western Australia Incorporated

and

WA Centre for Pathology and Medical Research.

No. PSACR 22 of 1999.

The Civil Service Association of Western Australia Incorporated

and

Commissioner of Health, Health Department of Western Australia.

No. PSACR 30 of 1999.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER A.R. BEECH.

14 September 1999.

Reasons for Decision.

The parties to these applications have been renegotiating enterprise bargaining agreements which expired on 12 December 1998 in the case of the PathCentre and on 19 September 1997 in the case of the Health Department. In both cases the parties have agreed on the terms of proposed replacement agreements except for the date to be used for the purposes of calculating the first pay increase due to employees. The union claims the dates to be used for the purposes of calculating the first pay increase should be 25 March 1999 in the case of the PathCentre and 20 April 1999 in the case of the Health Department. In both cases the respondents claim the dates should be the first pay period on or after the registration of the agreements by the Commission.

The facts of each application are slightly different and it is convenient to deal first with the application relating to the PathCentre.

<u>PathCentre</u>

The union seeks two orders. The first order sought is that the agreement that has been reached between the parties but not yet signed should have immediate effect and continue to have effect until such time as it is varied or cancelled by the Public Service Arbitrator. The second order is that the date to be used for the purposes of calculating the first pay increase should be 25 March 1999.

The essence of the union's application is the length of time which elapsed before the PathCentre could formally offer the agreement to the union. The union expressly recognises that the PathCentre is required to observe an approval process before it may formally make the offer. At staff meetings held on 16 and 17 February 1999 the PathCentre and the CSA jointly explained the history of negotiations to that date, the current state of the negotiations and the changes proposed for the new enterprise agreement (exhibit 4, part 1, p. 94). Significantly, the process for the approval of the agreement from that time was also detailed at that meeting. The approval process for the union involved a ballot of its members. It was estimated that the time frame for that ballot would be approximately 2 weeks (*ibid* at p.101). The approval process for the PathCentre was set out at that meeting as follows—

> Once members have endorsed the agreement, management will be required to pilot the final agreement through the formal endorsement and approval processes as follows—
>
> Treasury endorsement.
>
> Health Minister's approval.
>
> Cabinet Subcommittee on Labour Relations endorsement.
>
> Cabinet approval (flows from CSCLR endorsement).
>
> Registration with the Western Australian Industrial Commission.
>
> Time frame: the parties to the agreement are committed to making every endeavour to ensure the minimum delays are incurred in the process they are responsible for. The aim of the parties is to have a new agreement registered by 1 April 1999 (*ibid*).

The union's ballot was held on 25 March and the result made known on 30 March (*ibid* at p.114). The union's argument is at that point an agreement had been reached in principle, that is, the proposition which had been put to the union by the PathCentre had been endorsed by the union's members and, therefore, by the union. All that remained to be done was for the PathCentre to then seek formal approval to make an offer in the terms of the in-principle agreement.

On the evidence before the Commission, the PathCentre advised the union on 8 April that the Department of Productivity and Labour Relations had suggested that changes be made to the milestones within the agreement because Cabinet had to approve the payments and there was a requirement to demonstrate that the milestones have been achieved. At a meeting held the next day, 9 April, the parties agreed that a significant part of the milestones would be amended. However, the PathCentre also advised the union that DOPLAR was concerned that there was no documentary evidence as to progress made by the PathCentre with regard to the productivity model that was already in place. The PathCentre advised the union of a need to provide appropriate information to ensure milestones are supported when the document was submitted to the Cabinet Sub-Committee.

The matter apparently did not progress very promptly from that point forward. It was not until 20 May 1999 that the PathCentre was able to advise the Commission (otherwise than as currently constituted) that the proposals and the milestones to be inserted into the enterprise agreement had been finalised by it and presented to the union (*ibid* at p.127). However, as at 11 June there had still been no Treasury clearance, in part because the PathCentre found the proposed measures difficult to cost for the purposes of a memorandum to the Cabinet Sub-Committee on Labour Relations (*ibid* at p.131). Approval was given for the EBA by Cabinet on 12 July and the PathCentre signed the proposed agreement and sent it to the union on 19 July.

<u>Health Department of Western Australia</u>

In similar vein the union alleges delays occurred in the approval process which it recognises that the Health Department needed to observe. The union seeks similar orders in relation to the Health Department as it seeks in relation to the PathCentre. In the case of the Health Department the parties reached agreement on a document to be used as a final draft of the proposed agreement on 8 April. The ballot of its members held by the CSA occurred between 10-20 April with the result being known on 22 April. The parties made some minor changes to the agreement and on 5 May, the CSA confirmed its agreement and recognised that the respondent was then to progress the agreement through the relevant approval processes (exhibit 4, part 2 p. 72). The evidence before the Commission from a participant in the negotiations on behalf of the union was that there was a likelihood of having the first pay increase as from the first pay in April. It was certainly assumed that the respondent was entitled to make the offer which it made and a period of approximately 6 weeks seemed to be an achievable timeframe.

In fact the respondent advised the union on 13 May that further information was required by Treasury. Indeed, the respondent was not able to confirm Treasury approval until 8 July (*ibid* p. 85, 90). Cabinet approval was given within a fortnight of that date and on 26 July the respondent provided signed copies of the proposed agreement to the CSA (exhibit 3(18)).

<u>Conclusion</u>

I am satisfied on the evidence before me in relation to both the PathCentre and the Health Department that the approval processes took a longer period of time than was anticipated by the parties. The PathCentre's approval process commenced after it knew on 30 March that the union ballot approved the proposed agreement. The process took from then until it was able to sign the agreement on 19 July, a period of 1 day short of 16 weeks. That is to be contrasted with the period of time that the parties themselves had estimated the approval process would take. That period can be estimated from the information given to the staff at the meetings on 16 and 17 February 1999 which have already been referred to. The parties had estimated that the union would take 2 weeks for its ballot process and the aim of the parties overall was to have a new agreement registered by 1 April. On that basis, the parties had estimated the period between 16 and 17 February 1999 and 1 April 1999 as being the period of time the approval process would take, a period which includes 2 weeks for the union ballot. That is, the parties saw a period of 2 weeks for the union ballot and a further, approximately, 4 weeks to 1 April 1999 for the PathCentre's approval process. The fact that it took 16 weeks is significantly different from the estimation. It is still significant even if the evidence of one of the employees of the PathCentre is used as a measure. He had been involved in the previous enterprise bargaining agreement negotiations and his evidence is that based on that experience a period of 6 weeks was a reasonable period of time for the process. I am prepared to accept that period as a guide of what was seen by the parties as a reasonable time frame for the approval process.

