CUMULATIVE DIGEST HEADINGS

*Denotes New Heading

Absence Without Leave
Act—Interpretation of
Allowances—See also specific heading, e.g. Isolation Allowance, Industry Allowance, Meal Money—(Includes Special Rates and Provisions)
Annual Leave—(Includes Annual Leave Loading)
Appeal
Apprentices and Juniors
Awards—(Includes specified sub-headings, First Awards, New Awards, Area, Scope, Coverage, Cancellations, Award-Free, Respondency)
Board of Reference
Board and Lodging—(Includes Accommodation)
Bonus—(Includes Incentive Payments)
Breach of Acts/Award/Orders
Capacity to Pay—Includes Inability to Pay
Casual Work—(Includes loadings applicable to such work and nature of casual employment)
Classification—(Includes Reclassification)
Clothing—(Used when clothing is/is not provided and for clothing allowances)
Common Rule—(Used in relation to Awards being or becoming Common Rule awards)
Comparative Wage Justice—See also Nexus—(Includes Relativities)
Compassionate Leave—(Includes Bereavement Leave)
Compensation—See also specific heading, e.g. Redundancy, Long Service Leave—(Includes compensation for unfair dismissals)
Conference—(Includes such matters as jurisdiction arising out of)
Confined Space
Consumer Price Index
Contract of Service—(Used in relation to Section 29 (2) applications)
Contract out of Award
Custom and Practice
Dangerous Work
Date of Operation—(Includes Retrospectivity, Prospectivity)
Demarcation
Dirt Money
Disabilities
Discrimination
Employee—(Used in such cases as whether person is an employee or independent contractor or agent)
Enforcement of Acts/Awards/Orders
Entry: Right of
Hours of Work
Industrial Action—(Includes Work-to-Rule, Picketing, Stop Work Meeting, Strike, Bans, Lockouts)
Industrial Matter
Industry—(Used re questions of extent and meaning of specified industry)
Industry Allowance
Interpretation—Words and Phrases
Intervention
Isolation Allowance
Jurisdiction
Jury Service
Leave Without Pay
Living Away From Home Allowance
Long Service Leave
Managerial Prerogative
Manning
Maternity Leave
Meal Breaks
Meal Money
Misconduct
Mixed Functions—(Includes Higher Duties)
Natural Justice
Nexus
Night and Weekend Work
On Call—(Includes Stand by)
Order—(Includes Cancellation of Order)
Over Award Payment
Overtime—(Includes Call Back, Recall)
Part-Time
Penalty Rates
Piecework
Preference—(Includes Compulsory Unionism)
Principles (Wage Fixing)
Procedural Matters (e.g. Standards of evidence)
Promotion Appeals
Public Holidays
Public Interest
Redundancy/Retrenchment—(Includes Severance Pay)
Reinstatement
Registration—See Unions
Rest Periods—(Includes Smokos)
Safety
Shift Work
Sick Leave
Standdown
Stay of Proceedings
Superannuation
Supplementary and Service Payments
Tallies
Technological Change
Termination—(Includes Dismissal, Wrongful/Unfair Dismissal)
Training
Transfer
Travelling—(Includes Travelling Allowance and Travelling Time)
Unfair Discrepancy
Unions—(Includes Direction for Observance of Rules, Registration, Rules, Enforcement of Rules, Coverage/Constitutional Coverage, Dues, Membership, Cancellations, Exemptions)
Utilisation of Contractors
Victimisation
Wages—(Includes Catch-up Margins, Payment by Results, Piece Work, Minimum Wage)
Work Value
Worker Participation
Workers Compensation
*Workplace Agreement

CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF THE INDUSTRIAL APPEAL COURT, INDUSTRIAL RELATIONS COMMISSION AND INDUSTRIAL MAGISTRATES COURT CONTAINED IN VOL. 81 PART 1, SUB PARTS 1 - 6.

NOTE: [1] Denotes Industrial Appeal Court Decision; [2] Denotes Full Bench Decision; [3] Denotes Commission in Court Session Decision; [4] Denotes Decision of President

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ACT - INTERPRETATION OF

[3]Application re joinder to Award - Applicant Union argued that although the Contract Cleaners' (Ministry of Education) Award 1990 was limited to the named Respondents, it was regarded generally by the contract cleaning industry and the Education Department as the Award which sets the benchmark for wages and conditions for contract cleaning employees cleaning Government Schools and it was therefore necessary that when new contract cleaning employers gain contracts, the Award be extended to them by having them named as Respondents to the Award - Respondents argued amongst a number of reasons that the coverage of the Contract Cleaners' (General and Window Contractors) Award (the General Award) currently applies to the employers that the union is seeking to join to the award, that it was the General award which forms the award safety net and that the Contract Cleaners' (Ministry of Education) Award, 1990 was a consent award which applied only to the employers who consented to it - Further, that the General award has undergone a Minimum Rates Adjustment exercise and therefore it has properly set rates of pay whereas the Contract Cleaners' (Min. of Educ) Award, 1990 has not - Commission in Court Session was of the view that the material before it justified why the claim had not been progressed under s.41 of the Act or pursued under any other of the State Wage Principles - Further, that the equity, good conscience and substantial merits of the case lay with the Applicant such that the application should succeed - Granted - LIQUOR, HOSPITALITY & MISC -v- Airlite Cleaning Pty Ltd & Others - APPL 1431 of 1998 - Commission in Court Session - BEECH C/SCOTT C./KENNER C - 08/09/00 – Cleaning 35

[4]Application to revoke Order re Stay of Operation (80WAIG1759) - Respondent sought to revoke Commission's Order in PRES 3 of 2000, by which Commission wholly stayed the operation of Order No. 473 of 1999 - President found that the delay in this matter was such that it would have enabled a successful application for want of prosecution to have occurred and appellant's appeal dismissed - Further, because of the inadequate explanation for the delay, the length of the delay and the period of respondent's deprivation of the fruit of his "judgment", President was of the opinion that, having regard to the interests of the parties pursuant to s.26(1)(c) of the Act and having regard to s.26(1)(a) of the Act, the equity, good conscience and substantial merits of the case reside with the respondent and therefore revoked the Order for a stay made on 26 April 2000 and ordered that monies be paid forthwith to respondent - Granted - YMCA of Perth -v- Mr M Cousins - PRES 3 of 2000 - President - SHARKEY P - 21/12/00 - Community Services 410

Conference referred re termination of employment - Applicant Union argued that the termination of Applicant was harsh, oppressive and unfair and contrary to s.84AA of the Workers Compensation Act, s.41 of the Minimum Conditions of Employment Act and Clause 34 of the Burswood International Resort Casino Employees Industrial Agreement 2000 - Further, that the Respondent's action was taken substantially because Applicant was the President of (BRUE) and was being discriminated against and the process and planning for his termination was flawed in that it was not shared with him and he was not trained to apply for other positions nor did the Company sought to find him an alternative position - Respondent argued that with the arrival of a new CEO, and constraint on the budget, the managers were required to review their operations and, subsequently the manager Environmental Services made changes to his operation which impacted on the Applicant's duties - Further, Applicant was to be terminated unless he found suitable alternative position, as he could not fulfil the requirements of his original contract as an Environmental Systems Attendant due to his injury - Commission reviewed authorities, Acts and found on evidence that it was plausible and more likely that the Applicant's duties were diminished due to a legitimate drive for efficiency, that there had been no discrimination due to him being a delegate and that evidence proved that his duties had not been cut because of this - Commission exercised its judgement according to equity, good conscience and the substantial merits of the case and found that, to so swiftly terminate Applicant's employment if he himself does not find an alternative position, particularly given the spirit of s.84AA, would be harsh and unfair - Further, the Respondent should have engaged in a fuller exploration of options for Applicant and recommended that this take some months including appropriate training - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 350 of 2000 - WOOD,C - 02/02/01 - Accommodatn, Cafes&Restaurants 699

[2]Appeal against Decision of Industrial Magistrate (unreported) and Appeal against Decision of Commission (80WAIG4419) re unfair dismissal - Preliminary application - Respondent argued on a number of grounds including that the appeal was incompetent and that it had been brought frivolously and vexatiously with the object of delaying and prejudicing the fair trial of the proceedings before the Magistrate - Further, Respondent sought orders that Appeal No. FBA 7/2000 be struck out and that Appellant pay the costs of and incidental to the proceedings - Full Bench found on a number of reasons that the appeal was competent, that it was premature and unnecessary, at this stage, to rule on the issues of frivolous and vexatious, and that there was prejudice by the prospect of irremediable exclusion, therefore, having regard to the equity, good conscience and the substantial merits of the case, dismissed the application to dismiss for want of prosecution - Appeal Nos. FBA7 and FBA43 of 2000 - Respondent argued that there was irresistible inference that the appeal was brought frivolously and vexatiously, that Appellant's appeal should not be allowed to be withdrawn and that, given the length of time that the breach of the procedural rules had continued, the reasons for the breach and the fact that respondent and the administration of the court's business had been prejudiced, then both appeals should be struck out - Appellant's Counsel argued that he had no objection to the appeals being dismissed rather than withdrawn and he offered no argument in support of the appeals - Full Bench found that the most satisfactory way of dealing with the appeals with some finality, and to which course there was no objection in any event, was to dismiss the appeals by way of determination of the appeals - Dismissed - Chubb Security Australia Pty Ltd -v- Mr PR Danson - FBA 7,43 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 26/07/00 - Other Business Services . 783

[4]Application for stay of operation of Order made by the Chairperson of the "Coal Industry Tribunal" in Application No. 2/2001 (81WAIG731) pending appeal to Full Bench - Applicant argued on the following: "there was a serious question to be tried in respect of the grounds upon which the Applicant seeks a review of the Order, the circumstances justify the making of an order staying the operation of the Order as the Applicant has, and will, continue to suffer loss and damage should the Order not be stayed and the Respondent and its members will suffer no prejudice if the Order is so stayed" - Further, Applicant sought relief that the decision of the Tribunal should be stayed, insofar as it purports to restrain the Applicant from continuing the changes outlined in the letter dated 31 January 2001 referred to in the Order - Respondent opposed the application - President applied Principles pursuant to the "Coal Act" in applications for a stay, and reviewed relevant sections of the "Coal Act", the EBA and evidence and found on a number of reasons that there was no serious issue to be tried as there was an "industrial dispute" within the meaning of s.3 and s.10 of the Coal Act, and that jurisdiction existed and exists in the Tribunal to make such Order - Further, President found that it would not deprive a "successful party" of the fruits of an Order such as this and that Applicant had not established that an Order should be made in its favour because it had not established that the equity, good conscience and the substantial merits of the case, or that the balance of convenience lay with it - Dismissed - Griffin Coal Mining Company Pty Limited -v- The Coal Miners' Industrial Union of Workers of Western Australia, Collie - PRES 3 of 2001 - President - SHARKEY P - 01/03/01 - Coal Mining 832

ACT - INTERPRETATION OF—*continued*

Application pursuant to s.49AB(3) of the I.R. Act re dispute regarding "right of entry" - Parties sought Commission's assistance to determine a dispute as to whether representatives of the union were empowered to enter premises of the employer - Applicant union sought Orders that the initial Application No. C242 of 2000 be joined to this application, second, that accredited union representatives have the right to enter Respondent's premises in accordance with the right of entry provision of the Award and thirdly, the Respondent or its agents should not hinder representatives of the union from exercising their right of entry - Respondent argued there was no jurisdiction under s.49AB(3) for the Commission to entertain the application - Commission reviewed authorities, relevant sections of the I.R. Act, and Award and found that the general powers of entry which were prescribed by the effect of s.49AB(1) could only be exercised for the purpose of dealing with an industrial matter after procedures which are set out in the section have been executed and that had not occurred in this case - Further, Commission concluded that it was bound to accept as a proper interpretation and statement of the law, the views of His Honour in Zaknich (ibid), that a union official was only at liberty to remain upon premises of an employer employing union labour and the consequence of that interpretation of the relevant provisions was that the BGC site could not be regarded as a premises of that kind - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Homestyle Pty Ltd T/as BGC Construction & Others - APPL 1456 of 2000 - GREGOR C - 20/02/01 – Construction....................................... 862

Application re unfair dismissal - Preliminary issue re jurisdiction - Respondent argued that Commission lacked jurisdiction to deal with the applications as both employees were casual and pursuant to the Federal Workplace Relations Act 1996 and Regulations, were excluded from the operation of unfair dismissal procedures, there being a direct inconsistency between the Federal and State Acts - Respondent argued that consumption of alcohol on duty and a series of events which amounted to behaviour and an attitude on the part of applicant (Mr Rushton) was the reason for termination - Applicant (Mr Rushton) defended the allegations and for most part agreed that they occurred but he viewed them as trivial - Applicant (Mr Cairns) argued that he felt intimidated and threatened by another officer following an incident, that after respondent investigated the incident, he was told that he would stay on and be offered work but that never happened - Commission reviewed authorities, relevant sections of the Federal Act, the Australian Constitution and found that there was no inconsistency between the Federal Workplace Relations Act 1996 and the WA I.R. Act 1979 and hence the Commission had jurisdiction to hear the matter - Commission determined (in a further Reasons for Decision) that the nature of the applicants' employment relationship in all aspect was casual - Further, Commission found on evidence that the respondent was not prepared to continue to roster Mr Cairns away from his intimidator and unless Mr Cairns had that guarantee then he was not prepared to work for the respondent, therefore, there had been no dismissal of Mr Cairns and hence that being the fact there was no jurisdiction for the Commission and accordingly dismissed his application for want of jurisdiction - Commission further found that Mr Rushton did consume alcohol and fall asleep whilst on duty, therefore, having regard to the Undercliffe case (65WAIG385) the decision to dismiss him on notice was not unfair, harsh or oppressive in all circumstances - Applications Dismissed - Mr A Cairns -v- The West Australian Turf Club - APPL 795,809,827 of 2000 - WOOD,C - 15/09/00 – Sport... 867

Application re unfair dismissal - Applicant argued that his summary dismissal for alleged misconduct was unfair because he was not given an opportunity to discuss that or given a proper induction or training on the job and was not given counselling or support from his superiors - Further, Applicant sought reinstatement originally but argued at hearing that this would be impracticable and sought six months compensation as alternative - Respondent argued that Applicant had not conducted himself in a professional manner and dismissal was the only real option considered due to the seriousness of the Applicant's actions - Commission found that the Applicant knew full well of the seriousness with which the employer might view his financial predicament, that the employer had every right to lose trust in him, and that he clearly knew that his job was in jeopardy, therefore the dismissal was not unfair, harsh or oppressive - Dismissed - Mr BJ Gardner -v- Police & Nurses Credit Society Ltd - APPL 1937 of 1999 - WOOD,C - 14/03/01 – Finance 880

Conference referred re unfair dismissal and contractual entitlements - Matter remitted back to Commission with instruction that it be dealt with "according to law" and in accordance with the reasons for decision of the Full Bench - Applicant sought compensation for loss of income and in addition, for injury sustained as a result of his dismissal - Further, Applicant Union argued that whatever formula was used to assess compensation, Applicant was entitled to the maximum allowable under the Industrial Relations Act - Respondent argued that the Applicant should be compensated for something less than the maximum allowable under the Act and drew attention to the fact that he was subject to criticism which led to other proceedings in the Commission before his termination - Commission reviewed various tests cases, relevant sections of the I.R. Act and Workplace Relations Act 1996 and found that the onus was on the employer to establish that the employee had failed to mitigate his loss and the employer had simply not discharged that onus - Further, that in the present case, the task of assessing compensation was made more difficult than usual because the evidence as to the Applicant's earnings at the time of dismissal and subsequently are at best scant, and that may be due in part to the fact that so much time had lapsed since Applicant's dismissal - Commission concluded that Respondent should pay Applicant compensation for dismissal found to have been unfair by the Full Bench - Granted. - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Barminco Pty Ltd - CR 186 of 1998 - FIELDING C - 05/11/98 - Services to Mining... 916

[2]Appeal against Decision of Commission (80 WAIG 4482) re unfair dismissal and contractual entitlements claims - Appellant argued that the Commission erred in holding that it did not have jurisdiction to hear and determine the application - Appellant sought that the Full Bench overrule previous decisions if not distinguishable on the facts - Respondent argued that if the appeal was upheld, the matter should be remitted - Full Bench had already observed that it should not overrule a previous decision unless it had a conviction that that decision was wrong - Full Bench found that the actual work was performed geographically outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction - Full Bench found the Commission had correctly made findings on the claims and the Appellant should not be disadvantaged by re-opening matters – In Supplementary Reasons, Majority of Full Bench had granted an adjournment to seek legal advice - Upheld - Mr MA Tranfield -v- Ray Douglas Parker - FBA 46 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 03/04/01 - Oil and Gas Extraction 990

Complaint re Breach of Workplace Agreement Act 1993 - Complainant argued that he was unfairly, harshly or oppressively dismissed and sought reinstatement or compensation and recovery of costs - Defendant argued that complainant's performance and conduct constituted serious breaches of his contract of employment, which justified his dismissal - Industrial Magistrate found on evidence that complainant acted in an honest, open and frank way with respect to the formation of his prospective counselling business - IM further found that defendant failed to call witnesses to substantiate claims to discharge its evidentiary burden concerning the issue, that there was no foundation for the termination of complainant's employment, and that on balance, complainant was unfairly dismissed - IM found that as reinstatement was not a realistic option, complainant was entitled to recover lost earnings - Proven - Mr PJ Moss -v- Serenity Lodge Inc - CP 216 of 1999 - Industrial Magistrate - Cicchini IM - 07/12/00 - Community Services... 1006

[2]Application for alteration of Union Rules - Full Bench were satisfied that s.55, s.56, s.59, in particular s.55(4)(a), (b), (c), (d) and (e), of the Act have been complied with, in particular, inter alia, that 30 days had expired from 28 February 2001 to the hearing of the application on 2 April 2001, that the application had been authorised in accordance with the rules of the Applicant organisation and that reasonable steps were taken to adequately inform the members as required by s.55(4) of the Act - Further, Full Bench were satisfied that the equity, good conscience and the substantial merits of the application, as well as the objects of the Act lay with granting the application - Granted - The Master Plumbers' and Mechanical Services Association of Western Australia (Union of Employers) -v- (Not applicable) - FBM 1 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 09/04/01 – Unions... 1061

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ACT - INTERPRETATION OF—*continued*

[1]Appeal against Decision of Full Bench (80 WAIG 4610) re exclusive right to represent employees - IAC reviewed authorities and found that the appellant being neither a party or being permitted to intervene in the proceeding had no right of appeal under S.90 of the Industrial Relations Act 1979 - IAC found the right to be heard could not lead to the appellant being considered a party or intervenor and the appeal was incompetent - IAC commented that there was reason to question whether the opportunity to be heard under s 72A(5) and other provisions would deny the Commission the power to join or allow the intervention of a person under s27(1)(j) & (k) - Dismissed - The Food Preservers' Union of Western Australia, Union of Workers -v - AUTO, FOOD, METAL, ENGIN UNION & Other - IAC 7 of 2000 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 27/04/01 - Food, Beverage and Tobacco Mfg 1141

Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed and that he was made redundant without any prior consultation in breach of ss 40-42 of the Minimum Conditions of Employment Act 1993 - Further, Applicant sought reinstatement to his position or in the alternative, the maximum of six months compensation - Respondent argued that there was a restructure, the company had to cut cost and the Applicant was chosen for redundancy because he was the poorest performer and he was costing the company nearly twice as much as those that were performing better that him - Commission reviewed authorities and found on evidence that the Respondent had discharged their onus in proving there was a valid redundancy, that the redundancy was effected to save costs and that Applicant was made redundant largely, but not solely, for cost reasons - Further, Commission reviewed the Minimum Co Employment Act 1993 and found that Applicant had not proven his case that someone else should have been chosen for redundancy or that he should have been given another position, therefore, weighing up all the circumstances in the matter, Commission did not consider that Applicant's selection for redundancy was unfair, harsh or oppressive - Dismissed - Mr GE Garbett -v- Midland Brick Company Pty Ltd - APPL 791 of 2000 - WOOD,C - 09/05/01 - Non-Metallic Min Product Mfg 1206

Applications re unfair dismissal - Applicants argued that dismissal was harsh, oppressive and unfair - Respondent argued that at the time the decision was made to terminate Applicants, the financial state of the company was poor and the company had little cash flow as it was building stock and not making sales - Commission reviewed authorities, clauses 32 and 32A of the Award and found that the termination of Applicant (Myles) was unfair because Respondent failed to pay him a severance payment - Further, the manner of dismissal was harsh because no discussions took place as required by clauses 32 and 32A of the Award and s.32 of the Minimum Conditions of Employment Act, and ordered that Applicant (Myles) be paid a global award by Respondent as compensation and that his contractual benefits claim dismissed - In the case of Applicant (Wigham), Commission was satisfied that he had made out a case that the selection process for dismissal was unfair - Further, Commission found that Applicant (Wigham) was unfairly dismissed, that reinstatement was impracticable and ordered that he be paid by the Respondent eight weeks' remuneration and eight weeks' ordinary pay, together with $10.00 tool allowance and $25.00 service allowance for each week - Orders Issued - Mr TW Wigham -v- SFM Engineering Pty Ltd - APPL 1375,1384 of 2000 - SMITH, C - 06/04/01 - General Construction 1241

[2]Appeal against decision of Commission (81 WAIG 1262) re unfair dismissal claim - Appellant argued that Commission did not have jurisdiction to order reinstatement once the Appellant had agreed to pay compensation - Full Bench reviewed IR Act, authorities and found that the Commission acted within power, correctly and validly exercising the unconditional power conferred by s23A(1)(b), a power not conditioned by s 23A(1a)(b) - Dismissed - BHP Iron Ore Pty Ltd -v- AUTO, FOOD, METAL, ENGIN UNION - FBA 21 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 21/05/01 - Metal Ore Mining 1363

Application for an order revoking an order reinstating an unfairly dismissed employee - Applicant Employer argued that S23A(3) of the IR Act created a right for it to refuse to obey an order for reinstatement and the Commission must therefore issue an order for compensation- Respondents argued that it was not open for the Applicant to bring the application, the Respondent Employee's attitude had been the subject of the original hearing, reinstatement was not a popularity issue and the Commission had discretion - Commission reviewed authorities and found that if the process of revocation was automatic it would render the power to reinstate nugatory and that power was discretionary - Commission found it was not open in the application to consider further evidence on a point that was already decided - Commission had considered the employee's attitude and behaviour and reinstatement had more potential benefit to him - Dismissed - Iluka Resources Limited & Other -v- Mr MA Rulyancich & Others - APPL 432 of 2001 - BEECH C - 01/06/01 - Other Mining 1397

Application pursuant to Section 27 re application being set aside and hearing date vacated and that a directions hearing be listed - Applicant argued that an error was made on an order dated 16 February 2001 and the order for discontinuance be revoked and returned for conciliation - Respondent argued Commission does not have the power to entertain application 440 of 2001, as by virtue of order 16 February 2001 Commission was functus officio in respect to the section 29 application - Commission found that that there was an error and having regard for section 26 of the IR Act, the original order discontinuing section 29 application be revoked - Order Issued - Mr J Lane -v- Aussie Online Ltd - APPL 440 of 2001 - WOOD,C - 17/05/01 – Technology 1424

Application for reinstatement or compensation on the grounds of unfair dismissal - Applicant argued that despite there being yearly contracts, the Applicant's employment should be regarded as continuous up until the time of termination, there was no evidence that the Applicant performed poorly and relevant decisions were not taken by a validly constituted management committee under the Respondent's constitution - Applicant argued that the "spill and fill" was merely a device to get rid of the Applicant and that there was a breach of the MCE Act - Respondent argued that it had engaged in a genuine restructuring of its operations to provide better service and there was in fact no dismissal - Respondent further argued that the Applicant had failed to mitigate her loss and had been paid a substantial redundancy package - Commission found failure to consult as required under the MCE Act led to the conclusion that the dismissal was unfair and that the manner of the termination left a lot to be desired - Commission found reinstatement was impractical, but only injury warranted compensation - Granted in part - Ms LF Oliver -v- Coolgardie Community Care Incorporated - APPL 1075 of 2000 - KENNER C - 10/05/01 - Community Services ... 1435

Conference referred re unfair dismissal seeking reinstatement - Applicant Union opposed the application going to the construction of s.23 of the IR Act - Applicant Union argued that Respondent did not have the standing to bring application to revoke the reinstatement order and submitted that an order for reinstatement was solely for the benefit of the unfairly dismissed employee - Further, Applicant Union argued that an alternative means of dealing with a failure to comply with such an order, does not create a right to not comply - Respondent argued that Commission should revoke and amend the order for reinstatement and award compensation for the loss or injury caused by the dismissal - Respondent argued that on its proper construction, reference to 'may' in s.23A(3), although expressed in directory terms, should be interpreted in a mandatory sense. - Further, Respondent argued that if s.23A(3) was to be interpreted such that 'may' means Commission had a discretion to issue a further order on revocation, then that discretion may be exercised simply as a consequence of the employer's failure to comply with the reinstatement order or its impracticability to comply with the order - Commission found that once it was satisfied that there had been a failure to comply as a matter of jurisdictional fact, Commission was then obliged to consider whether to revoke original order and that the terms of s.23A as a whole conferred on the employer a right to not comply with a reinstatement order - Commission rejected Respondent's submissions to revoke Commission's order - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 - KENNER C - 31/05/01 - Metal Ore Mining 1457

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ALLOWANCES

[2]Appeal against decision of Public Service Arbitrator (unreported) re variation of Award - Appellant argued that Public Service Arbitrator erred in law in declaring that the Commuted Overtime Allowance should be categorised as a general allowance to which principles 2, 5 and 6 of the State Wage Principles apply, that on the face of the clause and in the context of the Award, the allowance was a commuted allowance, paid in lieu of payments which would otherwise be made under the Overtime Allowance clause of the Public Service Award No. PSAA4 of 1989 and not an allowance with relation to either the nature of the work or conditions under which the work is performed - Further, Appellant sought a declaration that the application was not an issue to be progressed and determined under Principles 2, 5 and 6 of the State Wage Principles - Full Bench found that the PSA correctly held that the matter should proceed as if it were an issue under Principle 2 which attracts the attention of Principles 5 and 6; and that it was a general allowance and that the Principles should be applied accordingly - Further, the PSA was correct, on a fair reading of the Principles and the award as a whole, in so concluding, therefore there was no merit in the appeal - Full Bench applied authorities regarding the application for extension of time, which were opposed by the Respondents and found on a number of factors, the maintenance of the time limit of 21 days pursuant to s.49(3) of the Act would not work an injustice in this case and that the CSA had not established that the denial of the application would prejudice it - Dismissed - Civil Service Association of Western Australia Incorporated -v- Executive Director, Fisheries Western Australia & Other - FBA 37 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 08/12/00............................. 11

Application re alteration of working conditions - Applicant argued that in or about 1997 the Inspectors, with the knowledge and consent of the respondent, housed company's vehicles at their private residences and were paid for the extra hour involved in travelling to and from the checkpoint until respondent ceased the practice on 11 November 1999 - Respondent argued that there was no longer any rational justification for that practice which originated when it had its office in the Kununurra townsite which is no longer the case - Commission found that the practice in question was a longstanding one endorsed by senior officers of the respondent and being a term of the contract of employment for the Inspectors in question, cannot be removed or varied unilaterally except by agreement of the Inspectors or by termination of the contract, thus applicant was entitled to an additional hour for each full day worked at the Kununurra checkpoint as a term of employment - Granted - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer, Agriculture Western Australia - PSACR 2 of 2000 - FIELDING C - 14/03/01 - Health Services.. 1004

Application re unfair dismissal and contractual entitlements - Applicant argued that after sustaining an injury at work, he had medical treatment and was provided with a medical certificate stating that he was unfit to work for four weeks - Further, after a short period off, he was told by the Respondent that if he "did not return to work he wouldn't have a job" - There was no appearance by the Respondent - Commission found that Applicant was not given a fair go and for him to be dismissed while incapacitated and under threat that he had to return to work was harsh and oppressive and ordered that Respondent pay to the Applicant 15 weeks salary and tool allowance within 21 days of the Order - Upheld and Dismissed - Mr B Smith -v- High Quality Brickwork - APPL 1425 of 2000 - COLEMAN CC - 08/03/01 - Construction Trade Services... 1019

Application re contractual entitlements - Applicant argued that he had been denied an over rider commission and an advertising allowance that had not been paid - Respondent argued that a reconciliation of the advertising allowances and the advertising expenses incurred showed that there had been an overpayment - Commission found that Applicant was entitled to part of his claim for contractual entitlements and ordered accordingly - Granted in part - Mr GS Hincks -v - Darrell Crouch and Associates Pty Ltd - APPL 1320 of 2000 - BEECH C - 18/05/00 - Real Estate Agency 1320

ANNUAL LEAVE

Complaint re Breach of Minimum Conditions of Employment Act 1993 - Complainant argued that the Defendant deducted pay without lawful authority and failed to pay accrued annual leave and one week's wages - Complainant argued that she was working for the named Defendant, that she was advised that there was going to be some change to the ownership of the entity, however, to her knowledge those arrangements had not been finalised - Defendant argued that the Defendant was not the Complainant's employer at all during that material period - Defendant argued there were two separate entities and that they were entirely separate - Industrial Magistrate found that the evidence overwhelmingly in favour of Complainant and accepted that there was an underpayment of untaken annual leave and an entitlement of a week's pay - Proven and Granted - Ms NA Roberts -v- Snogrin Pty Ltd t/a Eclipse Hardware - CP 98 of 2000 - Industrial Magistrate - Cicchini IM - 29/11/00 – Hardware 274

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because he was in a "resign or be fired" type of situation so he decided to finish up and be paid out - Respondent argued that Applicant had been treated almost like a "Family Member" and was respected for his seniority and it never intended to terminate his employment - Commission found that in the circumstances of the history of the three employees taking leave during quiet times even if leave was not usually extended and the consideration with which the Applicant had been treated by the Respondent over the years, it was unreasonable for the Applicant to have refused to take further leave and the Applicant's resignation was not in substance a dismissal, therefore dismissed the claim for unfair dismissal and contractual entitlements - Dismissed - Mr N Pitcher -v- Wyldes Window Treatments & Vertical Drapes ACN 059 668 290 - APPL 1265 of 2000 - BEECH C - 21/12/00 - Textile Manufacturing.. 302

Application re contractual entitlements - Applicant argued that he had been denied contractual entitlements at the termination of his employment in the form of pay in lieu of notice, holiday pay and annual leave loading and that he was entitled to reimbursement of outstanding amounts which he incurred in expenditure at the direction or with the approval of the Respondent - There was no argument from the Respondent - Commission found that the Applicant was entitled to the amount he had claimed; that they formed part of his contract of employment and that he had not been paid those amounts - Accordingly an Order was issued granting the contractual entitlements but the claim for costs was dismissed as the circumstances in the case were not extreme or unusual - Granted - Mr CA Truijens -v- Hanson Publishing Pty Ltd t/a jam Design Studios - APPL 888 of 2000 - SCOTT C. - 27/12/00 – Publishing... 318

Complaint re Breach of Award - Preliminary issue re summary judgement - Industrial Magistrate heard submissions from both parties and found that Defendant have discharged the onus that there was a plausible ground of defence and granted Defendant unconditional leave to defend - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - 11/01/01 664

Application re unfair dismissal and contractual entitlements - Applicant argued that she had created an invoice without reference to her employer because it was the practice of other employers for whom she had worked that staff rates were applicable - Nevertheless, she apologised, offered to pay for the difference, promising not to do such a thing again and nothing further was said on the subject for a further eight days until her dismissal - Respondent argued that dismissal was because of the invoice, that he could no longer trust her and told her that he had been advised that because dismissal was for reasons of misconduct he had no need to pay entitlements - Commission found that summary dismissal eight days later was harsh and therefore unfair, and as reinstatement was impracticable respondent should pay applicant four days' wages and 3.07 days' annual leave entitlements - Granted in Part - Ordered Accordingly - Ms K Dutton -v- Adrian J Domney T/A Euro Automotives Repair - APPL 1032 of 2000 - BEECH C - 16/01/01 - Automotive 678

Application re unfair dismissal and contractual entitlements - Applicant argued that there was no consultation and no alternatives were offered, that termination decision had already been made and the meeting of 12/5/2000 was only to deal with matters to do with pay - Respondent argued that the operation of the Bureau was now different from what it was when managed by applicant as funds for marketing had been taken away by Mandurah Council, the Bureau had been scaled down in respect of hours, contracts and accounting arrangements and a sub -committee now managed the place - Commission found that the procedure adopted by the Board was lacking in unfairness in its entirety, that reinstatement was impracticable as there was no job for applicant to go back to and awarded compensation by way of injury and denied contractual entitlement - Ordered Accordingly - Mrs WK Faulkner -v- Mandurah Tourist Bureau Inc Executive Committee - APPL 912 of 2000 - WOOD,C - 22/11/00 - Tourism 680

ANNUAL LEAVE—*continued*

Application re contractual entitlements - Applicant argued that Respondent owed her holiday pay of $1035.96 gross and two full days of work, being $384.80 gross - There was no appearance for the Respondent - Commission found that Applicant had proven her case and ordered Respondent to pay the Applicant the amounts as claimed being a total of $1420.36 gross less normal taxation payments to the Commissioner of Taxation - Granted - Ms MC Moss -v- Jam Design Studio - APPL 72 of 2001 - WOOD,C - 13/03/01 1046

Application re contractual entitlements - Applicant argued she was owed a number of benefits under her contract of employment being payment for final week of her employment, two and a half days of sick leave entitlement, two weeks wages for retrenchment without notice, proportionate annual leave entitlement on termination and superannuation - There was no appearance or argument by the Respondent - Commission found that Applicant was not terminated for any other reason other than retrenchment, therefore entitled to the benefits under the contract of employment - Applicant acknowledged that the claim of superannuation was not within the jurisdiction of the Commission - Accordingly an Order was issued - Granted - Ms KJ Priest -v- Anovoy Pty Ltd - Peter Radosevich (Director) - APPL 2139 of 2000 - BEECH C 1049

Application re contractual entitlements - Applicant argued that he had not been paid entitlements due to him which included unpaid wages, and accumulated holiday pay for three weeks - No appearance or response from Respondent - Commission found that entitlements were owed to Applicant and ordered accordingly - Granted - Mr J Kerr -v- Trinet Digital Ltd - APPL 342 of 2001 - WOOD,C - 11/05/01 – Computing 1423

APPEAL

[1]Appeal against Decision of Full Bench (80WAIG159) re wearing of badges by union members during hours of employment - Appellant argued whether the decision of the Full Bench was erroneous in law and whether the exercise of the Senior Commissioner's exercise of discretion in the relevant circumstances gave rise to reviewable errors of law - Respondent union argued that the matters before the Full Bench were essentially matters of industrial fairness concerning the introduction and use of a badge - Industrial Appeal Court found that the Full Bench fell into error in seeking to balance rights vested in the employer as a consequence of the contractual arrangements as against the reasons advanced by the employees for wearing the badge - Further the reasons for wearing the badge were not of the same contractual or normative order as the rights of the employer to determine what was required by way of grooming thus the appeal was allowed - Appeal Upheld - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality 4

[1]Application for stay of proceedings in Matter No. CR159/1999 pending determination of Appeal - Appellant argued for a stay of proceedings of the Decision of Full Bench until the determination of the appeal before IAC or further Order - Industrial Appeal Court found that it was quite satisfied that the circumstances, as well as the balance of convenience justified the stay of proceedings to be granted - Granted - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality 9

[2]Appeal against decision of Public Service Arbitrator (unreported) re variation of Award - Appellant argued that Public Service Arbitrator erred in law in declaring that the Commuted Overtime Allowance should be categorised as a general allowance to which principles 2, 5 and 6 of the State Wage Principles apply, that on the face of the clause and in the context of the Award, the allowance was a commuted allowance, paid in lieu of payments which would otherwise be made under the Overtime Allowance clause of the Public Service Award No. PSAA4 of 1989 and not an allowance with relation to either the nature of the work or conditions under which the work is performed - Further, Appellant sought a declaration that the application was not an issue to be progressed and determined under Principles 2, 5 and 6 of the State Wage Principles - Full Bench found that the PSA correctly held that the matter should proceed as if it were an issue under Principle 2 which attracts the attention of Principles 5 and 6; and that it was a general allowance and that the Principles should be applied accordingly - Further, the PSA was correct, on a fair reading of the Principles and the award as a whole, in so concluding, therefore there was no merit in the appeal - Full Bench applied authorities regarding the application for extension of time, which were opposed by the Respondents and found on a number of factors, the maintenance of the time limit of 21 days pursuant to s.49(3) of the Act would not work an injustice in this case and that the CSA had not established that the denial of the application would prejudice it - Dismissed - Civil Service Association of Western Australia Incorporated -v- Executive Director, Fisheries Western Australia & Other - FBA 37 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 08/12/00 11

[2]Appeal against decision of the Commission (80WAIG3068) re unfair dismissal and contractual entitlements - Appellant argued that the learned Commissioner erred in fact and law in that he failed to give proper weight to the evidence and erred in fact and law in finding that a reasonable period of notice for the Respondent to remedy the situation would have been 3 months and in assessing the compensation for loss and injury - Respondent argued that the grounds of appeal were defective because they did not comply with Regulation 29 of the Industrial Relations Commission Regulations 1985 - Full Bench found that the grounds of appeal did comply and that they were provided and sufficiently detailed to enable the Respondent to know substantially the case which it had to answer - Full Bench concluded that this was a discretionary decision and that the Appellant had to establish that the exercise of the discretion at first instance had miscarried with the principles laid down - Full Bench concluded that no established error in the exercise of the discretion at first instance had been made out that would warrant the interference of the Full Bench - Dismissed - Olten Pty Ltd T/as MSA Security -v- Mr AJ Byfield - FBA 39 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 18/12/00 – Security 15

[2]Appeal against decision of Commission (80WAIG416 & 4855) re unfair dismissal and contractual entitlements - Appellant argued that the learned Commissioner erred on numerous points and sought an Order that the claim of unfair dismissal be dismissed, that as the learned Commissioner misdirected himself and made substantial errors of law and fact, the Full Bench should substitute inferences correctly drawn to find that the Respondent constructively determined its contract of service unfairly with s.29 of the Act and to award compensation Further, Appellant sought an order to quash the Order at first instance to dismiss and an Order that the Respondent did dismiss the Appellant unfairly and should pay compensation - Respondent opposed the claims - Full Bench found that the Commissioner had correctly referred to and considered the applicable legal principles of constructive dismissal and determined on the facts before him that there was no constructive dismissal - Further, that there was no arguable case on Appeal, that the justice of the matter lay with the Respondent and pursuant to s.26(1)(a) of the Act and, having considered the interests of the parties under s.26(1)(c) of the Act, the applications to extend time was dismissed and, therefore, the appeal was incompetent as being out of time - Dismissed - Mr BF Stokes -v- The Typing Centre of Perth Pty Ltd T/A Australian International College of Commerce - FBA 47 of 2000 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 30/11/00 – Colleges 22