In the case of the Health Department, its approval process commenced on 5 May. The process took from then until 26 July, a period of just short of 12 weeks. That is to be contrasted with the estimate, on the evidence, of 6 weeks as an achievable time frame.

The fact that the approval process took a longer period of time than anticipated is not without significance to the enterprise bargaining process. I accept that neither respondent may make a formal offer to the union until after Cabinet has given its approval to it. Nevertheless, an expectation was created amongst the PathCentre's employees that the formal offer would be made sometime around 1 April to allow its formal acceptance and registration to then occur. From the evidence before the Commission two issues had prevented the PathCentre from concluding its procedures as speedily as it itself had anticipated. The first resulted from the apparent need to change milestones which had been suggested by the Department of Productivity and Labour Relations on or about 8 April but which were not concluded until 20 May. The second concern was that Treasury approval had not been received at least by 11 June, if not later. However, any changes required to be made to the in-principle agreement did not change the parties' agreement. No further ratification of the parties' respective positions was necessary, other than the respondents' approval processes.

Further, the in-principle agreement was reached on terms which included an understanding by the parties that the respective operative dates of the first wage increase would be the dates the agreements were registered, the dates being anticipated to be approximately six weeks from the reaching of the in-principle agreement. All parties participated in the negotiations in good faith. On that basis, the employees voted accordingly to accept the in-principle agreement. If a delay occurred in the approval process because the proposal put by the PathCentre required modification, as in the case of the milestones, or was sufficiently difficult to cost that it was not able to secure the necessary approval within the timeframe it estimated, then the principle of good faith bargaining is affected. As Cawley C recognised in a recent matter involving the Department for the Arts (*CSA v. Director General, Ministry for Culture and the Arts* (1998) 79 WAIG 245 at 246), a date of operation can be a very effective tool in the negotiating armoury. There is the risk of frustration of employees' hopes and the possible costs in goodwill involved if delays cause that date to be exceeded. Here, the time taken to secure approval in each case is significant. Fairness indicates that some recognition of the fact ought to occur as the union now claims.

The respondents are unable to agree to an operative date earlier than the date the agreements are registered in the Commission. They are bound by government policy in this regard and openly participated in the negotiation process on that basis. The policy, as the respondents submit, is designed to ensure a uniform and consistent outcome across government. A uniform outcome is obviously desirable where the procedures to be followed by an employer in having approval granted for an enterprise bargaining agreement offer result in a uniform outcome. However, where as here, the procedure appears to have been somewhat more lengthy than anticipated by the parties, the strict application of the policy may not provide a fair result.

It was not argued that the State Wage Principles (1999) 79 WAIG 1847 at 1850 had application to these matters. The applications do not seek the variation of a registered agreement nor do the orders sought have the effect of varying wages or conditions above or below the award safety net. Rather, the applications are brought in circumstances where parties to enterprise bargaining have reached agreement on all matters except one, in this case the dates to be used for the purposes of calculating the first pay increase due to employees. The considerations the Commission is to have regard to are those in s.26 of the Act. The Commission is to have regard for the interests of the persons immediately concerned whether directly affected or not. The Commission should also take into account the capacity of the respondents to pay the first wage increase from an earlier date than the date the agreement as a whole comes into operation. The Commission is also to take into account any changes in productivity that have occurred or are likely to occur.

Enterprise bargaining is the central tenet of industrial relations. I accept that there is some force in the submission that the circumstances in these applications may serve to undermine the bargaining process and the concept of good faith bargaining, particularly for the future. A loss of faith by employees in the enterprise bargaining process as a whole is certainly not in the interests of good industrial relations. I find that it is in the interests of both parties that some consideration be given to the perceived delay in the approval process. The respondents make the point that the productivity improvements contained within the agreements have not yet come into operation and will not do so until the agreements are registered. In the case of the Health Department the agreement is based upon prospective productivity. Funding requirements are that internally generated productivity initiatives and trade-offs provide 50% of the proposed increase and the other 50% is funded from Treasury directly. The respondents argue that it is therefore unfair for them to have to pay the first wage increase prior to the productivity improvements to which the pay increase relates come into effect.

In reply the union states its understanding that in the case of the PathCentre the first payment is able to met. In the case of the Health Department the union submits that first payment is to be based upon the trading-off of conditions of employment. In both cases, however, the Commission is unaware of the extent to which the costs to the respondents if a first increase is paid prior to the date of registration are prohibitive such that the unfairness to them in having to do so outweighs the unfairness which I find has occurred to the employees in these matters. On balance, I find that the union has discharged the onus upon it and demonstrated that an order ought to issue to prescribe an earlier date for the purpose of calculating the first pay increase due to employees upon registration of the agreement between the parties than the date the agreement is registered.

However, I am not satisfied that the approach of the union is appropriate in these cases. The dates the ballots were held are not as significant as the dates the outcomes are known. It is only then that the union is itself able to confirm its acceptance of the in-principle agreement. Further, the union's own evidence is that the employees are prepared to allow a reasonable period of time for the respondents to complete its processes. I am not persuaded therefore that the union's claimed date is appropriate. Rather, in my view it is appropriate to consider when the parties reached an in-principle agreement and look to the period of time which the parties themselves estimated was reasonable for the approval process to occur. In the case of the PathCentre an in-principle agreement was reached on 30 March. The estimated time, including the actual registration of the agreement, was a six week period. In fairness, the date for the purpose of calculating the first pay increase due to employees upon registration of this agreement should be a date 6 weeks later than 30 March. In the case of the Health Department an in-principle agreement was reached on 5 May. The estimated time, including the actual registration of the agreement, was also a six week period. In fairness, the date for the purpose of calculating the first pay increase due to employees upon registration of this agreement should be a date 6 weeks later than 5 May.

The Commission therefore decides that in the case of the PathCentre the date for the purpose of calculating the first pay increase due to employees upon registration of the agreement between the parties shall be the first pay period on or after 12 May 1999. In the case of the Health Department the date for the purpose of calculating the first pay increase due to employees upon registration of the agreement between the parties shall be the first pay period on or after 10 June 1999.

The respondents argued that s.39 prohibited the Commission from granting retrospectivity beyond the dates the respective applications were lodged in the Commission. However, the orders to issue do not themselves operate retrospectively. Rather, in each case the order will come into effect on the occurrence of a future action, that is, the registration of the parties' agreements and merely determine a date that is not agreed between the parties.