[2]Appeal against Decision of Industrial Magistrate (80WAIG217) re breach of the Minimum Conditions of Employment Act - Appellant argued that the Learned Magistrate erred in law and fact on a number of grounds including that he misdirected himself in failing to find that the correct multiplicand was the sum paid on the pay day prior to termination and that it failed to find that it was a term of contract, implied by practice and acquiescence between the parties, that pay days were every Thursday provided commission was then payable - Further, Appellant sought a declaration and an Order that he had an entitlement to unpaid commission, that the multiplicand for calculating his paid annual leave was correct, that Respondent pay accrued pro rata annual leave pursuant to the MCE or alternatively that the relevant pay period was the last full pay period which preceded (sic) termination, that the correct weekly rate for calculating Appellant's paid annual leave was $1,940.00 and that if any sum was ordered it attract 6% interest - Full Bench reviewed MCE Act and found that no grounds of appeal was made out, that His Worship did not err as alleged in the grounds of appeal and that Appellant was not an employee for the purposes of the MCE Act 1993 - Dismissed - Mr DJ Hignett -v- Joburne Pty Ltd T/a Blackburn Real Estate - FBA 15 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 14/12/00 - Real Estate Agency 30

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APPEAL—*continued*

[2]Appeal against Decision of Commission (80WAIG4829) re Dismissed application re Unfair Dismissal - Appellant argued that the learned Commissioner erred in law in dismissing the Appellant's claim pursuant to section 27 and erred in law in failing to exercise jurisdiction pursuant to section 26 - Further, the learned Commissioner erred in law and in fact in failing to give sufficient weight to the evidence of the Appellant with respect to the conciliation conference and application of the equitable doctrine of promissory estoppel - Respondent argued that an agreement was reached between the parties at the conciliation conference in the AIRC at the satisfaction of the Appellant and the Respondent acted on good faith - Full Bench found that it was open for the Commissioner to find as she did and that there was no error in the exercise of her discretion and the Appeal was not made out - Dismissed - Mr B Campbell -v- Kimberley Building Supplies - FBA 48 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 06/02/01 - Building Structure Services 353

[2]Appeal against decision of the Commission (80WAIG3334) re wrongful dismissal of seven officers - Appellants argued the Commissioner erred in law and in excess of jurisdiction, that the application before him was not an industrial matter and that he had considered Affidavit and other material which was not evidence in the proceedings - Respondent union argued that the Commissioner of Police breached his agreement with those dismissed officers by not deciding this issue pursuant to s.23 of the Police Act 1892 and Regulations, and acted harshly or oppressively in acting pursuant to s.8 of that Act - Full Bench found that since the Commissioner of Police is not the Crown, discharging an officer cannot be seen as an act done at the will or pleasure of the Crown and accordingly it was wrong to do so without affording natural justice or procedural fairness, and further found that the Commissioner of Police was not the employer of Police Officers, the Minister was, that Police Officers were indubitably officers of the Crown and not employees, that there was no jurisdiction in the Commission to hear and determine the application, and having considered all of the material and submissions upheld the Appeal and quashed the decision at first instance, it being a nullity and having been made without jurisdiction - Ordered Accordingly - The Honourable Minister of Police & Other -v- Western Australian Police Union of Workers - FBA 38 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 14/11/00 – Police 356

[2]Appeal against Decision of Commission (80WAIG5633) re unfair dismissal and contractual entitlements - Appellant argued that the Applicant was to be reinstated at the site said to be owned by Goldfields Pty Ltd and not the Appellant, that the shortage of work has been misunderstood to be at that site and not the Kalamunda site, that the amount ordered to be repaid, being the loss of earnings, should be reduced by the amounts for annual leave and notice in lieu, which was paid in termination pay, that the amount should also be reduced by the unemployment benefits received for the corresponding period and that reinstatement was not possible due to the fact that Appellant has ceased to operate - Further, the Commission erred at first instance in that it ordered that amounts said to have been lost or not paid to the Respondent between the date of dismissal and the date of the order appealed against be paid - Applicant conceded to the ground which alleged that the Commissioner erred in ordering the payment of monies which the Commissioner ordered be paid, being the wages and other remuneratory items not paid or lost by Applicant because of unfair dismissal - Full Bench found that this ground was based on the City of Geraldton v Cooling (80WAIG5341) which was authority for the proposition that an order for compensation following a dismissal was not within power if an order for reinstatement was made, as it was here, thus, the appeal was upheld on this ground and the order varied - Further, Full Bench found that the Order for reinstatement was not made as a result of any miscarriage of discretion in the Commission at first instance and that the other grounds of appeal had not been made out and were dismissed - Upheld in part otherwise dismissed - Pollock Nominees Pty Ltd ACN 008 842 911 -v- Mr JL Butterfield - FBA 50 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 05/02/01.................... 369

[2]Appeal against decision of Commission (80WAIG3106) re unfair dismissal - Appellant employer appealed against that decision on the grounds that the learned Commission erred by finding that dismissal was unfair despite evidence of a genuine redundancy, exceeding his jurisdiction and interfering with the Appellant's decision to terminate, determining that Appellant was obliged to make compensatory payment for the purposes of redundancy and awarding Respondent a sum of $9477.00, thus requiring Appellant to apply for an order to stay the decision pending determination of this Appeal - Respondent argued that he had been unfairly dismissed due to difficulties in the relationship between the parties which manifested in five major episodes during the course of his employment - Full Bench found that Appellant had not treated Respondent fairly, that dismissal was unfair, reinstatement was impracticable, that the decision at first instance was arrived at by an erroneous exercise of discretion and therefore varied the decision and substituted the figure of $1,114.92 for the figure of $9477.00 in the decision - Appeal upheld and decision at first instance varied - WA Access Pty Ltd (ACN 009 392 830) -v- Mr MR Vaughan - FBA 34 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/11/00 – Spraypainting.................... 373

[4]Application to revoke Order re Stay of Operation (80WAIG1759) - Respondent sought to revoke Commission's Order in PRES 3 of 2000, by which Commission wholly stayed the operation of Order No. 473 of 1999 - President found that the delay in this matter was such that it would have enabled a successful application for want of prosecution to have occurred and appellant's appeal dismissed - Further, because of the inadequate explanation for the delay, the length of the delay and the period of respondent's deprivation of the fruit of his "judgment", President was of the opinion that, having regard to the interests of the parties pursuant to s.26(1)(c) of the Act and having regard to s.26(1)(a) of the Act, the equity, good conscience and substantial merits of the case reside with the respondent and therefore revoked the Order for a stay made on 26 April 2000 and ordered that monies be paid forthwith to respondent - Granted - YMCA of Perth -v- Mr M Cousins - PRES 3 of 2000 - President - SHARKEY P - 21/12/00 - Community Services 410

Appeal by the Applicant union pursuant to s.23B of the Industrial Relations Act - Applicant union sought to reverse the decision of the Respondent to reduce the salary of its member and be reprimanded - These penalties were imposed after a finding of misconduct made pursuant to the Education Act following an inquiry under Section 7C - Applicant union argued that the penalty imposed on its member was disproportionate to the offence, in the event if it was concluded that the misconduct occurred and further argued that the reduction in salary grade imposed by the Respondent was a "blunt instrument" and taken cumulatively, and would lead to a substantial financial impost on its member - Commission heard evidence from a number of people and although the evidence to the incident was conflicting, Commission considered the evidence carefully, paid regard to the content of the inquiry report by the independent inquirer and found that the conduct of the Applicant union's member was not "mild but firm" as it described in Reg32 of the Regulations and the re-enactment of the incident was an error of judgement and was not an appropriate response by the teacher - Accordingly an Order was issued dismissing the appeal - Dismissed - The State School Teachers Union of W.A. (Incorporated) -v- Hon Min for Education - APPL 1204 of 2000 - KENNER C - 05/02/01 - School 672

[1]Appeal against Decision of Commission In Court Session (80WAIG4508) re terms and conditions of employment, redundancy payments and superannuation schemes - Appellants argued that CICS erred in law by purporting to give retrospective effect to order 1, that the base salary and roster allowance of each letter of offer employees be increased and erred in law in finding that following the merger, the Appellant's Mid-West operations were quickly restored to profitability or giving consideration to other factors when there was no evidence to support this finding - Further, Appellants argued that the Commission erred in law in making orders in relation to Iluka Resources Limited where there was no industrial matter between it and the Respondents and erred in law by acting on the irrelevant consideration that RGC Mineral Sands Ltd had previously offered a limited choice of superannuation funds to its employees and having regard to a Superannuation scheme which applied to Workplace Agreement employees and granting liberty to apply to the award employees of Iluka Resources Limited and Iluka Mid-West Limited when the industrial matter between Appellants and Respondents did not relate to the award employees - Industrial Appeal Court found that the CICS had the power to give retrospective effect to its order awarding an increase in salaries and allowances, that there was revealed an evidentiary basis on which the CICS could properly make the challenged finding that profitability was quickly restored for the Mid-West operations following the Merger - Further, IAC found that it was a matter for the CICS to find whether an order to enable letter of offer employees to become members of the Iluka Resources Limited fund was appropriate as a matter of equity, good conscience and the substantial merits of the case - IAC found that no grounds had been made out and failed to be persuaded thus Appeal dismissed - Dismissed - Iluka Midwest Limited & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 5 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Parker J. - 08/02/01 - Other Mining.................... 763

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APPEAL—*continued*

[1]Appeal against Decision of Commission In Court Session (81WAIG35) re joinder of respondents to award - Appellants argued that the majority of the CICS erred in law in failing to comply with the requirements of s29A(2) of the I.R. Act 1979 in hearing the applicant at first instance - Counsel for the Respondent argued that the intent of s29A was clear in that the section was designed to provide for notice of applications to parties that would otherwise not receive notice of the application - Further, it was contended by Counsel for the respondent that the addition of named respondents to the award did not alter the "scope" of the award so as to attract s29A(2) - Industrial Appeal Court applied decision in "Australian Meat Industry Employer's Union v Stewart Butchering Co Pty Ltd (1993)(73WAIG1196)", and agreed with the Learned President's observation that the alteration of named respondents to an award was a variation to the "scope" of the award so as to attract the provisions of s29A - IAC was of the view that the appeals should be allowed and the matters remitted to a single commissioner to be dealt with according to law after the provisions of s29A of the I.R. Act have been complied - Further, IAC added that if the intention of Parliament was that s29A(2) should apply to common rule awards, then the section should be amended to say so - Upheld and Remitted - Airlite Cleaning Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 8 & 9 of 2000 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - Other Services 769

[2]Appeal against Decision of Commission (80WAIG4504) re dismissed application re unfair dismissal - Appellant Union argued that the Commission at first instance erred when it gave no or insufficient weight to the evidence in relation to the following: "that there was no risk to safety of the life or limb of Mr. Rac or that there was no damage to Company plant or equipment of any kind, that this was the first breach of tagging procedure by Mr. Reichelt, and that the automatic penalty of dismissal for a tagging procedure breach was contrary to the rules of natural justice or criminal justice" - Further, Appellant Union argued that the disciplinary enquiry was in error as to its understanding of the range of disciplinary penalties that could be applied and that the speculation by the Commission as to "the tray could have dropped and killed Mr. Rac" was not credible on the evidence given by Mr. Reichelt and Mr. Rac and that the decision be quashed and a determination that the dismissal was unfair and an order of reinstatement of Mr. Reichelt to his former position be issued - Full Bench found that this was an appeal against a discretionary decision and was unable to interfere with a discretionary decision unless that appellant had established that the Commission at first instance erred according to the principles - Further, Full Bench found that the finding depends on the credibility of witnesses and the finding must stand unless it can be shown that the Commissioner had failed to use or had palpably misused his advantage or had acted on evidence or which was glaringly improbable - Full Bench concluded that the Appellant had not established that the exercise of the Commissioner's discretion at first instance miscarried according to the principles laid down and that the appeal was not made out as there was no appealable error in the exercise of the discretion - Appeal Dismissed - CONSTRUCTION, MINING, ENERGY -v- BHP Pty Ltd - FBA 45 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 02/03/01 - Metal Ore Mining... 773

[2]Appeal against Decision of Industrial Magistrate (unreported) and Appeal against Decision of Commission (80WAIG4419) re unfair dismissal - Preliminary application - Respondent argued on a number of grounds including that the appeal was incompetent and that it had been brought frivolously and vexatiously with the object of delaying and prejudicing the fair trial of the proceedings before the Magistrate - Further, Respondent sought orders that Appeal No. FBA 7/2000 be struck out and that Appellant pay the costs of and incidental to the proceedings - Full Bench found on a number of reasons that the appeal was competent, that it was premature and unnecessary, at this stage, to rule on the issues of frivolous and vexatious, and that there was prejudice by the prospect of irremediable exclusion, therefore, having regard to the equity, good conscience and the substantial merits of the case, dismissed the application to dismiss for want of prosecution - Appeal Nos. FBA7 and FBA43 of 2000 - Respondent argued that there was irresistible inference that the appeal was brought frivolously and vexatiously, that Appellant's appeal should not be allowed to be withdrawn and that, given the length of time that the breach of the procedural rules had continued, the reasons for the breach and the fact that respondent and the administration of the court's business had been prejudiced, then both appeals should be struck out - Appellant's Counsel argued that he had no objection to the appeals being dismissed rather than withdrawn and he offered no argument in support of the appeals - Full Bench found that the most satisfactory way of dealing with the appeals with some finality, and to which course there was no objection in any event, was to dismiss the appeals by way of determination of the appeals - Dismissed - Chubb Security Australia Pty Ltd -v- Mr PR Danson - FBA 7,43 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 26/07/00 - Other Business Services . 783

[2]Appeal against Decision of Commission (81WAIG327) re illegal disciplinary action - Application to extend time to appeal and to extend time to make application to extend time - Appellant Union argued that there were delays that contributed to the appeal being lodged out of time and that using the various principles referred to the appeal and application should be granted - Respondent opposed the Application to extend time within which to appeal and for leave to extend time within which to make application to extend time - Full Bench found that the object of a rule to extend time was to ensure that legislative provisions or rules which fix times for doing acts do not become incidents of injustice and that the discretion to extend time was given for the sole purposes of enabling the Commission to do justice between the parties - Full Bench concluded that there would be detriment and therefore injustice to Respondent in allowing an extension of time within which to appeal from a decision which Appellant Union had, in anticipation of such a decision being given accepted therefore, appeal was incompetent and dismissed - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 52 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/03/01 - Iron Ore... 981

[2]Appeal against Decision of Commission (81WAIG299) re unfair dismissal and contractual entitlements - Appellant argued on a number of grounds that the Commission at first instance erred in fact and in law in finding that the appropriate measure of compensation for the harsh, oppressive and unfair dismissal of the Appellant was four week's remuneration - Further, Appellant sought that appeal be upheld and that the decision of the Commission that the Respondent pay to the Appellant compensation of four week's wages be set aside and in lieu thereof, the Respondent be ordered to pay to the Appellant a differing compensation amount - Full Bench reviewed authorities and found on evidence that the Commissioner erred in not finding that there was no evidence that a dismissal was contemplated or would have occurred but for the fact that the Respondent wished to force a variation in contract on Appellant against his will, that there was no evidence either that Appellant did not wish to continue in his employment and that it was more probable that the employment would and could have continued for at least twelve months - Full Bench further found that the dismissal was found and found correctly to have been substantially unfair, and that the Commissioner should have made a finding of loss based on the difference between wages earned and wages lost subsequent to the dismissal, therefore grounds of Appeal 1(a), (b) and (c), insofar as they apply, as to loss have been made out - Further, that the exercise of discretion at first instance, relating to ground 1(d) - injury, had been miscarried and that ground 2 was a submission and not a relevant ground - Upheld and Order at first instance varied - Mr NR Lynam -v- Lataga Pty Ltd - FBA 53 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/KENNER C - 29/03/01........... 986

[2]Appeal against Decision of Commission (80 WAIG 4482) re unfair dismissal and contractual entitlements claims - Appellant argued that the Commission erred in holding that it did not have jurisdiction to hear and determine the application - Appellant sought that the Full Bench overrule previous decisions if not distinguishable on the facts - Respondent argued that if the appeal was upheld, the matter should be remitted - Full Bench had already observed that it should not overrule a previous decision unless it had a conviction that that decision was wrong - Full Bench found that the actual work was performed geographically outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction - Full Bench found the Commission had correctly made findings on the claims and the Appellant should not be disadvantaged by re-opening matters – In Supplementary Reasons, Majority of Full Bench had granted an adjournment to seek legal advice - Upheld - Mr MA Tranfield -v- Ray Douglas Parker - FBA 46 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 03/04/01 - Oil and Gas Extraction 990

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APPEAL—*continued*

[4]Application for stay of operation of a direction of the Commission in Application Nos. 1693, 1710, 1711, 1712, and 1713 of 2000 (81WAIG936, 1068) pending Appeal to Full Bench - Appellant Employer argued that Commission in the exercise of its discretion failed to give proper weight and consideration to the following matters that, it was not in the public interest to order the discovery of confidential communications between employers and their industrial relations advisers and that such documents were not and could not be relevant to the matters at issue in the substantive case - Respondents argued that to stay the operation of the order might have the effect of delaying the final hearing and determination of the matter, a delay which could not be compensated for in money, even if Respondents were successful - President found that the principles applicable for a stay should be applied and that the decision appealed against was a discretionary decision and that to succeed on appeal Appellant would have to establish that the exercise of discretion was miscarried in accordance with the principles - Further, President found that an appellate court should exercise caution in undertaking to review a decision on a matter of practice or procedure and that the stay of operation had not been established and therefore, there should not be interference by the President with an interlocutory order - Dismissed - Cable Sands (W.A.) Pty Ltd -v- Mr R Sullivan & Others - PRES 5 of 2001 - President - SHARKEY P - 19/03/01 - Mineral.......... 998

[1]Appeal against Decision of Full Bench (80 WAIG 4610) re exclusive right to represent employees - IAC reviewed authorities and found that the appellant being neither a party or being permitted to intervene in the proceeding had no right of appeal under S.90 of the Industrial Relations Act 1979 - IAC found the right to be heard could not lead to the appellant being considered a party or intervenor and the appeal was incompetent - IAC commented that there was reason to question whether the opportunity to be heard under s 72A(5) and other provisions would deny the Commission the power to join or allow the intervention of a person under s27(1)(j) & (k) - Dismissed - The Food Preservers' Union of Western Australia, Union of Workers -v - AUTO, FOOD, METAL, ENGIN UNION & Other - IAC 7 of 2000 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 27/04/01 - Food, Beverage and Tobacco Mfg.......... 1141

[2]Appeal against Decision of Commission (81 WAIG 683) re denied contractual entitlements - Appellant argued it was not liable to pay the amount claimed because the respondent was an employee of the appellant when she applied for the position and wished to remain so and thus was lent to another employer to fill a position - Respondent argued that the respondent and another person were both parties to the contract of employment when the respondent was seconded - Full Bench found that despite not objecting to being named as the respondent at first instance it was clear that a third party was the employer for the purposes of s29b(ii) of the IRACT 1979 - Full Bench found that whilst one contract of employment with the appellant was suspended, another was in existence between another employer and the respondent and the Commission had no jurisdiction to hear and determine the claim - Dismissed - Minister for Education -v- Ms AE Galipo - FBA 5 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 11/04/01 – Education 1145

[2]Appeal against Decision of Commission (81 WAIG 311) re denied contractual entitlements - Appellant argued that the Commission erred in finding that he had repudiated a redundancy agreement and was in breach of his fiduciary duty to the respondent - Appellant argued the respondent waived or released the appellant from further performing his obligations under the redundancy package - Respondent argued the redundancy agreement was dependant upon a consultancy agreement and the appellant had repudiated the contract by advising he was commencing employment with a competitor and taking clients in breach of a restraint of trade provision-Full Bench found the Commission was entitled to find the contract was not severable, the appellant repudiated the contract seriously to justify summary dismissal and was not entitled to the benefits of the contract - Full Bench further found Appellant was bound by case at first instance - Dismissed - Mr G Sargant -v- Lowndes Lambert Australia Pty Ltd - FBA 1 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 23/04/01 – Finance 1149

[1]Appeal against decision of Full Bench (79 WAIG 2313) re dismissed appeal to Full Bench re finding of unfair dismissal, upon failure of Appellant to appear - Appellant argued the Appellant failed to receive notice to attend the hearing of Full Bench due to change of address and medical factors and that dismissing the appeal without giving him the right to be heard denied him natural justice - IAC found that in the circumstances the Full Bench was entirely justified in making the order and did not commit any error of law or exceed its jurisdiction - IAC found no question of law - Dismissed - Kamel Lebeidi - Sugar Gum Restaurant -v- Ms RA Napoli - IAC 9 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 01/02/01 - Accommodatn, Cafes&Restaurants 1357

[2]Appeal against decision of Commission (81 WAIG 721) re use of contractors - Appellant argued that the Commission erred by not determining the question of available reasonable hours and not placing sufficient weight on the evidence of a reversed overtime ban by the Respondent - Respondent argued that the contracting out was consistent with the provisions of the award - Full Bench found that the central issue was whether on the evidence it was open to find that no employee would suffer any "detrimental effect" within the meaning of the award in relation to his/her available hours of work by using contractors and that it was open to the Commission to so find - There was no question of a reduction in overtime, instead the Respondent proposed that the status quo be maintained - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - FBA 2 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 16/05/01 - Metal Ore Mining.......... 1358

[2]Appeal against decision of Commission (81 WAIG 1262) re unfair dismissal claim - Appellant argued that Commission did not have jurisdiction to order reinstatement once the Appellant had agreed to pay compensation - Full Bench reviewed IR Act, authorities and found that the Commission acted within power, correctly and validly exercising the unconditional power conferred by s23A(1)(b), a power not conditioned by s 23A(1a)(b) - Dismissed - BHP Iron Ore Pty Ltd -v- AUTO, FOOD, METAL, ENGIN UNION - FBA 21 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 21/05/01 - Metal Ore Mining.......... 1363

[2]Appeal against decision of Commission (81 WAIG 679) re unfair dismissal claim - Appellant argued, interlaid, the Commission failed to give proper consideration to the Respondent's obligations for training, teaching and counselling the Appellant and sought compensation - Respondent argued the Appellant was on a probationary period and had not performed to required standards - Majority Full Bench found the Commission should have found the Appellant was not counselled or informed sufficiently as to the standards which he was required to meet - Full Bench found the Appellant had not been warned, given sufficient reason for dismissal and the employer acted in a procedurally and substantially unfair manner - Full Bench found sparse reasons for decision made it difficult to find the discretion did not miscarry and that the Appellant should be compensated for loss equal to the balance of the probationary period -Upheld and decision varied - Mr MJ East -v- Picton Press Pty Ltd - FBA 3 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 04/05/01 - Printg, Publishg & Rcdd Media.......... 1367

[2]Appeal against decision of Commission (79 WAIG 2053) re allegedly denied contractual entitlements and applications to extend time to file appeal and appeal books - Matter brought on by Full Bench's own motion pursuant to a Practice Direction - Appellant did not appear, but argued in writing that the distance between Qld and WA and ill health were the reasons for the delay in attending to matters - Respondent argued nothing of merit was submitted in favour of the application to extend time to lodge the appeal, the appeal was five months out of time and therefore a nullity - Full Bench found the Appellant had been afforded every reasonable opportunity to prosecute the appeal, but failed to do so - Full Bench found the interests of the Respondent, the community, justice, which favoured the respondent and the equity, good conscience and substantial merits of the case required the appeal and applications to be dismissed - Dismissed not be dismissed - Full Bench found that the Appellant had been afforded every reasonable opportunity to prosecute the appeal, including a telephone hearing, but had failed to do so and the application should be dismissed in the public interest - Full Bench further found that the interests of the respondent the community and the Commission and the equity good conscience and substantial merits of the case required the dismissal of the appeal and all other applications before the Full Beech nothing was put that the Commission had Commission had exercised its discretion under s27 of the IR Act in error or that the grounds of appeal did not demonstrate an arguable case on appeal - Dismissed for want of - in error - Mr P Sobczuk -v- Carnarvon Medical Service Aboriginal Corporation - FBA 11 of 1999 - Full Bench - SHARKEY P/SCOTT C./SMITH, C - 11/06/01 - Health Services 1373

CUMULATIVE DIGEST—*continued*

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APPRENTICES AND JUNIORS

Application re unfair dismissal and contractual entitlements - Applicant argued that after sustaining an injury at work, he had medical treatment and was provided with a medical certificate stating that he was unfit to work for four weeks - Further, after a short period off, he was told by the Respondent that if he "did not return to work he wouldn't have a job" - There was no appearance by the Respondent - Commission found that Applicant was not given a fair go and for him to be dismissed while incapacitated and under threat that he had to return to work was harsh and oppressive and ordered that Respondent pay to the Applicant 15 weeks salary and tool allowance within 21 days of the Order - Upheld and Dismissed - Mr B Smith -v- High Quality Brickwork - APPL 1425 of 2000 - COLEMAN CC - 08/03/01 - Construction Trade Services.......... 1019

Complaint re Breach of Award - Complainant argued that Defendant had breached the Building Trades (Construction) Award 1987 No. R17 of 1978 in that Defendant failed to pay adult rates of pay as a full time employee and not as a casual employee, failed to provide annual leave and loading and public holidays and at the appropriate rates and other entitlements on termination - Defendant argued that there was no case to answer as there was not in existence an employment relationship between Complainant and Defendant and that there was no entitlement to the award claims - Industrial Magistrate found that Complainant was an employee and that the award would apply - IM further found that Complainant failed to show specific benefits that he was entitled to under the award in that there was no evidence to show which days were actually worked by Complainant and that without such evidence the Court could not determine what the actual entitlements were and that he had not established the amounts that were owing - No case to answer - Mr A La Guidara -v- Mr A Tripolitano - CP 161 of 2000;M 51 of 2001 - Industrial Magistrate - Cicchini IM - 17/05/01 – Building.......... 1389

AWARDS

[2]Appeal against decision of Public Service Arbitrator (unreported) re variation of Award - Appellant argued that Public Service Arbitrator erred in law in declaring that the Commuted Overtime Allowance should be categorised as a general allowance to which principles 2, 5 and 6 of the State Wage Principles apply, that on the face of the clause and in the context of the Award, the allowance was a commuted allowance, paid in lieu of payments which would otherwise be made under the Overtime Allowance clause of the Public Service Award No. PSAA4 of 1989 and not an allowance with relation to either the nature of the work or conditions under which the work is performed - Further, Appellant sought a declaration that the application was not an issue to be progressed and determined under Principles 2, 5 and 6 of the State Wage Principles - Full Bench found that the PSA correctly held that the matter should proceed as if it were an issue under Principle 2 which attracts the attention of Principles 5 and 6; and that it was a general allowance and that the Principles should be applied accordingly - Further, the PSA was correct, on a fair reading of the Principles and the award as a whole, in so concluding, therefore there was no merit in the appeal - Full Bench applied authorities regarding the application for extension of time, which were opposed by the Respondents and found on a number of factors, the maintenance of the time limit of 21 days pursuant to s.49(3) of the Act would not work an injustice in this case and that the CSA had not established that the denial of the application would prejudice it - Dismissed - Civil Service Association of Western Australia Incorporated -v- Executive Director, Fisheries Western Australia & Other - FBA 37 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 08/12/00.......... 11

[3]Application re joinder to Award - Applicant Union argued that although the Contract Cleaners' (Ministry of Education) Award 1990 was limited to the named Respondents, it was regarded generally by the contract cleaning industry and the Education Department as the Award which sets the benchmark for wages and conditions for contract cleaning employees cleaning Government Schools and it was therefore necessary that when new contract cleaning employers gain contracts, the Award be extended to them by having them named as Respondents to the Award - Respondents argued amongst a number of reasons that the coverage of the Contract Cleaners' (General and Window Contractors) Award (the General Award) currently applies to the employers that the union is seeking to join to the award, that it was the General award which forms the award safety net and that the Contract Cleaners' (Ministry of Education) Award, 1990 was a consent award which applied only to the employers who consented to it - Further, that the General award has undergone a Minimum Rates Adjustment exercise and therefore it has properly set rates of pay whereas the Contract Cleaners' (Min. of Educ) Award, 1990 has not - Commission in Court Session was of the view that the material before it justified why the claim had not been progressed under s.41 of the Act or pursued under any other of the State Wage Principles - Further, that the equity, good conscience and substantial merits of the case lay with the Applicant such that the application should succeed - Granted - LIQUOR, HOSPITALITY & MISC -v- Airlite Cleaning Pty Ltd & Others - APPL 1431 of 1998 - Commission in Court Session - BEECH C/SCOTT C./KENNER C - 08/09/00 – Cleaning.......... 35

[3]Application to vary awards re Redundancy - Applicant Union sought to amend awards in the pastry cooking industries to remove the exemption which applied in the Redundancy clause to employers with less than 15 employees - Applicant argued that increased automation of dough making and mixing, faster, larger automatic ovens and the use of pre-mixes, are changes which have resulted in less skilled employees being utilised in place of qualified tradespersons - Respondent argued that because there was a shortage of qualified tradespeople, any such tradesperson made redundant would have no difficulty in finding employment in a very short time - Commission found amongst a number of reasons that equity and substantial merits of the case justify the applications being granted and concluded that the exemption ought to be removed from these awards - Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Baking Industry Employers' Association of Western Australia - APPL 146,147,148 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/01/00 - Baking.......... 399

Application to vary the Rangers (National Parks) Consolidated Award, 1987 by consent - Commission found that the award does not reduce conditions or disadvantage employees - Further, that this was a single enterprise specific award which was being varied by consent to give effect to structural efficiency initiatives or productivity based arrangements and the variation made to the State Wage Principles to recognise those circumstances was applicable - Award Varied and Consolidated - Department of Conservation and Land Management -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - APPL 1744 of 2000 - BEECH C - 24/11/00 - Government.......... 655

[1]Appeal against Decision of Commission In Court Session (81WAIG35) re joinder of respondents to award - Appellants argued that the majority of the CICS erred in law in failing to comply with the requirements of s29A(2) of the I.R. Act 1979 in hearing the applicant at first instance - Counsel for the Respondent argued that the intent of s29A was clear in that the section was designed to provide for notice of applications to parties that would otherwise not receive notice of the application - Further, it was contended by Counsel for the respondent that the addition of named respondents to the award did not alter the "scope" of the award so as to attract s29A(2) - Industrial Appeal Court applied decision in "Australian Meat Industry Employer's Union v Stewart Butchering Co Pty Ltd (1993)(73WAIG1196)", and agreed with the Learned President's observation that the alteration of named respondents to an award was a variation to the "scope" of the award so as to attract the provisions of s29A - IAC was of the view that the appeals should be allowed and the matters remitted to a single commissioner to be dealt with according to law after the provisions of s29A of the I.R. Act have been complied - Further, IAC added that if the intention of Parliament was that s29A(2) should apply to common rule awards, then the section should be amended to say so - Upheld and Remitted - Airlite Cleaning Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 8 & 9 of 2000 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - Other Services.......... 769

Application re variation of the Artworkers Award No. 30 of 1987 - Applicant sought to be removed as a respondent from the award on the grounds that it no longer has any employees employed under the award and no expectation of employing any artworkers - Commission reviewed authorities, relevant sections of the Act and found that the Act empowers it to cancel the award if it was defunct however, this award was not defunct, and there had been no evidence before it that the award was defunct or that there was no longer any employer carrying on business as an employer in the industry covered by the award and by that reason the Town of Narrogin should not be bound to the award - Further, the powers are exercised in two circumstances, in that when there are no employees left anywhere, or where an employer was no longer carrying on business in an industry to which the award applies and the two test in this case had not been met - Dismissed - Town of Narrogin -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers - APPL 1412 of 2000 - GREGOR C - 06/04/01 - Government Administration.......... 1002

AWARDS—*continued*

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services.................... 1162

[2]Appeal against decision of Commission (81 WAIG 721) re use of contractors - Appellant argued that the Commission erred by not determining the question of available reasonable hours and not placing sufficient weight on the evidence of a reversed overtime ban by the Respondent - Respondent argued that the contracting out was consistent with the provisions of the award - Full Bench found that the central issue was whether on the evidence it was open to find that no employee would suffer any "detrimental effect" within the meaning of the award in relation to his/her available hours of work by using contractors and that it was open to the Commission to so find - There was no question of a reduction in overtime, instead the Respondent proposed that the status quo be maintained - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - FBA 2 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 16/05/01 - Metal Ore Mining.................... 1358

BONUS

Application re contractual entitlements - Applicant sought denied benefits which he was entitled to under his contract of employment - Applicant argued that the commission earned by him for sales which were not complete at the time of his termination of employment had not been paid - Respondent argued that Applicant must complete each sale personally and that if a member of the sales team leaves and that person was replaced, the new person fitted into the team and fulfilled the orders - Commission found that commission was due on a measure and quote which was legitimate which was sold at the customer's house and that Applicant was entitled to commission on sales where he undertook the measure and quote and brought in the order to the business premises - Order Issued - Mr AE Jackson -v- Iustini Holdings Trading As Doors Plus - APPL 1885 of 2000 - SCOTT C. - Construction Trade Services.................... 1215

BREACH OF ACTS/AWARDS/ORDERS

[2]Appeal against Decision of Industrial Magistrate (80WAIG217) re breach of the Minimum Conditions of Employment Act - Appellant argued that the Learned Magistrate erred in law and fact on a number of grounds including that he misdirected himself in failing to find that the correct multiplicand was the sum paid on the pay day prior to termination and that it failed to find that it was a term of contract, implied by practice and acquiescence between the parties, that pay days were every Thursday provided commission was then payable - Further, Appellant sought a declaration and an Order that he had an entitlement to unpaid commission, that the multiplicand for calculating his paid annual leave was correct, that Respondent pay accrued pro rata annual leave pursuant to the MCE or alternatively that the relevant pay period was the last full pay period which preceded (sic) termination, that the correct weekly rate for calculating Appellant's paid annual leave was $1,940.00 and that if any sum was ordered it attract 6% interest - Full Bench reviewed MCE Act and found that no grounds of appeal was made out, that His Worship did not err as alleged in the grounds of appeal and that Appellant was not an employee for the purposes of the MCE Act 1993 - Dismissed - Mr DJ Hignett -v- Joburne Pty Ltd T/a Blackburn Real Estate - FBA 15 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 14/12/00 - Real Estate Agency.................... 30

Complaint re Breach of Minimum Conditions of Employment Act 1993 - Complainant argued that the Defendant deducted pay without lawful authority and failed to pay accrued annual leave and one week's wages - Complainant argued that she was working for the named Defendant, that she was advised that there was going to be some change to the ownership of the entity, however, to her knowledge those arrangements had not been finalised - Defendant argued that the Defendant was not the Complainant's employer at all during that material period - Defendant argued there were two separate entities and that they were entirely separate - Industrial Magistrate found that the evidence overwhelmingly in favour of Complainant and accepted that there was an underpayment of untaken annual leave and an entitlement of a week's pay - Proven and Granted - Ms NA Roberts -v- Snogrin Pty Ltd t/a Eclipse Hardware - CP 98 of 2000 - Industrial Magistrate - Cicchini IM - 29/11/00 – Hardware 274

Complaint re Breach of Award - Preliminary issue re summary judgement - Industrial Magistrate heard submissions from both parties and found that Defendant have discharged the onus that there was a plausible ground of defence and granted Defendant unconditional leave to defend - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - 11/01/01 - --.................... 664

Complaint re unfair dismissal and breach of Workplace Agreement - Complainant argued that he was unfairly dismissed contrary to the provisions of the Workplace Agreements Act 1993 - Defendant argued that Complainant failed to mention on the pre-placement medical examination form of an incident resulting in an operation for injury to his right knee and again failed to provide details of that injury and the subsequent arthroscopy on the workers compensation claim form - Further, the claim was inconsistent with the notification of the earlier report that he had injured his right knee when, in fact, on that occasion he reported that he had injured his left knee - Industrial Magistrate found that omissions made by the Complainant were not such that Defendant had no other remedy, that his non-reporting did not endanger the safety of the workplace, that on balance dismissal was unfair in all the circumstances and ordered Defendant to pay compensation to the Complainant - Reasons for Decision Issued - Mr SD Oxtoby -v- Viceroy Australia Bounty (Victoria) Pty Ltd (ACN 089 020 860) - CP 219 of 2000 - Industrial Magistrate - Tarr IM - 18/01/01.................... 855

Complaint re breach of Workplace Agreements Act 1993 - Complainant argued that he was unfairly dismissed without warning or valid reason and sought compensation on the basis that it was impracticable to re-employ or reinstate him given that he has now found alternative employment - Defendant denied that it unfairly dismissed complainant and argued that it simply exercised its right under the probation clause of the workplace agreement not to continue with complainant's employment - Industrial Magistrate found that complainant was terminated without any proper verbal or written warnings and without proper notice, that the probationary term of contract was simply used to justify complainant's dismissal and accordingly, complainant's claim alleging unfair dismissal was made out by reason of lack of procedural fairness as well as on the substantive merits of the case - Further, IM found that no documentation or pay slips have been produced and there has been no evidence to show exact hours worked during the relevant period, therefore complainant had failed to establish his claim regarding compensation - Reason for Decision Issued - Mr M Rea -v- Canon Foods Pty Ltd - CP 226 of 2000 - Industrial Magistrate - Cicchini IM - 21/02/01 – Retailing.................... 856

CUMULATIVE DIGEST—*continued*

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BREACH OF ACTS/AWARDS/ORDERS—*continued*

Complaint re breach of Workplace Agreement Act 1993 - Complainant argued that he was unfairly, harshly or oppressively dismissed and sought reinstatement or compensation and recovery of costs - Defendant argued that complainant's performance and conduct constituted serious breaches of his contract of employment, which justified his dismissal - Industrial Magistrate found on evidence that complainant acted in an honest, open and frank way with respect to the formation of his prospective counselling business - IM further found that defendant failed to call witnesses to substantiate claims to discharge its evidentiary burden concerning the issue, that there was no foundation for the termination of complainant's employment, and that on balance, complainant was unfairly dismissed - IM found that as reinstatement was not a realistic option, complainant was entitled to recover lost earnings - Proven - Mr PJ Moss -v- Serenity Lodge Inc - CP 216 of 1999 - Industrial Magistrate - Cicchini IM - 07/12/00 - Community Services.......... 1006

Complaint re breach and enforcement of Award and Minimum Conditions of Employment Act - Complainant argued that Defendant failed to pay annual leave, sick leave and overtime - Complainant argued that Defendant had initiated and in effect orchestrated the termination so that it could be released from the obligations of Workers' Compensation and Rehabilitation Act and that entitlements accrued whilst on workers' compensation should be paid - Defendant argued and disputed that it had unilaterally terminated Complainant's employment at all, it argued that Complainant resigned from his position to take up employment with another employer as a security officer - Magistrate found that the parties terminated company on mutual agreement and the entitlements for annual leave, sick leave and payment in lieu of notice were not made out - Magistrate found that Complainant was entitled to unpaid overtime as proven because Defendant could not offset overaward and production bonuses payments made for a particular purpose against overtime payments - Proven in Part - Mr PA Jones -v- Barminco Pty Ltd - CP 38,212 of 2000 - Industrial Magistrate - Cicchini IM - 02/05/01 - Services to Mining.......... 1183

Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed and that he was made redundant without any prior consultation in breach of ss 40-42 of the Minimum Conditions of Employment Act 1993 - Further, Applicant sought reinstatement to his position or in the alternative, the maximum of six months compensation - Respondent argued that there was a restructure, the company had to cut cost and the Applicant was chosen for redundancy because he was the poorest performer and he was costing the company nearly twice as much as those that were performing better that him - Commission reviewed authorities and found on evidence that the Respondent had discharged their onus in proving there was a valid redundancy, that the redundancy was effected to save costs and that Applicant was made redundant largely, but not solely, for cost reasons - Further, Commission reviewed the Minimum Co Employment Act 1993 and found that Applicant had not proven his case that someone else should have been chosen for redundancy or that he should have been given another position, therefore, weighing up all the circumstances in the matter, Commission did not consider that Applicant's selection for redundancy was unfair, harsh or oppressive - Dismissed - Mr GE Garbett -v- Midland Brick Company Pty Ltd - APPL 791 of 2000 - WOOD,C - 09/05/01 - Non-Metallic Min Product Mfg.......... 1206

Complaint re Breach of Award - Complainant argued that Defendant had breached the Building Trades (Construction) Award 1987 No. R17 of 1978 in that Defendant failed to pay adult rates of pay as a full time employee and not as a casual employee, failed to provide annual leave and loading and public holidays and at the appropriate rates and other entitlements on termination - Defendant argued that there was no case to answer as there was not in existence an employment relationship between Complainant and Defendant and that there was no entitlement to the award claims - Industrial Magistrate found that Complainant was an employee and that the award would apply - IM further found that Complainant failed to show specific benefits that he was entitled to under the award in that there was no evidence to show which days were actually worked by Complainant and that without such evidence the Court could not determine what the actual entitlements were and that he had not established the amounts that were owing - No case to answer - Mr A La Guidara -v- Mr A Tripolitano - CP 161 of 2000;M 51 of 2001 - Industrial Magistrate - Cicchini IM - 17/05/01 – Building.......... 1389

CASUAL WORK

Application re unfair dismissal - Applicant and Respondent agreed that the Applicants employment was on a casual basis, however Applicant argued she was unfairly dismissed after refusing to obey a direction of the manager which she believed was incorrect - Commission found dismissal to be harsh and thus unfair, and as reinstatement was impracticable ordered compensation - Commission found that position was casual and business winding down employment may only have continued for one week after termination and ordered compensation as such - Granted - Ms M Darby -v- Rocket Transport Services Pty Ltd T/A Rocket Couriers - APPL 1213 of 2000 - BEECH C - 12/01/01 - Services to Transport.......... 676

Application re unfair dismissal - Preliminary issue re jurisdiction - Respondent argued that Commission lacked jurisdiction to deal with the applications as both employees were casual and pursuant to the Federal Workplace Relations Act 1996 and Regulations, were excluded from the operation of unfair dismissal procedures, there being a direct inconsistency between the Federal and State Acts - Respondent argued that consumption of alcohol on duty and a series of events which amounted to behaviour and an attitude on the part of applicant (Mr Rushton) was the reason for termination - Applicant (Mr Rushton) defended the allegations and for most part agreed that they occurred but he viewed them as trivial - Applicant (Mr Cairns) argued that he felt intimidated and threatened by another officer following an incident, that after respondent investigated the incident, he was told that he would stay on and be offered work but that never happened - Commission reviewed authorities, relevant sections of the Federal Act, the Australian Constitution and found that there was no inconsistency between the Federal Workplace Relations Act 1996 and the WA I.R. Act 1979 and hence the Commission had jurisdiction to hear the matter - Commission determined (in a further Reasons for Decision) that the nature of the applicants' employment relationship in all aspect was casual - Further, Commission found on evidence that the respondent was not prepared to continue to roster Mr Cairns away from his intimidator and unless Mr Cairns had that guarantee then he was not prepared to work for the respondent, therefore, there had been no dismissal of Mr Cairns and hence that being the fact there was no jurisdiction for the Commission and accordingly dismissed his application for want of jurisdiction - Commission further found that Mr Rushton did consume alcohol and fall asleep whilst on duty, therefore, having regard to the Undercliffe case (65WAIG385) the decision to dismiss him on notice was not unfair, harsh or oppressive in all circumstances - Applications Dismissed - Mr A Cairns -v- The West Australian Turf Club - APPL 795,809,827 of 2000 - WOOD,C - 15/09/00 – Sport.......... 867

Application re unfair dismissal and contractual entitlements - Applicant sought compensation for unfair dismissal and also for a denied contractual benefit - Respondent argued that applicant was stood down and there was no termination - Commission found that applicant was unfairly terminated, that reinstatement would be totally impracticable, that the loss was a loss of pay of one hour as applicant was a casual, and ordered payment of $13.30 by respondent to applicant - Order Issued - Mrs M De Niese -v- Curtin Hotels Pty Ltd Trading as the Imperial Hotel - APPL 1645 of 2000 - WOOD,C - 27/02/01 - Accommodatn, Cafes&Restaurants.......... 878

Application re unfair dismissal - Applicant argued that she was unfairly dismissed - Respondent argued that applicant breached health regulations, put other staff members at risk when in anger she threw a quantity of brandy into an extremely hot pan causing flames 3 to 4 feet into the air, and her temper and rudeness were disruptive in the workplace and resulted in complaints from other staff members about her behaviour - Commission found on evidence that applicant was prone not to follow direction and was prone to argue about the directions that were given to her, leading to her dismissal, and as she was a casual employee was afforded one hour's notice - Dismissed - BR Dopsaj -v- Robyn & Merv Finlay El Cabbalo Roadhouse - APPL 1597 of 2000 - WOOD,C - 16/02/00 – Restaurant.......... 879

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CASUAL WORK—*continued*

Application re unfair dismissal - Applicant summarily dismissed by a recruitment agency that had a labour hire agreement contract with another company who had requested that the Applicant be removed - Applicant argued he had never seen the relevant Code of Conduct or Privacy documents, the dismissal was harsh, oppressive and unfair and sought reinstatement - Respondent argued that the Applicant had made a derogatory comment about a customer in the comments field of his notes screen which was against the other company's Code of Conduct and 'Privacy' instruction - Commission found that the evidence disclosed that the nature of engagement could not be characterised at law as casual employment - Commission found that Respondent abused the right to terminate the Applicant's employment because the customer made no complaint about the service, the Respondent made no enquiry about why the applicant made the note and failed to instruct its employees about the Code of Conduct - All the training Applicant received was prior to the creation of the Privacy instruction - - Commission found that reinstatement was not practicable and the Respondent should pay the Applicant compensation for loss at the date of hearing - Granted - Mr DJ Conole -v- Julia Ross Recruitment Pty Ltd & Other - APPL 450 of 2000 - SMITH, C - 25/05/01 - Recruitment Services 1402

Application re unfair dismissal - Applicant argued that her dismissal from a position of permanent part time receptionist was harsh, unfair, for no valid reason, sought a declaration that dismissal was of that nature but did not seek reinstatement - Respondent argued that applicant's employment status throughout the employment period was one of a casual nature - Commission found that Applicant did not prove that her services were terminated at all, that she was not dismissed, she resigned, therefore the Commission had no jurisdiction and this application should be dismissed - Dismissed - Ms A Hoare -v- Noongar Land Council - APPL 764 of 2000 - GREGOR C - 12/06/01 - Community Services 1420

Application re unfair dismissal - Applicant argued that she was unfairly dismissed because the night of the dismissal was an unusually busy night and there were a number of reasons why things did not go particularly well that night, she was working under pressure, the Manager at the time was affected by alcohol and was abusive - Respondent argued that Applicant was dismissed for being too slow over the course of her employment - Commission was not persuaded on the evidence overall that the reason applicant was dismissed was simply the events of that night but that Respondent had been concerned from Applicant's first shift and rostered her for less hours after the first week, and found on the balance of probabilities that respondent had already reached the decision to dismiss Applicant prior to that evening - Further, Commission found that applicant had not discharged the onus upon her that dismissal was harsh, oppressive or unfair - Order Issued - Ms LA March -v- Hungry Hollow Tavern - APPL 1722 of 1999 - BEECH C - 06/06/01 - Accommodatn, Cafes&Restaurants 1431

COMMON RULE

[1]Appeal against Decision of Commission In Court Session (81WAIG35) re joinder of respondents to award - Appellants argued that the majority of the CICS erred in law in failing to comply with the requirements of s29A(2) of the I.R. Act 1979 in hearing the applicant at first instance - Counsel for the Respondent argued that the intent of s29A was clear in that the section was designed to provide for notice of applications to parties that would otherwise not receive notice of the application - Further, it was contended by Counsel for the respondent that the addition of named respondents to the award did not alter the "scope" of the award so as to attract s29A(2) - Industrial Appeal Court applied decision in "Australian Meat Industry Employer's Union v Stewart Butchering Co Pty Ltd (1993)(73WAIG1196)", and agreed with the Learned President's observation that the alteration of named respondents to an award was a variation to the "scope" of the award so as to attract the provisions of s29A - IAC was of the view that the appeals should be allowed and the matters remitted to a single commissioner to be dealt with according to law after the provisions of s29A of the I.R. Act have been complied - Further, IAC added that if the intention of Parliament was that s29A(2) should apply to common rule awards, then the section should be amended to say so - Upheld and Remitted - Airlite Cleaning Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 8 & 9 of 2000 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - Other Services 769

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services 1162

COMPENSATION

[2]Appeal against decision of the Commission (80WAIG3068) re unfair dismissal and contractual entitlements - Appellant argued that the learned Commissioner erred in fact and law in that he failed to give proper weight to the evidence and erred in fact and law in finding that a reasonable period of notice for the Respondent to remedy the situation would have been 3 months and in assessing the compensation for loss and injury - Respondent argued that the grounds of appeal were defective because they did not comply with Regulation 29 of the Industrial Relations Commission Regulations 1985 - Full Bench found that the grounds of appeal did comply and that they were provided and sufficiently detailed to enable the Respondent to know substantially the case which it had to answer - Full Bench concluded that this was a discretionary decision and that the Appellant had to establish that the exercise of the discretion at first instance had miscarried with the principles laid down - Full Bench concluded that no established error in the exercise of the discretion at first instance had been made out that would warrant the interference of the Full Bench - Dismissed - Olten Pty Ltd T/as MSA Security -v- Mr AJ Byfield - FBA 39 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 18/12/00 – Security 15

Application re unfair dismissal - Applicant argued that he was summarily dismissed and sought reinstatement if it was practicable, or alternatively the maximum level of compensation - Respondent argued that Applicant solicited a cash job for an ant treatment at a private company in Cannington, was suspended on pay and asked to provide a reason why he should not be terminated - Commission found that having heard all the evidence, came to the conclusion that Applicant did solicit for a cash payment, that the act of solicitation amounted to conduct of stealing as a servant and warranted summary dismissal - Commission was satisfied that for the above reasons Respondent did not act unfairly, harshly or oppressively in dismissing Applicant - Dismissed - Mr SP Davies -v- Nationwide Environmental Management Pty Ltd - APPL 862 of 2000 - WOOD,C - 08/12/00 – Pesticides 281

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COMPENSATION—*continued*

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because she was dismissed while on probation and was not given an opportunity to explain any of the allegations - Respondent argued that Applicant was dismissed because of the complaints and statements received from other management staff and patrons which showed that the Applicant did not have the support of other management staff - Commission found after hearing evidence from other staff that for the substantive and procedural reasons the dismissal was unfair and as reinstatement was impracticable Applicant was awarded compensation for the loss or injury which was caused by the harshness of the dismissal - The claim of contractual benefit had not been made out and was dismissed - Accordingly an Order was issued - Discontinued - Ms ALM Gloede -v- Mercure Inn, Karratha - APPL 859 of 2000 - BEECH C - 01/12/00 – Hotels.................... 285

Application re unfair dismissal and contractual entitlements - Applicant argued that he conducted consultancy work for the Respondent whilst he was still in Adelaide and in December 1999 was engaged to work in Perth, but in March 2000 Respondent reneged on an agreement allowing him to take the company vehicle to Adelaide to relocate his family, and on his return to Perth offered him a new contract which he did not accept, and therefore sought relocation expenses under the contract, compensation for lost income on unfair dismissal and loss of six months use of car - Respondent argued that the contract included a three month probation period and use of mobile phone and car for company business only - Commission found the contract did not include provisions for relocation expenses, that Applicant took the car to Adelaide against the clear intention of his employer who was entitled to summarily dismiss him at that point and that Applicant was not dismissed unfairly - Dismissed - Mr M Howard -v- Allied Contracting Services - APPL 529 of 2000 - WOOD,C - 08/12/00 – Contracting 290

Application re unfair dismissal - Applicant argued that he was terminated unfairly, and sought compensation for lost wages, ongoing loss in his new position, one month's pay in lieu of notice and injury for suffering arising from the dismissal - Respondent argued that as the contract issue concerning overtime was unresolved he terminated Applicant and paid him one week's pay for notice as permitted under the contract of employment, and further referenced a letter as conclusive proof that overtime was not to be paid to applicant - Commission was satisfied that Applicant's performance was not in question, he received no warning or indication that his employment was in jeopardy and that he was dismissed unfairly, hence he should be paid the total of $1579.50 for denied contractual benefits and a total of $3,510 by way of compensation - Granted - Mr NR Lynam -v- Lataga Pty Ltd - APPL 555 of 2000 - WOOD,C - 29/11/00.................... 299

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because he was in a "resign or be fired" type of situation so he decided to finish up and be paid out - Respondent argued that Applicant had been treated almost like a "Family Member" and was respected for his seniority and it never intended to terminate his employment - Commission found that in the circumstances of the history of the three employees taking leave during quiet times even if leave was not usually extended and the consideration with which the Applicant had been treated by the Respondent over the years, it was unreasonable for the Applicant to have refused to take further leave and the Applicant's resignation was not in substance a dismissal, therefore dismissed the claim for unfair dismissal and contractual entitlements - Dismissed - Mr N Pitcher -v- Wyldes Window Treatments & Vertical Drapes ACN 059 668 290 - APPL 1265 of 2000 - BEECH C - 21/12/00 – Textile Manufacturing.................... 302

Application re unfair dismissal and denied contractual entitlements - Applicants argued that they were dismissed following an abusive encounter at the restaurant with one of the Respondent's directors - Respondent argued that both Applicants resigned in that encounter, or if they were dismissed, dismissal was justifiable because they had been drinking in the restaurant contrary to specific instructions - Commission found that both Applicants were dismissed for misconduct, that though their dismissals were warranted, the manner in which they were both dismissed was quite oppressive, however, their claims of unfairness for the substantive reasons they have argued are not made out - Commission was satisfied that reinstatement was impracticable and ordered $500 to be paid to each Applicant as compensation for the injury arising from the manner of their dismissals - Granted - Mr JP Grigg -v- Royale Enterprises Pty Ltd - APPL 1600 of 1999 - BEECH C - 18/11/00 - Accommodatn, Cafes&Restaurants.................... 305

Application re unfair dismissal and denied contractual entitlements - Applicants argued that they were dismissed following an abusive encounter at the restaurant with one of the Respondent's directors - Respondent argued that both Applicants resigned in that encounter, or if they were dismissed, dismissal was justifiable because they had been drinking in the restaurant contrary to specific instructions - Commission found that both Applicants were dismissed for misconduct, that though their dismissals were warranted, the manner in which they were both dismissed was quite oppressive, however, their claims of unfairness for the substantive reasons they have argued are not made out - Commission was satisfied that reinstatement was impracticable and ordered $500 to be paid to each Applicant as compensation for the injury arising from the manner of their dismissals - Granted - Ms KR Riley -v- Royale Enterprises Pty Ltd - APPL 1599,1600 of 1999 - BEECH C - 18/11/00 - Accommodatn, Cafes&Restaurants.................... 305

[2]Appeal against Decision of Commission (80WAIG5633) re unfair dismissal and contractual entitlements - Appellant argued that the Applicant was to be reinstated at the site said to be owned by Goldfields Pty Ltd and not the Appellant, that the shortage of work has been misunderstood to be at that site and not the Kalamunda site, that the amount ordered to be repaid, being the loss of earnings, should be reduced by the amounts for annual leave and notice in lieu, which was paid in termination pay, that the amount should also be reduced by the unemployment benefits received for the corresponding period and that reinstatement was not possible due to the fact that Appellant has ceased to operate - Further, the Commission erred at first instance in that it ordered that amounts said to have been lost or not paid to the Respondent between the date of dismissal and the date of the order appealed against be paid - Applicant conceded to the ground which alleged that the Commissioner erred in ordering the payment of monies which the Commissioner ordered be paid, being the wages and other remuneratory items not paid or lost by Applicant because of unfair dismissal - Full Bench found that this ground was based on the City of Geraldton v Cooling (80WAIG5341) which was authority for the proposition that an order for compensation following a dismissal was not within power if an order for reinstatement was made, as it was here, thus, the appeal was upheld on this ground and the order varied - Further, Full Bench found that the Order for reinstatement was not made as a result of any miscarriage of discretion in the Commission at first instance and that the other grounds of appeal had not been made out and were dismissed - Upheld in part otherwise dismissed - Pollock Nominees Pty Ltd ACN 008 842 911 -v- Mr JL Butterfield - FBA 50 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 05/02/01.................... 369

[2]Appeal against decision of Commission (80WAIG3106) re unfair dismissal - Appellant employer appealed against that decision on the grounds that the learned Commission erred by finding that dismissal was unfair despite evidence of a genuine redundancy, exceeding his jurisdiction and interfering with the Appellant's decision to terminate, determining that Appellant was obliged to make compensatory payment for the purposes of redundancy and awarding Respondent a sum of $9477.00, thus requiring Appellant to apply for an order to stay the decision pending determination of this Appeal - Respondent argued that he had been unfairly dismissed due to difficulties in the relationship between the parties which manifested in five major episodes during the course of his employment - Full Bench found that Appellant had not treated Respondent fairly, that dismissal was unfair, reinstatement was impracticable, that the decision at first instance was arrived at by an erroneous exercise of discretion and therefore varied the decision and substituted the figure of $1,114.92 for the figure of $9477.00 in the decision - Appeal upheld and decision at first instance varied - WA Access Pty Ltd (ACN 009 392 830) -v- Mr MR Vaughan - FBA 34 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/11/00 – Spraypainting.................... 373

[4]Application to revoke Order re Stay of Operation (80WAIG1759) - Respondent sought to revoke Commission's Order in PRES 3 of 2000, by which Commission wholly stayed the operation of Order No. 473 of 1999 - President found that the delay in this matter was such that it would have enabled a successful application for want of prosecution to have occurred and appellant's appeal dismissed - Further, because of the inadequate explanation for the delay, the length of the delay and the period of respondent's deprivation of the fruit of his "judgment", President was of the opinion that, having regard to the interests of the parties pursuant to s.26(1)(c) of the Act and having regard to s.26(1)(a) of the Act, the equity, good conscience and substantial merits of the case reside with the respondent and therefore revoked the Order for a stay made on 26 April 2000 and ordered that monies be paid forthwith to respondent - Granted - YMCA of Perth -v- Mr M Cousins - PRES 3 of 2000 - President - SHARKEY P - 21/12/00 - Community Services 410

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COMPENSATION—*continued*

Application re unfair dismissal - Applicant and Respondent agreed that the Applicants employment was on a casual basis, however Applicant argued she was unfairly dismissed after refusing to obey a direction of the manager which she believed was incorrect - Commission found dismissal to be harsh and thus unfair, and as reinstatement was impracticable ordered compensation - Commission found that position was casual and business winding down employment may only have continued for one week after termination and ordered compensation as such - Granted - Ms M Darby -v- Rocket Transport Services Pty Ltd T/A Rocket Couriers - APPL 1213 of 2000 - BEECH C - 12/01/01 - Services to Transport 676

Application re unfair dismissal and contractual entitlements - Applicant argued that there was no consultation and no alternatives were offered, that termination decision had already been made and the meeting of 12/5/2000 was only to deal with matters to do with pay - Respondent argued that the operation of the Bureau was now different from what it was when managed by applicant as funds for marketing had been taken away by Mandurah Council, the Bureau had been scaled down in respect of hours, contracts and accounting arrangements and a sub -committee now managed the place - Commission found that the procedure adopted by the Board was lacking in unfairness in its entirety, that reinstatement was impracticable as there was no job for applicant to go back to and awarded compensation by way of injury and denied contractual entitlement - Ordered Accordingly - Mrs WK Faulkner -v- Mandurah Tourist Bureau Inc Executive Committee - APPL 912 of 2000 - WOOD,C - 22/11/00 - Tourism 680

Application re unfair dismissal - Applicant argued dismissal was unfair because he raised issues of safety in the workplace and a lack of equipment and had thereafter been victimised and was dismissed - There was no appearance or argument on behalf of the Respondent - Commission found that the Applicant's version of events was on the balance of probabilities correct and the Respondent had acted upon wrong information given to him and had breached its right to terminate the contract of employment in such a way that it abused that right - Commission further found that the dismissal was unfair and since there was no position to which the Applicant could be reinstated granted compensation - Granted - Mr RB Hansen -v- Noongar Enterprise Aboriginal Corporation trading as Unity of First People of Australia - APPL 601 of 2000 - GREGOR C - 24/01/01 - Other Services 691

Application re unfair dismissal - Applicant argued dismissal was unfair because the job he was previously performing still exists and was now performed by a less qualified person and sought compensation - Respondent denied that dismissal was unfair and argued that the restructure was bona fide, that Applicant was told he was surplus to the requirements after the restructure and that it took steps to find applicant alternative employment which regrettably proved fruitless - Further, that Applicant was paid five and a half weeks pay in lieu of notice and eight and three quarter weeks of redundancy pay which was fair and equitable in all the circumstances - Commission, after considering the whole of the circumstances found on evidence that the dismissal was not unfair - Dismissed - Mr P Manvell -v- Transfield Pty Ltd - APPL 961 of 2000 - FIELDING C - 30/01/01 – Building......... 706

Complaint re breach of Workplace Agreements Act 1993 - Complainant argued that he was unfairly dismissed without warning or valid reason and sought compensation on the basis that it was impracticable to re-employ or reinstate him given that he has now found alternative employment - Defendant denied that it unfairly dismissed complainant and argued that it simply exercised its right under the probation clause of the workplace agreement not to continue with complainant's employment - Industrial Magistrate found that complainant was terminated without any proper verbal or written warnings and without proper notice, that the probationary term of contract was simply used to justify complainant's dismissal and accordingly, complainant's claim alleging unfair dismissal was made out by reason of lack of procedural fairness as well as on the substantive merits of the case - Further, IM found that no documentation or pay slips have been produced and there has been no evidence to show exact hours worked during the relevant period, therefore complainant had failed to establish his claim regarding compensation - Reason for Decision Issued - Mr M Rea -v- Canon Foods Pty Ltd - CP 226 of 2000 - Industrial Magistrate - Cicchini IM - 21/02/01 – Retailing.. 856

Application re unfair dismissal - Applicant argued that he had attended work after Commission ordered reinstatement, however, the employer has failed to comply with the Order - Commission found on evidence that applicant's loss was at least 6 months remuneration and that the parties were in agreement as to the calculation of the loss, except that respondent sought consideration for Centrelink payments received by applicant - Commission found that it was inappropriate to deduct unemployment benefits received by applicant during the course of unemployment and accordingly, revoked the order for reinstatement - Further, Commission ordered that respondent pay applicant $31,509.17 as compensation for unfair dismissal and $2,217.04 as pay in lieu of notice, no later than 7 days from the date of the Order - Ordered Accordingly - Mr JL Butterfield -v- Pollock Nominees Pty Ltd ACN 008 842 911 - APPL 604 of 2000 - SCOTT C. - 23/02/01............................ 866

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that the dismissal was unfair because it was not warranted as it did not relate to any performance issues and that there was nothing unusual or unacceptable about his actions given the normal practice and expectations of the business - Respondent argued that the Applicant was dismissed summarily because he was on licensed premises, after hours and with company, and that he consumed and provided drinks which he did not pay for at that time and this was a breach of trust - Commission found that the Applicant was not given an opportunity to address what may or may not have happened and that he had been charged with the operation of the whole business and that the dismissal was unfair - Commission found that it was impractical for the Applicant to be reinstated and compensation and contractual entitlements were awarded - Granted - Mr M Lewis -v- West Shore Group - APPL 1395 of 2000 - WOOD,C - Accommodatn, Cafes&Restaurants 887

Application re unfair dismissal seeking compensation and denied contractual entitlements - Applicant argued that the Respondent contrived an arrangement to deny her a redundancy payment and that she was not competent to perform the duties of the final job offered to her - Respondent argued that there would not be a redundancy but, there would be a position made available to the Applicant and would also provide the necessary support and that the Applicant was capable of performing the job being offered - Commission preliminarily found that this was a matter of either a redundancy or an income loss but not the two together and that the Applicant was either going to be given a redundancy payment or a job - Commission found that the Applicant had not proven her case and that the Applicant had in effect resigned in that she needed to accept the job or in fact the employment relationship was going to end- Dismissed for want of jurisdiction - Mrs E Noteboom -v- Thorn Australia Pty Ltd - APPL 1506 of 2000 - WOOD,C - 20/02/01 – Electronic 893

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that his dismissal was both unfair and unlawful in that he never received any payment after being dismissed, that he never received any reasons for his dismissal, that Respondent did not provide him with any particulars relating to his alleged performance or conduct shortcomings, that he was not advised that his employment was in jeopardy and was not provided with any reasonable opportunity to respond to the allegations made by Respondent - Respondent opposed the claims and argued that Applicant had misused the expense system, had abused his position of trust as a general manager, thus, the dismissal was justified and Applicant was not entitled to any payment and was substantially indebted to the Respondent - Commission found that Applicant work performance was not an issue relied on by Respondent and that the system for expenses claims at Respondent was based on judgement and the exercise of discretion as to whether an expense should be claimed against Respondent - Further, having considered all the evidence, Commission found that it did not consider that Applicant was guilty of conduct warranting summary dismissal and that Applicant had not engaged in a wilful course of conduct in relation to his expenses to have justified Respondent in applying the employer's ultimate sanction and thus, the dismissal was wrongful or unlawful at common law - Commission rejected the submissions of claim and counterclaim by Respondent to set-off any entitlement awarded in favour of Applicant by the sum allegedly owed to Respondent - Upheld in Part and Order Issued - Mr I Phippard -v- BGC (Australia) Pty Ltd - APPL 1958 of 1999 - KENNER C - 24/01/01... 895

CUMULATIVE DIGEST—*continued*

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COMPENSATION—*continued*

Conference referred re unfair dismissal and contractual entitlements - Matter remitted back to Commission with instruction that it be dealt with "according to law" and in accordance with the reasons for decision of the Full Bench - Applicant sought compensation for loss of income and in addition, for injury sustained as a result of his dismissal - Further, Applicant Union argued that whatever formula was used to assess compensation, Applicant was entitled to the maximum allowable under the Industrial Relations Act - Respondent argued that the Applicant should be compensated for something less than the maximum allowable under the Act and drew attention to the fact that he was subject to criticism which led to other proceedings in the Commission before his termination - Commission reviewed various tests cases, relevant sections of the I.R. Act and Workplace Relations Act 1996 and found that the onus was on the employer to establish that the employee had failed to mitigate his loss and the employer had simply not discharged that onus - Further, that in the present case, the task of assessing compensation was made more difficult than usual because the evidence as to the Applicant's earnings at the time of dismissal and subsequently are at best scant, and that may be due in part to the fact that so much time had lapsed since Applicant's dismissal - Commission concluded that Respondent should pay Applicant compensation for dismissal found to have been unfair by the Full Bench - Granted. - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Barminco Pty Ltd - CR 186 of 1998 - FIELDING C - 05/11/98 - Services to Mining.. 916

[2]Appeal against Decision of Commission (81WAIG299) re unfair dismissal and contractual entitlements - Appellant argued on a number of grounds that the Commission at first instance erred in fact and in law in finding that the appropriate measure of compensation for the harsh, oppressive and unfair dismissal of the Appellant was four week's remuneration - Further, Appellant sought that appeal be upheld and that the decision of the Commission that the Respondent pay to the Appellant compensation of four week's wages be set aside and in lieu thereof, the Respondent be ordered to pay to the Appellant a differing compensation amount - Full Bench reviewed authorities and found on evidence that the Commissioner erred in not finding that there was no evidence that a dismissal was contemplated or would have occurred but for the fact that the Respondent wished to force a variation in contract on Appellant against his will, that there was no evidence either that Appellant did not wish to continue in his employment and that it was more probable that the employment would and could have continued for at least twelve months - Full Bench further found that the dismissal was found and found correctly to have been substantially unfair, and that the Commissioner should have made a finding of loss based on the difference between wages earned and wages lost subsequent to the dismissal, therefore grounds of Appeal 1(a), (b) and (c), insofar as they apply, as to loss have been made out - Further, that the exercise of discretion at first instance, relating to ground 1(d) - injury, had been miscarried and that ground 2 was a submission and not a relevant ground - Upheld and Order at first instance varied - Mr NR Lynam -v- Lataga Pty Ltd - FBA 53 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/KENNER C - 29/03/01........... 986

Complaint re Breach of Workplace Agreement Act 1993 - Complainant argued that he was unfairly, harshly or oppressively dismissed and sought reinstatement or compensation and recovery of costs - Defendant argued that complainant' s performance and conduct constituted serious breaches of his contract of employment, which justified his dismissal - Industrial Magistrate found on evidence that complainant acted in an honest, open and frank way with respect to the formation of his prospective counselling business - IM further found that defendant failed to call witnesses to substantiate claims to discharge its evidentiary burden concerning the issue, that there was no foundation for the termination of complainant's employment, and that on balance, complainant was unfairly dismissed - IM found that as reinstatement was not a realistic option, complainant was entitled to recover lost earnings - Proven - Mr PJ Moss -v- Serenity Lodge Inc - CP 216 of 1999 - Industrial Magistrate - Cicchini IM - 07/12/00 - Community Services.. 1006

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that the employment was terminated without there being any valid reason connected with the capacity or conduct of Applicant or the operational requirements of the employer's business and that it failed to raise these concerns with Applicant or take any positive steps to ensure that Applicant was aware of those concerns and the implications of not taking appropriate action to address those concerns - Further, Respondent failed to give Applicant reasonable notice or pay in lieu of notice - Respondent argued that Applicant was formally warned about his performance and was also verbally warned on a number of occasions that he was required to improve his performance - Commission found that Applicant was aware his performance was unsatisfactory and had received memorandum that his job was at risk and that Applicant had not made out a case that Respondent abused its right to terminate his employment on grounds of poor performance - Dismissed - Mr IW Cannon -v- Linfox Transport (Australia) Pty Ltd (ACN 004 718 647) - APPL 1813 of 1999 - SMITH, C - 21/03/01 - Transport Industry.. 1020

Application re unfair dismissal - Applicant argued dismissal was unfair because there were no complaints about her work and she was never warned that her employment was in jeopardy and sought compensation - Respondent argued that it had a number of complaints about the Applicant which were not put to her, however, other complaints about her conduct were clearly put to the Applicant on a number of occasions - Respondent further argued that it did not advise the Applicant of the reasons for dismissal because of the potential for conflict that that would bring - Commission found that Respondent had good cause to terminate Applicant's employment, however, there had been a denial of procedural fairness which constituted unfairness in the dismissal as the Applicant was not given a warning or provided with a reason for termination - Further, Commission found that reinstatement was impracticable and ordered compensation - Granted - Mrs CD Joseph -v- Chelsea's For Hair and Beauty - APPL 1853 of 2000 - SCOTT C. - 27/03/01 – Hairdressing 1032

Applications re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair and claimed compensation equal to a reasonable redundancy payment, denied contractual entitlements, long service leave and payment for relocation - Applicant argued that there was alternate work available for him to do and that he should of been retained in employment over another employee and that no reasonable alternatives were provided by Respondent and also given an impression that a promotion would be offered only to then be dismissed - Respondent argued that it had restructured its organisation and as a result Applicant's position became redundant and payment in lieu of notice and severance payment was made - Commission found that the claim for unfair dismissal was made out against Respondent being in breach of the implied term referred to and being made redundant when Applicant was expecting to given a wider role and that there was an inadequacy of severance payment made - Further, Commission found that reinstatement was not sought and that there had been a genuine redundancy, Commission therefore considered the remedy of compensation and that a further eight week's salary be paid by way of a redundancy payment - Order Issued - Mr A Birnie -v- A.W.I. Administration Services Pty Ltd - APPL 1198,1457 of 2000 - BEECH C - Metal Ore Mining.. 1198

Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed and that he was made redundant without any prior consultation in breach of ss 40-42 of the Minimum Conditions of Employment Act 1993 - Further, Applicant sought reinstatement to his position or in the alternative, the maximum of six months compensation - Respondent argued that there was a restructure, the company had to cut cost and the Applicant was chosen for redundancy because he was the poorest performer and he was costing the company nearly twice as much as those that were performing better that him - Commission reviewed authorities and found on evidence that the Respondent had discharged their onus in proving there was a valid redundancy, that the redundancy was effected to save costs and that Applicant was made redundant largely, but not solely, for cost reasons - Further, Commission reviewed the Minimum Co Employment Act 1993 and found that Applicant had not proven his case that someone else should have been chosen for redundancy or that he should have been given another position, therefore, weighing up all the circumstances in the matter, Commission did not consider that Applicant's selection for redundancy was unfair, harsh or oppressive - Dismissed - Mr GE Garbett -v- Midland Brick Company Pty Ltd - APPL 791 of 2000 - WOOD,C - 09/05/01 - Non-Metallic Min Product Mfg... 1206

Application re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair and application was made to clear his name of the accusation of stealing - Respondent argued that reasonable steps were taken to allow Applicant to respond to the allegations of stealing and over the course of time the story changed - Further, Respondent argued that after investigating the matter he came to the view that the product (tin) was taken without authority or permission to do so - Commission found that by applying the weight of evidence principles, all the factors upon which Respondent formed the view were accepted over Applicant's story - Dismissed - Mr DJ Kearns -v- Aarjen Pty Ltd - APPL 1970 of 2000 - WOOD,C - Retail Trade.. 1218

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COMPENSATION—*continued*

Application re unfair dismissal - Applicant argued that termination was harsh, oppressive and unfair, that the effect was immediate without notice, that the unfairness was compounded through his inability to refute any allegations of misconduct because at the time of the dismissal none had been made and that he was not given any information concerning those allegations in the letter of termination - Respondent argued that the dismissal followed months of mismanagement and misconduct by Applicant - Commission reviewed authorities and found on evidence that on balance, Applicant was not given a "fair go" as an employee and his dismissal was, therefore harsh and unfair - Further, that reinstatement was impracticable and awarded compensation to the Applicant - In Supplementary Reasons For Decision, Respondent argued a motion to reopen and to make further submissions concerning the quantum of compensation - Respondent argued there was no loss that the Applicant could point to because in the period in which he was unemployed he did not attempt to sufficiently mitigate his loss - Commission applied the law relating to finding of loss and injury and the assessment of compensation and found that in all of the circumstances it was appropriate that an award be made to Applicant for loss and injury - Order Issued - Mr I Lawless -v- Ghirardi Restaurant Pty Ltd (ACN 081 550 469) - APPL 1822 of 1999 - GREGOR C - 19/01/01 - Accommodatn, Cafes&Restaurants........................ 1219

Applications re unfair dismissal seeking compensation - Applicants argued that dismissal was unfair as both were dismissed without any warning because they had membership with the Construction, Forestry, Mining and Energy Union and an incident that involved an organiser of the CFMEU - Further, Applicants argued that they were employed on a permanent full time basis - Respondent argued that Applicants were both engaged on a day to day basis, effectively as casual employees and that they had no real entitlement to ongoing employment - Commission rejected the submissions by Respondent that Applicants were employed on a casual basis and that Applicants were dismissed harshly, oppressively and unfairly and that there was no good reason for their dismissal - Commission found that reinstatement was impracticable and awarded compensation to Applicants - Granted and Order Issued - Mr GK Smith -v- J&P Metals Pty Ltd - APPL 1377,1378 of 2000 - KENNER C - 20/04/01 - Construction Trade Services 1238

Applications re unfair dismissal - Applicants argued that dismissal was harsh, oppressive and unfair - Respondent argued that at the time the decision was made to terminate Applicants, the financial state of the company was poor and the company had little cash flow as it was building stock and not making sales - Commission reviewed authorities, clauses 32 and 32A of the Award and found that the termination of Applicant (Myles) was unfair because Respondent failed to pay him a severance payment - Further, the manner of dismissal was harsh because no discussions took place as required by clauses 32 and 32A of the Award and s.32 of the Minimum Conditions of Employment Act, and ordered that Applicant (Myles) be paid a global award by Respondent as compensation and that his contractual benefits claim dismissed - In the case of Applicant (Wigham), Commission was satisfied that he had made out a case that the selection process for dismissal was unfair - Further, Commission found that Applicant (Wigham) was unfairly dismissed, that reinstatement was impracticable and ordered that he be paid by the Respondent eight weeks' remuneration and eight weeks' ordinary pay, together with $10.00 tool allowance and $25.00 service allowance for each week - Orders Issued - Mr TW Wigham -v- SFM Engineering Pty Ltd - APPL 1375,1384 of 2000 - SMITH, C - 06/04/01 - General Construction... 1241

Conference referred re unfair dismissal seeking reinstatement - Applicant Union argued that their member was unfairly dismissed because the Respondent's response to his actions was disproportionate to the gravity of the conduct and that the conduct in question occurred outside the workplace and that the policy was not entirely clear in this regard which added to the unfairness of the dismissal - Respondent argued that the member had engaged in conduct in breach of the Policy with knowledge of the terms of the Policy and further submitted that the conduct and behaviour was premeditated and designed to harass and intimidate other employees which included using the word "scab" - Respondent also argued that reinstatement was not a viable option if the dismissal was unfair - Commission found that the member was dismissed for making unwelcome remarks and using derogatory and offensive words to employees who had accepted workplace agreements - Commission found having regard to all the circumstances, including the length of service and unblemished employment record that the Respondent's decision to dismiss was harsh, oppressive and unfair - Further, the utterances of the member were not accompanied by any threats, other verbal abuse or intimidation - As to the question of remedy, Applicant Union sought reinstatement, whilst Respondent opposed it - Commission ordered reinstatement - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 KENNER C - Metal Ore Mining... 1262

[2]Appeal against decision of Commission (81 WAIG 1262) re unfair dismissal claim - Appellant argued that Commission did not have jurisdiction to order reinstatement once the Appellant had agreed to pay compensation - Full Bench reviewed IR Act, authorities and found that the Commission acted within power, correctly and validly exercising the unconditional power conferred by s23A(1)(b), a power not conditioned by s 23A(1a)(b) - Dismissed - BHP Iron Ore Pty Ltd -v- AUTO, FOOD, METAL, ENGIN UNION - FBA 21 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 21/05/01 - Metal Ore Mining.. 1363