The union also seeks an order that brings the agreement between the parties into operation out of these proceedings. However, in my view the power of the Commission to make such an order should be exercised only if the parties did not intend to register their agreement as an industrial agreement. The Act provides a separate process for the registration of agreements as industrial agreements. That process contains its own requirements. The Commission should be slow to depart from the proper process for giving effect to parties' agreements. To agree to the union's first requested order would be to depart from that proper process when such a departure is not appropriate if the intention of the parties is to now proceed to register their agreement. A liberty will be reserved to re-list the matter if the agreement is not lodged in the Commission for registration within a short time from this decision. The reserving of a right to re-list the matter will merely allow the union to further pursue its claim.

Minutes of proposed orders now issue.

Appearances: Ms K. Franz and with her Ms D. Whittaker on behalf of the applicant.

Mr B. Troy on behalf of the Commissioner of Health, Health Department of Western Australia, and Mr T. Neil on behalf of the WA Centre for Pathology and Medical Research.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

WA Centre for Pathology and Medical Research.

No. PSACR 22 of 1999.

16 September 1999.

Order.

HAVING heard Ms K. Franz and with her Ms D. Whittaker on behalf of the applicant and Mr B. Troy on behalf of the Commissioner of Health, Health Department of Western Australia, and Mr T. Neil on behalf of the WA Centre for Pathology and Medical Research, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT on registration of the enterprise agreement between the parties as expressed at 19 July 1999, the date for the purposes of calculating the first pay increase due to employees shall be deemed to be the first pay period on or after 12 May 1999.
2. THAT liberty is reserved to either party for one month from the date of this order to have this application re-listed.

(Sgd.) A.R. BEECH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Commissioner of Health, Health Department of Western Australia.

No. PSACR 30 of 1999.

16 September 1999.

Order.

HAVING heard Ms K. Franz and with her Ms D. Whittaker on behalf of the applicant and Mr B. Troy on behalf of the Commissioner of Health, Health Department of Western Australia, and Mr T. Neil on behalf of the WA Centre for Pathology and Medical Research, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT on registration of the enterprise agreement between the parties as expressed at 26 July 1999, the date for the purposes of calculating the first pay increase due to employees shall be deemed to be the first pay period on or after 10 June 1999.
2. THAT liberty is reserved to either party for one month from the date of this order to have this application re-listed.

(Sgd.) A.R. BEECH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lumen Christi College

and

Frances Wiffen.

No. CR 198 of 1999.

COMMISSIONER P E SCOTT.

17 September 1999.

Order.

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on the 16th day of September 1999 the Applicant filed a Notice of Discontinuance in respect of the matter;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be, and is hereby dismissed.

(Sgd.) P.E. SCOTT,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

PARTIES		NUMBER COMMISSIONER	DATE	MATTER	RESULT
Australian Rail, Tram and Bus Industry Union	Western Australian Government Railways Commission	Beech C C173 of 1999	19/7/99	Forcing the signing of a WPA	Concluded
Australian Rail, Tram and Bus Industry Union	Western Australian Government Railways Commission	Beech C C89 of 1999	—	Resume Work Order	Concluded
Australian Rail, Tram and Bus Industry Union	Western Australian Government Railways Commission	Beech C C172 of 1999	19/7/99	Westrail Policies	Concluded
Australian Rail, Tram and Bus Industry Union	Western Australian Government Railways Commission	Beech C C237 of 1999	—	Working Conditions	Concluded
Australian Workers Union	Eltin Surface Mining Pty Ltd	Beech C C221 of 1999	—	Dispute re Proceeding to Completion of Registration of Agreement	Concluded
Australian Workers Union	Milne Feeds Pty Ltd	Kenner C C227 of 1999	1/9/99	Pay Rates for Weekend Work	Discontinued

PARTIES		NUMBER COMMISSIONER	DATE	MATTER	RESULT
Australian Workers Union	St Barbara Mines Ltd	Fielding SC C217 of 1999	27/8/99	Termination	Discontinued
Australian Workers Union	Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Fielding SC C272 of 1998	2/10/98	Recruitment	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Midland Toyota	Fielding SC C268 of 1999	—	Correct Application of Payout of Tool Money	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Monadelphous Group of Companies	Kenner C C252 of 1999	15/9/99	Transfer of Employee	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Howard Porter Pty Ltd	Kenner C C232 of 1999	16/9/99	Alleged Unfair Dismissal	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Total Corrosion Control Pty Ltd	Kenner C C171 of 1999	4/8/99	Alleged Unfair Dismissal	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Mainline Powder Coaters	Kenner C C210 of 1999	27/8/99	Dispute re Classification of Union Member	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Garrigan Structural Steel Pty Ltd	Kenner C C239 of 1999	—	Alleged Unfair Dismissal	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Steelform Hydraulics	Beech C C378 of 1998	3/2/99	Award Interpretation	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	BHP Building Products	Kenner C C234 of 1999	13/9/99	Alleged Unfair Dismissal	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Extraman (WA) Pty Ltd	Kenner C C231 of 1999	17/9/99	Alleged Contractual Entitlements	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Fluor Daniel Diversified Plant Services Pty Ltd	Kenner C C219 of 1999	25/8/99	Dispute over new enterprise Agreement	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Westrac Equipment Pty Ltd	Kenner C C233 of 1999	13/9/99	Alleged Unfair Dismissal	Referred
Builders' Labourers, Painters and Plasterers Union	Novacoat Pty Ltd	Kenner C C215 of 1999	17/8/99	Alleged Contractual Entitlements	Discontinued
Builders' Labourers, Painters and Plasterers Union	Doric Constructions Pty Ltd	Kenner C C165 of 1999	28/6/99	Site Access	Discontinued
Builders' Labourers, Painters and Plasterers Union and Other	Insite Commercial Interiors Pty Ltd	Kenner C C205 of 1999	9/8/99	Coverage of Work	Discontinued
Civil Service Association	Executive Director, Education Department of Western Australia	Scott C PSAC84 of 1998	—	Alleged Bullying, Harassment and Victimisation of an Employee	Concluded
Civil Service Association	Chief Executive Officer, Education Department of Western Australia	Beech C PSAC28 of 1998	5/5/98	Accommodation Allowance	Concluded
Civil Service Association	Dr S Shea, Executive Director, Department of Conservation and Land Management	Gregor C PSAC27 of 1999	15/9/99	Breakdown in Negotiations over Enterprise Bargaining Agreement	Discontinued
Civil Service Association	Legal Aid Commission of Western Australia	Scott C PSAC24 of 1999	—	Second Round Negotiations for Enterprise Agreement	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union	Western Australian Newspapers Limited	Kenner C C184 of 1999	30/8/99	Job Skills	Discontinued

PARTIES		NUMBER COMMISSIONER	DATE	MATTER	RESULT
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union	Artfocus Holdings t/a Kea Group/Kea Digital Media	Kenner C C224 of 1999	9/9/99	Alleged Unfair Dismissal	Referred
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union	NRP Electrical Services	Kenner C C248 of 1999	15/9/99	Redundancy Entitlements	Dismissed
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore Pty Ltd	Fielding SC C278 of 1998	2/10/96 7/12/98 8/1/99 3/3/99	Dispute re AWU, CMETSU Coverage of Workplace	Discontinued
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore Pty Ltd	Fielding SC C247 of 1999	7/9/99	Recognition of Employee Representation of the Union	Referred
Forest Products, Furnishing and Allied Industrial Union	Bunnings Forest Products	Kenner C C88 of 1999	21/4/99	Travel Provisions for Fallers	Discontinued
Hospital Salaried Officers Association	Silver Chain Nursing Association Inc	Fielding SC C271 of 1999	—	Change in Rostered Hours	Consent Order
Independent Schools Salaried Officers' Association	The Quintilian School	Scott C C230 of 1999	20/8/99	Removal of Annual Development Reviews	Concluded
Liquor, Hospitality and Miscellaneous Workers' Union	Bilby's Place Child Care Centre	Beech C C157 of 1999	9/8/99	Section 44	Concluded
Liquor, Hospitality and Miscellaneous Workers' Union	Café Spiaggia	Beech C C188 of 1999	8/9/99	Dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers' Union	Office of Country High School Hostels Authority	Scott C C249 of 1999	9/9/99	Reinstatement	Concluded
Lumen Christi College	Frances Wiffen	Scott C C198 of 1999	28/7/99 14/7/99	Teaching Load	Referred
Transport Workers Union	Pinnacle Services Pty Ltd	Beech C C141 of 1999	22/6/99	Harassment	Concluded
Transport Workers Union	Ministry of Premier and Cabinet	Beech C C196 of 1999	12/7/99	Contact of Employees on RDO	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kevin W Reilly

and

Commissioner of Police.

No. 196 of 1999.

COMMISSIONER J F GREGOR.

10 September 1999.

Order.

WHEREAS this matter was heard in Perth on 23 April 1999. At the hearing there was a motion by Mr P. Momber, of Counsel, for the applicant, that publication of information given in the proceedings so far be suppressed; and

WHEREAS the motion was supported by Mr J O'Sullivan, of Counsel, for the Commission of Police; and

WHEREAS on the basis of what had been submitted, the Commission issued an order in transcript that information given on 23 April 1999, not be published nor will any further information; and

WHEREAS this order was subject to news organisations present in the hearing having a right to be heard on the matter. The right to make any submissions was held open until the close of business on 23 April 1999; and

WHEREAS no news organisation sought to be heard; and

WHEREAS on 2 August 1999, in response to inquiries from a news organisation, the Commission issued a Statement that if any news organisation wished to be heard on the question of the continuation of suppression orders for proceedings listed to occur in Kalgoorlie on 3 August 1999, that notice of such intention be given by 5.00pm on Monday, 2 August 1999; and

WHEREAS in response to the Statement, the solicitors for the West Australian Newspapers Ltd, the Publisher of the West Australian and Hocking & Company Propriety Limited, the Publisher of the Kalgoorlie Miner gave notice of intention to make submissions on the question of the continuation of the suppression order on the Kalgoorlie proceedings; and

WHEREAS on 3 August 1999, the Commission heard from Mr Alan Dungey, of Counsel, acting on behalf of Western Australian Newspapers Limited and Hocking & Company Propriety Limited; and

WHEREAS after hearing Mr Dungey, the Commission has decided that it would vary the orders made in transcript on 22 April 1999 so that the order will remain in force but partial relief from the order will be granted to allow reporting of the proceedings other than when evidence is led which may prejudice the position of persons not party to the hearing, prejudice the investigation of matters relating to the applicant or any person who may be associated with the applicant or prejudice or disrupt the inquiry into any criminal matters; and

WHEREAS Counsel appearing before the Commission can move in such circumstances that the suppression order operate;

NOW THEREFORE pursuant to the powers vested in it by s. 27 of the Industrial Relations Act, 1979 the Commission hereby orders—

1. THAT information given on 23 April 1999 not be published nor will any other information adduced during the proceedings except that the suppression of any such information will only take place if Counsel representing either of the parties declares that evidence is about to be led which might prejudice the position of persons not party to the hearing, prejudice the investigation of matters relating to the applicant or any person who may be associated with the applicant or prejudice or disrupt the inquiry into any criminal matters.
2. THAT liberty to request that this order be cancelled, is required on 48 hours notice.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Faizan Adjie

and

Aker Unirig Pty Ltd.

No. 827 of 1999.

COMMISSIONER J F GREGOR.

14 September 1999.

Order and Direction.

WHEREAS on 18 August 1999, the Commission conducted a conference between the parties at which time that matter did not settle; and

WHEREAS at the conference the Commission gave verbal directions that the matter was adjourned for 14 days and advised the applicant, through his agent, that if he did not inform the Commission within 14 days of the status of the application, that it would be dismissed on the Commission's own motion; and

WHEREAS on 8 September 1999 the Commission issued an order discontinuing the application; and

WHEREAS on 8 September 1999 the agent for the applicant contacted the Commission in the belief that the matter was still alive; and

WHEREAS the applicant did not comply with the directions given by the Commission in conference and requests that the matter be kept alive; and

WHEREAS the Commission will not prejudice the applicant and grants an extension of time for 30 days from the date hereof; and

WHEREAS the Commission has decided to direct that if no advise is received from the applicant concerning the status of the application within 30 days of the date hereof, the application will be discontinued for want of prosecution; and

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders and directs—

1. THAT the order dated 8 September 1999 discontinuing application No. 827 of 1999 be cancelled.
2. THAT if no advice is received from the applicant concerning the status of the application within 30 days of the date hereof, the application will be discontinued for want of prosecution

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Dr Lisa Landymore -Lim

and

Arismac Sales.

No. 1009 of 1999.

COMMISSIONER P E SCOTT.

16 September 1999.

Direction.

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979; and

WHEREAS on the 29th day of July and the 15th day of September 1999 the Commission convened conferences for the purpose of conciliating between the parties however, agreement was not reached; and

WHEREAS the application is to be set down for hearing and determination; and

WHEREAS at the conference held on the 15th day of September 1999 it was agreed that the following directions would issue—

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby directs—

1. THAT no later than 7 days from the 15th day of September 1999 the Applicant shall put in writing to the Respondent those matters which she seeks to have the Respondent agree for the purposes of a Statement of Agreed Facts.
2. THAT no later than 7 days from the date of receipt of the matters referred to in clause 1. above, the Respondent shall answer those matters and put to the Applicant those matters which it seeks to have the Applicant agree for the purposes of a Statement of Agreed Facts.
3. THAT no later than the 30th day of September 1999 the Respondent shall advise the Commission and the Applicant of any decision regarding the future status of its business.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Eric Harold Davey

and

Churches of Christ Homes and Community Services Inc.