Applications re unfair dismissal claim - Applicant argued that dismissal was harsh, oppressive and unfair and sought reinstatement and compensation - Respondent argued that a disciplinary inquiry convened under an Industrial Relations Agreement found that the Applicant had breached the Company's Non-Harassment Policy, was involved in the distribution of offensive material, marking an affidavit with offensive comments and had lied about any involvement in those matters - Commission found there was no evidence that the Applicant in any way did or was associated with the distribution of the material around the site or that the "target" of the harassment ever knew of the notations on the affidavit - Commission found the Applicant was dismissed for conduct that did not breach the policy and the dismissal was harsh, oppressive and unfair - Commission found the Respondent knew of the deceit and could not resurrect it ex post facto - Commission found that an application to re-open the case upon the Respondent's agreement to pay compensation should be treated as part of the substantive matter, it should not do so in all the circumstances and the Applicant should be reinstated - However, Commission found the Applicant's conduct in misleading the Respondent could not be condoned and he should receive a written warning to be placed on his personal file to the effect that any further conduct of that kind will lead to termination of his employment - Ordered Accordingly - CONSTRUCTION, MINING, ENERGY -v- BHP Iron Ore Ltd - APPL 1393 of 2000;APPL 747 of 2001 - KENNER C - 08/05/01 - Metal Ore Mining.. 1393

Application for an order revoking an order reinstating an unfairly dismissed employee - Applicant Employer argued that S23A(3) of the IR Act created a right for it to refuse to obey an order for reinstatement and the Commission must therefore issue an order for compensation- Respondents argued that it was not open for the Applicant to bring the application, the Respondent Employee's attitude had been the subject of the original hearing, reinstatement was not a popularity issue and the Commission had discretion - Commission reviewed authorities and found that if the process of revocation was automatic it would render the power to reinstate nugatory and that power was discretionary - Commission found it was not open in the application to consider further evidence on a point that was already decided - Commission had considered the employee's attitude and behaviour and reinstatement had more potential benefit to him - Dismissed - Iluka Resources Limited & Other -v- Mr MA Rulyancich & Others - APPL 432 of 2001 - BEECH C - 01/06/01 - Other Mining 1397

Application re unfair dismissal - Applicant argued that termination of his employment was unfair as his employment was terminated prior to the expiration of the probationary period and sought compensation for the wages he would have earned from date of termination to expiration of the one month probationary period - Respondent argued that the reason why Applicant's employment was terminated was because Applicant did not perform, in that sales figures for the plumbing section did not increase - Commission found that clearly Applicant was not given sufficient time to prove himself as a competent Plumbing Salesperson in Respondent's business, that Respondent unfairly terminated Applicant's employment and ordered that Respondent pay Applicant $710.75 for eight days pay as compensation - Order Issued - Mr D Allia -v- CD Dodd Pty Ltd T/A Ross's Salvage & Handyman - APPL 1999 of 2000 - SMITH, C - 06/06/01 – Plumbing.. 1400

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COMPENSATION—*continued*

Application re unfair dismissal - Applicant summarily dismissed by a recruitment agency that had a labour hire agreement contract with another company who had requested that the Applicant be removed - Applicant argued he had never seen the relevant Code of Conduct or Privacy documents, the dismissal was harsh, oppressive and unfair and sought reinstatement - Respondent argued that the Applicant had made a derogatory comment about a customer in the comments field of his notes screen which was against the other company's Code of Conduct and 'Privacy' instruction - Commission found that the evidence disclosed that the nature of engagement could not be characterised at law as casual employment - Commission found that Respondent abused the right to terminate the Applicant's employment because the customer made no complaint about the service, the Respondent made no enquiry about why the applicant made the note and failed to instruct its employees about the Code of Conduct - All the training Applicant received was prior to the creation of the Privacy instruction - - Commission found that reinstatement was not practicable and the Respondent should pay the Applicant compensation for loss at the date of hearing - Granted - Mr DJ Conole -v- Julia Ross Recruitment Pty Ltd & Other - APPL 450 of 2000 - SMITH, C - 25/05/01 - Recruitment Services 1402

Application re unfair dismissal and contractual benefits - Applicant argued that the passing comments given were not treated as warnings and that Respondent's attitude had changed once re-enrolment at university had taken place - Further, Applicant argued that Respondent had given a pay rise early and two bonuses prior to re-enrolment at university - Respondent argued that numerous verbal warnings were given to Applicant regarding lack of work performance and that they were pleased for Applicant that he was considering leaving to go to university and that the bonuses were at the lower end because of the poor work performance - Further, Respondent argued that they were forced to incur unnecessary costs by Applicant and his agent and sought costs to be awarded or offset - Commission found that the dismissal was unfair because Applicant had not been warned that his employment was in jeopardy due to underperformance This meant that the dismissal was unfair because of a procedural issue - Commission also found reinstatement was impracticable and awarded compensation - Further, Commission found that the circumstances did not warrant making an order for costs against Applicant - Order Issued - Mr BE Davies -v- Phoenix Paints Pty Ltd - APPL 2019 of 2000 - BEECH C - 07/05/01 – Paint........ 1406

Application re unfair dismissal seeking compensation - Applicant argued that dismissal was harsh, oppressive and unfair because he was given little training and never given an opportunity to give his side of the story when presented with warnings and there were never any discussions regarding the warnings given - Respondent argued that many written and verbal warnings were given because of his abusive and unsatisfactory conduct and performance - Commission found that there were a number of alleged incidents in which Applicant was said to have engaged in unsatisfactory conduct and that none of these issues were ever put to Applicant or any further inquiries into the allegations - Further, Commission found that Applicant did not have any real and proper opportunity to answer the allegations or to obtain appropriate representation - Finally, as to remedy Commission found that reinstatement was impracticable and awarded compensation - Order Issued - Mr S Davey -v- Shire of Collie - APPL 1358 of 2000 - KENNER C - 22/06/01 - Local Government 1410

Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and due outstanding contractual entitlements as the allegations that he was unable to comply with Respondent's request to keep the greens at standards required by them, as the greens were at sufficient standard as required - Further, Applicant argued that he had an extensive period of time as he was diagnosed with a life threatening illness - Respondent argued that dismissal was due to the fact that there was a history of dissatisfaction expressed at his level of performance and the standard required for the surfaces not being met and that he was not putting in enough time on the job - Commission found that sufficient time was given for Applicant to comply with Respondent's request and that Applicant was aware that his position was in jeopardy if he failed to comply - Dismissed - Mr JA Fuller -v- North Beach Bowling Club - APPL 1943 of 1999 - GREGOR C - 18/05/01 - Recreation 1413

Application re unfair dismissal - Applicant argued that dismissal was unfair because of his refusal to sign a subcontract agreement presented to him by Respondent and that it was not due to the alleged allegation of falsifying his timesheets - Respondent argued that his employment was not terminated on account of his failure to sign a so -called subcontract agreement, but, because Applicant had falsified his time sheets on a number of occasions and had claimed for payment for time not worked - Commission found that Applicant had falsified his time sheets and his claims for payment and his failure to comply with a lawful direction - Dismissed - Mr MR Henry -v- Hanssen Pty Ltd - APPL 1549 of 2000 - SCOTT C. - 15/05/01 - Construction Trade Services 1416

Application re unfair dismissal - Supplementary reasons for decision re question of compensation - Respondent requested a motion to reopen matter to make further submissions concerning the quantum of compensation - Respondent argued that there was no loss that Applicant can point to because in the period in which he was unemployed he did not attempt to mitigate his loss - Commission found that Applicant did not continue to suffer an impact upon his professional reputation and that during the period of time in question he did not make sufficient efforts to mitigate his loss, thus, the compensation awarded was decreased - Order Issued - Mr I Lawless -v- Ghirardi Restaurant Pty Ltd (ACN 081 550 469) - APPL 1822 of 1999 - GREGOR C - 03/05/01 - Accommodatn, Cafes&Restaurants 1426

Application for reinstatement or compensation on the grounds of unfair dismissal - Applicant argued that despite there being yearly contracts, the Applicant's employment should be regarded as continuous up until the time of termination, there was no evidence that the Applicant performed poorly and relevant decisions were not taken by a validly constituted management committee under the Respondent's constitution - Applicant argued that the "spill and fill" was merely a device to get rid of the Applicant and that there was a breach of the MCE Act - Respondent argued that it had engaged in a genuine restructuring of its operations to provide better service and there was in fact no dismissal - Respondent further argued that the Applicant had failed to mitigate her loss and had been paid a substantial redundancy package - Commission found failure to consult as required under the MCE Act led to the conclusion that the dismissal was unfair and that the manner of the termination left a lot to be desired - Commission found reinstatement was impractical, but only injury warranted compensation - Granted in part - Ms LF Oliver -v- Coolgardie Community Care Incorporated - APPL 1075 of 2000 - KENNER C - 10/05/01 - Community Services ... 1435

Application re unfair dismissal and contractual entitlements - Applicant argued that she was harshly, oppressively and unfairly dismissed - Respondent denied there was a dismissal at all and that Applicant was having considerable difficulties in her working relationship with another manager - Commission found that there was a significant degree of conflict in the workplace between Applicant and Respondent, that Applicant did not truly resign from her employment but was dismissed and that the most likely date of dismissal was the date upon which Applicant received termination payments into her bank account - Commission also found that dismissal was harsh, oppressive and unfair, that reinstatement was impractical and ordered Applicant to be compensated for loss by $6,000 - Order Issued - Mrs JM Temby -v- Albany and Districts Skills Training Committee Incorporated - APPL 1927 of 2000 - KENNER C - 07/06/01 - Business Services 1449

Conference referred re unfair dismissal seeking reinstatement - Applicant Union opposed the application going to the construction of s.23 of the IR Act - Applicant Union argued that Respondent did not have the standing to bring application to revoke the reinstatement order and submitted that an order for reinstatement was solely for the benefit of the unfairly dismissed employee - Further, Applicant Union argued that an alternative means of dealing with a failure to comply with such an order, does not create a right to not comply - Respondent argued that Commission should revoke and amend the order for reinstatement and award compensation for the loss or injury caused by the dismissal - Respondent argued that on its proper construction, reference to 'may' in s.23A(3), although expressed in directory terms, should be interpreted in a mandatory sense. - Further, Respondent argued that if s.23A(3) was to be interpreted such that 'may' means Commission had a discretion to issue a further order on revocation, then that discretion may be exercised simply as a consequence of the employer's failure to comply with the reinstatement order or its impracticability to comply with the order - Commission found that once it was satisfied that there had been a failure to comply as a matter of jurisdictional fact, Commission was then obliged to consider whether to revoke original order and that the terms of s.23A as a whole conferred on the employer a right to not comply with a reinstatement order - Commission rejected Respondent's submissions to revoke Commission's order - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 - KENNER C - 31/05/01 - Metal Ore Mining 1457

COMPENSATION—*continued*

Conference Referred re unfair dismissal seeking compensation - Applicant Union argued that member was harshly, oppressively and unfairly dismissed because the decision to terminate was excessive regarding deliberate act of member and the isolated incident was taken out of context because member was an excellent employee over many years - Further, Respondent had already decided to terminate before giving member an opportunity to reply and other alternative options could have been considered to termination - Further, compensation was being sought because Respondent no longer operated the Roadhouse - Respondent argued that member was dismissed for misconduct and that the damage caused was destructive - Commission found that that member deliberately threw waste over a customer's truck and that was because customer had parked behind the back door obstructing the drain - Further, Respondent had determined prior to confronting member that he was to dismiss member for gross misconduct and that member was summarily dismissed for deliberately throwing waste - Issue considered by Commission was whether the punishment was appropriate and whether there was proper consideration in deriving the punishment - Commission found that dismissal was harsh and excessive as member was not given a fair go and that compensation should be awarded - Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Clifton Nominees Pty Ltd - CR 310 of 2000 - WOOD,C - 17/05/01 - Accommodatn, Cafes&Restaurants 1463

CONFERENCE

Conference referred re termination of employment - Applicant Union argued that the termination of Applicant was harsh, oppressive and unfair and contrary to s.84AA of the Workers Compensation Act, s.41 of the Minimum Conditions of Employment Act and Clause 34 of the Burswood International Resort Casino Employees Industrial Agreement 2000 - Further, that the Respondent's action was taken substantially because Applicant was the President of (BRUE) and was being discriminated against and the process and planning for his termination was flawed in that it was not shared with him and he was not trained to apply for other positions nor did the Company sought to find him an alternative position - Respondent argued that with the arrival of a new CEO, and constraint on the budget, the managers were required to review their operations and, subsequently the manager Environmental Services made changes to his operation which impacted on the Applicant's duties - Further, Applicant was to be terminated unless he found suitable alternative position, as he could not fulfil the requirements of his original contract as an Environmental Systems Attendant due to his injury - Commission reviewed authorities, Acts and found on evidence that it was plausible and more likely that the Applicant's duties were diminished due to a legitimate drive for efficiency, that there had been no discrimination due to him being a delegate and that evidence proved that his duties had not been cut because of this - Commission exercised its judgement according to equity, good conscience and the substantial merits of the case and found that, to so swiftly terminate Applicant's employment if he himself does not find an alternative position, particularly given the spirit of s.84AA, would be harsh and unfair - Further, the Respondent should have engaged in a fuller exploration of options for Applicant and recommended that this take some months including appropriate training - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 350 of 2000 - WOOD,C - 02/02/01 - Accommodatn, Cafes&Restaurants.............................. 699

Conference Referred re contracting out of work within the Mine Productions area - Applicant argued that the utilisation of a contractor would detrimentally effect the availability of reasonable hours of work of its members contrary to the terms of clause 29 of the award - Respondent argued that the use of a contractor for this work was to better utilise the mineworker classification employees on their principal tasks involving the operation of equipment rather than cleaning reflectors and signs, and estimated that the efficiency savings for it would be approximately $650,000 net per annum - Commission found that employees of the proposed contractor would work "side by side" with employees of Respondent, there would be no diminution in terms of earnings or any effect on the normal working hours of employees, no Respondent's employees would suffer any detrimental effect by engagement of a contractor for sign and reflector cleaning and maintenance, and concluded that the work proposed to be contracted out by Respondent should proceed - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 308 of 2000 - KENNER C - 29/01/01 – Mining.... 721

[2]Appeal against Decision of Commission (80WAIG4504) re dismissed application re unfair dismissal - Appellant Union argued that the Commission at first instance erred when it gave no or insufficient weight to the evidence in relation to the following: "that there was no risk to safety of the life or limb of Mr. Rac or that there was no damage to Company plant or equipment of any kind, that this was the first breach of tagging procedure by Mr. Reichelt, and that the automatic penalty of dismissal for a tagging procedure breach was contrary to the rules of natural justice or criminal justice" - Further, Appellant Union argued that the disciplinary enquiry was in error as to its understanding of the range of disciplinary penalties that could be applied and that the speculation by the Commission as to "the tray could have dropped and killed Mr. Rac" was not credible on the evidence given by Mr. Reichelt and Mr. Rac and that the decision be quashed and a determination that the dismissal was unfair and an order of reinstatement of Mr. Reichelt to his former position be issued - Full Bench found that this was an appeal against a discretionary decision and was unable to interfere with a discretionary decision unless that appellant had established that the Commission at first instance erred according to the principles - Further, Full Bench found that the finding depends on the credibility of witnesses and the finding must stand unless it can be shown that the Commissioner had failed to use or had palpably misused his advantage or had acted on evidence or which was glaringly improbable - Full Bench concluded that the Appellant had not established that the exercise of the Commissioner's discretion at first instance miscarried according to the principles laid down and that the appeal was not made out as there was no appealable error in the exercise of the discretion - Appeal Dismissed - CONSTRUCTION, MINING, ENERGY -v- BHP Pty Ltd - FBA 45 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 02/03/01 - Metal Ore Mining.. 773

Conference referred re unfair dismissal and contractual entitlements - Matter remitted back to Commission with instruction that it be dealt with "according to law" and in accordance with the reasons for decision of the Full Bench - Applicant sought compensation for loss of income and in addition, for injury sustained as a result of his dismissal - Further, Applicant Union argued that whatever formula was used to assess compensation, Applicant was entitled to the maximum allowable under the Industrial Relations Act - Respondent argued that the Applicant should be compensated for something less than the maximum allowable under the Act and drew attention to the fact that he was subject to criticism which led to other proceedings in the Commission before his termination - Commission reviewed various tests cases, relevant sections of the I.R. Act and Workplace Relations Act 1996 and found that the onus was on the employer to establish that the employee had failed to mitigate his loss and the employer had simply not discharged that onus - Further, that in the present case, the task of assessing compensation was made more difficult than usual because the evidence as to the Applicant's earnings at the time of dismissal and subsequently are at best scant, and that may be due in part to the fact that so much time had lapsed since Applicant's dismissal - Commission concluded that Respondent should pay Applicant compensation for dismissal found to have been unfair by the Full Bench - Granted. - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Barminco Pty Ltd - CR 186 of 1998 - FIELDING C - 05/11/98 - Services to Mining.. 916

Conference referred re safety and welfare issues associated with the operation of single officer Police stations throughout Western Australia and in particular the Yalgoo Police station - Applicant union sought orders that the Respondent be ordered to appoint additional residing Police officers at Yalgoo, Gascoyne Junction and Dwellingup Police stations - Respondent argued that the deployment of members of the Police Force was the prerogative of the Commissioner of Police and objected to the issue of any order - Commission conducted inspections in the surrounding districts and at each of the above named Police stations and found from evidence and from the statistics provided, that the threat level of assault on Police officers was at least no higher in single officer Police stations than it was for Police Officers generally - Commission concluded that in the great majority of cases the situation was handled quite adequately by the command structure and to ensure that it does so there must be on-going audit of middle level commanders to ensure that police officers who are in single police stations working by themselves are adequately supervised and supported, if not, situations of unsafe work practice and welfare issues would arise quickly - Commission did not issue orders sought but noted that it remained open to the WAPU in individual circumstances to make notifications to this Commission and the matters would be dealt with on an individual basis - Dismissed - Western Australian Police Union of Workers -v- The Hon. Minister for Police - CR 15 of 2000 - GREGOR C - 02/03/01 – Police 921

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CONFERENCE—*continued*

Conference re withdrawal from an unregistered agreement - Applicant sought an Order that Respondent continue to be bound by and observe the terms and conditions of an unregistered industrial agreement, and an Interim Order to continue the effect of the Agreement pending the hearing and determination of the substantive claim - Preliminary issue re jurisdiction - Counsel for the Respondent argued that Commission lacked jurisdiction to entertain the matter, given that a ground of the application amounted to an application to enforce the BHP Iron Ore Enterprise Bargaining Agreement 1997 (EBA III) - Further, the application also sought the imposition of an agreement on non-consenting parties, therefore, the application was one involving the exercise of judicial power and beyond the jurisdiction of the Commission - Commission reviewed authorities and found on a number of reasons, that the present claim for an order was one that was properly characterised as one seeking an order of the Commission, to create future rights and obligations, albeit reflecting the terms and conditions of the Agreement and this would entail the exercise of arbitral and not judicial power - Further, because the Commission may be called upon to interpret the terms of EBA III, as part of the proceedings, does not of itself, fundamentally change the character of the matter, therefore the present claim was within the Commission's jurisdiction - Commission further reviewed authorities and found that the issue regarding the jurisdiction to impose a s.41 agreement on a non consenting party, does not arise in this matter - Order Issued - CONSTRUCTION, MINING, ENERGY & Others -v- BHP Iron Ore Pty Ltd – APPL C 60 of 2001 - KENNER C - 14/03/01 - Metal Ore Mining 1056

Conference re unfair dismissal - Applicant Union argued that dismissal of member was unlawful because it was contrary to the Order issued by Commission in CR350 of 2000 (81WAIG699) re exploring options and providing appropriate training to member - Further, Applicant Union argued that an Order be issued that member be reinstated to position held by him immediately prior to his dismissal and that the parties agree to the duties to be performed by member - Respondent argued and questioned the jurisdiction of the Commission to issue such an order and says that member was dismissed for continued and wilful refusal to obey a lawful and reasonable instruction - Commission found that it had the jurisdiction to issue such an order and issued an order that Respondent not dismiss member from his employment which also allowed the parties liberty to apply to vary, cancel or revoke this Order - Interim Order issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - C 89 of 2001 - BEECH C - 30/04/01 – Hospitality 1248

Conference referred re utilization of Ongoing Change Agreement II - Applicant argued that the proposed transfer of twelve employees from Respondent's MEW Section to mining operations at its Mt Newman site for a six months trial constituted a forced redundancy and that it arises as a consequence of the engagement by Respondent of contractors in the MEW to perform work previously performed by employees and was not supportable under the Agreement - Respondent argued that Union party had consented, subject to certain conditions, to permit Respondent to initiate one to three months trials of changes in the workplace and also denied that the proposed trial involved forced redundancies - Commission found that the main issues were whether the terms of the OC II contemplated the change as proposed by Respondent and whether the proposal falls into one of the exclusion's contained in OC II or it constituted "wholesale contracting out" in the MEW - Commission found that proposed transfers to the employees were not consistent with the terms of the Ongoing Change Agreement II and the proposed changes should be the subject of negotiations between the parties - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 264 of 2000 - KENNER C - Metal Ore Mining..... 1254

Conference referred re unfair dismissal seeking reinstatement - Applicant Union argued that their member was unfairly dismissed because the Respondent's response to his actions was disproportionate to the gravity of the conduct and that the conduct in question occurred outside the workplace and that the policy was not entirely clear in this regard which added to the unfairness of the dismissal - Respondent argued that the member had engaged in conduct in breach of the Policy with knowledge of the terms of the Policy and further submitted that the conduct and behaviour was premeditated and designed to harass and intimidate other employees which included using the word "scab" - Respondent also argued that reinstatement was not a viable option if the dismissal was unfair - Commission found that the member was dismissed for making unwelcome remarks and using derogatory and offensive words to employees who had accepted workplace agreements - Commission found having regard to all the circumstances, including the length of service and unblemished employment record that the Respondent's decision to dismiss was harsh, oppressive and unfair - Further, the utterances of the member were not accompanied by any threats, other verbal abuse or intimidation - As to the question of remedy, Applicant Union sought reinstatement, whilst Respondent opposed it - Commission ordered reinstatement - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 KENNER C - Metal Ore Mining 1262

Conference referred re additional public holiday - Applicant Union argued that the Respondent was bound by the City of Stirling (Building Maintenance Section) Enterprise Agreement No AG 118 of 2000 which provided for an additional public holiday, namely a union picnic day - Further Union argued that it attempted to seek discussions with Respondent to schedule a date when the workers could take that holiday - Respondent argued that it had refused to meet with the Union because of its assertion that the inclusion of the Union's picnic day was a mistake and that it was therefore not bound to abide by the terms of the agreement - Commission found that there was a genuine mistake made and that the mistake was contained in the registered document - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- City of Stirling - CR 200 of 2000 - GREGOR C - Local Government........ 1268

Conference referred re unfair dismissal - Applicant Union argued that its member was harshly, oppressively and unfairly dismissed and sought an order that he be reinstated and any orders or conditions that the Commission saw fit to impose - Respondent denied the claim and opposed the orders sought - Commission reviewed authorities, evidence and found on a number of reasons that the union member was not harshly, oppressively and unfairly dismissed - Dismissed - AUST MEAT INDUSTRY EMPL UNION -v- Geraldton Meat Exports - CR 4 of 2001 - SMITH, C - 04/05/01 - Food, Beverage and Tobacco Mfg 1271

Conference referred re unfair dismissal seeking reinstatement - Applicant Union opposed the application going to the construction of s.23 of the IR Act - Applicant Union argued that Respondent did not have the standing to bring application to revoke the reinstatement order and submitted that an order for reinstatement was solely for the benefit of the unfairly dismissed employee - Further, Applicant Union argued that an alternative means of dealing with a failure to comply with such an order, does not create a right to not comply - Respondent argued that Commission should revoke and amend the order for reinstatement and award compensation for the loss or injury caused by the dismissal - Respondent argued that on its proper construction, reference to 'may' in s.23A(3), although expressed in directory terms, should be interpreted in a mandatory sense. - Further, Respondent argued that if s.23A(3) was to be interpreted such that 'may' means Commission had a discretion to issue a further order on revocation, then that discretion may be exercised simply as a consequence of the employer's failure to comply with the reinstatement order or its impracticability to comply with the order - Commission found that once it was satisfied that there had been a failure to comply as a matter of jurisdictional fact, Commission was then obliged to consider whether to revoke original order and that the terms of s.23A as a whole conferred on the employer a right to not comply with a reinstatement order - Commission rejected Respondent's submissions to revoke Commission's order - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 - KENNER C - 31/05/01 - Metal Ore Mining 1457

Conference Referred re alleged unfair dealings with redundancy payments - Applicant Union argued that the Regulations 20(7)(a) of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 had been unfairly and improperly applied to one of its members and that severance pay should have been calculated at the rate for a Regional Signal Superintendent - Respondent argued that Commission did not have the jurisdiction to hear and determine the application under s.44 of the IR Act because of the operation of s.95(3) of the Public Sector Management Act, in the alternative, member had not acted continuously in the position of Regional Signal Superintendent - Commission found that the pre-condition to a severance payment at a higher rate than the substantive rate of pay was not continuous service, but, continuous payment of the allowance and that severance payment at the higher rate of pay had not been met and in all circumstances it had not been demonstrated that the Regulations had been or improperly applied - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- Westrail - Western Australian Government Railways Commission - CR 348 of 2000 - SMITH, C - 25/05/01 - Rail Transport 1460

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CONFERENCE—*continued*

Conference Referred re unfair dismissal seeking compensation - Applicant Union argued that member was harshly, oppressively and unfairly dismissed because the decision to terminate was excessive regarding deliberate act of member and the isolated incident was taken out of context because member was an excellent employee over many years - Further, Respondent had already decided to terminate before giving member an opportunity to reply and other alternative options could have been considered to termination - Further, compensation was being sought because Respondent no longer operated the Roadhouse - Respondent argued that member was dismissed for misconduct and that the damage caused was destructive - Commission found that that member deliberately threw waste over a customer's truck and that was because customer had parked behind the back door obstructing the drain - Further, Respondent had determined prior to confronting member that he was to dismiss member for gross misconduct and that member was summarily dismissed for deliberately throwing waste - Issue considered by Commission was whether the punishment was appropriate and whether there was proper consideration in deriving the punishment - Commission found that dismissal was harsh and excessive as member was not given a fair go and that compensation should be awarded - Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Clifton Nominees Pty Ltd - CR 310 of 2000 - WOOD,C - 17/05/01 - Accommodatn, Cafes&Restaurants 1463

CONTRACT OF SERVICE

Application re contractual entitlements - Applicant argued that commission sales to the amount of $405,861 were outstanding - Respondent argued that it would be unreasonable to pay Applicant commission monies post termination, as the Applicant was not present to do the work required to complete the sale arrangements - Commission found that the custom and practice of this employment relationship was not to pay commissions post termination, that whilst the contract was silent on this point it could be implied as part of the contract and whilst the Applicant may not have been aware of this during his employment, he enjoyed the arrangement of the contract whereby he was paid a guaranteed fortnightly amount - Further, that there was no evidence before the Commission as to whether the threshold for the year, which the Agent for the respondent says was worked on a calendar year, had been met, that the calculation was only done on a monthly reconciled basis and the whole structure of the contract was only performed on whilst the Applicant was employed by the respondent - Dismissed - Mr RJ Birkett -v- Stegbar Pty Ltd - APPL 186 of 2000 - WOOD,C - 08/12/00........ 276

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because she was dismissed while on probation and was not given an opportunity to explain any of the allegations - Respondent argued that Applicant was dismissed because of the complaints and statements received from other management staff and patrons which showed that the Applicant did not have the support of other management staff - Commission found after hearing evidence from other staff that for the substantive and procedural reasons the dismissal was unfair and as reinstatement was impracticable Applicant was awarded compensation for the loss or injury which was caused by the harshness of the dismissal - The claim of contractual benefit had not been made out and was dismissed - Accordingly an Order was issued - Discontinued - Ms ALM Gloede -v- Mercure Inn, Karratha - APPL 859 of 2000 - BEECH C - 01/12/00 – Hotels........ 285

Application re unfair dismissal and contractual entitlements - Applicant argued that he conducted consultancy work for the Respondent whilst he was still in Adelaide and in December 1999 was engaged to work in Perth, but in March 2000 Respondent reneged on an agreement allowing him to take the company vehicle to Adelaide to relocate his family, and on his return to Perth offered him a new contract which he did not accept, and therefore sought relocation expenses under the contract, compensation for lost income on unfair dismissal and loss of six months use of car - Respondent argued that the contract included a three month probation period and use of mobile phone and car for company business only - Commission found the contract did not include provisions for relocation expenses, that Applicant took the car to Adelaide against the clear intention of his employer who was entitled to summarily dismiss him at that point and that Applicant was not dismissed unfairly - Dismissed - Mr M Howard -v- Allied Contracting Services - APPL 529 of 2000 - WOOD,C - 08/12/00 – Contracting 290

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because he was in a "resign or be fired" type of situation so he decided to finish up and be paid out - Respondent argued that Applicant had been treated almost like a "Family Member" and was respected for his seniority and it never intended to terminate his employment - Commission found that in the circumstances of the history of the three employees taking leave during quiet times even if leave was not usually extended and the consideration with which the Applicant had been treated by the Respondent over the years, it was unreasonable for the Applicant to have refused to take further leave and the Applicant's resignation was not in substance a dismissal, therefore dismissed the claim for unfair dismissal and contractual entitlements - Dismissed - Mr N Pitcher -v- Wyldes Window Treatments & Vertical Drapes ACN 059 668 290 - APPL 1265 of 2000 - BEECH C - 21/12/00 - Textile Manufacturing........ 302

Application re contractual entitlements - Applicant argued that he was owed monies under his contract of employment - Respondent argued that when Applicant advised him he wanted to retire, he responded by saying to the Applicant he was prepared to offer him a generous redundancy package on the basis that he stay on as a consultant and assist in the transfer of clients and business, but Applicant breached the conditions of the redundancy package, and in the alternative, was summarily dismissed - Commission found that Applicant repudiated the terms of his employment, in particular he repudiated the terms of the redundancy package – Further, Commission found that the relief sought by Applicant should be refused on grounds that a breach of fiduciary duty had been committed - Dismissed - Mr G Sargant -v- Lowndes Lambert Australia Pty Ltd – APPL 633 of 2000 - SMITH, C - 29/12/00 – Insurance........ 311

Application re contractual entitlements - Applicant argued that he had been denied contractual entitlements at the termination of his employment in the form of pay in lieu of notice, holiday pay and annual leave loading and that he was entitled to reimbursement of outstanding amounts which he incurred in expenditure at the direction or with the approval of the Respondent - There was no argument from the Respondent - Commission found that the Applicant was entitled to the amount he had claimed; that they formed part of his contract of employment and that he had not been paid those amounts - Accordingly an Order was issued granting the contractual entitlements but the claim for costs was dismissed as the circumstances in the case were not extreme or unusual - Granted - Mr CA Truijens -v- Hanson Publishing Pty Ltd t/a jam Design Studios - APPL 888 of 2000 - SCOTT C. - 27/12/00 – Publishing........ 318

Application re unfair dismissal and contractual entitlements - Applicant argued that she had created an invoice without reference to her employer because it was the practice of other employers for whom she had worked that staff rates were applicable - Nevertheless, she apologised, offered to pay for the difference, promising not to do such a thing again and nothing further was said on the subject for a further eight days until her dismissal - Respondent argued that dismissal was because of the invoice, that he could no longer trust her and told her that he had been advised that because dismissal was for reasons of misconduct he had no need to pay entitlements - Commission found that summary dismissal eight days later was harsh and therefore unfair, and as reinstatement was impracticable respondent should pay applicant four days' wages and 3.07 days' annual leave entitlements - Granted in Part - Ordered Accordingly - Ms K Dutton -v- Adrian J Domney T/A Euro Automotives Repair - APPL 1032 of 2000 - BEECH C - 16/01/01 – Automotive........ 678

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair and sought Orders pursuant to section 29 for unfair dismissal and contractual entitlements - Respondent made a preliminary point that the application should be dismissed as it named two Respondents and did not conform with the statutory pre-requisite that an unfair dismissal proceeding under s.29 of the I.R.Act can only be against one Respondent - Commission after considering the whole of the circumstances ordered that the motion by the Respondent that the application be dismissed was dismissed and the second named Respondent be deleted from the Application - Ordered accordingly - Mr M Forgione -v- Chocolate Graphics (WA) Pty Ltd & Other - APPL 1676 of 1999;APPL 1125 of 2000 - GREGOR C - 25/07/00........ 682

CUMULATIVE DIGEST—*continued*

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CONTRACT OF SERVICE—*continued*

Application re contractual entitlements - Applicant argued that she had not been allowed a benefit, not being a benefit under an award or order, to which she was entitled under her contract of service and sought an Order that she be paid the balance of the salary she would have earned pursuant to the terms of the secondment agreement which was a fixed term contract and the amount she received as salary for the position at the Schools of Isolated and District Education (SIDE) during the year 2000 - Respondent did not oppose the application but claimed that the Applicant failed to mitigate her loss by taking up a lower paid position - Commission found that the Applicant had been denied a benefit under the terms of the secondment agreement and had diligently sought suitable alternative employment - Accordingly an Order was issued - Granted - Ms E Galipo -v- Education Department of WA - APPL 972 of 2000 - SMITH, C - 22/01/01 – Education 683

Applications re contractual entitlements - Applicants argued that they were entitled to payment of a retainer and two weeks' pay in lieu of notice as these entitlements arose from their contracts of employment - There was no appearance or argument from Respondent - Commission determined the nature of the relationships between the parties and found that the relationships were those of employees and employers respectively - Further, Commission found that the Applicants were each employees of the Respondents, that the Applicants were entitled to the payments of a retainer and payments in lieu of notice - Ordered accordingly - Mr AP Gilbride -v- Fast Net Publishers Group - APPL 94,177,231,232 of 2000 - SCOTT C. - 21/07/00 - Printg, Publishg & Rcdd Media 686

Application re contractual entitlement - Applicant argued he was owed a sum of $17,273.72 by way of denied contractual entitlement of superannuation contributions made on his behalf to the Fund - Respondent denied applicant's claim and argued that applicant had been paid all of the entitlements due to him under his contract of employment - Commission found that applicant had as an entitlement under his contract of employment superannuation contributions of 18% of his salary and was claiming an additional amount representing respondent's obligation under the SGA Act, but with no evidence to support it, and concluded that the application should be dismissed - Dismissed - Mr JJ Kelly -v- Aherns (Suburban) Pty Ltd - APPL 500 of 2000 - KENNER C - 05/02/01 - Retail Trade 698

Application re contractual entitlements - Applicant sought to reconcile the amounts that he was owed and the amounts that he had been paid and that the balance between the two amounts - There was no appearance on behalf of the Respondent - Commission found that the Applicant was employed on a commission basis by the Respondent and had done the calculations necessary to reconcile the amounts he was owed - An Order was issued requiring the Respondent to forthwith pay to the Applicant the sum claimed and as the circumstances of this matter were of such an unusual or extreme nature Commission awarded costs - Granted - Mr YY Yap -v- Paragon Marketing Pty Ltd - APPL 1233 of 2000 - BEECH C - 19/12/00 716

Conference Referred re contracting out of work within the Mine Productions area - Applicant argued that the utilisation of a contractor would detrimentally effect the availability of reasonable hours of work of its members contrary to the terms of clause 29 of the award - Respondent argued that the use of a contractor for this work was to better utilise the mineworker classification employees on their principal tasks involving the operation of equipment rather than cleaning reflectors and signs, and estimated that the efficiency savings for it would be approximately $650,000 net per annum - Commission found that employees of the proposed contractor would work "side by side" with employees of Respondent, there would be no diminution in terms of earnings or any effect on the normal working hours of employees, no Respondent's employees would suffer any detrimental effect by engagement of a contractor for sign and reflector cleaning and maintenance, and concluded that the work proposed to be contracted out by Respondent should proceed - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 308 of 2000 - KENNER C - 29/01/01 – Mining 721

Application re unfair dismissal and contractual entitlements - Applicant sought compensation for unfair dismissal and also for a denied contractual benefit - Respondent argued that applicant was stood down and there was no termination - Commission found that applicant was unfairly terminated, that reinstatement would be totally impracticable, that the loss was a loss of pay of one hour as applicant was a casual, and ordered payment of $13.30 by respondent to applicant - Order Issued - Mrs M De Niese -v- Curtin Hotels Pty Ltd Trading as the Imperial Hotel - APPL 1645 of 2000 - WOOD,C - 27/02/01 - Accommodatn, Cafes&Restaurants 878

Application re contractual entitlement - Applicant sought orders for alleged unpaid contractual benefits - Commission found that there were proceedings between the parties in the District Court which amongst other things encompass the whole of this matter, that that application was alive and was being pursued by applicant by way of him seeking advice from Counsel - Further, that applicant had sought advice once before about proceedings in the District Court and as a result the matter was adjourned - Commission was satisfied that because of the history in these Reasons, the application should be dismissed for want of prosecution - Dismissed - Mr RT Healey -v- Tribune Resources N.L - APPL 131 of 1999 - GREGOR C - 20/02/99 884

Application re contractual entitlements - Applicant argued that he was denied benefits as contained in the Sales Representative Employment Agreement of 17 May 1999 - Respondent argued that on each occasion that it dismissed applicant, it relented and reinstated him - Commission found that applicant had made out his claim in relation to the alleged dismissal which occurred in September 1999 and remained entitled to 8% advertising incentive and also the 3% over-rider commission, but after the December 1999 dismissal, his entitlement to both claimed conditions of employment ended then - Granted in Part and Adjourned - Mr GS Hincks -v- Darrell Crouch and Associates Pty Ltd - APPL 1320 of 2000 - BEECH C - 31/01/01 885

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because he would not sign a workplace agreement - Respondent argued on evidence that the workplace agreement had nothing to do with the dismissal as such - Commission found that the Applicant was dismissed as a result of the conversation between it and the Respondent and the issues raised by the Respondent as to the reasons for the dismissal were at least arguably valid - Further, that Applicant's lack of any positive response in relation to the Victoria traffic incident at the time in the context of the other issues raised by the Respondent led the Commission to conclude that the Applicant had not persuaded it that his dismissal was unfair - Dismissed - Mr MJ Carberry -v- TJ & HP Abbott Transport - APPL 1403 of 2000 - BEECH C - 09/03/01 – Transport 871

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that his dismissal was both unfair and unlawful in that he never received any payment after being dismissed, that he never received any reasons for his dismissal, that Respondent did not provide him with any particulars relating to his alleged performance or conduct shortcomings, that he was not advised that his employment was in jeopardy and was not provided with any reasonable opportunity to respond to the allegations made by Respondent - Respondent opposed the claims and argued that Applicant had misused the expense system, had abused his position of trust as a general manager, thus, the dismissal was justified and Applicant was not entitled to any payment and was substantially indebted to the Respondent - Commission found that Applicant work performance was not an issue relied on by Respondent and that the system for expenses claims at Respondent was based on judgement and the exercise of discretion as to whether an expense should be claimed against Respondent - Further, having considered all the evidence, Commission found that it did not consider that Applicant was guilty of conduct warranting summary dismissal and that Applicant had not engaged in a wilful course of conduct in relation to his expenses to have justified Respondent in applying the employer' s ultimate sanction and thus, the dismissal was wrongful or unlawful at common law - Commission rejected the submissions of claim and counterclaim by Respondent to set-off any entitlement awarded in favour of Applicant by the sum allegedly owed to Respondent - Upheld in Part and Order Issued - Mr I Phippard -v- BGC (Australia) Pty Ltd - APPL 1958 of 1999 - KENNER C - 24/01/01 895

Application re contractual entitlements - Applicant argued that he had been denied a benefit in accordance with his contract of employment, being unpaid commissions from the sale of spray-on paving - Commission found that Applicant had a contract of service which entitled him to commissions of 15 per cent on any sales made by him, that in addition, he had an agreement with the Sales Manager that if he attended on a lead and if a sale eventuated he would receive 50 per cent of the commission - Further, that Applicant did so attend and that a sale was made, therefore Applicant was entitled to 50 per cent of the commission on account of that sale and ordered that Respondent pay the Applicant the amount of 50 per cent of that sale - Granted - Mr ND Pritchard -v- WA Spray On Paving Pty Ltd - APPL 1655 of 2000 - SCOTT C. - 12/02/01 - General Construction 906

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CONTRACT OF SERVICE—*continued*

Application re contractual entitlement - Applicant sought to recover $230.34 allegedly denied to him over 3 years and contended that respondent miscalculated the magnitude of fortnightly instalments by using a divisor of 26.071 rather than 26 - Respondent opposed the claim and argued that applicant had been paid his full entitlement of $28,000 and that the method of calculation it adopted was one commonly used in industry - Commission found that the method adopted by respondent for calculating the magnitude of instalments was correct, that the evidence revealed that applicant had in fact been paid $28,000 for each of the annums in question, albeit not entirely in the relevant annum, and that applicant had not established that he had been denied the benefit he alleged - Dismissed - Mr AJ Whittle -v- Rendezvous Hotels Management Pty Ltd Trading As Rendezvous Observation City Hotel - APPL 34 of 2001 - FIELDING C - 23/02/01 – Hotel........ 911

[2]Appeal against decision of Commission (80 WAIG 4482) re unfair dismissal and contractual entitlements claims - Appellant argued that the Commission erred in holding that it did not have jurisdiction to hear and determine the application - Appellant sought that the Full Bench overrule previous decisions if not distinguishable on the facts - Respondent argued that if the appeal was upheld, the matter should be remitted - Full Bench had already observed that it should not overrule a previous decision unless it had a conviction that that decision was wrong - Full Bench found that the actual work was performed geographically outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction - Full Bench found the Commission had correctly made findings on the claims and the Appellant should not be disadvantaged by re-opening matters – In Supplementary Reasons, Majority of Full Bench had granted an adjournment to seek legal advice - Upheld - Mr MA Tranfield -v- Ray Douglas Parker - FBA 46 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 03/04/01 - Oil and Gas Extraction 990

Application re alteration of working conditions - Applicant argued that in or about 1997 the Inspectors, with the knowledge and consent of the respondent, housed company's vehicles at their private residences and were paid for the extra hour involved in travelling to and from the checkpoint until respondent ceased the practice on 11 November 1999 - Respondent argued that there was no longer any rational justification for that practice which originated when it had its office in the Kununurra townsite which is no longer the case - Commission found that the practice in question was a longstanding one endorsed by senior officers of the respondent and being a term of the contract of employment for the Inspectors in question, cannot be removed or varied unilaterally except by agreement of the Inspectors or by termination of the contract, thus applicant was entitled to an additional hour for each full day worked at the Kununurra checkpoint as a term of employment - Granted - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer, Agriculture Western Australia - PSACR 2 of 2000 - FIELDING C - 14/03/01 - Health Services........ 1004

Application re unfair dismissal - Applicant argued that dismissal was harsh, oppressive and unfair as he was not consulted about being made redundant, nor were alternatives considered and as reinstatement was impracticable, that it sought compensation as a remedy - Respondent argued that an investigation into the West Australian operation found that the Company was in worse shape than expected, sought immediately to introduce some cost reduction strategies and after applicant indicated that he wished to leave the company and be paid out a redundancy, he was formally given notice that his position had been made redundant with one month's notice of termination - Commission found that applicant had raised the issue of his resignation though he did not intend to resign, that the actions of respondent around that time were in response to applicant's suggestion that he would leave and his request for a redundancy sweetener, that though the process adopted to terminate his services lacked some sensitivity applicant had not proven his case that the dismissal was harsh, oppressive or unfair - Dismissed - Mr JF Booth -v- Brownbuilt Pty Ltd (A.C.N. 002 558 894) T/as Brownbuilt Metalux Industries - APPL 24 of 2000 - WOOD,C - 27/03/01 - Sheet Metal Fabrication........ 1015

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that the employment was terminated without there being any valid reason connected with the capacity or conduct of Applicant or the operational requirements of the employer's business and that it failed to raise these concerns with Applicant or take any positive steps to ensure that Applicant was aware of those concerns and the implications of not taking appropriate action to address those concerns - Further, Respondent failed to give Applicant reasonable notice or pay in lieu of notice - Respondent argued that Applicant was formally warned about his performance and was also verbally warned on a number of occasions that he was required to improve his performance - Commission found that Applicant was aware his performance was unsatisfactory and had received memorandum that his job was at risk and that Applicant had not made out a case that Respondent abused its right to terminate his employment on grounds of poor performance - Dismissed - Mr IW Cannon -v- Linfox Transport (Australia) Pty Ltd (ACN 004 718 647) - APPL 1813 of 1999 - SMITH, C - 21/03/01 - Transport Industry........ 1020

Application re contractual entitlements - Applicant argued that she was to be paid remuneration equal to 50% of her gross takings, that upon the introduction of compulsory superannuation the practice commenced to pay superannuation calculated on the statutory percentage applied to the gross earnings, that later it unilaterally commenced deducting the required percentage from her earnings - Further, Applicant argued that she was thereafter under paid because the amount should have been calculated on and paid in excess of to the 50% of her gross takings whereas it was deducted from the takings - Applicant sought benefits which had not been paid to her at the completion of her engagement - Respondent argued that upon the introduction of compulsory superannuation contributions it was agreed that it would pay the compulsory superannuation percentage on top of the 50% billing, however, after May 1995 a review led to a decision that payment on top of the 50% was outside the original agreement and the practice began deducting superannuation contributions from the gross billing achieved by Applicant - Commission found on evidence that the Applicant's contract was never changed at law and the Applicant was always entitled to have her superannuation assessed on top of the 50% billings - Further, Applicant was entitled to the benefit of that contract now, and the parties agreed that the sum of money in dispute was $17,877.35, therefore, Commission ordered that the practice pay the Applicant that sum of money - Granted - PW De Boer -v- Third Ave Surgery - APPL 1465 of 1999;APPL 829 of 2000 - GREGOR C - 20/03/00 - Health Services 1027

Application re unfair dismissal and contractual entitlements - Commission listed the application For Mention Only and the Applicant had been asked to show cause why the application should not be struck out for want of prosecution - Parties were asked by Commission to provide further particulars - Commission after considering the parties submissions, concluded on a number of reasons that Applicant's lack of interest in his application for a period of at least 6 months could not be passed over especially given the Respondent's current position and that while there may be some reason on the authorities to differentiate between claims of unfair dismissal and claims for denied contractual entitlements particularly as a claim for a denied contractual entitlement was not subject to the 28 day time limitation imposed upon an applicant claiming unfair dismissal, Commission was unable to differentiate between these two claims for this purpose - Further, Commission acknowledged that the sum of money claimed was not insignificant, however, that was as much a reason for an Applicant to vigorously pursue the claim as anything else and the size of the amount claimed was an added reason why it concluded that Applicant, for whatever reason, was merely not interested for an unwarranted period of time in pursuing its claim - Struck out for want of prosecution - Mr P Hammond -v- Goldfields Scaffolding Pty Ltd (ACN 058 634 101) - APPL 419 of 2000 - BEECH C - 15/03/01 - Construction Trade Services 1030

Application re unfair dismissal - Applicant argued that dismissal was unfair in all circumstances, he went to Paraburdoo on the understanding that he would have worked for six months, there was no agreement for a probation period and his treatment generally by Respondent did not allow him a proper opportunity to fulfil his contract of employment - Respondent argued on a number of reasons, including that there was no contract of employment setting out a fixed term of six months, that employment was offered to employees on an ongoing basis subject to successful completion of probation, this had been agreed with the Applicant in the telephone conversions leading to his engagement and the condition of employment relating to probation was specifically explained to him prior to him being engaged - Commission applied Principles and found that Respondent took every reasonable action to allow the Applicant to perform his contract of employment, that Applicant was the architect of his own misfortune, he did not present himself to work as required and that there had been no breach by Respondent of its obligations to act fairly to the Applicant - Dismissed - Mr E Kapsanis -v- Goldspace Pty Ltd T/as Paraburdoo Inn - APPL 1465 of 1999;APPL 829 of 2000 - GREGOR C - 20/03/01 – Hospitality........ 1033

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CONTRACT OF SERVICE—*continued*

Application re unfair dismissal - First Applicant argued that the notice of termination was given to them without explanation and he disputed he had been paid any money for redundancy - Second Applicant argued that he was never given any suggestion that his position was in jeopardy, that no director of the respondent made any complaint to him about the standard of his work and he was told by Mr John Polmear that he would like both applicants to run the company while he was away in the Eastern States - Respondent argued that the Goods and Services Tax on 1stJuly 2000 severely impacted on the operations of his company and as a consequence was forced to reduce its workforce to preserve the financial viability of the operation - Commission found on the balance of probabilities, that applicants were dismissed for performance failure and were not given the opportunity to say anything about respondent's assessment of their standard of work, which can only be seen to be procedurally unfair, but after careful consideration of the balance in the whole of the circumstances of the terminations, given that there be a fair go all round and not just to one party or the other, that there was not unfairness to the point where the Commission would find that the terminations were harsh or unfair - Dismissed - Mr JP Lynch -v- Twinside Retaining Walls & Fences - APPL 1477,1483 of 2000 - GREGOR C - 04/04/01 - Construction Trade Services 1038

Application re unfair dismissal - Applicant argued that he was harshly, unfairly and oppressively dismissed, that his summary dismissal was contrary to the terms of the employment contract, and sought to amend his particulars of claim - Respondents argued that applicant's refusal to allow them unrestricted access to the firm's files and failure to issue accounts as instructed in respect of files of the firm, left them with no alternative but to terminate his employment - Further, Respondent objected to applicant's application to amend and provide an alternative claim on the grounds that through his conduct, applicant had abandoned any claim that he was dismissed, that they had incurred considerable costs in preparing submissions for a preliminary argument as to whether dismissal occurred and filed a notice of answer and counterproposal - Commission found that after having regard to the competing interests of the parties, it was apparent that if the application to amend was not granted that the prejudice to applicant was greater than the prejudice to respondent, and decided to make an order granting leave to amend - Granted - Mr T Mijatovic -v- Peter Terrence Hare and Evelyn Lilly Tuba t/as E&S Legal Group - APPL 1659 of 2000 - SMITH, C - 23/02/01 – Legal 1043

Application re contractual entitlements - Applicant argued that Respondent owed her holiday pay of $1035.96 gross and two full days of work, being $384.80 gross - There was no appearance for the Respondent - Commission found that Applicant had proven her case and ordered Respondent to pay the Applicant the amounts as claimed being a total of $1420.36 gross less normal taxation payments to the Commissioner of Taxation - Granted - Ms MC Moss -v- Jam Design Studio - APPL 72 of 2001 - WOOD,C - 13/03/01 1046

Application re contractual entitlements - Applicant argued she was owed a number of benefits under her contract of employment being payment for final week of her employment, two and a half days of sick leave entitlement, two weeks wages for retrenchment without notice, proportionate annual leave entitlement on termination and superannuation - There was no appearance or argument by the Respondent - Commission found that Applicant was not terminated for any other reason other than retrenchment, therefore entitled to the benefits under the contract of employment - Applicant acknowledged that the claim of superannuation was not within the jurisdiction of the Commission - Accordingly an Order was issued - Granted - Ms KJ Priest -v- Anovoy Pty Ltd - Peter Radosevich (Director) - APPL 2139 of 2000 - BEECH C 1049

Application re unfair dismissal and contractual entitlements divided re monies paid equal to shares and options - Applicant argued that notice was given that he wished to exercise the liberty granted in relation to the options and shares and sought an order for the benefit denied be paid in an amount of money equal to the value of the shares and options - Further, the issue to be determined was of jurisdiction and whether the Commission had the power to award a sum of money where specific performance of a benefit under a contract cannot be ordered - Respondent argued that the Commission did not have the jurisdiction to hear and determine the matter because it was not a claim for a benefit he was entitled to under his contract of service, that is, he claimed instead a sum of money equal to the value of shares and options - Further, Respondent argued that the jurisdiction was not available because a claim for damages for a breach of contract was not an industrial matter as defined in that it did not relate to rights and duties of employers' employees, instead it related to failure to allow benefits under contract of services, that is damages for breach of contract and that it did not sufficiently relate to rights and duties of an employer and employee - Commission referred to various authorities and found that the Commission had the jurisdiction and power to deal with this matter and that this was an industrial matter capable of being referred under section 29 - Order Issued - Ms E Gribble -v- Eileen and Doug Krepp - APPL 74 of 1999 - GREGOR C - 12/03/01 – Technology 1050

[2]Appeal against Decision of Commission (81 WAIG 683) re denied contractual entitlements - Appellant argued it was not liable to pay the amount claimed because the respondent was an employee of the appellant when she applied for the position and wished to remain so and thus was lent to another employer to fill a position - Respondent argued that the respondent and another person were both parties to the contract of employment when the respondent was seconded - Full Bench found that despite not objecting to being named as the respondent at first instance it was clear that a third party was the employer for the purposes of s29b(ii) of the IRACT 1979 - Full Bench found that whilst one contract of employment with the appellant was suspended, another was in existence between another employer and the respondent and the Commission had no jurisdiction to hear and determine the claim - Dismissed - Minister for Education -v- Ms AE Galipo - FBA 5 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 11/04/01 – Education 1145

[2]Appeal against Decision of Commission (81 WAIG 311) re denied contractual entitlements - Appellant argued that the Commission erred in finding that he had repudiated a redundancy agreement and was in breach of his fiduciary duty to the respondent - Appellant argued the respondent waived or released the appellant from further performing his obligations under the redundancy package - Respondent argued the redundancy agreement was dependant upon a consultancy agreement and the appellant had repudiated the contract by advising he was commencing employment with a competitor and taking clients in breach of a restraint of trade provision-Full Bench found the Commission was entitled to find the contract was not severable, the appellant repudiated the contract seriously to justify summary dismissal and was not entitled to the benefits of the contract - Full Bench further found Appellant was bound by case at first instance - Dismissed - Mr G Sargant -v- Lowndes Lambert Australia Pty Ltd - FBA 1 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 23/04/01 – Finance 1149

Applications re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair and claimed compensation equal to a reasonable redundancy payment, denied contractual entitlements, long service leave and payment for relocation - Applicant argued that there was alternate work available for him to do and that he should of been retained in employment over another employee and that no reasonable alternatives were provided by Respondent and also given an impression that a promotion would be offered only to then be dismissed - Respondent argued that it had restructured its organisation and as a result Applicant's position became redundant and payment in lieu of notice and severance payment was made - Commission found that the claim for unfair dismissal was made out against Respondent being in breach of the implied term referred to and being made redundant when Applicant was expecting to given a wider role and that there was an inadequacy of severance payment made - Further, Commission found that reinstatement was not sought and that there had been a genuine redundancy, Commission therefore considered the remedy of compensation and that a further eight week's salary be paid by way of a redundancy payment - Order Issued - Mr A Birnie -v- A.W.I. Administration Services Pty Ltd - APPL 1198,1457 of 2000 - BEECH C - Metal Ore Mining 1198

Application re contractual entitlements - Applicant sought denied benefits which he was entitled to under his contract of employment - Applicant argued that the commission earned by him for sales which were not complete at the time of his termination of employment had not been paid - Respondent argued that Applicant must complete each sale personally and that if a member of the sales team leaves and that person was replaced, the new person fitted into the team and fulfilled the orders - Commission found that commission was due on a measure and quote which was legitimate which was sold at the customer's house and that Applicant was entitled to commission on sales where he undertook the measure and quote and brought in the order to the business premises - Order Issued - Mr AE Jackson -v- Iustini Holdings Trading As Doors Plus - APPL 1885 of 2000 - SCOTT C. - Construction Trade Services 1215

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CONTRACT OF SERVICE—*continued*

Application re contractual entitlements - Applicant argued that when she was given written notice that her position was to reduce from a full-time position of 37.5 hours per week to 22.5 hours per week, she was entitled to a "partial redundancy" payment of $5,551.00 calculated on the basis of the 15 hours per week she lost at 2 weeks' pay for each of her 9 years' service - Respondent opposed the claim and argued that at all relevant times, Applicant was a part -time employee whose hours could be, and were varied both up and down and that there was no redundancy - Further, Respondent argued that Applicant was aware of the fact that she was a part-time employee and that Applicant had accepted that her hours of work could be increased or decreased with appropriate notice - Commission found on the evidence and material before it that in the terms of the enterprise bargaining agreement provisions, Applicant was not made redundant when her hours was reduced, therefore she was not, and accordingly she was not entitled to a benefit under her contract of employment - Further, the evidence had not shown that the reduction in hours was part of a two-stage plan to eventually make the position redundant, nor that it was of itself a redundancy under the enterprise bargaining agreement - Dismissed - L Kambourakis -v- Ethnic Child Care Resource Unit - APPL 2022 of 2000 - BEECH C - 08/05/01 - Community Services 1216

Application re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair and application was made to clear his name of the accusation of stealing - Respondent argued that reasonable steps were taken to allow Applicant to respond to the allegations of stealing and over the course of time the story changed - Further, Respondent argued that after investigating the matter he came to the view that the product (tin) was taken without authority or permission to do so - Commission found that by applying the weight of evidence principles, all the factors upon which Respondent formed the view were accepted over Applicant's story - Dismissed - Mr DJ Kearns -v- Aarjen Pty Ltd - APPL 1970 of 2000 - WOOD,C - Retail Trade........ 1218

Applications re contractual entitlements - Applicant argued that Respondent failed to pay him contractual entitlements due under the terms of an employment arrangement - Respondent argued there was no employee/employer relationship, therefore Commission lacked jurisdiction to deal with either applications - Commission concluded after considering the facts in the context of the law to be applied, that the necessary ingredients to create an employee/employer relationship were missing between the Applicant and the Respondent, that Applicant only had access to this Commission if he was an employee and as he was not, there was no alternative but to dismiss both applications for want of jurisdiction - Dismissed for want of jurisdiction - Mr WT Lunt -v- WRS Pacific Pty Ltd ACN 009 248 999 - APPL 1827,1912 of 2000 - GREGOR C - 04/05/01.... 1223

Applications re unfair dismissal seeking compensation - Applicants argued that dismissal was unfair as both were dismissed without any warning because they had membership with the Construction, Forestry, Mining and Energy Union and an incident that involved an organiser of the CFMEU - Further, Applicants argued that they were employed on a permanent full time basis - Respondent argued that Applicants were both engaged on a day to day basis, effectively as casual employees and that they had no real entitlement to ongoing employment - Commission rejected the submissions by Respondent that Applicants were employed on a casual basis and that Applicants were dismissed harshly, oppressively and unfairly and that there was no good reason for their dismissal - Commission found that reinstatement was impracticable and awarded compensation to Applicants - Granted and Order Issued - Mr GK Smith -v- J&P Metals Pty Ltd - APPL 1377,1378 of 2000 - KENNER C - 20/04/01 - Construction Trade Services 1238

Application re contractual entitlements - Applicant argued that he had been denied an over rider commission and an advertising allowance that had not been paid - Respondent argued that a reconciliation of the advertising allowances and the advertising expenses incurred showed that there had been an overpayment - Commission found that Applicant was entitled to part of his claim for contractual entitlements and ordered accordingly - Granted in part - Mr GS Hincks -v - Darrell Crouch and Associates Pty Ltd - APPL 1320 of 2000 - BEECH C - 18/05/00 - Real Estate Agency 1320

[2]Appeal against decision of Commission (81 WAIG 679) re unfair dismissal claim - Appellant argued, interlaid, the Commission failed to give proper consideration to the Respondent's obligations for training, teaching and counselling the Appellant and sought compensation - Respondent argued the Appellant was on a probationary period and had not performed to required standards - Majority Full Bench found the Commission should have found the Appellant was not counselled or informed sufficiently as to the standards which he was required to meet - Full Bench found the Appellant had not been warned, given sufficient reason for dismissal and the employer acted in a procedurally and substantially unfair manner - Full Bench found sparse reasons for decision made it difficult to find the discretion did not miscarry and that the Appellant should be compensated for loss equal to the balance of the probationary period -Upheld and decision varied - Mr MJ East -v- Picton Press Pty Ltd - FBA 3 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 04/05/01 - Printg, Publishg & Rcdd Media........ 1367

Application re unfair dismissal - Applicant argued that termination of his employment was unfair as his employment was terminated prior to the expiration of the probationary period and sought compensation for the wages he would have earned from date of termination to expiration of the one month probationary period - Respondent argued that the reason why Applicant's employment was terminated was because Applicant did not perform, in that sales figures for the plumbing section did not increase - Commission found that clearly Applicant was not given sufficient time to prove himself as a competent Plumbing Salesperson in Respondent's business, that Respondent unfairly terminated Applicant's employment and ordered that Respondent pay Applicant $710.75 for eight days pay as compensation - Order Issued - Mr D Allia -v- CD Dodd Pty Ltd T/A Ross's Salvage & Handyman - APPL 1999 of 2000 - SMITH, C - 06/06/01 – Plumbing........ 1400

Application re unfair dismissal - Applicant argued that Respondent had not paid two week's wages and that Respondent was aware of new address to post cheque - Respondent argued that cheque had been sent out in good faith to previous address - Commission found that Respondent should send cheque for the agreed sum to the address as provided by Applicant - Order Issued - Mr KJ Coughlan -v- Catalyst Recruitment Systems - APPL 1665 of 2000 - BEECH C - 07/06/01 - Recruitment Services 1405

Application re unfair dismissal and contractual benefits - Applicant argued that the passing comments given were not treated as warnings and that Respondent's attitude had changed once re-enrolment at university had taken place - Further, Applicant argued that Respondent had given a pay rise early and two bonuses prior to re-enrolment at university - Respondent argued that numerous verbal warnings were given to Applicant regarding lack of work performance and that they were pleased for Applicant that he was considering leaving to go to university and that the bonuses were at the lower end because of the poor work performance - Further, Respondent argued that they were forced to incur unnecessary costs by Applicant and his agent and sought costs to be awarded or offset - Commission found that the dismissal was unfair because Applicant had not been warned that his employment was in jeopardy due to underperformance This meant that the dismissal was unfair because of a procedural issue - Commission also found reinstatement was impracticable and awarded compensation - Further, Commission found that the circumstances did not warrant making an order for costs against Applicant - Order Issued - Mr BE Davies -v- Phoenix Paints Pty Ltd - APPL 2019 of 2000 - BEECH C - 07/05/01 – Paint........ 1406

Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and due outstanding contractual entitlements as the allegations that he was unable to comply with Respondent's request to keep the greens at standards required by them, as the greens were at sufficient standard as required - Further, Applicant argued that he had an extensive period of time as he was diagnosed with a life threatening illness - Respondent argued that dismissal was due to the fact that there was a history of dissatisfaction expressed at his level of performance and the standard required for the surfaces not being met and that he was not putting in enough time on the job - Commission found that sufficient time was given for Applicant to comply with Respondent's request and that Applicant was aware that his position was in jeopardy if he failed to comply - Dismissed - Mr JA Fuller -v- North Beach Bowling Club - APPL 1943 of 1999 - GREGOR C - 18/05/01 - Recreation 1413

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CONTRACT OF SERVICE—*continued*

Application re unfair dismissal - Applicant argued that dismissal was unfair because of his refusal to sign a subcontract agreement presented to him by Respondent and that it was not due to the alleged allegation of falsifying his timesheets - Respondent argued that his employment was not terminated on account of his failure to sign a so -called subcontract agreement, but, because Applicant had falsified his time sheets on a number of occasions and had claimed for payment for time not worked - Commission found that Applicant had falsified his time sheets and his claims for payment and his failure to comply with a lawful direction - Dismissed - Mr MR Henry -v- Hanssen Pty Ltd - APPL 1549 of 2000 - SCOTT C. - 15/05/01 - Construction Trade Services 1416

Application re unfair dismissal - Applicant argued that her dismissal from a position of permanent part time receptionist was harsh, unfair, for no valid reason, sought a declaration that dismissal was of that nature but did not seek reinstatement - Respondent argued that applicant's employment status throughout the employment period was one of a casual nature - Commission found that Applicant did not prove that her services were terminated at all, that she was not dismissed, she resigned, therefore the Commission had no jurisdiction and this application should be dismissed - Dismissed - Ms A Hoare -v- Noongar Land Council - APPL 764 of 2000 - GREGOR C - 12/06/01 - Community Services 1420

Application re contractual entitlements - Applicant argued that he had not been paid entitlements due to him which included unpaid wages, and accumulated holiday pay for three weeks - No appearance or response from Respondent - Commission found that entitlements were owed to Applicant and ordered accordingly - Granted - Mr J Kerr -v- Trinet Digital Ltd - APPL 342 of 2001 - WOOD,C - 11/05/01 – Computing.......... 1423

Application re unfair dismissal and contractual benefits - Applicant argued that he was harshly, oppressively and unfairly dismissed and denied a benefit under his contract of service because Respondent failed to consider alternative punishment measures such as a warning and that termination was carried out in public - Further, Applicant worked long hours and should have been considered when final payment arranged - Respondent argued that Applicant was dismissed for incidents involving misconduct and negligence which included an attempt to blame an apprentice for food being delivered late, failure to secure and lock the premises and property and a lack of trust - Commission found that Respondent had reasons to lose trust in Applicant and it was clear Applicant had failed to secure premises on occasions and that Applicant was afforded an adequate opportunity to put his version of events - Further, Commission found that Applicant was entitled to the guaranteed minimum hours of work as paid out - Dismissed - Mr W Manson -v- Allclass Holdings Pty Ltd Trading as Gourmet Professional Catering Company W.A - APPL 1816 of 2000 - SMITH, C - 11/05/00 – Catering.......... 1428

Application re unfair dismissal and contractual entitlements - Applicant argued that she had not been paid a benefit due to her under her contract of employment and that she had worked the hours but not been paid - No appearance from Respondent - Commission found that Applicant was entitled to the benefits claimed - Order Issued - Mrs J Loth -v- Childrens Therapy & Education Clinic - APPL 348 of 2001 - BEECH C - 08/06/01 – Education.......... 1428

Application re contractual entitlements - Respondent applied for costs incurred as a result of Applicant's non -attendance at the conference held in Albany - Applicant argued that the maximum distance from Denmark to Albany would be 110Kms and that it was not necessary for both principals to attend the conference and that preparation costs claimed were unreasonable in its entirety because conciliation conferences are designed to be an informal attempt to negotiate settlement between the parties and little or no preparation was required for the conference - Respondent argued that the following costs were incurred travel 152Km, shop assistant wages for two persons and preparation of information for the conference - Commission found in favour of the distance travelled claim and the claim for the shop assistant wages - Granted in part - Mr AW McConkey -v- M & A's of Denmark - APPL 1951 of 2000 - BEECH C - 07/06/01.......... 1434

Application for reinstatement or compensation on the grounds of unfair dismissal - Applicant argued that despite there being yearly contracts, the Applicant's employment should be regarded as continuous up until the time of termination, there was no evidence that the Applicant performed poorly and relevant decisions were not taken by a validly constituted management committee under the Respondent's constitution - Applicant argued that the "spill and fill" was merely a device to get rid of the Applicant and that there was a breach of the MCE Act - Respondent argued that it had engaged in a genuine restructuring of its operations to provide better service and there was in fact no dismissal - Respondent further argued that the Applicant had failed to mitigate her loss and had been paid a substantial redundancy package - Commission found failure to consult as required under the MCE Act led to the conclusion that the dismissal was unfair and that the manner of the termination left a lot to be desired - Commission found reinstatement was impractical, but only injury warranted compensation - Granted in part - Ms LF Oliver -v- Coolgardie Community Care Incorporated - APPL 1075 of 2000 - KENNER C - 10/05/01 - Community Services ... 1435

Applications re unfair dismissal claims and allegedly denied contractual entitlements - Applicant had been employed temporarily in a higher position - Respondent argued the Applicant was engaged on a temporary contract as Manager and the terms and conditions of the CASH award applied to the contract in its entirety - Commission found it was clear from the express terms of the contract for the Manager position that there was no provision for termination by giving notice - Commission found that unilaterally reverting the Applicant to the position of co -ordinator constituted a dismissal at law, but it was not in all the circumstances harsh, oppressive or unfair - Commission found the reason the Applicant was stood down was because of issues raised in respect of her duties as Manager and, in light of the fact that the Applicant was not directed to work as Co-ordinator after that time, the claim in respect of that position was made out - Commission found that the employment would have ended and that in light of the fact that the applicant had only served eight weeks of her probationary period an award of compensation for five weeks remuneration at the Co-ordinator rate should be granted - Granted in part - Ms P Pawaboot -v- Eastern Region Domestic Violence Services Network Inc. - APPL 1321,1725 of 2000 - SMITH, C - 04/05/01 - Community Services 1438

Applications re contractual entitlements - Applicants argued that they were owed a sum of money being a benefit that was not under an award or order - Applicants argued that they had performed the work required and had received a cheque that was dishonoured, further, they were unsuccessful in recovering monies through a debt collection agency - No appearance or argument from Respondent - Commission investigated the principal place of business and made searches of the business name and a notice of hearing was served at that address - Commission found that notice of hearing was served and claims were made out by Applicants - Granted - Ms E Reeves -v- Top Models International - APPL 1825 of 1999;APPL 20 of 2000 - SMITH, C-12/04/01 - Modelling 1446

CONTRACT OUT OF AWARD

[4]Application for stay of operation of Decision of Commission in Matter No. CR308/2000 (81WAIG721) pending appeal to Full Bench - President reviewed Principles and found that for an application for stay to be granted, the strength of the case must raise a serious issue to be tried and that exceptional circumstances must be established by Applicant, however, for a number of reasons in this case, it had not been established that there was a serious issue to be tried or that the balance of convenience lay with the Applicant - Further, that the interests of the Applicant staying the operation of the declaration was overcome by the interests of the employer in availing itself of the benefit of the declaration, that there was no exceptional circumstances requiring that the Respondent be deprived of the fruits of its order and that the equity, good conscience and the substantial merits of the case lay with a dismissal of the application - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - PRES 2 of 2001 - President - SHARKEY P - 06/02/01 - Services to Mining.......... 406

CUMULATIVE DIGEST—*continued*

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CUSTOM AND PRACTICE

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that his dismissal was both unfair and unlawful in that he never received any payment after being dismissed, that he never received any reasons for his dismissal, that Respondent did not provide him with any particulars relating to his alleged performance or conduct shortcomings, that he was not advised that his employment was in jeopardy and was not provided with any reasonable opportunity to respond to the allegations made by Respondent - Respondent opposed the claims and argued that Applicant had misused the expense system, had abused his position of trust as a general manager, thus, the dismissal was justified and Applicant was not entitled to any payment and was substantially indebted to the Respondent - Commission found that Applicant work performance was not an issue relied on by Respondent and that the system for expenses claims at Respondent was based on judgement and the exercise of discretion as to whether an expense should be claimed against Respondent - Further, having considered all the evidence, Commission found that it did not consider that Applicant was guilty of conduct warranting summary dismissal and that Applicant had not engaged in a wilful course of conduct in relation to his expenses to have justified Respondent in applying the employer's ultimate sanction and thus, the dismissal was wrongful or unlawful at common law - Commission rejected the submissions of claim and counterclaim by Respondent to set-off any entitlement awarded in favour of Applicant by the sum allegedly owed to Respondent - Upheld in Part and Order Issued - Mr I Phippard -v- BGC (Australia) Pty Ltd - APPL 1958 of 1999 - KENNER C - 24/01/01 895

Application re alteration of working conditions - Applicant argued that in or about 1997 the Inspectors, with the knowledge and consent of the respondent, housed company's vehicles at their private residences and were paid for the extra hour involved in travelling to and from the checkpoint until respondent ceased the practice on 11 November 1999 - Respondent argued that there was no longer any rational justification for that practice which originated when it had its office in the Kununurra townsite which is no longer the case - Commission found that the practice in question was a longstanding one endorsed by senior officers of the respondent and being a term of the contract of employment for the Inspectors in question, cannot be removed or varied unilaterally except by agreement of the Inspectors or by termination of the contract, thus applicant was entitled to an additional hour for each full day worked at the Kununurra checkpoint as a term of employment - Granted - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer, Agriculture Western Australia - PSACR 2 of 2000 - FIELDING C - 14/03/01 - Health Services 1004

DANGEROUS WORK

Conference referred re safety and welfare issues associated with the operation of single officer Police stations throughout Western Australia and in particular the Yalgoo Police station - Applicant union sought orders that the Respondent be ordered to appoint additional residing Police officers at Yalgoo, Gascoyne Junction and Dwellingup Police stations - Respondent argued that the deployment of members of the Police Force was the prerogative of the Commissioner of Police and objected to the issue of any order - Commission conducted inspections in the surrounding districts and at each of the above named Police stations and found from evidence and from the statistics provided, that the threat level of assault on Police officers was at least no higher in single officer Police stations than it was for Police Officers generally - Commission concluded that in the great majority of cases the situation was handled quite adequately by the command structure and to ensure that it does so there must be on-going audit of middle level commanders to ensure that police officers who are in single police stations working by themselves are adequately supervised and supported, if not, situations of unsafe work practice and welfare issues would arise quickly - Commission did not issue orders sought but noted that it remained open to the WAPU in individual circumstances to make notifications to this Commission and the matters would be dealt with on an individual basis - Dismissed - Western Australian Police Union of Workers -v- The Hon. Minister for Police - CR 15 of 2000 - GREGOR C - 02/03/01 – Police 921

DATE OF OPERATION

1Appeal against Decision of Commission In Court Session (80WAIG4508) re terms and conditions of employment, redundancy payments and superannuation schemes - Appellants argued that CICS erred in law by purporting to give retrospective effect to order 1, that the base salary and roster allowance of each letter of offer employees be increased and erred in law in finding that following the merger, the Appellant's Mid-West operations were quickly restored to profitability or giving consideration to other factors when there was no evidence to support this finding - Further, Appellants argued that the Commission erred in law in making orders in relation to Iluka Resources Limited where there was no industrial matter between it and the Respondents and erred in law by acting on the irrelevant consideration that RGC Mineral Sands Ltd had previously offered a limited choice of superannuation funds to its employees and having regard to a Superannuation scheme which applied to Workplace Agreement employees and granting liberty to apply to the award employees of Iluka Resources Limited and Iluka Mid-West Limited when the industrial matter between Appellants and Respondents did not relate to the award employees - Industrial Appeal Court found that the CICS had the power to give retrospective effect to its order awarding an increase in salaries and allowances, that there was revealed an evidentiary basis on which the CICS could properly make the challenged finding that profitability was quickly restored for the Mid-West operations following the Merger - Further, IAC found that it was a matter for the CICS to find whether an order to enable letter of offer employees to become members of the Iluka Resources Limited fund was appropriate as a matter of equity, good conscience and the substantial merits of the case - IAC found that no grounds had been made out and failed to be persuaded thus Appeal dismissed - Dismissed - Iluka Midwest Limited & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 5 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Parker J. - 08/02/01 - Other Mining 763

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services 1162

CUMULATIVE DIGEST—*continued*

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DISCRIMINATION

Conference referred re termination of employment - Applicant Union argued that the termination of Applicant was harsh, oppressive and unfair and contrary to s.84AA of the Workers Compensation Act, s.41 of the Minimum Conditions of Employment Act and Clause 34 of the Burswood International Resort Casino Employees Industrial Agreement 2000 - Further, that the Respondent's action was taken substantially because Applicant was the President of (BRUE) and was being discriminated against and the process and planning for his termination was flawed in that it was not shared with him and he was not trained to apply for other positions nor did the Company sought to find him an alternative position - Respondent argued that with the arrival of a new CEO, and constraint on the budget, the managers were required to review their operations and, subsequently the manager Environmental Services made changes to his operation which impacted on the Applicant's duties - Further, Applicant was to be terminated unless he found suitable alternative position, as he could not fulfil the requirements of his original contract as an Environmental Systems Attendant due to his injury - Commission reviewed authorities, Acts and found on evidence that it was plausible and more likely that the Applicant's duties were diminished due to a legitimate drive for efficiency, that there had been no discrimination due to him being a delegate and that evidence proved that his duties had not been cut because of this - Commission exercised its judgement according to equity, good conscience and the substantial merits of the case and found that, to so swiftly terminate Applicant's employment if he himself does not find an alternative position, particularly given the spirit of s.84AA, would be harsh and unfair - Further, the Respondent should have engaged in a fuller exploration of options for Applicant and recommended that this take some months including appropriate training - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 350 of 2000 - WOOD,C - 02/02/01 - Accommodatn, Cafes&Restaurants 699

Application re unfair dismissal seeking reinstatement and contractual entitlements - Applicant argued that dismissal was unfair and that he was also entitled to long service leave - Applicant argued that the Respondent's inquiries were inadequate in relation to the investigation and finding by the Principal that Applicant was guilty of sexual misconduct in respect of a student at the College - Respondent argued that Applicant failed to provide any information that could provide a defence to the allegations of misconduct at the time of the investigation when the opportunity was given - Further, Respondent argued that all matters were considered in making the decision to terminate including the nature of the allegations, the evidence presented, the failure to respond satisfactorily to the allegations within a reasonable time frame, the impact on the family concerned, the impact on the school and its staff, and the duty of care owed to the children in the college - Commission found that Respondent had conducted itself in a proper manner and Applicant was given reasonable opportunity to provide a defence and that it had not abused its right to terminate - Further, Commission found that the employment relationship had irretrievably broken down and that the trust could not be restored - As to the long service leave, Commission found that the Commission did not have the jurisdiction to hear and determine the claim of long service leave, as this was an enforcement or recovery of wages under an award and that it should be pursued in the Industrial Magistrate's Court pursuant to section 83 of the I.R. Act - Dismissed - Mr R Newton -v- Roman Catholic Bishop of Bunbury - APPL 18 of 2000 - SMITH, C – Education.. 1226