No. APPL 1050 of 1999.

COMMISSIONER S J KENNER.

7 October 1999.

Direction.

HAVING heard Mr P Ward of counsel for the applicant and Mr C Gallow of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

(2) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 14 days prior to the date of hearing.

(3) THAT the parties file and serve upon one another any signed witness statements in reply upon which they intend to rely no later than seven days prior to the date of hearing.

(4) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than seven days prior to the date of hearing.

(5) THAT the applicant and respondent file an agreed statement of facts (if any) no later than three days prior to the date of hearing.

(6) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.

(7) THAT the matter be listed for hearing for three days.

(8) 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.

Nedjeljko Duratovic

and

Stephen Dennis Mant and Loretta Kaye Mant in partnership trading as Total Fencing.

No. 1119 of 1999.

16 September 1999.

Order.

WHEREAS a Notice of Application was lodged in the Commission on 19 July 1999 wherein the applicant claims that "Total Fencing" failed to pay him benefits he was due under his contract of employment; and

WHEREAS on 31 August 1999 the Commission conducted a conference pursuant to s.32 of the Industrial Relations Act 1979 at the commencement of which the agent for the applicant served upon the representative of "Total Fencing", Stephen Dennis Mant—

(A) a Notice of Application to amend the application lodged on 19 July 1999 to cite "Stephen Dennis Mant and Loretta Kaye Mant, in partnership, trading as Total Fencing" as the true respondents thereto; and

(B) a Notice of Application to amend the application lodged on 19 July 1999 by substituting a new schedule of claim which includes additional benefits alleged not to have been allowed to the applicant by the respondents; and

WHEREAS at the aforementioned conference the Commission considered the Notice of Application described in paragraph (A) hereof and, by consent, amended the application lodged on 19 July 1999 to cite as the respondents the persons named in the application to amend; and

WHEREAS the Notice of Application described in paragraph (B) had not, at the date of the conference, been served upon Loretta Kaye Mant;

AND WHEREAS neither respondent had prior knowledge of the Notice of Application described in paragraph (B) and its contents;

NOW THEREFORE the Commission, pursuant to the powers conferred by the Industrial Relations Act 1979 hereby orders—

(1) THAT the applicant shall forthwith serve upon Loretta Kaye Mant a copy of each Notice of Application described in paragraphs (A) and (B) hereof and lodged in the Commission on 31 August 1999;

(2) THAT the Notice of Application lodged in the Commission on 19 July 1999 be and is hereby amended by citing as the respondents thereto—Stephen Dennis Mant and Loretta Kaye Mant, in partnership, trading as Total Fencing;

(3) THAT the respondents cited in order (2) hereof shall, either jointly or severally, complete and file in the Commission no later than 17 September 1999 a Notice of Answer and Counterproposal in respect of each of—

(a) the Notice of Application lodged in the Commission on 19 July 1999 ; and

(b) the Notice of Application lodged in the Commission on 31 August 1999 which applies to amend the claims made in the application mentioned in paragraph (a) hereof; and

(4) THAT the respondents shall, upon compliance with order (3) hereof, forthwith thereafter serve a copy of each Notice of Answer and Counterproposal so filed upon the applicant named in each Notice of Application.

(Sgd.) C.B. PARKS,
[L.S.] Commissioner.

RECLASSIFICATION APPEALS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

JM Dorahy

and

Commissioner of Police.

No.PSA 81 of 1998.

8 September 1999.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS no objection to that course has been taken;

NOW THEREFORE, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Shirley Margaret Becker

and

Commissioner of Police.

No.PSA 83 of 1998.

8 September 1999.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS no objection to that course has been taken;

NOW THEREFORE, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kathryn Elizabeth Hyde

and

Commissioner of Police.

No.PSA 84 of 1998.

8 September 1999.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS no objection to that course has been taken;

NOW THEREFORE, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Katrina Jones

and

Commissioner of Police.

No.PSA 88 of 1998.

8 September 1999.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS no objection to that course has been taken;

NOW THEREFORE, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner,
Public Service Arbitrator.

NOTICES—
Union matters—

NOTICE.

FBM No. 2 of 1999.

NOTICE is given of an application by The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch and the Federated Liquor and Allied Industries Employee's Union of Australia, Western Australian Branch, Union of Workers for the amalgamation of those organisations to form a new organisation to be known as the *"Australian Liquor, Hospitality and Miscellaneous Workers Union, Western 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—

"3—Eligibility For Membership

(1) The Union shall consist of an unlimited number of persons who are employed or who are usually employed in or in connection with any of the following industries or callings, within the State of Western Australia—

(a) The manufacture, preparation or processing of butter, casein; cheese; ice cream; milk or yoghurt.

(b) The manufacture or preparation of lacquer; of white lead; red lead; zinc or any other paints; of varnish and of synthetic resins or moulding powders (except those used in the manufacture of fibrous plaster).

(c) The manufacture of plastics and fibreglass or substitutes therefor (excepting those used in the printing industry) or goods (excepting furniture) made therefrom or goods (excepting furniture) in the manufacture of which plastics or fibreglass or substitutes therefor are used; photographic supplies or materials; records; films; rolls; tapes; or any such like article used for reproducing purposes; floor tiles (excluding porcelain, ceramic and cement tiles): linoleum; stramit board, wall board (excepting fibrous plaster board or asbestos).

(d) The manufacture, preparation, processing or treatment of coated abrasives, calico, canvas, hessian, jute or stockinet bags; blinds; brooms; brushes; candles; cork or cork products; cotton, felt or felt products; glycerine; insulation material including slagwool; pyrotechnics; rope; soap; soda; tarpaulins, tents; tobacco or tobacco products; twine; typewriter ribbons.

(e) Photography except workers employed in motion picture production and film processing connected therewith.

(f) [Not in use]

(g) Ambulance and first aid attendants; home care aides (aged, destitute or disabled persons); kindergarten aides; animal welfare officers or workers; dancing instructors; house mistresses, masters and supervisors (excluding teachers—qualified or otherwise); domestic staff, groundsmen, gardeners and yardmen of convents, denominational schools, teachers' residentials, student residentials, colleges (excluding agricultural college and school hostels); parking attendants (excluding municipal employees); persons engaged in the sanding or treating of flooring; undertakers' assistants.