Applications re unfair dismissal seeking compensation - Applicants argued that dismissal was unfair as both were dismissed without any warning because they had membership with the Construction, Forestry, Mining and Energy Union and an incident that involved an organiser of the CFMEU - Further, Applicants argued that they were employed on a permanent full time basis - Respondent argued that Applicants were both engaged on a day to day basis, effectively as casual employees and that they had no real entitlement to ongoing employment - Commission rejected the submissions by Respondent that Applicants were employed on a casual basis and that Applicants were dismissed harshly, oppressively and unfairly and that there was no good reason for their dismissal - Commission found that reinstatement was impracticable and awarded compensation to Applicants - Granted and Order Issued - Mr GK Smith -v- J&P Metals Pty Ltd - APPL 1377,1378 of 2000 - KENNER C - 20/04/01 - Construction Trade Services 1238

Application re unfair dismissal - Applicant argued that dismissal was unfair because she had not taken too many sick leave days unnecessary and that other employees should have been terminated due to downsizing before her as she had the longest service - Further, Applicant argued that she was dismissed because she was pregnant - Respondent argued that it needed to reduce staff and that the process also continued after Applicant's dismissal and the number of sick leave days taken were not relevant or important to the process of downsizing - Further, Respondent argued that he was unaware that Applicant was pregnant when notice was given - Commission found that the number of sick days taken was not a relevant issue and that the process regarding downsizing was not unfair - Further, Commission found that Respondent was not aware of the Applicant's pregnancy and that it was not an issue in the overall need to reduce staff - Dismissed - Ms K Ruston -v- Leader Lounge Furnishings - APPL 1547 of 2000 - BEECH C - 17/05/01 - Furniture 1448

EMPLOYEE

Complaint re Breach of Minimum Conditions of Employment Act 1993 - Complainant argued that the Defendant deducted pay without lawful authority and failed to pay accrued annual leave and one week's wages - Complainant argued that she was working for the named Defendant, that she was advised that there was going to be some change to the ownership of the entity, however, to her knowledge those arrangements had not been finalised - Defendant argued that the Defendant was not the Complainant's employer at all during that material period - Defendant argued there were two separate entities and that they were entirely separate - Industrial Magistrate found that the evidence overwhelmingly in favour of Complainant and accepted that there was an underpayment of untaken annual leave and an entitlement of a week's pay - Proven and Granted - Ms NA Roberts -v- Snogrin Pty Ltd t/a Eclipse Hardware - CP 98 of 2000 - Industrial Magistrate - Cicchini IM - 29/11/00 – Hardware 274

Applications re contractual entitlements - Applicants argued that they were entitled to payment of a retainer and two weeks' pay in lieu of notice as these entitlements arose from their contracts of employment - There was no appearance or argument from Respondent - Commission determined the nature of the relationships between the parties and found that the relationships were those of employees and employers respectively - Further, Commission found that the Applicants were each employees of the Respondents, that the Applicants were entitled to the payments of a retainer and payments in lieu of notice - Ordered accordingly - Mr AP Gilbride -v- Fast Net Publishers Group - APPL 94,177,231,232 of 2000 - SCOTT C. - 21/07/00 - Printg, Publishg & Rcdd Media 686

Complaint re Breach of Workplace Agreement Act - Complainant argued that the Defendant unfairly, harshly or oppressively terminated the employment contrary to the provisions implied in the workplace agreement - Complainant argued that at a meeting at which he was dismissed he asked whether he was being accused of stealing and he was told he was not - Defendant argued that the Complainant was not dismissed but, asked to explain the discrepancies that were recorded on the til and computer printouts, then the Complainant was given an opportunity to think about it and the actions taken by the Complainant was of resignation and this was supported by his lack of response - Industrial Magistrate found that on the evidence he could not conclude whether there was a dismissal or a resignation but on the evidence the Complainant had not established he was unfairly dismissed and the complaint not proved - Dismissed - Mr CJ Guerrini -v- Modillion Holding P/L - CP 272 of 2000 - Industrial Magistrate - Cicchini IM - 07/03/01 - Services to Transport.. 853

Application re unfair dismissal - Applicant argued that he was dismissed without warning and considered that reinstatement would be impracticable and sought compensation for being harshly, oppressively and unfairly dismissed - Respondent argued that applicant was never employed as an employee, but was engaged as a contractor, was not required to produce company details or a taxation file number and did not receive annual or sick leave - Commission concluded after considering carefully all the submissions of the parties and the evidence, that it was not convinced that applicant was an employee or, on balance, had proven his case - Further, Commission found that applicant was engaged as a contractor, hence Commission did not have jurisdiction to hear the application - Dismissed - Mr RA Kellar -v- BDM Marketing Pty Ltd ACN 067 632 688 - APPL 481 of 2000 - WOOD,C - 16/03/01 - Business Services.. 1036

Application re unfair dismissal - Applicant argued he was unfairly dismissed - Respondent argued that Applicant was a contractor and not an employee - Commission found on balance that Applicant was a contractor and not an employee - Dismissed for want of jurisdiction - Mr S Beacroft -v- Fletcher International WA - APPL 1864 of 2000 - BEECH C - 01/05/01.............................. 1196

CUMULATIVE DIGEST—*continued*

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EMPLOYEE—*continued*

Applications re unfair dismissal - Applicants argued they have been harshly, oppressively and unfairly dismissed - Respondent argued that Commission lacked jurisdiction to deal with either application as Applicants were engaged as sub-contractors and not employees during their period of engagement - Commission reviewed authorities and evidence, and having regard to all the relevant indicia, was satisfied that at all material times the Applicants were employees working under a contract of service - Declaration Issued - Mr R Howe -v- Intercorp Services Pty Ltd trading as Westvision Painting Company - APPL 810,811 of 2000 - SMITH, C - 27/04/01 - Construction Trade Services 1212

Applications re contractual entitlements - Applicant argued that Respondent failed to pay him contractual entitlements due under the terms of an employment arrangement - Respondent argued there was no employee/employer relationship, therefore Commission lacked jurisdiction to deal with either applications - Commission concluded after considering the facts in the context of the law to be applied, that the necessary ingredients to create an employee/employer relationship were missing between the Applicant and the Respondent, that Applicant only had access to this Commission if he was an employee and as he was not, there was no alternative but to dismiss both applications for want of jurisdiction - Dismissed for want of jurisdiction - Mr WT Lunt -v- WRS Pacific Pty Ltd ACN 009 248 999 - APPL 1827,1912 of 2000 - GREGOR C - 04/05/01.... 1223

Application re unfair dismissal - Applicant argued that dismissal was unfair because of his refusal to sign a subcontract agreement presented to him by Respondent and that it was not due to the alleged allegation of falsifying his timesheets - Respondent argued that his employment was not terminated on account of his failure to sign a so -called subcontract agreement, but, because Applicant had falsified his time sheets on a number of occasions and had claimed for payment for time not worked - Commission found that Applicant had falsified his time sheets and his claims for payment and his failure to comply with a lawful direction - Dismissed - Mr MR Henry -v- Hanssen Pty Ltd - APPL 1549 of 2000 - SCOTT C. - 15/05/01 - Construction Trade Services 1416

Applications re contractual entitlements - Applicants argued that they were owed a sum of money being a benefit that was not under an award or order - Applicants argued that they had performed the work required and had received a cheque that was dishonoured, further, they were unsuccessful in recovering monies through a debt collection agency - No appearance or argument from Respondent - Commission investigated the principal place of business and made searches of the business name and a notice of hearing was served at that address - Commission found that notice of hearing was served and claims were made out by Applicants - Granted - Ms E Reeves -v- Top Models International - APPL 1825 of 1999;APPL 20 of 2000 - SMITH, C - 12/04/01 - Modelling 1446

ENFORCEMENT OF ACTS/AWARDS/ORDER

Complaint re Breach of Minimum Conditions of Employment Act 1993 - Complainant argued that the Defendant deducted pay without lawful authority and failed to pay accrued annual leave and one week's wages - Complainant argued that she was working for the named Defendant, that she was advised that there was going to be some change to the ownership of the entity, however, to her knowledge those arrangements had not been finalised - Defendant argued that the Defendant was not the Complainant's employer at all during that material period - Defendant argued there were two separate entities and that they were entirely separate - Industrial Magistrate found that the evidence overwhelmingly in favour of Complainant and accepted that there was an underpayment of untaken annual leave and an entitlement of a week's pay - Proven and Granted - Ms NA Roberts -v- Snogrin Pty Ltd t/a Eclipse Hardware - CP 98 of 2000 - Industrial Magistrate - Cicchini IM - 29/11/00 – Hardware 274

Complaint re breach and enforcement of Award and Minimum Conditions of Employment Act - Complainant argued that Defendant failed to pay annual leave, sick leave and overtime - Complainant argued that Defendant had initiated and in effect orchestrated the termination so that it could be released from the obligations of Workers' Compensation and Rehabilitation Act and that entitlements accrued whilst on workers' compensation should be paid - Defendant argued and disputed that it had unilaterally terminated Complainant's employment at all, it argued that Complainant resigned from his position to take up employment with another employer as a security officer - Magistrate found that the parties terminated company on mutual agreement and the entitlements for annual leave, sick leave and payment in lieu of notice were not made out - Magistrate found that Complainant was entitled to unpaid overtime as proven because Defendant could not offset overaward and production bonuses payments made for a particular purpose against overtime payments - Proven in Part - Mr PA Jones -v- Barminco Pty Ltd - CP 38,212 of 2000 - Industrial Magistrate - Cicchini IM - 02/05/01 - Services to Mining.......... 1183

ENTRY: RIGHT OF

Application pursuant to s.49AB(3) of the I.R. Act re dispute regarding "right of entry" - Parties sought Commission's assistance to determine a dispute as to whether representatives of the union were empowered to enter premises of the employer - Applicant union sought Orders that the initial Application No. C242 of 2000 be joined to this application, second, that accredited union representatives have the right to enter Respondent's premises in accordance with the right of entry provision of the Award and thirdly, the Respondent or its agents should not hinder representatives of the union from exercising their right of entry - Respondent argued there was no jurisdiction under s.49AB(3) for the Commission to entertain the application - Commission reviewed authorities, relevant sections of the I.R. Act, and Award and found that the general powers of entry which were prescribed by the effect of s.49AB(1) could only be exercised for the purpose of dealing with an industrial matter after procedures which are set out in the section have been executed and that had not occurred in this case - Further, Commission concluded that it was bound to accept as a proper interpretation and statement of the law, the views of His Honour in Zaknich (ibid), that a union official was only at liberty to remain upon premises of an employer employing union labour and the consequence of that interpretation of the relevant provisions was that the BGC site could not be regarded as a premises of that kind - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Homestyle Pty Ltd T/as BGC Construction & Others - APPL 1456 of 2000 - GREGOR C - 20/02/01 – Construction.......... 862

HOURS OF WORK

Conference Referred re contracting out of work within the Mine Productions area - Applicant argued that the utilisation of a contractor would detrimentally effect the availability of reasonable hours of work of its members contrary to the terms of clause 29 of the award - Respondent argued that the use of a contractor for this work was to better utilise the mineworker classification employees on their principal tasks involving the operation of equipment rather than cleaning reflectors and signs, and estimated that the efficiency savings for it would be approximately $650,000 net per annum - Commission found that employees of the proposed contractor would work "side by side" with employees of Respondent, there would be no diminution in terms of earnings or any effect on the normal working hours of employees, no Respondent's employees would suffer any detrimental effect by engagement of a contractor for sign and reflector cleaning and maintenance, and concluded that the work proposed to be contracted out by Respondent should proceed - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 308 of 2000 - KENNER C - 29/01/01 – Mining.... 721

Conference referred re termination by redundancy - Applicant Union argued that Applicant's position was full -time at the time she commenced her long service leave, that it was to that position that she returned following her leave, that the decision taken by Respondent was to make redundant that full-time position, therefore, Applicant's redundancy entitlements are to be calculated on the basis of the full-time hours she had previously worked - Further, Applicant Union sought a Declaration that the reference to "each year of completed years of service" referred to in Clause 5(a) - Severance Pay of the ECCRU Enterprise Bargaining Agreement 1999 means "each calendar year of employment" - Commission found on evidence that Applicant was notified of the reduction in her hours, that the change did not so much restructure the position but reduced its hours from 37.5 to 22.5 and that the position which was abolished by Respondent was the one which had 22.5 hours per week - Further, Commission reviewed Clause 5 of the ECCRU Enterprise Bargaining Agreement 1999 and found the "completed service" referred to in that clause refers to the employee attending for work and performing work pursuant to her contract of employment, therefore, Applicant was entitled to two weeks' pay for each year where her service was complete for that year, that is for each year that she attended for work and worked in accordance with her contract of employment - Commission adjourned the matter inviting the parties to provide an agreed minute of any Order to issue in the matter but subsequently Applicant filed a Notice of Discontinuance - Discontinued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Ethnic Child Care Resource Unit - CR 32 of 2000 - BEECH C - 08/11/00 - Community Services 919

CUMULATIVE DIGEST—*continued*

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HOURS OF WORK—*continued*

Application re alteration of working conditions - Applicant argued that in or about 1997 the Inspectors, with the knowledge and consent of the respondent, housed company's vehicles at their private residences and were paid for the extra hour involved in travelling to and from the checkpoint until respondent ceased the practice on 11 November 1999 - Respondent argued that there was no longer any rational justification for that practice which originated when it had its office in the Kununurra townsite which is no longer the case - Commission found that the practice in question was a longstanding one endorsed by senior officers of the respondent and being a term of the contract of employment for the Inspectors in question, cannot be removed or varied unilaterally except by agreement of the Inspectors or by termination of the contract, thus applicant was entitled to an additional hour for each full day worked at the Kununurra checkpoint as a term of employment - Granted - Civil Service Association of Western Australia Incorporated -v- Chief Executive Officer, Agriculture Western Australia - PSACR 2 of 2000 - FIELDING C - 14/03/01 - Health Services.......... 1004

Application re contractual entitlements - Applicant argued that when she was given written notice that her position was to reduce from a full-time position of 37.5 hours per week to 22.5 hours per week, she was entitled to a "partial redundancy" payment of $5,551.00 calculated on the basis of the 15 hours per week she lost at 2 weeks' pay for each of her 9 years' service - Respondent opposed the claim and argued that at all relevant times, Applicant was a part -time employee whose hours could be, and were varied both up and down and that there was no redundancy - Further, Respondent argued that Applicant was aware of the fact that she was a part-time employee and that Applicant had accepted that her hours of work could be increased or decreased with appropriate notice - Commission found on the evidence and material before it that in the terms of the enterprise bargaining agreement provisions, Applicant was not made redundant when her hours was reduced, therefore she was not, and accordingly she was not entitled to a benefit under her contract of employment - Further, the evidence had not shown that the reduction in hours was part of a two-stage plan to eventually make the position redundant, nor that it was of itself a redundancy under the enterprise bargaining agreement - Dismissed - L Kambourakis -v- Ethnic Child Care Resource Unit - APPL 2022 of 2000 - BEECH C - 08/05/01 - Community Services.......... 1216

Application re unfair dismissal - Applicant argued that her dismissal from a position of permanent part time receptionist was harsh, unfair, for no valid reason, sought a declaration that dismissal was of that nature but did not seek reinstatement - Respondent argued that applicant's employment status throughout the employment period was one of a casual nature - Commission found that Applicant did not prove that her services were terminated at all, that she was not dismissed, she resigned, therefore the Commission had no jurisdiction and this application should be dismissed - Dismissed - Ms A Hoare -v- Noongar Land Council - APPL 764 of 2000 - GREGOR C - 12/06/01 - Community Services.......... 1420

Application re unfair dismissal and contractual benefits - Applicant argued that he was harshly, oppressively and unfairly dismissed and denied a benefit under his contract of service because Respondent failed to consider alternative punishment measures such as a warning and that termination was carried out in public - Further, Applicant worked long hours and should have been considered when final payment arranged - Respondent argued that Applicant was dismissed for incidents involving misconduct and negligence which included an attempt to blame an apprentice for food being delivered late, failure to secure and lock the premises and property and a lack of trust - Commission found that Respondent had reasons to lose trust in Applicant and it was clear Applicant had failed to secure premises on occasions and that Applicant was afforded an adequate opportunity to put his version of events - Further, Commission found that Applicant was entitled to the guaranteed minimum hours of work as paid out - Dismissed - Mr W Manson -v- Allclass Holdings Pty Ltd Trading as Gourmet Professional Catering Company W.A - APPL 1816 of 2000 - SMITH, C - 11/05/00 – Catering.......... 1428

Application re unfair dismissal - Applicant argued that she was unfairly dismissed because the night of the dismissal was an unusually busy night and there were a number of reasons why things did not go particularly well that night, she was working under pressure, the Manager at the time was affected by alcohol and was abusive - Respondent argued that Applicant was dismissed for being too slow over the course of her employment - Commission was not persuaded on the evidence overall that the reason applicant was dismissed was simply the events of that night but that Respondent had been concerned from Applicant's first shift and rostered her for less hours after the first week, and found on the balance of probabilities that respondent had already reached the decision to dismiss Applicant prior to that evening - Further, Commission found that applicant had not discharged the onus upon her that dismissal was harsh, oppressive or unfair - Order Issued - Ms LA March -v- Hungry Hollow Tavern - APPL 1722 of 1999 - BEECH C - 06/06/01 - Accommodatn, Cafes&Restaurants.......... 1431

INDUSTRIAL ACTION

[1]Appeal against Decision of Full Bench (80WAIG159) re wearing of badges by union members during hours of employment - Appellant argued whether the decision of the Full Bench was erroneous in law and whether the exercise of the Senior Commissioner's exercise of discretion in the relevant circumstances gave rise to reviewable errors of law - Respondent union argued that the matters before the Full Bench were essentially matters of industrial fairness concerning the introduction and use of a badge - Industrial Appeal Court found that the Full Bench fell into error in seeking to balance rights vested in the employer as a consequence of the contractual arrangements as against the reasons advanced by the employees for wearing the badge - Further the reasons for wearing the badge were not of the same contractual or normative order as the rights of the employer to determine what was required by way of grooming thus the appeal was allowed - Appeal Upheld - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality.......... 4

[1]Application for stay of proceedings in Matter No. CR159/1999 pending determination of Appeal - Appellant argued for a stay of proceedings of the Decision of Full Bench until the determination of the appeal before IAC or further Order - Industrial Appeal Court found that it was quite satisfied that the circumstances, as well as the balance of convenience justified the stay of proceedings to be granted - Granted - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality.......... 9

Conference referred re illegal disciplinary action - Applicant union challenged the veracity of the written "final warning" issued by Respondent to its member and denied that its member was guilty of intimidating behaviour towards fellow employees - Further, Applicant Union submitted that the conduct which led to the "final warning" should be seen in the context of industrial action over what was a very sensitive issue in the Respondent's workplaces - Applicant Union sought an Order directing Respondent to rescind the "final warning" - Respondent argued that an investigation carried out during the course of the industrial action concluded that the union member was guilty of "intimidating behaviours and of abusive language" and as a consequence he was issued with the "final warning" - Further, Respondent argued that the union's member was in breach of the "BHP Iron Ore Non- Harassment Policy" - Commission found the union member's conduct, at least in the car-park, constituted harassment if not also intimidation of the employees to whom he directed his abuse - Commission further found in all circumstances, particularly having regard to union member's prior good record, the nature of and the circumstances in which the transgressions complained of were committed, that it would not be unreasonable if he was warned that should he be guilty of any further instances of intimidatory and/or threatening behaviour inconsistent with the Respondent's Non-Harassment Policy, his employment was liable to be terminated - Upheld - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore - CR 20 of 2000 - FIELDING C - 29/09/00 - Iron Ore.......... 327

Conference re unfair dismissal - Applicant Union argued that dismissal of member was unlawful because it was contrary to the Order issued by Commission in CR350 of 2000 (81WAIG699) re exploring options and providing appropriate training to member - Further, Applicant Union argued that an Order be issued that member be reinstated to position held by him immediately prior to his dismissal and that the parties agree to the duties to be performed by member - Respondent argued and questioned the jurisdiction of the Commission to issue such an order and says that member was dismissed for continued and wilful refusal to obey a lawful and reasonable instruction - Commission found that it had the jurisdiction to issue such an order and issued an order that Respondent not dismiss member from his employment which also allowed the parties liberty to apply to vary, cancel or revoke this Order - Interim Order issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - C 89 of 2001 - BEECH C - 30/04/01 – Hospitality.......... 1248

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INDUSTRIAL ACTION—*continued*

Conference referred re utilization of Ongoing Change Agreement II - Applicant argued that the proposed transfer of twelve employees from Respondent's MEW Section to mining operations at its Mt Newman site for a six months trial constituted a forced redundancy and that it arises as a consequence of the engagement by Respondent of contractors in the MEW to perform work previously performed by employees and was not supportable under the Agreement - Respondent argued that Union party had consented, subject to certain conditions, to permit Respondent to initiate one to three months trials of changes in the workplace and also denied that the proposed trial involved forced redundancies - Commission found that the main issues were whether the terms of the OC II contemplated the change as proposed by Respondent and whether the proposal falls into one of the exclusion's contained in OC II or it constituted "wholesale contracting out" in the MEW - Commission found that proposed transfers to the employees were not consistent with the terms of the Ongoing Change Agreement II and the proposed changes should be the subject of negotiations between the parties - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 264 of 2000 - KENNER C - Metal Ore Mining..... 1254

Conference referred re unfair dismissal seeking reinstatement - Applicant Union argued that their member was unfairly dismissed because the Respondent's response to his actions was disproportionate to the gravity of the conduct and that the conduct in question occurred outside the workplace and that the policy was not entirely clear in this regard which added to the unfairness of the dismissal - Respondent argued that the member had engaged in conduct in breach of the Policy with knowledge of the terms of the Policy and further submitted that the conduct and behaviour was premeditated and designed to harass and intimidate other employees which included using the word "scab" - Respondent also argued that reinstatement was not a viable option if the dismissal was unfair - Commission found that the member was dismissed for making unwelcome remarks and using derogatory and offensive words to employees who had accepted workplace agreements - Commission found having regard to all the circumstances, including the length of service and unblemished employment record that the Respondent's decision to dismiss was harsh, oppressive and unfair - Further, the utterances of the member were not accompanied by any threats, other verbal abuse or intimidation - As to the question of remedy, Applicant Union sought reinstatement, whilst Respondent opposed it - Commission ordered reinstatement - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 KENNER C - Metal Ore Mining.. 1262

Conference referred re unfair dismissal seeking reinstatement - Applicant Union opposed the application going to the construction of s.23 of the IR Act - Applicant Union argued that Respondent did not have the standing to bring application to revoke the reinstatement order and submitted that an order for reinstatement was solely for the benefit of the unfairly dismissed employee - Further, Applicant Union argued that an alternative means of dealing with a failure to comply with such an order, does not create a right to not comply - Respondent argued that Commission should revoke and amend the order for reinstatement and award compensation for the loss or injury caused by the dismissal - Respondent argued that on its proper construction, reference to 'may' in s.23A(3), although expressed in directory terms, should be interpreted in a mandatory sense. - Further, Respondent argued that if s.23A(3) was to be interpreted such that 'may' means Commission had a discretion to issue a further order on revocation, then that discretion may be exercised simply as a consequence of the employer's failure to comply with the reinstatement order or its impracticability to comply with the order - Commission found that once it was satisfied that there had been a failure to comply as a matter of jurisdictional fact, Commission was then obliged to consider whether to revoke original order and that the terms of s.23A as a whole conferred on the employer a right to not comply with a reinstatement order - Commission rejected Respondent's submissions to revoke Commission's order - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 - KENNER C - 31/05/01 - Metal Ore Mining 1457

INDUSTRIAL MATTER

[2]Appeal against decision of the Commission (80WAIG3334) re wrongful dismissal of seven officers - Appellants argued the Commissioner erred in law and in excess of jurisdiction, that the application before him was not an industrial matter and that he had considered Affidavit and other material which was not evidence in the proceedings - Respondent union argued that the Commissioner of Police breached his agreement with those dismissed officers by not deciding this issue pursuant to s.23 of the Police Act 1892 and Regulations, and acted harshly or oppressively in acting pursuant to s.8 of that Act - Full Bench found that since the Commissioner of Police is not the Crown, discharging an officer cannot be seen as an act done at the will or pleasure of the Crown and accordingly it was wrong to do so without affording natural justice or procedural fairness, and further found that the Commissioner of Police was not the employer of Police Officers, the Minister was, that Police Officers were indubitably officers of the Crown and not employees, that there was no jurisdiction in the Commission to hear and determine the application, and having considered all of the material and submissions upheld the Appeal and quashed the decision at first instance, it being a nullity and having been made without jurisdiction - Ordered Accordingly - The Honourable Minister of Police & Other -v- Western Australian Police Union of Workers - FBA 38 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 14/11/00 – Police 356

[4]Application for stay of operation of Order made by the Chairperson of the "Coal Industry Tribunal" in Application No. 2/2001 (81WAIG731) pending appeal to Full Bench - Applicant argued on the following: "there was a serious question to be tried in respect of the grounds upon which the Applicant seeks a review of the Order, the circumstances justify the making of an order staying the operation of the Order as the Applicant has, and will, continue to suffer loss and damage should the Order not be stayed and the Respondent and its members will suffer no prejudice if the Order is so stayed" - Further, Applicant sought relief that the decision of the Tribunal should be stayed, insofar as it purports to restrain the Applicant from continuing the changes outlined in the letter dated 31 January 2001 referred to in the Order - Respondent opposed the application - President applied Principles pursuant to the "Coal Act" in applications for a stay, and reviewed relevant sections of the "Coal Act", the EBA and evidence and found on a number of reasons that there was no serious issue to be tried as there was an "industrial dispute" within the meaning of s.3 and s.10 of the Coal Act, and that jurisdiction existed and exists in the Tribunal to make such Order - Further, President found that it would not deprive a "successful party" of the fruits of an Order such as this and that Applicant had not established that an Order should be made in its favour because it had not established that the equity, good conscience and the substantial merits of the case, or that the balance of convenience lay with it - Dismissed - Griffin Coal Mining Company Pty Limited -v- The Coal Miners' Industrial Union of Workers of Western Australia, Collie - PRES 3 of 2001 - President - SHARKEY P - 01/03/01 - Coal Mining 832

Application pursuant to s.49AB(3) of the I.R. Act re dispute regarding "right of entry" - Parties sought Commission's assistance to determine a dispute as to whether representatives of the union were empowered to enter premises of the employer - Applicant union sought Orders that the initial Application No. C242 of 2000 be joined to this application, second, that accredited union representatives have the right to enter Respondent's premises in accordance with the right of entry provision of the Award and thirdly, the Respondent or its agents should not hinder representatives of the union from exercising their right of entry - Respondent argued there was no jurisdiction under s.49AB(3) for the Commission to entertain the application - Commission reviewed authorities, relevant sections of the I.R. Act, and Award and found that the general powers of entry which were prescribed by the effect of s.49AB(1) could only be exercised for the purpose of dealing with an industrial matter after procedures which are set out in the section have been executed and that had not occurred in this case - Further, Commission concluded that it was bound to accept as a proper interpretation and statement of the law, the views of His Honour in Zaknich (ibid), that a union official was only at liberty to remain upon premises of an employer employing union labour and the consequence of that interpretation of the relevant provisions was that the BGC site could not be regarded as a premises of that kind - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Homestyle Pty Ltd T/as BGC Construction & Others - APPL 1456 of 2000 - GREGOR C - 20/02/01 – Construction....................................... 862

INDUSTRIAL MATTER—*continued*

[2]Appeal against decision of Commission (80 WAIG 4482) re unfair dismissal and contractual entitlements claims - Appellant argued that the Commission erred in holding that it did not have jurisdiction to hear and determine the application - Appellant sought that the Full Bench overrule previous decisions if not distinguishable on the facts - Respondent argued that if the appeal was upheld, the matter should be remitted - Full Bench had already observed that it should not overrule a previous decision unless it had a conviction that that decision was wrong - Full Bench found that the actual work was performed geographically outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction - Full Bench found the Commission had correctly made findings on the claims and the Appellant should not be disadvantaged by re-opening matters – In Supplementary Reasons, Majority of Full Bench had granted an adjournment to seek legal advice - Upheld - Mr MA Tranfield -v- Ray Douglas Parker - FBA 46 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 03/04/01 - Oil and Gas Extraction 990

[4]Application for stay of operation of a direction of the Commission in Application Nos. 1693, 1710, 1711, 1712, and 1713 of 2000 (81WAIG936, 1068) pending Appeal to Full Bench - Appellant Employer argued that Commission in the exercise of its discretion failed to give proper weight and consideration to the following matters that, it was not in the public interest to order the discovery of confidential communications between employers and their industrial relations advisers and that such documents were not and could not be relevant to the matters at issue in the substantive case - Respondents argued that to stay the operation of the order might have the effect of delaying the final hearing and determination of the matter, a delay which could not be compensated for in money, even if Respondents were successful - President found that the principles applicable for a stay should be applied and that the decision appealed against was a discretionary decision and that to succeed on appeal Appellant would have to establish that the exercise of discretion was miscarried in accordance with the principles - Further, President found that an appellate court should exercise caution in undertaking to review a decision on a matter of practice or procedure and that the stay of operation had not been established and therefore, there should not be interference by the President with an interlocutory order - Dismissed - Cable Sands (W.A.) Pty Ltd -v- Mr R Sullivan & Others - PRES 5 of 2001 - President - SHARKEY P - 19/03/01 - Mineral........ 998

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services........ 1162

INDUSTRY

[2]Appeal against decision of Commission (80 WAIG 4482) re unfair dismissal and contractual entitlements claims - Appellant argued that the Commission erred in holding that it did not have jurisdiction to hear and determine the application - Appellant sought that the Full Bench overrule previous decisions if not distinguishable on the facts - Respondent argued that if the appeal was upheld, the matter should be remitted - Full Bench had already observed that it should not overrule a previous decision unless it had a conviction that that decision was wrong - Full Bench found that the actual work was performed geographically outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction - Full Bench found the Commission had correctly made findings on the claims and the Appellant should not be disadvantaged by re-opening matters – In Supplementary Reasons, Majority of Full Bench had granted an adjournment to seek legal advice - Upheld - Mr MA Tranfield -v- Ray Douglas Parker - FBA 46 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 03/04/01 - Oil and Gas Extraction 990

INTERPRETATION-WORDS & PHRASES

[2]Appeal against decision of Commission (80WAIG416 & 4855) re unfair dismissal and contractual entitlements - Appellant argued that the learned Commissioner erred on numerous points and sought an Order that the claim of unfair dismissal be dismissed, that as the learned Commissioner misdirected himself and made substantial errors of law and fact, the Full Bench should substitute inferences correctly drawn to find that the Respondent constructively determined its contract of service unfairly with s.29 of the Act and to award compensation Further, Appellant sought an order to quash the Order at first instance to dismiss and an Order that the Respondent did dismiss the Appellant unfairly and should pay compensation - Respondent opposed the claims - Full Bench found that the Commissioner had correctly referred to and considered the applicable legal principles of constructive dismissal and determined on the facts before him that there was no constructive dismissal - Further, that there was no arguable case on Appeal, that the justice of the matter lay with the Respondent and pursuant to s.26(1)(a) of the Act and, having considered the interests of the parties under s.26(1)(c) of the Act, the applications to extend time was dismissed and, therefore, the appeal was incompetent as being out of time - Dismissed - Mr BF Stokes -v- The Typing Centre of Perth Pty Ltd T/A Australian International College of Commerce - FBA 47 of 2000 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 30/11/00 – Colleges 22

[3]Application re joinder to Award - Applicant Union argued that although the Contract Cleaners' (Ministry of Education) Award 1990 was limited to the named Respondents, it was regarded generally by the contract cleaning industry and the Education Department as the Award which sets the benchmark for wages and conditions for contract cleaning employees cleaning Government Schools and it was therefore necessary that when new contract cleaning employers gain contracts, the Award be extended to them by having them named as Respondents to the Award - Respondents argued amongst a number of reasons that the coverage of the Contract Cleaners' (General and Window Contractors) Award (the General Award) currently applies to the employers that the union is seeking to join to the award, that it was the General award which forms the award safety net and that the Contract Cleaners' (Ministry of Education) Award, 1990 was a consent award which applied only to the employers who consented to it - Further, that the General award has undergone a Minimum Rates Adjustment exercise and therefore it has properly set rates of pay whereas the Contract Cleaners' (Min. of Educ) Award, 1990 has not - Commission in Court Session was of the view that the material before it justified why the claim had not been progressed under s.41 of the Act or pursued under any other of the State Wage Principles - Further, that the equity, good conscience and substantial merits of the case lay with the Applicant such that the application should succeed - Granted - LIQUOR, HOSPITALITY & MISC -v- Airlite Cleaning Pty Ltd & Others - APPL 1431 of 1998 - Commission in Court Session - BEECH C/SCOTT C./KENNER C - 08/09/00 – Cleaning........ 35

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INTERPRETATION-WORDS & PHRASES—*continued*

[4]Application for stay of operation of Decision of Commission in Matter No. CR308/2000 (81WAIG721) pending appeal to Full Bench - President reviewed Principles and found that for an application for stay to be granted, the strength of the case must raise a serious issue to be tried and that exceptional circumstances must be established by Applicant, however, for a number of reasons in this case, it had not been established that there was a serious issue to be tried or that the balance of convenience lay with the Applicant - Further, that the interests of the Applicant staying the operation of the declaration was overcome by the interests of the employer in availing itself of the benefit of the declaration, that there was no exceptional circumstances requiring that the Respondent be deprived of the fruits of its order and that the equity, good conscience and the substantial merits of the case lay with a dismissal of the application - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - PRES 2 of 2001 - President - SHARKEY P - 06/02/01 - Services to Mining........ 406

Conference referred re termination of employment - Applicant Union argued that the termination of Applicant was harsh, oppressive and unfair and contrary to s.84AA of the Workers Compensation Act, s.41 of the Minimum Conditions of Employment Act and Clause 34 of the Burswood International Resort Casino Employees Industrial Agreement 2000 - Further, that the Respondent's action was taken substantially because Applicant was the President of (BRUE) and was being discriminated against and the process and planning for his termination was flawed in that it was not shared with him and he was not trained to apply for other positions nor did the Company sought to find him an alternative position - Respondent argued that with the arrival of a new CEO, and constraint on the budget, the managers were required to review their operations and, subsequently the manager Environmental Services made changes to his operation which impacted on the Applicant's duties - Further, Applicant was to be terminated unless he found suitable alternative position, as he could not fulfil the requirements of his original contract as an Environmental Systems Attendant due to his injury - Commission reviewed authorities, Acts and found on evidence that it was plausible and more likely that the Applicant's duties were diminished due to a legitimate drive for efficiency, that there had been no discrimination due to him being a delegate and that evidence proved that his duties had not been cut because of this - Commission exercised its judgement according to equity, good conscience and the substantial merits of the case and found that, to so swiftly terminate Applicant's employment if he himself does not find an alternative position, particularly given the spirit of s.84AA, would be harsh and unfair - Further, the Respondent should have engaged in a fuller exploration of options for Applicant and recommended that this take some months including appropriate training - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 350 of 2000 - WOOD,C - 02/02/01 - Accommodatn, Cafes&Restaurants........ 699

[1]Appeal against Decision of Commission In Court Session (81WAIG35) re joinder of respondents to award - Appellants argued that the majority of the CICS erred in law in failing to comply with the requirements of s29A(2) of the I.R. Act 1979 in hearing the applicant at first instance - Counsel for the Respondent argued that the intent of s29A was clear in that the section was designed to provide for notice of applications to parties that would otherwise not receive notice of the application - Further, it was contended by Counsel for the respondent that the addition of named respondents to the award did not alter the "scope" of the award so as to attract s29A(2) - Industrial Appeal Court applied decision in "Australian Meat Industry Employer's Union v Stewart Butchering Co Pty Ltd (1993)(73WAIG1196)", and agreed with the Learned President's observation that the alteration of named respondents to an award was a variation to the "scope" of the award so as to attract the provisions of s29A - IAC was of the view that the appeals should be allowed and the matters remitted to a single commissioner to be dealt with according to law after the provisions of s29A of the I.R. Act have been complied - Further, IAC added that if the intention of Parliament was that s29A(2) should apply to common rule awards, then the section should be amended to say so - Upheld and Remitted - Airlite Cleaning Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 8 & 9 of 2000 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - Other Services........ 769

[2]Appeal against Decision of Industrial Magistrate (unreported) and Appeal against Decision of Commission (80WAIG4419) re unfair dismissal - Preliminary application - Respondent argued on a number of grounds including that the appeal was incompetent and that it had been brought frivolously and vexatiously with the object of delaying and prejudicing the fair trial of the proceedings before the Magistrate - Further, Respondent sought orders that Appeal No. FBA 7/2000 be struck out and that Appellant pay the costs of and incidental to the proceedings - Full Bench found on a number of reasons that the appeal was competent, that it was premature and unnecessary, at this stage, to rule on the issues of frivolous and vexatious, and that there was prejudice by the prospect of irremediable exclusion, therefore, having regard to the equity, good conscience and the substantial merits of the case, dismissed the application to dismiss for want of prosecution - Appeal Nos. FBA7 and FBA43 of 2000 - Respondent argued that there was irresistible inference that the appeal was brought frivolously and vexatiously, that Appellant's appeal should not be allowed to be withdrawn and that, given the length of time that the breach of the procedural rules had continued, the reasons for the breach and the fact that respondent and the administration of the court's business had been prejudiced, then both appeals should be struck out - Appellant's Counsel argued that he had no objection to the appeals being dismissed rather than withdrawn and he offered no argument in support of the appeals - Full Bench found that the most satisfactory way of dealing with the appeals with some finality, and to which course there was no objection in any event, was to dismiss the appeals by way of determination of the appeals - Dismissed - Chubb Security Australia Pty Ltd -v- Mr PR Danson - FBA 7,43 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 26/07/00 - Other Business Services . 783

[4]Application for stay of operation of Order made by the Chairperson of the "Coal Industry Tribunal" in Application No. 2/2001 (81WAIG731) pending appeal to Full Bench - Applicant argued on the following: "there was a serious question to be tried in respect of the grounds upon which the Applicant seeks a review of the Order, the circumstances justify the making of an order staying the operation of the Order as the Applicant has, and will, continue to suffer loss and damage should the Order not be stayed and the Respondent and its members will suffer no prejudice if the Order is so stayed" - Further, Applicant sought relief that the decision of the Tribunal should be stayed, insofar as it purports to restrain the Applicant from continuing the changes outlined in the letter dated 31 January 2001 referred to in the Order - Respondent opposed the application - President applied Principles pursuant to the "Coal Act" in applications for a stay, and reviewed relevant sections of the "Coal Act", the EBA and evidence and found on a number of reasons that there was no serious issue to be tried as there was an "industrial dispute" within the meaning of s.3 and s.10 of the Coal Act, and that jurisdiction existed and exists in the Tribunal to make such Order - Further, President found that it would not deprive a "successful party" of the fruits of an Order such as this and that Applicant had not established that an Order should be made in its favour because it had not established that the equity, good conscience and the substantial merits of the case, or that the balance of convenience lay with it - Dismissed - Griffin Coal Mining Company Pty Limited -v- The Coal Miners' Industrial Union of Workers of Western Australia, Collie - PRES 3 of 2001 - President - SHARKEY P - 01/03/01 - Coal Mining........ 832

Application pursuant to s.49AB(3) of the I.R. Act re dispute regarding "right of entry" - Parties sought Commission's assistance to determine a dispute as to whether representatives of the union were empowered to enter premises of the employer - Applicant union sought Orders that the initial Application No. C242 of 2000 be joined to this application, second, that accredited union representatives have the right to enter Respondent's premises in accordance with the right of entry provision of the Award and thirdly, the Respondent or its agents should not hinder representatives of the union from exercising their right of entry - Respondent argued there was no jurisdiction under s.49AB(3) for the Commission to entertain the application - Commission reviewed authorities, relevant sections of the I.R. Act, and Award and found that the general powers of entry which were prescribed by the effect of s.49AB(1) could only be exercised for the purpose of dealing with an industrial matter after procedures which are set out in the section have been executed and that had not occurred in this case - Further, Commission concluded that it was bound to accept as a proper interpretation and statement of the law, the views of His Honour in Zaknich (ibid), that a union official was only at liberty to remain upon premises of an employer employing union labour and the consequence of that interpretation of the relevant provisions was that the BGC site could not be regarded as a premises of that kind - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Homestyle Pty Ltd T/as BGC Construction & Others - APPL 1456 of 2000 - GREGOR C - 20/02/01 – Construction........ 862

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INTERPRETATION-WORDS & PHRASES—*continued*

Application re unfair dismissal - Preliminary issue re jurisdiction - Respondent argued that Commission lacked jurisdiction to deal with the applications as both employees were casual and pursuant to the Federal Workplace Relations Act 1996 and Regulations, were excluded from the operation of unfair dismissal procedures, there being a direct inconsistency between the Federal and State Acts - Respondent argued that consumption of alcohol on duty and a series of events which amounted to behaviour and an attitude on the part of applicant (Mr Rushton) was the reason for termination - Applicant (Mr Rushton) defended the allegations and for most part agreed that they occurred but he viewed them as trivial - Applicant (Mr Cairns) argued that he felt intimidated and threatened by another officer following an incident, that after respondent investigated the incident, he was told that he would stay on and be offered work but that never happened - Commission reviewed authorities, relevant sections of the Federal Act, the Australian Constitution and found that there was no inconsistency between the Federal Workplace Relations Act 1996 and the WA I.R. Act 1979 and hence the Commission had jurisdiction to hear the matter - Commission determined (in a further Reasons for Decision) that the nature of the applicants' employment relationship in all aspect was casual - Further, Commission found on evidence that the respondent was not prepared to continue to roster Mr Cairns away from his intimidator and unless Mr Cairns had that guarantee then he was not prepared to work for the respondent, therefore, there had been no dismissal of Mr Cairns and hence that being the fact there was no jurisdiction for the Commission and accordingly dismissed his application for want of jurisdiction - Commission further found that Mr Rushton did consume alcohol and fall asleep whilst on duty, therefore, having regard to the Undercliffe case (65WAIG385) the decision to dismiss him on notice was not unfair, harsh or oppressive in all circumstances - Applications Dismissed - Mr A Cairns -v- The West Australian Turf Club - APPL 795,809,827 of 2000 - WOOD,C - 15/09/00 – Sport 867

Application re unfair dismissal - Applicant argued that his summary dismissal for alleged misconduct was unfair because he was not given an opportunity to discuss that or given a proper induction or training on the job and was not given counselling or support from his superiors - Further, Applicant sought reinstatement originally but argued at hearing that this would be impracticable and sought six months compensation as alternative - Respondent argued that Applicant had not conducted himself in a professional manner and dismissal was the only real option considered due to the seriousness of the Applicant's actions - Commission found that the Applicant knew full well of the seriousness with which the employer might view his financial predicament, that the employer had every right to lose trust in him, and that he clearly knew that his job was in jeopardy, therefore the dismissal was not unfair, harsh or oppressive - Dismissed - Mr BJ Gardner -v- Police & Nurses Credit Society Ltd - APPL 1937 of 1999 - WOOD,C - 14/03/01 – Finance 880

Application re unfair dismissal - Preliminary point re jurisdiction - Applicant argued he was dismissed unfairly, harshly and oppressively after failing an alcohol test on his way to the site - Respondent argued that, in accordance with Clause 15 of the John Holland Construction & Engineering Pty Ltd Rail Infrastructure Maintenance Agreement 1996-1999 [MFIA1] and Clause 5 of the Rail Infrastructure Maintenance Award 1996 [MFIA2], Commission did not have jurisdiction to deal with the matter - Commission reviewed relevant sections of the award and found that the relevant part of the award for the purposes of the matter at hand, was Clause 10 of the Award and not Clause 5 - Further, Commission reviewed authorities and found that a person subject to the award and agreement in question may still make an application pursuant to s29(1)(b)(i) of the I.R. Act, 1979 as there was no provision in the award or agreement, for that purpose, excluding them from the State Commission or directing the parties in cases of termination to the Australian Industrial Relations Commission, therefore Commission had jurisdiction to deal with the application - Reasons for Decision Issued - Mr PA Renwick -v- John Holland Construction & Engineering Pty Ltd ACN 004 282 268 - APPL 571 of 2000 - WOOD,C - 09/02/01 - General Construction 908

Conference referred re unfair dismissal and contractual entitlements - Matter remitted back to Commission with instruction that it be dealt with "according to law" and in accordance with the reasons for decision of the Full Bench - Applicant sought compensation for loss of income and in addition, for injury sustained as a result of his dismissal - Further, Applicant Union argued that whatever formula was used to assess compensation, Applicant was entitled to the maximum allowable under the Industrial Relations Act - Respondent argued that the Applicant should be compensated for something less than the maximum allowable under the Act and drew attention to the fact that he was subject to criticism which led to other proceedings in the Commission before his termination - Commission reviewed various tests cases, relevant sections of the I.R. Act and Workplace Relations Act 1996 and found that the onus was on the employer to establish that the employee had failed to mitigate his loss and the employer had simply not discharged that onus - Further, that in the present case, the task of assessing compensation was made more difficult than usual because the evidence as to the Applicant's earnings at the time of dismissal and subsequently are at best scant, and that may be due in part to the fact that so much time had lapsed since Applicant's dismissal - Commission concluded that Respondent should pay Applicant compensation for dismissal found to have been unfair by the Full Bench - Granted. - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Barminco Pty Ltd - CR 186 of 1998 - FIELDING C - 05/11/98 - Services to Mining... 916

Conference referred re termination by redundancy - Applicant Union argued that Applicant's position was full -time at the time she commenced her long service leave, that it was to that position that she returned following her leave, that the decision taken by Respondent was to make redundant that full-time position, therefore, Applicant's redundancy entitlements are to be calculated on the basis of the full-time hours she had previously worked - Further, Applicant Union sought a Declaration that the reference to "each year of completed years of service" referred to in Clause 5(a) - Severance Pay of the ECCRU Enterprise Bargaining Agreement 1999 means "each calendar year of employment" - Commission found on evidence that Applicant was notified of the reduction in her hours, that the change did not so much restructure the position but reduced its hours from 37.5 to 22.5 and that the position which was abolished by Respondent was the one which had 22.5 hours per week - Further, Commission reviewed Clause 5 of the ECCRU Enterprise Bargaining Agreement 1999 and found the "completed service" referred to in that clause refers to the employee attending for work and performing work pursuant to her contract of employment, therefore, Applicant was entitled to two weeks' pay for each year where her service was complete for that year, that is for each year that she attended for work and worked in accordance with her contract of employment - Commission adjourned the matter inviting the parties to provide an agreed minute of any Order to issue in the matter but subsequently Applicant filed a Notice of Discontinuance - Discontinued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Ethnic Child Care Resource Unit - CR 32 of 2000 - BEECH C - 08/11/00 - Community Services 919

[2]Appeal against decision of Commission (80 WAIG 4482) re unfair dismissal and contractual entitlements claims - Appellant argued that the Commission erred in holding that it did not have jurisdiction to hear and determine the application - Appellant sought that the Full Bench overrule previous decisions if not distinguishable on the facts - Respondent argued that if the appeal was upheld, the matter should be remitted - Full Bench had already observed that it should not overrule a previous decision unless it had a conviction that that decision was wrong - Full Bench found that the actual work was performed geographically outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction - Full Bench found the Commission had correctly made findings on the claims and the Appellant should not be disadvantaged by re-opening matters – In Supplementary Reasons, Majority of Full Bench had granted an adjournment to seek legal advice - Upheld - Mr MA Tranfield -v- Ray Douglas Parker - FBA 46 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 03/04/01 - Oil and Gas Extraction 990

Complaint re Breach of Workplace Agreement Act 1993 - Complainant argued that he was unfairly, harshly or oppressively dismissed and sought reinstatement or compensation and recovery of costs - Defendant argued that complainant's performance and conduct constituted serious breaches of his contract of employment, which justified his dismissal - Industrial Magistrate found on evidence that complainant acted in an honest, open and frank way with respect to the formation of his prospective counselling business - IM further found that defendant failed to call witnesses to substantiate claims to discharge its evidentiary burden concerning the issue, that there was no foundation for the termination of complainant's employment, and that on balance, complainant was unfairly dismissed - IM found that as reinstatement was not a realistic option, complainant was entitled to recover lost earnings - Proven - Mr PJ Moss -v- Serenity Lodge Inc - CP 216 of 1999 - Industrial Magistrate - Cicchini IM - 07/12/00 - Community Services.. 1006

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INTERPRETATION-WORDS & PHRASES—*continued*

Application re unfair dismissal and contractual entitlements divided re monies paid equal to shares and options - Applicant argued that notice was given that he wished to exercise the liberty granted in relation to the options and shares and sought an order for the benefit denied be paid in an amount of money equal to the value of the shares and options - Further, the issue to be determined was of jurisdiction and whether the Commission had the power to award a sum of money where specific performance of a benefit under a contract cannot be ordered - Respondent argued that the Commission did not have the jurisdiction to hear and determine the matter because it was not a claim for a benefit he was entitled to under his contract of service, that is, he claimed instead a sum of money equal to the value of shares and options - Further, Respondent argued that the jurisdiction was not available because a claim for damages for a breach of contract was not an industrial matter as defined in that it did not relate to rights and duties of employers' employees, instead it related to failure to allow benefits under contract of services, that is damages for breach of contract and that it did not sufficiently relate to rights and duties of an employer and employee - Commission referred to various authorities and found that the Commission had the jurisdiction and power to deal with this matter and that this was an industrial matter capable of being referred under section 29 - Order Issued - Ms E Gribble -v- Eileen and Doug Krepp - APPL 74 of 1999 - GREGOR C - 12/03/01 – Technology.......... 1050

Conference re withdrawal from an unregistered agreement - Applicant sought an Order that Respondent continue to be bound by and observe the terms and conditions of an unregistered industrial agreement, and an Interim Order to continue the effect of the Agreement pending the hearing and determination of the substantive claim - Preliminary issue re jurisdiction - Counsel for the Respondent argued that Commission lacked jurisdiction to entertain the matter, given that a ground of the application amounted to an application to enforce the BHP Iron Ore Enterprise Bargaining Agreement 1997 (EBA III) - Further, the application also sought the imposition of an agreement on non-consenting parties, therefore, the application was one involving the exercise of judicial power and beyond the jurisdiction of the Commission - Commission reviewed authorities and found on a number of reasons, that the present claim for an order was one that was properly characterised as one seeking an order of the Commission, to create future rights and obligations, albeit reflecting the terms and conditions of the Agreement and this would entail the exercise of arbitral and not judicial power - Further, because the Commission may be called upon to interpret the terms of EBA III, as part of the proceedings, does not of itself, fundamentally change the character of the matter, therefore the present claim was within the Commission's jurisdiction - Commission further reviewed authorities and found that the issue regarding the jurisdiction to impose a s.41 agreement on a non consenting party, does not arise in this matter - Order Issued - CONSTRUCTION, MINING, ENERGY & Others -v- BHP Iron Ore Pty Ltd – APPL C 60 of 2001 - KENNER C - 14/03/01 - Metal Ore Mining.......... 1056

Application re unfair dismissal - Applicant argued that termination was harsh, oppressive and unfair, that the effect was immediate without notice, that the unfairness was compounded through his inability to refute any allegations of misconduct because at the time of the dismissal none had been made and that he was not given any information concerning those allegations in the letter of termination - Respondent argued that the dismissal followed months of mismanagement and misconduct by Applicant - Commission reviewed authorities and found on evidence that on balance, Applicant was not given a "fair go" as an employee and his dismissal was, therefore harsh and unfair - Further, that reinstatement was impracticable and awarded compensation to the Applicant - In Supplementary Reasons For Decision, Respondent argued a motion to reopen and to make further submissions concerning the quantum of compensation - Respondent argued there was no loss that the Applicant could point to because in the period in which he was unemployed he did not attempt to sufficiently mitigate his loss - Commission applied the law relating to finding of loss and injury and the assessment of compensation and found that in all of the circumstances it was appropriate that an award be made to Applicant for loss and injury - Order Issued - Mr I Lawless -v- Ghirardi Restaurant Pty Ltd (ACN 081 550 469) - APPL 1822 of 1999 - GREGOR C - 19/01/01 - Accommodatn, Cafes&Restaurants.......... 1219

Applications re unfair dismissal - Applicants argued that dismissal was harsh, oppressive and unfair - Respondent argued that at the time the decision was made to terminate Applicants, the financial state of the company was poor and the company had little cash flow as it was building stock and not making sales - Commission reviewed authorities, clauses 32 and 32A of the Award and found that the termination of Applicant (Myles) was unfair because Respondent failed to pay him a severance payment - Further, the manner of dismissal was harsh because no discussions took place as required by clauses 32 and 32A of the Award and s.32 of the Minimum Conditions of Employment Act, and ordered that Applicant (Myles) be paid a global award by Respondent as compensation and that his contractual benefits claim dismissed - In the case of Applicant (Wigham), Commission was satisfied that he had made out a case that the selection process for dismissal was unfair - Further, Commission found that Applicant (Wigham) was unfairly dismissed, that reinstatement was impracticable and ordered that he be paid by the Respondent eight weeks' remuneration and eight weeks' ordinary pay, together with $10.00 tool allowance and $25.00 service allowance for each week - Orders Issued - Mr TW Wigham -v- SFM Engineering Pty Ltd - APPL 1375,1384 of 2000 - SMITH, C - 06/04/01 - General Construction.......... 1241

[2]Appeal against decision of Commission (81 WAIG 721) re use of contractors - Appellant argued that the Commission erred by not determining the question of available reasonable hours and not placing sufficient weight on the evidence of a reversed overtime ban by the Respondent - Respondent argued that the contracting out was consistent with the provisions of the award - Full Bench found that the central issue was whether on the evidence it was open to find that no employee would suffer any "detrimental effect" within the meaning of the award in relation to his/her available hours of work by using contractors and that it was open to the Commission to so find - There was no question of a reduction in overtime, instead the Respondent proposed that the status quo be maintained - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - FBA 2 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 16/05/01 - Metal Ore Mining.......... 1358

Application for an order revoking an order reinstating an unfairly dismissed employee - Applicant Employer argued that S23A(3) of the IR Act created a right for it to refuse to obey an order for reinstatement and the Commission must therefore issue an order for compensation- Respondents argued that it was not open for the Applicant to bring the application, the Respondent Employee's attitude had been the subject of the original hearing, reinstatement was not a popularity issue and the Commission had discretion - Commission reviewed authorities and found that if the process of revocation was automatic it would render the power to reinstate nugatory and that power was discretionary - Commission found it was not open in the application to consider further evidence on a point that was already decided - Commission had considered the employee's attitude and behaviour and reinstatement had more potential benefit to him - Dismissed - Iluka Resources Limited & Other -v- Mr MA Rulyancich & Others - APPL 432 of 2001 - BEECH C - 01/06/01 - Other Mining.......... 1397

INTERVENTION

[2]Application for Orders pursuant to Section 72A of the Industrial Relations Act - Full Bench issued a numbers of orders and directions to expedite the determination of the Application on 5 September 2000 - Full Bench also adjourned hearing at the request of both parties - Full Bench granted and ordered procedural applications - Applicant Union sought orders that the Merchant Service Guild (MSG) has the right to represent under the Act, to the exclusion of the Civil Service Association (CSA) the industrial interests of all Fisheries Officers employed in the Fisheries Department of Western Australia by the Executive Director Fisheries who are eligible for membership of the MSG and that the CSA does not have the right under the Act to represent the industrial interests of any Fisheries Officers - The grounds for the application are that the Applicant Union is best placed to represent the industrial interest of the Fisheries Officers because in the context of the enterprise the Applicant is the recognised principle union in relation to maritime employees and can commit greater resources and overall industry experience to protect the interests of those employees engaged in the maritime industry and would be better placed to promote and facilitate successful enterprise bargaining and that the orders sought are consistent with the objects of the Act - CSA argued that it had constitutional coverage of the Fisheries Officers and is a large existing organisation which does and is able to provide a wide variety of services and which has substantially provided resources to enable that to occur - Full Bench found that the CSA at all material times, had and has the capacity to properly and efficiently represent Fisheries Officers and has done so - Further, Full Bench found that the Fisheries Officers are ineligible to join MSG under its eligibility rule and that the MSG has no constitutional coverage of Fisheries officers - Full Bench concluded that the Applicant Union did not establish a substantial case - Dismissed - Merchant Service Guild of Australia, Western Australian Branch, Union of Workers -v- (Not applicable) - FBM 3 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 15/02/01 - Government Administration.... 380

CUMULATIVE DIGEST—*continued*

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INTERVENTION—*continued*

[1]Appeal against Decision of Commission In Court Session (80WAIG4508) re terms and conditions of employment, redundancy payments and superannuation schemes - Appellants argued that CICS erred in law by purporting to give retrospective effect to order 1, that the base salary and roster allowance of each letter of offer employees be increased and erred in law in finding that following the merger, the Appellant's Mid-West operations were quickly restored to profitability or giving consideration to other factors when there was no evidence to support this finding - Further, Appellants argued that the Commission erred in law in making orders in relation to Iluka Resources Limited where there was no industrial matter between it and the Respondents and erred in law by acting on the irrelevant consideration that RGC Mineral Sands Ltd had previously offered a limited choice of superannuation funds to its employees and having regard to a Superannuation scheme which applied to Workplace Agreement employees and granting liberty to apply to the award employees of Iluka Resources Limited and Iluka Mid-West Limited when the industrial matter between Appellants and Respondents did not relate to the award employees - Industrial Appeal Court found that the CICS had the power to give retrospective effect to its order awarding an increase in salaries and allowances, that there was revealed an evidentiary basis on which the CICS could properly make the challenged finding that profitability was quickly restored for the Mid-West operations following the Merger - Further, IAC found that it was a matter for the CICS to find whether an order to enable letter of offer employees to become members of the Iluka Resources Limited fund was appropriate as a matter of equity, good conscience and the substantial merits of the case - IAC found that no grounds had been made out and failed to be persuaded thus Appeal dismissed - Dismissed - Iluka Midwest Limited & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 5 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Parker J. - 08/02/01 - Other Mining........ 763

[4]Application for stay of operation of a direction of the Commission in Application Nos. 1693, 1710, 1711, 1712, and 1713 of 2000 (81WAIG936, 1068) pending Appeal to Full Bench - Appellant Employer argued that Commission in the exercise of its discretion failed to give proper weight and consideration to the following matters that, it was not in the public interest to order the discovery of confidential communications between employers and their industrial relations advisers and that such documents were not and could not be relevant to the matters at issue in the substantive case - Respondents argued that to stay the operation of the order might have the effect of delaying the final hearing and determination of the matter, a delay which could not be compensated for in money, even if Respondents were successful - President found that the principles applicable for a stay should be applied and that the decision appealed against was a discretionary decision and that to succeed on appeal Appellant would have to establish that the exercise of discretion was miscarried in accordance with the principles - Further, President found that an appellate court should exercise caution in undertaking to review a decision on a matter of practice or procedure and that the stay of operation had not been established and therefore, there should not be interference by the President with an interlocutory order - Dismissed - Cable Sands (W.A.) Pty Ltd -v- Mr R Sullivan & Others - PRES 5 of 2001 - President - SHARKEY P - 19/03/01 - Mineral........ 998

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services........ 1162

Conference re unfair dismissal - Applicant Union argued that dismissal of member was unlawful because it was contrary to the Order issued by Commission in CR350 of 2000 (81WAIG699) re exploring options and providing appropriate training to member - Further, Applicant Union argued that an Order be issued that member be reinstated to position held by him immediately prior to his dismissal and that the parties agree to the duties to be performed by member - Respondent argued and questioned the jurisdiction of the Commission to issue such an order and says that member was dismissed for continued and wilful refusal to obey a lawful and reasonable instruction - Commission found that it had the jurisdiction to issue such an order and issued an order that Respondent not dismiss member from his employment which also allowed the parties liberty to apply to vary, cancel or revoke this Order - Interim Order issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - C 89 of 2001 - BEECH C - 30/04/01 – Hospitality........ 1248

JURISDICTION

Application re unfair dismissal - Applicant argued dismissal was harsh, oppressive and unfair because she withdrew her resignation after the decision of the Respondent not to accept it and presented herself for work in accordance with that decision after the two months unpaid leave expired but was requested to leave the premises - Respondent argued Commission did not have jurisdiction to deal with the matter as the Applicant resigned from the employment - Commission found that although the Applicant sought to withdraw her resignation, her purported withdrawal was ineffective as the Respondent's Office Manager accepted her resignation and although it was tentatively argued on behalf of the Applicant that a new contract of employment was entered into when the Applicant was asked to report for work, that argument was not supported by the evidence - An Order was issued dismissing the application - Dismissed - Ms VE Little -v- Women's Legal Services Inc (WA) - APPL 550 of 2000 - SMITH, C - 12/12/00 – Legal........ 296

[2]Appeal against Decision of Commission (80WAIG4829) re Dismissed application re Unfair Dismissal - Appellant argued that the learned Commissioner erred in law in dismissing the Appellant's claim pursuant to section 27 and erred in law in failing to exercise jurisdiction pursuant to section 26 - Further, the learned Commissioner erred in law and in fact in failing to give sufficient weight to the evidence of the Appellant with respect to the conciliation conference and application of the equitable doctrine of promissory estoppel - Respondent argued that an agreement was reached between the parties at the conciliation conference in the AIRC at the satisfaction of the Appellant and the Respondent acted on good faith - Full Bench found that it was open for the Commissioner to find as she did and that there was no error in the exercise of her discretion and the Appeal was not made out - Dismissed - Mr B Campbell -v- Kimberley Building Supplies - FBA 48 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 06/02/01 - Building Structure Services........ 353

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JURISDICTION—*continued*

[2]Appeal against decision of the Commission (80WAIG3334) re wrongful dismissal of seven officers - Appellants argued the Commissioner erred in law and in excess of jurisdiction, that the application before him was not an industrial matter and that he had considered Affidavit and other material which was not evidence in the proceedings - Respondent union argued that the Commissioner of Police breached his agreement with those dismissed officers by not deciding this issue pursuant to s.23 of the Police Act 1892 and Regulations, and acted harshly or oppressively in acting pursuant to s.8 of that Act - Full Bench found that since the Commissioner of Police is not the Crown, discharging an officer cannot be seen as an act done at the will or pleasure of the Crown and accordingly it was wrong to do so without affording natural justice or procedural fairness, and further found that the Commissioner of Police was not the employer of Police Officers, the Minister was, that Police Officers were indubitably officers of the Crown and not employees, that there was no jurisdiction in the Commission to hear and determine the application, and having considered all of the material and submissions upheld the Appeal and quashed the decision at first instance, it being a nullity and having been made without jurisdiction - Ordered Accordingly - The Honourable Minister of Police & Other -v- Western Australian Police Union of Workers - FBA 38 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 14/11/00 – Police 356

[2]Application for Orders pursuant to Section 72A of the Industrial Relations Act - Full Bench issued a numbers of orders and directions to expedite the determination of the Application on 5 September 2000 - Full Bench also adjourned hearing at the request of both parties - Full Bench granted and ordered procedural applications - Applicant Union sought orders that the Merchant Service Guild (MSG) has the right to represent under the Act, to the exclusion of the Civil Service Association (CSA) the industrial interests of all Fisheries Officers employed in the Fisheries Department of Western Australia by the Executive Director Fisheries who are eligible for membership of the MSG and that the CSA does not have the right under the Act to represent the industrial interests of any Fisheries Officers - The grounds for the application are that the Applicant Union is best placed to represent the industrial interest of the Fisheries Officers because in the context of the enterprise the Applicant is the recognised principle union in relation to maritime employees and can commit greater resources and overall industry experience to protect the interests of those employees engaged in the maritime industry and would be better placed to promote and facilitate successful enterprise bargaining and that the orders sought are consistent with the objects of the Act - CSA argued that it had constitutional coverage of the Fisheries Officers and is a large existing organisation which does and is able to provide a wide variety of services and which has substantially provided resources to enable that to occur - Full Bench found that the CSA at all material times, had and has the capacity to properly and efficiently represent Fisheries Officers and has done so - Further, Full Bench found that the Fisheries Officers are ineligible to join MSG under its eligibility rule and that the MSG has no constitutional coverage of Fisheries officers - Full Bench concluded that the Applicant Union did not establish a substantial case - Dismissed - Merchant Service Guild of Australia, Western Australian Branch, Union of Workers -v- (Not applicable) - FBM 3 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 15/02/01 - Government Administration.... 380

Application re unfair dismissal - Preliminary point re jurisdiction was raised by the Respondent and it was agreed by both parties to allow the Commission to decide the point on the basis of written submissions - Applicant maintained that the date on which he was advised that his employment was to be terminated in two week's time was not the date on which he was terminated - Respondent maintained that was the date on which the Applicant was terminated therefore the application was lodged outside the 28 day time limitation - Commission found on the basis of written submissions that the Applicant's employment was in fact terminated on the date he was advised and that the application was lodged out of time - Accordingly an Order was issued striking out the application for want of jurisdiction - Dismissed - Mr BE Campin -v- Auto Auctions (WA) Pty Ltd (ACN 082 824 468) t/as WA Auto Auctions - APPL 1591 of 2000 - BEECH C - 29/01/01.......... 674

Applications re contractual entitlements - Applicants argued that they were entitled to payment of a retainer and two weeks' pay in lieu of notice as these entitlements arose from their contracts of employment - There was no appearance or argument from Respondent - Commission determined the nature of the relationships between the parties and found that the relationships were those of employees and employers respectively - Further, Commission found that the Applicants were each employees of the Respondents, that the Applicants were entitled to the payments of a retainer and payments in lieu of notice - Ordered accordingly - Mr AP Gilbride -v- Fast Net Publishers Group - APPL 94,177,231,232 of 2000 - SCOTT C. - 21/07/00 - Printg, Publishg & Rcdd Media 686

[1]Appeal against Decision of Commission In Court Session (80WAIG4508) re terms and conditions of employment, redundancy payments and superannuation schemes - Appellants argued that CICS erred in law by purporting to give retrospective effect to order 1, that the base salary and roster allowance of each letter of offer employees be increased and erred in law in finding that following the merger, the Appellant's Mid-West operations were quickly restored to profitability or giving consideration to other factors when there was no evidence to support this finding - Further, Appellants argued that the Commission erred in law in making orders in relation to Iluka Resources Limited where there was no industrial matter between it and the Respondents and erred in law by acting on the irrelevant consideration that RGC Mineral Sands Ltd had previously offered a limited choice of superannuation funds to its employees and having regard to a Superannuation scheme which applied to Workplace Agreement employees and granting liberty to apply to the award employees of Iluka Resources Limited and Iluka Mid-West Limited when the industrial matter between Appellants and Respondents did not relate to the award employees - Industrial Appeal Court found that the CICS had the power to give retrospective effect to its order awarding an increase in salaries and allowances, that there was revealed an evidentiary basis on which the CICS could properly make the challenged finding that profitability was quickly restored for the Mid-West operations following the Merger - Further, IAC found that it was a matter for the CICS to find whether an order to enable letter of offer employees to become members of the Iluka Resources Limited fund was appropriate as a matter of equity, good conscience and the substantial merits of the case - IAC found that no grounds had been made out and failed to be persuaded thus Appeal dismissed - Dismissed - Iluka Midwest Limited & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 5 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Parker J. - 08/02/01 - Other Mining.......... 763

[4]Application for stay of operation of Order made by the Chairperson of the "Coal Industry Tribunal" in Application No. 2/2001 (81WAIG731) pending appeal to Full Bench - Applicant argued on the following: "there was a serious question to be tried in respect of the grounds upon which the Applicant seeks a review of the Order, the circumstances justify the making of an order staying the operation of the Order as the Applicant has, and will, continue to suffer loss and damage should the Order not be stayed and the Respondent and its members will suffer no prejudice if the Order is so stayed" - Further, Applicant sought relief that the decision of the Tribunal should be stayed, insofar as it purports to restrain the Applicant from continuing the changes outlined in the letter dated 31 January 2001 referred to in the Order - Respondent opposed the application - President applied Principles pursuant to the "Coal Act" in applications for a stay, and reviewed relevant sections of the "Coal Act", the EBA and evidence and found on a number of reasons that there was no serious issue to be tried as there was an "industrial dispute" within the meaning of s.3 and s.10 of the Coal Act, and that jurisdiction existed and exists in the Tribunal to make such Order- Further, President found that it would not deprive a "successful party" of the fruits of an Order such as this and that Applicant had not established that an Order should be made in its favour because it had not established that the equity, good conscience and the substantial merits of the case, or that the balance of convenience lay with it - Dismissed - Griffin Coal Mining Company Pty Limited -v- The Coal Miners' Industrial Union of Workers of Western Australia, Collie - PRES 3 of 2001 - President - SHARKEY P - 01/03/01 - Coal Mining 832

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JURISDICTION—*continued*

Application re unfair dismissal - Preliminary issue re jurisdiction - Respondent argued that Commission lacked jurisdiction to deal with the applications as both employees were casual and pursuant to the Federal Workplace Relations Act 1996 and Regulations, were excluded from the operation of unfair dismissal procedures, there being a direct inconsistency between the Federal and State Acts - Respondent argued that consumption of alcohol on duty and a series of events which amounted to behaviour and an attitude on the part of applicant (Mr Rushton) was the reason for termination - Applicant (Mr Rushton) defended the allegations and for most part agreed that they occurred but he viewed them as trivial - Applicant (Mr Cairns) argued that he felt intimidated and threatened by another officer following an incident, that after respondent investigated the incident, he was told that he would stay on and be offered work but that never happened - Commission reviewed authorities, relevant sections of the Federal Act, the Australian Constitution and found that there was no inconsistency between the Federal Workplace Relations Act 1996 and the WA I.R. Act 1979 and hence the Commission had jurisdiction to hear the matter - Commission determined (in a further Reasons for Decision) that the nature of the applicants' employment relationship in all aspect was casual - Further, Commission found on evidence that the respondent was not prepared to continue to roster Mr Cairns away from his intimidator and unless Mr Cairns had that guarantee then he was not prepared to work for the respondent, therefore, there had been no dismissal of Mr Cairns and hence that being the fact there was no jurisdiction for the Commission and accordingly dismissed his application for want of jurisdiction - Commission further found that Mr Rushton did consume alcohol and fall asleep whilst on duty, therefore, having regard to the Undercliffe case (65WAIG385) the decision to dismiss him on notice was not unfair, harsh or oppressive in all circumstances - Applications Dismissed - Mr A Cairns -v- The West Australian Turf Club - APPL 795,809,827 of 2000 - WOOD,C - 15/09/00 – Sport 867

Application re unfair dismissal - Applicant argued that his summary dismissal for alleged misconduct was unfair because he was not given an opportunity to discuss that or given a proper induction or training on the job and was not given counselling or support from his superiors - Further, Applicant sought reinstatement originally but argued at hearing that this would be impracticable and sought six months compensation as alternative - Respondent argued that Applicant had not conducted himself in a professional manner and dismissal was the only real option considered due to the seriousness of the Applicant's actions - Commission found that the Applicant knew full well of the seriousness with which the employer might view his financial predicament, that the employer had every right to lose trust in him, and that he clearly knew that his job was in jeopardy, therefore the dismissal was not unfair, harsh or oppressive - Dismissed - Mr BJ Gardner -v- Police & Nurses Credit Society Ltd - APPL 1937 of 1999 - WOOD,C - 14/03/01 – Finance 880

Application re unfair dismissal - Preliminary point re jurisdiction - Applicant argued he was dismissed unfairly, harshly and oppressively after failing an alcohol test on his way to the site - Respondent argued that, in accordance with Clause 15 of the John Holland Construction & Engineering Pty Ltd Rail Infrastructure Maintenance Agreement 1996-1999 [MFIA1] and Clause 5 of the Rail Infrastructure Maintenance Award 1996 [MFIA2], Commission did not have jurisdiction to deal with the matter - Commission reviewed relevant sections of the award and found that the relevant part of the award for the purposes of the matter at hand, was Clause 10 of the Award and not Clause 5 - Further, Commission reviewed authorities and found that a person subject to the award and agreement in question may still make an application pursuant to s29(1)(b)(i) of the I.R. Act, 1979 as there was no provision in the award or agreement, for that purpose, excluding them from the State Commission or directing the parties in cases of termination to the Australian Industrial Relations Commission, therefore Commission had jurisdiction to deal with the application - Reasons for Decision Issued - Mr PA Renwick -v- John Holland Construction & Engineering Pty Ltd ACN 004 282 268 - APPL 571 of 2000 - WOOD,C - 09/02/01 - General Construction 908

[2]Appeal against Decision of Commission (81WAIG327) re illegal disciplinary action - Application to extend time to appeal and to extend time to make application to extend time - Appellant Union argued that there were delays that contributed to the appeal being lodged out of time and that using the various principles referred to the appeal and application should be granted - Respondent opposed the Application to extend time within which to appeal and for leave to extend time within which to make application to extend time - Full Bench found that the object of a rule to extend time was to ensure that legislative provisions or rules which fix times for doing acts do not become incidents of injustice and that the discretion to extend time was given for the sole purposes of enabling the Commission to do justice between the parties - Full Bench concluded that there would be detriment and therefore injustice to Respondent in allowing an extension of time within which to appeal from a decision which Appellant Union had, in anticipation of such a decision being given accepted therefore, appeal was incompetent and dismissed - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 52 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/03/01 - Iron Ore........ 981

[2]Appeal against decision of Commission (80 WAIG 4482) re unfair dismissal and contractual entitlements claims - Appellant argued that the Commission erred in holding that it did not have jurisdiction to hear and determine the application - Appellant sought that the Full Bench overrule previous decisions if not distinguishable on the facts - Respondent argued that if the appeal was upheld, the matter should be remitted - Full Bench had already observed that it should not overrule a previous decision unless it had a conviction that that decision was wrong - Full Bench found that the actual work was performed geographically outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction - Full Bench found the Commission had correctly made findings on the claims and the Appellant should not be disadvantaged by re-opening matters – In Supplementary Reasons, Majority of Full Bench had granted an adjournment to seek legal advice - Upheld - Mr MA Tranfield -v- Ray Douglas Parker - FBA 46 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 03/04/01 - Oil and Gas Extraction 990

Application re unfair dismissal - Applicant argued that he was dismissed without warning and considered that reinstatement would be impracticable and sought compensation for being harshly, oppressively and unfairly dismissed - Respondent argued that applicant was never employed as an employee, but was engaged as a contractor, was not required to produce company details or a taxation file number and did not receive annual or sick leave - Commission concluded after considering carefully all the submissions of the parties and the evidence, that it was not convinced that applicant was an employee or, on balance, had proven his case - Further, Commission found that applicant was engaged as a contractor, hence Commission did not have jurisdiction to hear the application - Dismissed - Mr RA Kellar -v- BDM Marketing Pty Ltd ACN 067 632 688 - APPL 481 of 2000 - WOOD,C - 16/03/01 - Business Services........ 1036

Application re unfair dismissal and contractual entitlements divided re monies paid equal to shares and options - Applicant argued that notice was given that he wished to exercise the liberty granted in relation to the options and shares and sought an order for the benefit denied be paid in an amount of money equal to the value of the shares and options - Further, the issue to be determined was of jurisdiction and whether the Commission had the power to award a sum of money where specific performance of a benefit under a contract cannot be ordered - Respondent argued that the Commission did not have the jurisdiction to hear and determine the matter because it was not a claim for a benefit he was entitled to under his contract of service, that is, he claimed instead a sum of money equal to the value of shares and options - Further, Respondent argued that the jurisdiction was not available because a claim for damages for a breach of contract was not an industrial matter as defined in that it did not relate to rights and duties of employers' employees, instead it related to failure to allow benefits under contract of services, that is damages for breach of contract and that it did not sufficiently relate to rights and duties of an employer and employee - Commission referred to various authorities and found that the Commission had the jurisdiction and power to deal with this matter and that this was an industrial matter capable of being referred under section 29 - Order Issued - Ms E Gribble -v- Eileen and Doug Krepp - APPL 74 of 1999 - GREGOR C - 12/03/01 – Technology........ 1050

CUMULATIVE DIGEST—*continued*

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JURISDICTION—*continued*

Conference re withdrawal from an unregistered agreement - Applicant sought an Order that Respondent continue to be bound by and observe the terms and conditions of an unregistered industrial agreement, and an Interim Order to continue the effect of the Agreement pending the hearing and determination of the substantive claim - Preliminary issue re jurisdiction - Counsel for the Respondent argued that Commission lacked jurisdiction to entertain the matter, given that a ground of the application amounted to an application to enforce the BHP Iron Ore Enterprise Bargaining Agreement 1997 (EBA III) - Further, the application also sought the imposition of an agreement on non-consenting parties, therefore, the application was one involving the exercise of judicial power and beyond the jurisdiction of the Commission - Commission reviewed authorities and found on a number of reasons, that the present claim for an order was one that was properly characterised as one seeking an order of the Commission, to create future rights and obligations, albeit reflecting the terms and conditions of the Agreement and this would entail the exercise of arbitral and not judicial power - Further, because the Commission may be called upon to interpret the terms of EBA III, as part of the proceedings, does not of itself, fundamentally change the character of the matter, therefore the present claim was within the Commission's jurisdiction - Commission further reviewed authorities and found that the issue regarding the jurisdiction to impose a s.41 agreement on a non consenting party, does not arise in this matter - Order Issued - CONSTRUCTION, MINING, ENERGY & Others -v- BHP Iron Ore Pty Ltd – APPL C 60 of 2001 - KENNER C - 14/03/01 - Metal Ore Mining 1056