(h) Marine yard employees; rag pickers, flock or cotton waste makers; wharf, jetty or ship's watchmen; wine saloon employees; wool scouring or fellmongery employees.

(i) The drying and refining of salt; the handling of scrap metals; or wrecking or dismantling of plant or machinery for scrap salvage; reclamation of drums.

(j) The making, manufacturing or repairing (including any process incidental to such making, manufacturing or repairing) of saddles, harness of all descriptions for horses and other animals, whip thongs, machine belting, trunks, portmanteaux and bags, suit and attache cases, canvas and leather sporting goods, ladies' handbags, wallets and purses and all other articles or things made of canvas, fibre, leather, plastic, vulcanite or of any substitute material for any of the foregoing materials (other than boots, shoes, sandals and slippers). The term making, manufacturing or repairing shall include such articles or portion of such articles as are made in metal or wood, including metal or wooden frames, corners or handles.

(k) Tanning and leather dressing; handling, bagging or grinding of bark; the manufacture of bark and other tanning extracts; the manufacture of glue, gelatine, agar agar and adhesives; the washing or treatment of animal hair with tanning, dressing, dyeing or other treatment of furs and other skins.

(l) Mounters, setters, chainmakers, swivelmakers, belt ring makers, repairers, ring makers, polishers, lappers, melters, refiners, bracelet and bangle makers, stampers, silversmiths, spinners, goldsmiths, gilders, chasers, engravers; watch, clock, clockwork, electric and spring dial clock makers, repairers, attendants and winders; jewellers' tool makers and optical technicians, lapidaries' spectacle makers, makers and renovators of electroplated ware (when working for jewellers or watchmakers), metal badge makers, jewel case makers, and all persons engaged wholly or partly in manufacturing or repairing jewellery, watches and clocks in any of the above branches.

(m) The production (by total environmental methods) of game and poultry.

Provided that no person employed in the foregoing industries in the capacity of clerk, storeman, packer, despatch hand, or member of the sales staff shall be eligible for membership.

Provided further that no person employed in any of the industries or callings mentioned in paragraphs (a)—(m) of this rule shall be eligible for membership by reason only of being employed in work of such kind as would; if he had been so employed on the 12th day of February, 1957, have made him eligible for membership of any of the following industrial unions of workers, viz—

Amalgamated Metal Workers' Union of Western Australia.

Australasian Society of Engineers Industrial Union of Workers, Western Australian Branch

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

The Federated Engine Drivers' and Firemen's Union of Workers of Western Australia

Australian Workers' Union, West Australian Branch, Industrial Union of Workers

The Breweries and Bottle-Yards Employees' Industrial Union of Workers of Western Australia

The United Furniture Trades Industrial Union of Workers, WA

The Operative Painters and Decorators Union of Australia, Western Australian Branch, Union of Workers

The Food Preservers' Union of Western Australia, Union of Workers

Printing and Kindred Industries Union, Western Australian Branch, Industrial Union of Workers

The West Australian Shop Assistants and Warehouse Employees' Industrial Union of Workers, Perth

The West Australian Clothing and Allied Trades Industrial Union of Workers, Perth

The Civil Service Association of Western Australia Incorporated

The Plumbers and Gas Fitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers

United Timber Yards, Sawmills and Woodworkers Employees' Union of Western Australia

The Boot Trade of Western Australia, Union of Workers, Perth

West Australian Amalgamated Society of Railway Employees' Union of Workers

The Royal Australian Nursing Federation (Western Australian Branch) Industrial Union of Workers, Perth

AND in addition the Union shall consist of an unlimited number of persons who are employed by the St John Ambulance Association for the purpose of operating first aid and/or ambulance services, and who hold a first aid certificate as a necessary condition of that employment.

(n) The artificial fertiliser industry, and/or the production of acids for commercial purposes; and/or in connection with any bonemill, animal manure, phosphate, superphosphate, compost, bird manure, fish fertiliser, sea-weed, lime or other mineral processing, and/or

(o) Other chemical industries including potash, arsenical-compound, alumina, sodium, sodium-sulphate, salt petre, antimony-ore, woodmeal, borax, potassium-chloride, potash-muriate, potassium-nitrate, ammonium-nitrate, golden-sulphide-of-antimony, sulphate-of-iron, trisodium-phosphate, didalcic-phosphate, formalin, phosphoric-acid, acetic-acid, muriatic-acid, sulphorous-acid, puritic-acid, lime-sulphur, hypo-sulphite-of-soda, limil, caustic-soda, sulphate-of-copper, carbon-tetrachloride, black-hypo, derris-products, mineral wool, manganese-sulphate, agresan, copper-carbonate, copper-oxy-chloride, carbon-bi-sulphide, nicotine-sulphate, copper-sulphate, arsenate of lead, arsenate-of-calcium alunite, glauconite, silicia-products, alkali-chlorites, chlorine, soluble-alkali silicates, stannic-chloride, hydrochloric-acid, sulphuric-acid, nitric acid, arsenic pentoxide, arsenic-acid, phenol-processing, beta-naphthol, ammonium-chloride, ammonium-sulphate, ether-andethyl-chloride, calciumm, aluminium and—zinc-sterrates, phthallicanhydride, sodium-bi-sulphite, sodium arsenate, lactic-acid, sulphanilamide, phosphate-compounds, sulphur dioxide, carbon-di-oxide, carbolic-acid, formaldehyde, fungicides, insecticides, veterinary medicines, synthetic hormones, solvents, power alcohol, alkali, synthetic ammonia, bleaching powder or liquid, liquid cattle dips, stock-licks, marking fluid, speddo, milk oil fluid, branding liquid, tricalos, stock food, itch fluid, foot rot paste, blowfly repellant, molasses, manufacture or processing, but excluding pharmaceutical or food processing works, in Western Australia, excluding that portion of the State comprised within the Kimberley Land Division.

Provided that no person employed in any of the industries mentioned in paragraphs (n) and (o) of this Rule shall be eligible for membership if he is eligible to be a member of the—

(i) Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

(ii) Australian Workers' Union, West Australian Branch, Industrial Union of Workers

(iii) The Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers; or

(iv) Any other Union registered under the provisions of the Industrial Arbitration Act, 1979 in accordance with the Constitution of any such Union as registered on the 8th day of May, 1946.

(p) The making of aerated waters, fruit juices and cordials.

(q) The occupation of teachers' aides.

(r) Assistants employed by the Public Health Department in community health work.

(s) Persons employed by the Slow Learning Children's Group of Western Australia (Inc.) in the calling of the training and care of intellectually or physically handicapped people as represented by the classifications of Cottage Parent or Social Trainer or similar classifications however called.

(t) Persons employed in community health work by non-Government Aboriginal Agencies other than persons who work in a professional, administrative or clerical capacity, and other than registered nurses, but not excluding enrolled nurses.

(u) Persons employed in child minding centres; day nurseries; pre-school centres; health or physical culture studios other than registered nurses, but not excluding enrolled nurses.

(v) The occupation of Enrolled Nurse.

(w) (i) The industries of animal welfare, animal care, animal breeding or animal homes.

(ii) Veterinary surgeons or veterinary nurses employed in veterinary clinics or hospitals.

(iii) Persons employed in animal, marine or wild life establishments.

Provided that no person employed in any of the industries or callings mentioned in subclause 4(1)(w) shall be eligible for membership if they are persons employed by a public authority, persons employed in a clerical capacity, or persons employed under and within the Public Service Act, 1978 as amended.

(2) In addition to the foregoing, the Union shall consist of an unlimited number of persons who are employed, or who are usually employed—

(a) By the West Australian Government in the Department of Water Supply, Sewerage and Drainage and the Metropolitan Water Supply, Sewerage and Drainage Board.

(b) In or in connection with the industries of laundries, drycleaning and/or linen repair including but not limited to tradesperson drycleaners, receivers and despatchers, cleaners, repairers, spotters, pressers, hand ironers, wet cleaners, steam air-finishers, examiners of garments, assemblers of garments, sorters of garments, washing machine operators and laundry hands throughout the state of Western Australia.

Provided that no person shall be eligible for membership by reason only of being employed in work of such kind as would if he had been so employed on the twenty seventh day of October 1992 made him eligible for membership of the Transport Workers' Union Western Australian Branch, Industrial Union of Workers.

(c) In or in connection with the following callings or industries—

The callings of Bakers (hand or machine), Pastrycooks, Confectioners, Apprentices and all others engaged in the manufacture, preparation, handling or processing of bread, pastry and confectionery.

Provided that no person shall be eligible for membership by reason only of being employed in work of such kind as would if he had been so employed on the sixteenth day of August, 1967, have made him eligible for membership of any of the following industrial union of workers, viz—

The Transport Workers' Union of Australia, Industrial Union of Workers, West Australian Branch;

The West Australian Shop Assistants and Warehouse Employees' Union of Workers;

The Food Preservers' Union of Western Australia, Union of Workers.

(3) In addition to the foregoing, the Union may admit to membership any person who is employed, or who is usually employed, in any hospital in the State of Western Australia other than persons being trained as nurses in registered training schools or persons who are employed as nurses and who are registered or are entitled to be registered under the Nurses' Registration Act 1922, or the Health Act, 1911-1923; provided that this exclusion shall not be deemed to include enrolled nurses or pupils undergoing training as enrolled nurses; provided that the word "Hospital" shall not be deemed to be a hospital for the insane within the meaning of the Lunacy Act, 1901-1920 so far as nurses (attendants) are concerned and provided further that no person shall be eligible for membership of this Union who, except as hereinafter provided, is a member or is eligible for membership of any of the following Unions—

The Metropolitan and South-Western Federated Engine Drivers and Firemen's Union of Workers of Western Australia;

Western Australian Amalgamated Society of Carpenters and Joiners' Association of Workers;

The West Australian Plumbers and Sheet Metal Workers' Industrial Union of Workers, Perth;

The West Australian Plumbers and Sheet Metal Workers' Industrial Union of Workers (Fremantle Branch);

Amalgamated Engineering Union of Workers, Kalgoorlie Branch;

Eastern Goldfields Federated Engine Drivers and Firemen's Union of Workers of Western Australia;

The Federated Engine Drivers and Firemen's Association of Australasia West Australian Branch Association of Workers;

Nothing herein contained shall deprive the Union of the exclusive right to admit to membership any person now or hereafter employed as a boiler attendant, carpenter, electrician, bricklayer or plumber at any hospital at which at the 1st September, 1947 any member of the Hospital Employees' Industrial Union of Workers, WA Coastal Branch, or the Hospital and Asylum Employees' Industrial Union of Workers, Eastern Goldfields Branch, was employed in all or any of such avocations.

In addition the following persons shall be eligible for membership.

Persons, employed in or in connection with the training or care of elderly or mentally, intellectually or physically handicapped people other than in hospitals or by the State Government. This sub-rule shall not extend to nurses registered on any register of the Nurses' Board of Western Australia, other than enrolled nurses.

For the purposes of this rule, the term "hospital" shall include—

(a) Establishments which, by virtue of their occupants, qualify for the payment of a personal care subsidy or are otherwise subsidised under the provisions of the Aged or Disabled Persons Homes Act, 1954-1974.

(b) Establishments licensed and subsidised under the provisions of the Mental Health Act.

(c) Establishments known as Princess Margaret Hospital for Children, Sir James Mitchell Spastic Centre, N'Gal-a Mothercraft Training Centre, The Braille Hospital, Hawkevale, Nadezda, Homes of Peace, or other establishments of the same or like nature as the foregoing.

The provisions of this subrule shall not apply to—

(a) Persons who work in Professional, Administrative and Clerical capacities;

(b) Persons employed in any classification which, at the 1st day of July, 1982, was covered by an award or a deemed consent award to which the Hospital Salaried Officers' Association of Western Australia (Union of Workers) was a party.

(4) In addition to the foregoing, the Union shall consist of an unlimited number of persons who are employed or who are usually employed in or in connection with any of the following industries or callings, within the State of Western Australia—

(a) Cleaner, caretaker, lift attendant, window cleaner, watchman, charwoman, usher, door keeper, gate keeper, porter, janitor, day or night patrolman, security officer, attendant in ladies' retiring rooms, and attendant in libraries, art galleries, museums, and car parks; the following classifications of persons employed on the Governor's establishment, or by a public authority or post-secondary education institution, as defined in the Industrial Relations Act, 1979, other than persons employed pursuant to an award to which, at lst January 1989, the Australian Workers' Union, West Australian Branch, Industrial Union of Workers was a party; gardener, gardener's labourer, maintenance man (other than tradespersons), maintenance labourer, groundsman, power mower operator, tractor mower operator, leading hand and home economics assistant; the following classifications of persons employed in National Parks, Marine Parks, Recreation Camps and Zoological Gardens; keeper, gardener, gardener's labourer, maintenance man, maintenance labourer, groundsman, warden, aquarist and ranger; the classification of ranger employed in Parks (other than those administered by the Rottnest Island Authority, the State Planning Commission or by a Local Government Authority). (Provided that the term gardener shall include horticulturist).

(b) Provided that no person who would be eligible for membership pursuant to subrule (4)(a) and who is eligible to be a member of an industrial union of workers in accordance with the rules of such union as constituted and duly registered under the Industrial Arbitration Act, 1912, as at the first day of September, 1932 shall be admitted as a member of this Union but a person employed in any of the callings mentioned in subrule (4)(a) hereof by a contractor engaged in the industry or industries in connection with which this union is registered shall, notwithstanding the foregoing, be eligible for membership of this union.

(5) In addition to the foregoing, the following persons shall be eligible for membership—

(a) Any graduate of a University or College of Advanced Education, or Child Care Certificate Course or equivalent who—

(i) holds a certificate, diploma or degree specialising in early childhood care and/or education; and

(ii) is or usually is actively engaged in teaching and/or caring for children under the age of six years.

(b) Any teacher with qualifications equivalent to that outlined in paragraph (a) of subrule (5) hereof, approved by the Australian Early Childhood Association and who is or usually is actively engaged in teaching children under the age of six years.

(c) Any teacher who holds a certificate of a Teachers' Training College approved by the Australian Early Childhood Association and who is or usually is actively engaged in teaching children under the age of six years.

(d) Any other graduate of a course in early childhood education at a University or College of Advanced Education who it is considered would assist the union to attain its objectives. The nomination of such a proposed member shall be proposed and seconded by two financial members of the Union and shall be submitted in writing to the Executive and, if unanimously approved, submitted in writing to a general meeting of the Union for ratification.

(e) Provided that no person who would be eligible for membership pursuant to subrule (5) and who is, or who is eligible to be, a member of the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers, as registered with the Western Australian Industrial Commission shall be eligible to become a member of this Union.

(f) Any person who holds a recognised qualification in early child care and who is or usually is actively engaged in the care of children under normal primary school age unless that person is or is eligible to be a member of the Civil Service Association of Western Australia Incorporated or the Royal Australian Nursing Federation (Western Australian Branch) Industrial Union of Workers, Perth as registered on the 29th June, 1973.

(g) Any graduate with early childhood education qualifications as specified in paragraphs (a)—(f) of subrule (5) hereof who is or is usually engaged in administration or supervision of services for education or care of children under the age of six years.

(h) Any graduate with early childhood education qualifications as specified in paragraphs (a)—(f) of subrule (5) hereof who is or is usually engaged in tutoring or lecturing to students of childcare or early childhood education.

(i) Any student enrolled at a University or College of Advanced Education in a course of early childhood education or in a Child Care Certificate Course at an approved institution is eligible to become a student member. These members shall not be eligible to exercise a vote or to hold office. The subscription payable by the student member shall be five dollars per annum or such other sum as determined by the Executive from time to time.

(j) Any person who, though not usually or ordinarily engaged in teaching and/or caring for children under the age of six years is a qualified person as defined in the foregoing subrules relating to union membership with an interest in the care and education of young children who is not working in an area covered industrially by this union is eligible to become a complementary member. These members shall not be eligible to exercise a vote or to hold office. The subscription payable by a complementary member shall be ten dollars per annum or such other amount as is determined by the Executive from time to time.

(6) Together with such other persons whether employed in the foregoing industries or not as have been appointed officers of The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch as at the date of registration of this union.

(7) In addition to the foregoing, the Union shall consist of an unlimited number of persons who are employed or who are usually employed in any capacity in or in connection with—

(a) Hotels, Motels, Tourist Complexes and/or Resorts, Service Flats and/or apartment Houses, Boarding and/or Lodging Houses;

(b) Casinos (provided that it shall not include any persons who are employed or usually employed in Casinos and whose major and substantial employment is such as to enable them to be eligible for membership of the Federated Clerks' Union of Australia Industrial Union of Workers, W.A. Branch);

(c) Clubs, Cabarets, Convention Centres, Taverns, Winehouses, Restaurants, Cafes, Eating Houses, Tearooms, Coffee Lounges, Oyster Saloons, Ice Cream and Cool Drink Saloons provided that it does not include milk bars, confection shops and delicatessens. (Provided further that it shall not include persons employed in food service establishments which primarily provide a take away service where no alcohol is sold or served except for employees of Pizza Hut);

(d) the preparation and service of food and drink wherever consumed by persons employed by professional or contract caterers for any commercial, social, industrial or other purpose or function and all persons employed in or in connection with canteens, mobile canteens, messes, kitchens and catering establishments;

(e) cleaning and attending to the provision of board and lodging or any other form of accommodation in camps and staff or workers' quarters;

(f) Tea Attendants, (including those employed in Government Departments, Instrumentalities and Trading Concerns) and persons employed by agencies or domestic service businesses in the preparation and/or cooking of food, the serving of meals and/or light refreshments and/or drinks. Provided that no persons employed in a retail or wholesale establishment shall be eligible to be a member pursuant to this subrule except where employed by a contract caterer.

(8) In addition to the foregoing, the Union shall also consist of an unlimited number of persons, whether permanaent or casual, who are employed (or who are ussually employed) by or in any of the following industries or callings, within the State of Western Australia—

(a) Hotels, motels, service flats and/or apartment houses, boarding and/or lodging houses:

(b) Clubs, cabarets, casinos (provided that it shall not include any persons who are employed or usually employed in casinos and whose major and substantial employment is such as to enable them to be eligible for membership of the Federated Clerks' Union of Australia indsutrial Union of Workers, W.A. Branch);

(c) Taverns, winehouses, restaurants, cafes, tearooms, coffee lounges, oyster saloons, ice cream and cool drink saloons, catering establishments, including persons employed by any company, firm or person carrying on business as a catering contractor;

(d) tea attendants, (including those employed in government departments, instrumentalities and trading concerns) and person employed in the preparation and/or cooking of food in retail establishments, (provided that it shall not include any person whose major and substantial employment is that of a shop assistant, storeman or storewoman) and persons employed by agencies or domestic service businesses in the preparation and/or cooking of food, the serving of meals and/or light refreshments and/or drinks.

Provided that in respect of the foregoing contained in this paragraph 8, no other person shall be eligible to become a member of the union excepting those persons who have been appointed officers of the Federated Liquor and Allied Industries Employees' Union of Australia, Wesetern Australian Branch, Union of Workers ("the FLAIEU") as at the date of registration of this union together with such other persons who may have been appointed Honorary Life Members of the FLAIEU.

(9) Provided further that in respect of all of the foregoing no person shall be eligible to become a member who is not an employee within the meaning of the Industrial Relations Act 1979 or the Workplace Agreements Act 1993".

This matter has been listed before the Full Bench on the 6th day of December 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.

13 October 1999.

R. C. LOVEGROVE,
Deputy Registrar.