[2]Appeal against Decision of Commission (81 WAIG 683) re denied contractual entitlements - Appellant argued it was not liable to pay the amount claimed because the respondent was an employee of the appellant when she applied for the position and wished to remain so and thus was lent to another employer to fill a position - Respondent argued that the respondent and another person were both parties to the contract of employment when the respondent was seconded - Full Bench found that despite not objecting to being named as the respondent at first instance it was clear that a third party was the employer for the purposes of s29b(ii) of the IRACT 1979 - Full Bench found that whilst one contract of employment with the appellant was suspended, another was in existence between another employer and the respondent and the Commission had no jurisdiction to hear and determine the claim - Dismissed - Minister for Education -v- Ms AE Galipo - FBA 5 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 11/04/01 – Education 1145

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services 1162

Applications re unfair dismissal - Applicants argued they have been harshly, oppressively and unfairly dismissed - Respondent argued that Commission lacked jurisdiction to deal with either application as Applicants were engaged as sub-contractors and not employees during their period of engagement - Commission reviewed authorities and evidence, and having regard to all the relevant indicia, was satisfied that at all material times the Applicants were employees working under a contract of service - Declaration Issued - Mr R Howe -v- Intercorp Services Pty Ltd trading as Westvision Painting Company - APPL 810,811 of 2000 - SMITH, C - 27/04/01 - Construction Trade Services 1212

Applications re contractual entitlements - Applicant argued that Respondent failed to pay him contractual entitlements due under the terms of an employment arrangement - Respondent argued there was no employee/employer relationship, therefore Commission lacked jurisdiction to deal with either applications - Commission concluded after considering the facts in the context of the law to be applied, that the necessary ingredients to create an employee/employer relationship were missing between the Applicant and the Respondent, that Applicant only had access to this Commission if he was an employee and as he was not, there was no alternative but to dismiss both applications for want of jurisdiction - Dismissed for want of jurisdiction - Mr WT Lunt -v- WRS Pacific Pty Ltd ACN 009 248 999 - APPL 1827,1912 of 2000 - GREGOR C - 04/05/01.... 1223

Conference re unfair dismissal - Applicant Union argued that dismissal of member was unlawful because it was contrary to the Order issued by Commission in CR350 of 2000 (81WAIG699) re exploring options and providing appropriate training to member - Further, Applicant Union argued that an Order be issued that member be reinstated to position held by him immediately prior to his dismissal and that the parties agree to the duties to be performed by member - Respondent argued and questioned the jurisdiction of the Commission to issue such an order and says that member was dismissed for continued and wilful refusal to obey a lawful and reasonable instruction - Commission found that it had the jurisdiction to issue such an order and issued an order that Respondent not dismiss member from his employment which also allowed the parties liberty to apply to vary, cancel or revoke this Order - Interim Order issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - C 89 of 2001 - BEECH C - 30/04/01 – Hospitality 1248

Conference re unfair dismissal - Applicant Union argued that dismissal of member was unlawful because it was contrary to the Order issued by Commission in CR350 of 2000 (81WAIG699) re exploring options and providing appropriate training to member - Further, Applicant Union argued that an Order be issued that member be reinstated to position held by him immediately prior to his dismissal and that the parties agree to the duties to be performed by member - Respondent argued and questioned the jurisdiction of the Commission to issue such an order and says that member was dismissed for continued and wilful refusal to obey a lawful and reasonable instruction - Commission found that it had the jurisdiction to issue such an order and issued an order that Respondent not dismiss member from his employment which also allowed the parties liberty to apply to vary, cancel or revoke this Order - Interim Order issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - C 89 of 2001 - BEECH C - 30/04/01 – Hospitality 1248

[1]Appeal against decision of Full Bench (79 WAIG 2313) re dismissed appeal to Full Bench re finding of unfair dismissal, upon failure of Appellant to appear - Appellant argued the Appellant failed to receive notice to attend the hearing of Full Bench due to change of address and medical factors and that dismissing the appeal without giving him the right to be heard denied him natural justice - IAC found that in the circumstances the Full Bench was entirely justified in making the order and did not commit any error of law or exceed its jurisdiction - IAC found no question of law - Dismissed - Kamel Lebeidi - Sugar Gum Restaurant -v- Ms RA Napoli - IAC 9 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 01/02/01 - Accommodatn, Cafes&Restaurants 1357

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JURISDICTION—*continued*

Complaint re Breach of Award - Complainant argued that Defendant had breached the Building Trades (Construction) Award 1987 No. R17 of 1978 in that Defendant failed to pay adult rates of pay as a full time employee and not as a casual employee, failed to provide annual leave and loading and public holidays and at the appropriate rates and other entitlements on termination - Defendant argued that there was no case to answer as there was not in existence an employment relationship between Complainant and Defendant and that there was no entitlement to the award claims - Industrial Magistrate found that Complainant was an employee and that the award would apply - IM further found that Complainant failed to show specific benefits that he was entitled to under the award in that there was no evidence to show which days were actually worked by Complainant and that without such evidence the Court could not determine what the actual entitlements were and that he had not established the amounts that were owing - No case to answer - Mr A La Guidara -v- Mr A Tripolitano - CP 161 of 2000;M 51 of 2001 - Industrial Magistrate - Cicchini IM - 17/05/01 – Building........ 1389

Application re unfair dismissal and preliminary hearing on jurisdiction - Applicant argued that he thought he was given time on 16 January 2001 to decide whether he wanted to end his employment and that 18 January 2001 was date of termination - Respondent refuted and argued that Applicant was given the option of working out the notice or leaving straight away, where Applicant agreed to take payment in lieu and leave - Commission found that Applicant was paid in lieu of notice and the termination date was 16 January 2001 and Commission was without jurisdiction - Dismissed for want of jurisdiction - Mr J Rakitic -v- Perth Auto Alliance (Centre Ford Northbridge) - APPL 292 of 2001 - WOOD,C - 16/05/01 - Motor Vehicle Rtlg & Services........ 1445

LONG SERVICE LEAVE

Application re unfair dismissal seeking reinstatement and contractual entitlements - Applicant argued that dismissal was unfair and that he was also entitled to long service leave - Applicant argued that the Respondent's inquiries were inadequate in relation to the investigation and finding by the Principal that Applicant was guilty of sexual misconduct in respect of a student at the College - Respondent argued that Applicant failed to provide any information that could provide a defence to the allegations of misconduct at the time of the investigation when the opportunity was given - Further, Respondent argued that all matters were considered in making the decision to terminate including the nature of the allegations, the evidence presented, the failure to respond satisfactorily to the allegations within a reasonable time frame, the impact on the family concerned, the impact on the school and its staff, and the duty of care owed to the children in the college - Commission found that Respondent had conducted itself in a proper manner and Applicant was given reasonable opportunity to provide a defence and that it had not abused its right to terminate - Further, Commission found that the employment relationship had irretrievably broken down and that the trust could not be restored - As to the long service leave, Commission found that the Commission did not have the jurisdiction to hear and determine the claim of long service leave, as this was an enforcement or recovery of wages under an award and that it should be pursued in the Industrial Magistrate's Court pursuant to section 83 of the I.R. Act - Dismissed - Mr R Newton -v- Roman Catholic Bishop of Bunbury - APPL 18 of 2000 - SMITH, C – Education........ 1226

Conference Referred re unfair dismissal seeking compensation - Applicant Union argued that member was harshly, oppressively and unfairly dismissed because the decision to terminate was excessive regarding deliberate act of member and the isolated incident was taken out of context because member was an excellent employee over many years - Further, Respondent had already decided to terminate before giving member an opportunity to reply and other alternative options could have been considered to termination - Further, compensation was being sought because Respondent no longer operated the Roadhouse - Respondent argued that member was dismissed for misconduct and that the damage caused was destructive - Commission found that that member deliberately threw waste over a customer's truck and that was because customer had parked behind the back door obstructing the drain - Further, Respondent had determined prior to confronting member that he was to dismiss member for gross misconduct and that member was summarily dismissed for deliberately throwing waste - Issue considered by Commission was whether the punishment was appropriate and whether there was proper consideration in deriving the punishment - Commission found that dismissal was harsh and excessive as member was not given a fair go and that compensation should be awarded - Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Clifton Nominees Pty Ltd - CR 310 of 2000 - WOOD,C - 17/05/01 - Accommodatn, Cafes&Restaurants 1463

MANAGERIAL PREROGATIVE

[4]Application for stay of operation of Order made by the Chairperson of the "Coal Industry Tribunal" in Application No. 2/2001 (81WAIG731) pending appeal to Full Bench - Applicant argued on the following: "there was a serious question to be tried in respect of the grounds upon which the Applicant seeks a review of the Order, the circumstances justify the making of an order staying the operation of the Order as the Applicant has, and will, continue to suffer loss and damage should the Order not be stayed and the Respondent and its members will suffer no prejudice if the Order is so stayed" - Further, Applicant sought relief that the decision of the Tribunal should be stayed, insofar as it purports to restrain the Applicant from continuing the changes outlined in the letter dated 31 January 2001 referred to in the Order - Respondent opposed the application - President applied Principles pursuant to the "Coal Act" in applications for a stay, and reviewed relevant sections of the "Coal Act", the EBA and evidence and found on a number of reasons that there was no serious issue to be tried as there was an "industrial dispute" within the meaning of s.3 and s.10 of the Coal Act, and that jurisdiction existed and exists in the Tribunal to make such Order - Further, President found that it would not deprive a "successful party" of the fruits of an Order such as this and that Applicant had not established that an Order should be made in its favour because it had not established that the equity, good conscience and the substantial merits of the case, or that the balance of convenience lay with it - Dismissed - Griffin Coal Mining Company Pty Limited -v- The Coal Miners' Industrial Union of Workers of Western Australia, Collie - PRES 3 of 2001 - President - SHARKEY P - 01/03/01 - Coal Mining........ 832

Conference referred re safety and welfare issues associated with the operation of single officer Police stations throughout Western Australia and in particular the Yalgoo Police station - Applicant union sought orders that the Respondent be ordered to appoint additional residing Police officers at Yalgoo, Gascoyne Junction and Dwellingup Police stations - Respondent argued that the deployment of members of the Police Force was the prerogative of the Commissioner of Police and objected to the issue of any order - Commission conducted inspections in the surrounding districts and at each of the above named Police stations and found from evidence and from the statistics provided, that the threat level of assault on Police officers was at least no higher in single officer Police stations than it was for Police Officers generally - Commission concluded that in the great majority of cases the situation was handled quite adequately by the command structure and to ensure that it does so there must be on-going audit of middle level commanders to ensure that police officers who are in single police stations working by themselves are adequately supervised and supported, if not, situations of unsafe work practice and welfare issues would arise quickly - Commission did not issue orders sought but noted that it remained open to the WAPU in individual circumstances to make notifications to this Commission and the matters would be dealt with on an individual basis - Dismissed - Western Australian Police Union of Workers -v- The Hon. Minister for Police - CR 15 of 2000 - GREGOR C - 02/03/01 – Police........ 921

MANNING

[4]Application for stay of operation of Order made by the Chairperson of the "Coal Industry Tribunal" in Application No. 2/2001 (81WAIG731) pending appeal to Full Bench - Applicant argued on the following: "there was a serious question to be tried in respect of the grounds upon which the Applicant seeks a review of the Order, the circumstances justify the making of an order staying the operation of the Order as the Applicant has, and will, continue to suffer loss and damage should the Order not be stayed and the Respondent and its members will suffer no prejudice if the Order is so stayed" - Further, Applicant sought relief that the decision of the Tribunal should be stayed, insofar as it purports to restrain the Applicant from continuing the changes outlined in the letter dated 31 January 2001 referred to in the Order - Respondent opposed the application - President applied Principles pursuant to the "Coal Act" in applications for a stay, and reviewed relevant sections of the "Coal Act", the EBA and evidence and found on a number of reasons that there was no serious issue to be tried as there was an "industrial dispute" within the meaning of s.3 and s.10 of the Coal Act, and that jurisdiction existed and exists in the Tribunal to make such Order- Further, President found that it would not deprive a "successful party" of the fruits of an Order such as this and that Applicant had not established that an Order should be made in its favour because it had not established that the equity, good conscience and the substantial merits of the case, or that the balance of convenience lay with it - Dismissed - Griffin Coal Mining Company Pty Limited -v- The Coal Miners' Industrial Union of Workers of Western Australia, Collie - PRES 3 of 2001 - President - SHARKEY P - 01/03/01 - Coal Mining 832

MISCONDUCT

Application re unfair dismissal - Applicant argued that he was summarily dismissed and sought reinstatement if it was practicable, or alternatively the maximum level of compensation - Respondent argued that Applicant solicited a cash job for an ant treatment at a private company in Cannington, was suspended on pay and asked to provide a reason why he should not be terminated - Commission found that having heard all the evidence, came to the conclusion that Applicant did solicit for a cash payment, that the act of solicitation amounted to conduct of stealing as a servant and warranted summary dismissal - Commission was satisfied that for the above reasons Respondent did not act unfairly, harshly or oppressively in dismissing Applicant - Dismissed - Mr SP Davies -v- Nationwide Environmental Management Pty Ltd - APPL 862 of 2000 - WOOD,C - 08/12/00 – Pesticides 281

Application re unfair dismissal - Applicant argued that he was dismissed unfairly - Respondent argued that Applicant repudiated his employment by refusing to go to Sydney for 3 -4 weeks unless he was paid more money - Commission found that the work to be done in Sydney represented a marketing development opportunity and that the wording in Applicant's Letter of Appointment was within the terms of his contract of employment to go to Sydney for 3-4 weeks for business development purposes - Commission reached the conclusion that applicant refused to obey the lawful and reasonable request of his employer, this was a repudiation of his contract of employment, that such refusal was a misconduct which justified dismissal, he had not demonstrated that he was dismissed and that his dismissal was unfair - Dismissed - Mr J Davey -v- Romteck Pty Ltd ACN 009 202 117 - APPL 1029 of 2000 - BEECH C - 18/10/00 - Electronic Equpmnt Manufacture 283

Application re unfair dismissal - Applicant argued that he was harshly, oppressively and unfairly dismissed after an accident and was not accorded a right of hearing regarding the allegations or afforded an opportunity to put his version of events but was given a pre written notice of termination - Respondent argued that the Applicant was summarily dismissed for misconduct after he drove a ride-on lawn mower and collided with the Grounds Maintenance Manager – Further, Respondent argued that there were no mitigating circumstances that it could have taken into account that would have excused the Applicant's deliberate act - Commission found on evidence that Applicant deliberately drove the ride-on mower at the Grounds Maintenance Manager and that Respondent had not unfairly exercised its right to dismiss the Applicant - Dismissed - Mr JF Jones -v- Spotless Service Australia Ltd ACN 005 309 320 - APPL 320 of 2000 - SMITH, C - 12/12/00 – Service 292

Application re unfair dismissal and denied contractual entitlements - Applicants argued that they were dismissed following an abusive encounter at the restaurant with one of the Respondent's directors - Respondent argued that both Applicants resigned in that encounter, or if they were dismissed, dismissal was justifiable because they had been drinking in the restaurant contrary to specific instructions - Commission found that both Applicants were dismissed for misconduct, that though their dismissals were warranted, the manner in which they were both dismissed was quite oppressive, however, their claims of unfairness for the substantive reasons they have argued are not made out - Commission was satisfied that reinstatement was impracticable and ordered $500 to be paid to each Applicant as compensation for the injury arising from the manner of their dismissals - Granted - Ms KR Riley -v- Royale Enterprises Pty Ltd - APPL 1599,1600 of 1999 - BEECH C - 18/11/00 - Accommodatn, Cafes&Restaurants 305

Conference referred re illegal disciplinary action - Applicant union challenged the veracity of the written "final warning" issued by Respondent to its member and denied that its member was guilty of intimidating behaviour towards fellow employees - Further, Applicant Union submitted that the conduct which led to the "final warning" should be seen in the context of industrial action over what was a very sensitive issue in the Respondent's workplaces - Applicant Union sought an Order directing Respondent to rescind the "final warning" - Respondent argued that an investigation carried out during the course of the industrial action concluded that the union member was guilty of "intimidating behaviours and of abusive language" and as a consequence he was issued with the "final warning" - Further, Respondent argued that the union's member was in breach of the "BHP Iron Ore Non- Harassment Policy" - Commission found the union member's conduct, at least in the car-park, constituted harassment if not also intimidation of the employees to whom he directed his abuse - Commission further found in all circumstances, particularly having regard to union member's prior good record, the nature of and the circumstances in which the transgressions complained of were committed, that it would not be unreasonable if he was warned that should he be guilty of any further instances of intimidatory and/or threatening behaviour inconsistent with the Respondent's Non-Harassment Policy, his employment was liable to be terminated - Upheld - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore - CR 20 of 2000 - FIELDING C - 29/09/00 - Iron Ore 327

[2]Appeal against Decision of Commission (80WAIG4829) re Dismissed application re Unfair Dismissal - Appellant argued that the learned Commissioner erred in law in dismissing the Appellant's claim pursuant to section 27 and erred in law in failing to exercise jurisdiction pursuant to section 26 - Further, the learned Commissioner erred in law and in fact in failing to give sufficient weight to the evidence of the Appellant with respect to the conciliation conference and application of the equitable doctrine of promissory estoppel - Respondent argued that an agreement was reached between the parties at the conciliation conference in the AIRC at the satisfaction of the Appellant and the Respondent acted on good faith - Full Bench found that it was open for the Commissioner to find as she did and that there was no error in the exercise of her discretion and the Appeal was not made out - Dismissed - Mr B Campbell -v- Kimberley Building Supplies - FBA 48 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 06/02/01 - Building Structure Services 353

Appeal by the Applicant union pursuant to s.23B of the Industrial Relations Act - Applicant union sought to reverse the decision of the Respondent to reduce the salary of its member and be reprimanded - These penalties were imposed after a finding of misconduct made pursuant to the Education Act following an inquiry under Section 7C - Applicant union argued that the penalty imposed on its member was disproportionate to the offence, in the event if it was concluded that the misconduct occurred and further argued that the reduction in salary grade imposed by the Respondent was a "blunt instrument" and taken cumulatively, and would lead to a substantial financial impost on its member - Commission heard evidence from a number of people and although the evidence to the incident was conflicting, Commission considered the evidence carefully, paid regard to the content of the inquiry report by the independent inquirer and found that the conduct of the Applicant union's member was not "mild but firm" as it described in Reg32 of the Regulations and the re-enactment of the incident was an error of judgement and was not an appropriate response by the teacher - Accordingly an Order was issued dismissing the appeal - Dismissed - The State School Teachers Union of W.A. (Incorporated) -v- Hon Min for Education - APPL 1204 of 2000 - KENNER C - 05/02/01 – School 672

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MISCONDUCT—*continued*

Application re unfair dismissal - Preliminary point re jurisdiction was raised by the Respondent and it was agreed by both parties to allow the Commission to decide the point on the basis of written submissions - Applicant maintained that the date on which he was advised that his employment was to be terminated in two week's time was not the date on which he was terminated - Respondent maintained that was the date on which the Applicant was terminated therefore the application was lodged outside the 28 day time limitation - Commission found on the basis of written submissions that the Applicant's employment was in fact terminated on the date he was advised and that the application was lodged out of time - Accordingly an Order was issued striking out the application for want of jurisdiction - Dismissed - Mr BE Campin -v- Auto Auctions (WA) Pty Ltd (ACN 082 824 468) t/as WA Auto Auctions - APPL 1591 of 2000 - BEECH C - 29/01/01 674

Application re unfair dismissal and contractual entitlements - Applicant argued that she had created an invoice without reference to her employer because it was the practice of other employers for whom she had worked that staff rates were applicable - Nevertheless, she apologised, offered to pay for the difference, promising not to do such a thing again and nothing further was said on the subject for a further eight days until her dismissal - Respondent argued that dismissal was because of the invoice, that he could no longer trust her and told her that he had been advised that because dismissal was for reasons of misconduct he had no need to pay entitlements - Commission found that summary dismissal eight days later was harsh and therefore unfair, and as reinstatement was impracticable respondent should pay applicant four days' wages and 3.07 days' annual leave entitlements - Granted in Part - Ordered Accordingly - Ms K Dutton -v- Adrian J Domney T/A Euro Automotives Repair - APPL 1032 of 2000 - BEECH C - 16/01/01 – Automotive........ 678

Application re unfair dismissal - Applicant argued dismissal was unfair because he was never warned about being dismissed for not having provided his statement and no one put to him that he was in any way obstructing the inquiry process and sought an Order for reinstatement pursuant to s.23A of the Industrial Relations Act - Respondent argued Applicant was summarily dismissed for gross misconduct as he was engaged in an altercation with another employee and the fight occurred within a potentially dangerous area - Commission heard evidence from a number of witnesses, carefully considered all of the relevant documentary evidence, had regard to all of the circumstances and found that Applicant's summary dismissal was harsh, oppressive and unfair and as there was no submission from the Respondent that the lapse of time would make reinstatement impracticable or there would not be work available to the Applicant in the classification he formerly occupied, ordered reinstatement - Granted - Mr W Hull -v- City of Mandurah - APPL 706 of 1998 - KENNER C - 09/02/01 - Construction Trade Services 693

Application re unfair dismissal - Applicant argued that he had a very good work record and was trusted by respondent, that after his 3 day absence from the office an argument had occurred for which he had apologised the next day and work had continued as normal until he was unfairly dismissed for which he believes was due to his concerns of unsafe work practices - Respondent argued that after an argument with applicant following his 3-day absence he noticed a sediment in the bottom of his teacup prepared by applicant which looked suspiciously like a pellet of rat poison and felt that he could not trust him anymore and dismissed him - Commission was satisfied that applicant was not dismissed due to his 3 days' absence but due to the discovery of residue of rat poison in the cup of hot drink he made for respondent - Further, applicant was guilty of misconduct, that he was not dismissed summarily, that dismissal was justified and not unfair - Dismissed - Mr TQ Tran -v- Shalimar Trading - APPL 1082 of 2000 - BEECH C - 23/01/01 – Textile 711

Complaint re Breach of Workplace Agreement Act - Complainant argued that the Defendant unfairly, harshly or oppressively terminated the employment contrary to the provisions implied in the workplace agreement - Complainant argued that at a meeting at which he was dismissed he asked whether he was being accused of stealing and he was told he was not - Defendant argued that the Complainant was not dismissed but, asked to explain the discrepancies that were recorded on the til and computer printouts, then the Complainant was given an opportunity to think about it and the actions taken by the Complainant was of resignation and this was supported by his lack of response - Industrial Magistrate found that on the evidence he could not conclude whether there was a dismissal or a resignation but on the evidence the Complainant had not established he was unfairly dismissed and the complaint not proved - Dismissed - Mr CJ Guerrini -v- Modillion Holding P/L - CP 272 of 2000 - Industrial Magistrate - Cicchini IM - 07/03/01 - Services to Transport........ 853

Application re unfair dismissal - Preliminary issue re jurisdiction - Respondent argued that Commission lacked jurisdiction to deal with the applications as both employees were casual and pursuant to the Federal Workplace Relations Act 1996 and Regulations, were excluded from the operation of unfair dismissal procedures, there being a direct inconsistency between the Federal and State Acts - Respondent argued that consumption of alcohol on duty and a series of events which amounted to behaviour and an attitude on the part of applicant (Mr Rushton) was the reason for termination - Applicant (Mr Rushton) defended the allegations and for most part agreed that they occurred but he viewed them as trivial - Applicant (Mr Cairns) argued that he felt intimidated and threatened by another officer following an incident, that after respondent investigated the incident, he was told that he would stay on and be offered work but that never happened - Commission reviewed authorities, relevant sections of the Federal Act, the Australian Constitution and found that there was no inconsistency between the Federal Workplace Relations Act 1996 and the WA I.R. Act 1979 and hence the Commission had jurisdiction to hear the matter - Commission determined (in a further Reasons for Decision) that the nature of the applicants' employment relationship in all aspect was casual - Further, Commission found on evidence that the respondent was not prepared to continue to roster Mr Cairns away from his intimidator and unless Mr Cairns had that guarantee then he was not prepared to work for the respondent, therefore, there had been no dismissal of Mr Cairns and hence that being the fact there was no jurisdiction for the Commission and accordingly dismissed his application for want of jurisdiction - Commission further found that Mr Rushton did consume alcohol and fall asleep whilst on duty, therefore, having regard to the Undercliffe case (65WAIG385) the decision to dismiss him on notice was not unfair, harsh or oppressive in all circumstances - Applications Dismissed - Mr A Cairns -v- The West Australian Turf Club - APPL 795,809,827 of 2000 - WOOD,C - 15/09/00 – Sport........ 867

Application re unfair dismissal and reinstatement - Applicant argued that dismissal was unfair and excessive because he rejected any suggestion that he was intentionally sleeping on the job during paid working time - Further, Applicant argued that he was resting whilst awaiting final run which was a common occurrence early in the morning and unaware of any other reported incidents - Respondents argued that Applicant was dismissed for serious misconduct for having been found asleep during paid working time instead of attending to work duties and taking into account other incidents that have taken place - Commission found it difficult to reach the conclusion that the Applicant was deliberately or intentionally sleeping on the job and that little had been done in discipline in relation to the other incidents - Further, Commission found that the Respondents were in error in regarding the other incidents and that the dismissal was harsh - Commission ordered reinstatement as the primary remedy and the parties were given an opportunity to agree on the form of the order - Granted and reinstatement ordered - Mr MA Rulyancich -v- Iluka Resources Limited & Other - APPL 1895 of 2000;CR 313 of 2000 - BEECH C - 23/02/01 - Other Mining 874

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that the dismissal was unfair because it was not warranted as it did not relate to any performance issues and that there was nothing unusual or unacceptable about his actions given the normal practice and expectations of the business - Respondent argued that the Applicant was dismissed summarily because he was on licensed premises, after hours and with company, and that he consumed and provided drinks which he did not pay for at that time and this was a breach of trust - Commission found that the Applicant was not given an opportunity to address what may or may not have happened and that he had been charged with the operation of the whole business and that the dismissal was unfair - Commission found that it was impractical for the Applicant to be reinstated and compensation and contractual entitlements were awarded - Granted - Mr M Lewis -v- West Shore Group - APPL 1395 of 2000 - WOOD,C - Accommodatn, Cafes&Restaurants 887

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MISCONDUCT—*continued*

Application re unfair dismissal - Applicant argued that her employment was terminated in a harsh and unfair manner and the dismissal was both substantively and procedurally unfair because the tasks she completed under the performance management ought to have been accepted by the Respondent and her employment should not have been terminated - There was no argument from the Respondent - Commission found that Applicant had not demonstrated any substantive unfairness in her dismissal, that Applicant was counselled in a reasonable and courteous manner, she was given ample opportunity to respond to issues raised with her, she took the opportunity provided, she was set reasonable time frames and tasks in consultation with her and she had the opportunity to have someone present with her during important meetings, therefore, there was no procedural unfairness - Dismissed - Ms C Nichols -v- Derbarl Yerrigan Health Service Inc - APPL 1536 of 1999 - SCOTT C. - 15/02/01 - Health Services 889

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that his dismissal was both unfair and unlawful in that he never received any payment after being dismissed, that he never received any reasons for his dismissal, that Respondent did not provide him with any particulars relating to his alleged performance or conduct shortcomings, that he was not advised that his employment was in jeopardy and was not provided with any reasonable opportunity to respond to the allegations made by Respondent - Respondent opposed the claims and argued that Applicant had misused the expense system, had abused his position of trust as a general manager, thus, the dismissal was justified and Applicant was not entitled to any payment and was substantially indebted to the Respondent - Commission found that Applicant work performance was not an issue relied on by Respondent and that the system for expenses claims at Respondent was based on judgement and the exercise of discretion as to whether an expense should be claimed against Respondent - Further, having considered all the evidence, Commission found that it did not consider that Applicant was guilty of conduct warranting summary dismissal and that Applicant had not engaged in a wilful course of conduct in relation to his expenses to have justified Respondent in applying the employer' s ultimate sanction and thus, the dismissal was wrongful or unlawful at common law - Commission rejected the submissions of claim and counterclaim by Respondent to set-off any entitlement awarded in favour of Applicant by the sum allegedly owed to Respondent - Upheld in Part and Order Issued - Mr I Phippard -v- BGC (Australia) Pty Ltd - APPL 1958 of 1999 - KENNER C - 24/01/01 895

Conference referred re unfair dismissal and contractual entitlements - Matter remitted back to Commission with instruction that it be dealt with "according to law" and in accordance with the reasons for decision of the Full Bench - Applicant sought compensation for loss of income and in addition, for injury sustained as a result of his dismissal - Further, Applicant Union argued that whatever formula was used to assess compensation, Applicant was entitled to the maximum allowable under the Industrial Relations Act - Respondent argued that the Applicant should be compensated for something less than the maximum allowable under the Act and drew attention to the fact that he was subject to criticism which led to other proceedings in the Commission before his termination - Commission reviewed various tests cases, relevant sections of the I.R. Act and Workplace Relations Act 1996 and found that the onus was on the employer to establish that the employee had failed to mitigate his loss and the employer had simply not discharged that onus - Further, that in the present case, the task of assessing compensation was made more difficult than usual because the evidence as to the Applicant's earnings at the time of dismissal and subsequently are at best scant, and that may be due in part to the fact that so much time had lapsed since Applicant's dismissal - Commission concluded that Respondent should pay Applicant compensation for dismissal found to have been unfair by the Full Bench - Granted. - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Barminco Pty Ltd - CR 186 of 1998 - FIELDING C - 05/11/98 - Services to Mining 916

Application re unfair dismissal - Applicant argued dismissal was unfair because there were no complaints about her work and she was never warned that her employment was in jeopardy and sought compensation - Respondent argued that it had a number of complaints about the Applicant which were not put to her, however, other complaints about her conduct were clearly put to the Applicant on a number of occasions - Respondent further argued that it did not advise the Applicant of the reasons for dismissal because of the potential for conflict that that would bring - Commission found that Respondent had good cause to terminate Applicant's employment, however, there had been a denial of procedural fairness which constituted unfairness in the dismissal as the Applicant was not given a warning or provided with a reason for termination - Further, Commission found that reinstatement was impracticable and ordered compensation - Granted - Mrs CD Joseph -v- Chelsea's For Hair and Beauty - APPL 1853 of 2000 - SCOTT C. - 27/03/01 – Hairdressing 1032

Application re unfair dismissal - Applicant argued that he was harshly, unfairly and oppressively dismissed, that his summary dismissal was contrary to the terms of the employment contract, and sought to amend his particulars of claim - Respondents argued that applicant's refusal to allow them unrestricted access to the firm's files and failure to issue accounts as instructed in respect of files of the firm, left them with no alternative but to terminate his employment - Further, Respondent objected to applicant's application to amend and provide an alternative claim on the grounds that through his conduct, applicant had abandoned any claim that he was dismissed, that they had incurred considerable costs in preparing submissions for a preliminary argument as to whether dismissal occurred and filed a notice of answer and counterproposal - Commission found that after having regard to the competing interests of the parties, it was apparent that if the application to amend was not granted that the prejudice to applicant was greater than the prejudice to respondent, and decided to make an order granting leave to amend - Granted - Mr T Mijatovic -v- Peter Terrence Hare and Evelyn Lilly Tuba t/as E&S Legal Group - APPL 1659 of 2000 - SMITH, C - 23/02/01 – Legal 1043

Application re unfair dismissal and contractual entitlements divided re monies paid equal to shares and options - Applicant argued that notice was given that he wished to exercise the liberty granted in relation to the options and shares and sought an order for the benefit denied be paid in an amount of money equal to the value of the shares and options - Further, the issue to be determined was of jurisdiction and whether the Commission had the power to award a sum of money where specific performance of a benefit under a contract cannot be ordered - Respondent argued that the Commission did not have the jurisdiction to hear and determine the matter because it was not a claim for a benefit he was entitled to under his contract of service, that is, he claimed instead a sum of money equal to the value of shares and options - Further, Respondent argued that the jurisdiction was not available because a claim for damages for a breach of contract was not an industrial matter as defined in that it did not relate to rights and duties of employers' employees, instead it related to failure to allow benefits under contract of services, that is damages for breach of contract and that it did not sufficiently relate to rights and duties of an employer and employee - Commission referred to various authorities and found that the Commission had the jurisdiction and power to deal with this matter and that this was an industrial matter capable of being referred under section 29 - Order Issued - Ms E Gribble -v- Eileen and Doug Krepp - APPL 74 of 1999 - GREGOR C - 12/03/01 – Technology 1050

Application for reinstatement or compensation on the grounds of unfair dismissal - Applicant argued she was not made aware of all the matters alleged against her and considered by the board of the respondent in making its decision to dismiss her, nor given adequate opportunity to respond and there was substantial issues in dispute in each case - Commission found on evidence that each of four incidents were brought to the Applicant's attention when they occurred, the applicant was given notice that her conduct was unacceptable and that a further breach would result in termination - Commission found that the Applicants aggressive behaviour on a day and mischievous allegation constituted unacceptable behaviour - Commission found that in light of the history of incidents and her conduct, it could not be maintained that the respondent had abused its right to terminate the Applicant's employment - Dismissed - Ms SF Bangsa-Jayah -v- Peedac Pty Ltd (ACN 079 007 613) & Other - APPL 282 of 2000 - SMITH, C - 04/05/01 - Community Services 1190

Application re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair and application was made to clear his name of the accusation of stealing - Respondent argued that reasonable steps were taken to allow Applicant to respond to the allegations of stealing and over the course of time the story changed - Further, Respondent argued that after investigating the matter he came to the view that the product (tin) was taken without authority or permission to do so - Commission found that by applying the weight of evidence principles, all the factors upon which Respondent formed the view were accepted over Applicant's story - Dismissed - Mr DJ Kearns -v- Aarjen Pty Ltd - APPL 1970 of 2000 - WOOD,C - Retail Trade........ 1218

CUMULATIVE DIGEST—*continued*

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MISCONDUCT—*continued*

Application re unfair dismissal - Applicant argued that termination was harsh, oppressive and unfair, that the effect was immediate without notice, that the unfairness was compounded through his inability to refute any allegations of misconduct because at the time of the dismissal none had been made and that he was not given any information concerning those allegations in the letter of termination - Respondent argued that the dismissal followed months of mismanagement and misconduct by Applicant - Commission reviewed authorities and found on evidence that on balance, Applicant was not given a "fair go" as an employee and his dismissal was, therefore harsh and unfair - Further, that reinstatement was impracticable and awarded compensation to the Applicant - In Supplementary Reasons For Decision, Respondent argued a motion to reopen and to make further submissions concerning the quantum of compensation - Respondent argued there was no loss that the Applicant could point to because in the period in which he was unemployed he did not attempt to sufficiently mitigate his loss - Commission applied the law relating to finding of loss and injury and the assessment of compensation and found that in all of the circumstances it was appropriate that an award be made to Applicant for loss and injury - Order Issued - Mr I Lawless -v- Ghirardi Restaurant Pty Ltd (ACN 081 550 469) - APPL 1822 of 1999 - GREGOR C - 19/01/01 - Accommodatn, Cafes&Restaurants........................ 1219

Application re unfair dismissal seeking reinstatement and contractual entitlements - Applicant argued that dismissal was unfair and that he was also entitled to long service leave - Applicant argued that the Respondent's inquiries were inadequate in relation to the investigation and finding by the Principal that Applicant was guilty of sexual misconduct in respect of a student at the College - Respondent argued that Applicant failed to provide any information that could provide a defence to the allegations of misconduct at the time of the investigation when the opportunity was given - Further, Respondent argued that all matters were considered in making the decision to terminate including the nature of the allegations, the evidence presented, the failure to respond satisfactorily to the allegations within a reasonable time frame, the impact on the family concerned, the impact on the school and its staff, and the duty of care owed to the children in the college - Commission found that Respondent had conducted itself in a proper manner and Applicant was given reasonable opportunity to provide a defence and that it had not abused its right to terminate - Further, Commission found that the employment relationship had irretrievably broken down and that the trust could not be restored - As to the long service leave, Commission found that the Commission did not have the jurisdiction to hear and determine the claim of long service leave, as this was an enforcement or recovery of wages under an award and that it should be pursued in the Industrial Magistrate's Court pursuant to section 83 of the I.R. Act - Dismissed - Mr R Newton -v- Roman Catholic Bishop of Bunbury - APPL 18 of 2000 - SMITH, C – Education... 1226

Conference referred re dispute over the a written reprimand for an employee - Applicant argued that the employee was being victimised by reason of his membership of the applicant and sought removal of the reprimand from his personal file - Respondent denied allegations and opposed orders - Commission found that the respondent's application of the regulations had previously involved a less formal approach to discipline - Commission found on evidence that the tag in question did not comply with the relevant regulations and that there was a breach - However, it was important from an industrial point of view, and as a matter of fairness that such strict application of be consistent across the board - Commission found the issuance of the reprimand to be industrially unfair, but was not persuaded that it was motivated by the employees position as a union convenor - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 160 of 2000 - KENNER C - 23/04/01 - Metal Ore Mining.. 1251

Conference referred re unfair dismissal seeking reinstatement - Applicant Union argued that their member was unfairly dismissed because the Respondent's response to his actions was disproportionate to the gravity of the conduct and that the conduct in question occurred outside the workplace and that the policy was not entirely clear in this regard which added to the unfairness of the dismissal - Respondent argued that the member had engaged in conduct in breach of the Policy with knowledge of the terms of the Policy and further submitted that the conduct and behaviour was premeditated and designed to harass and intimidate other employees which included using the word "scab" - Respondent also argued that reinstatement was not a viable option if the dismissal was unfair - Commission found that the member was dismissed for making unwelcome remarks and using derogatory and offensive words to employees who had accepted workplace agreements - Commission found having regard to all the circumstances, including the length of service and unblemished employment record that the Respondent's decision to dismiss was harsh, oppressive and unfair - Further, the utterances of the member were not accompanied by any threats, other verbal abuse or intimidation - As to the question of remedy, Applicant Union sought reinstatement, whilst Respondent opposed it - Commission ordered reinstatement - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 KENNER C - Metal Ore Mining.. 1262

Applications re unfair dismissal claim - Applicant argued that dismissal was harsh, oppressive and unfair and sought reinstatement and compensation - Respondent argued that a disciplinary inquiry convened under an Industrial Relations Agreement found that the Applicant had breached the Company's Non-Harassment Policy, was involved in the distribution of offensive material, marking an affidavit with offensive comments and had lied about any involvement in those matters - Commission found there was no evidence that the Applicant in any way did or was associated with the distribution of the material around the site or that the "target" of the harassment ever knew of the notations on the affidavit - Commission found the Applicant was dismissed for conduct that did not breach the policy and the dismissal was harsh, oppressive and unfair - Commission found the Respondent knew of the deceit and could not resurrect it ex post facto - Commission found that an application to re-open the case upon the Respondent's agreement to pay compensation should be treated as part of the substantive matter, it should not do so in all the circumstances and the Applicant should be reinstated - However, Commission found the Applicant's conduct in misleading the Respondent could not be condoned and he should receive a written warning to be placed on his personal file to the effect that any further conduct of that kind will lead to termination of his employment - Ordered Accordingly - CONSTRUCTION, MINING, ENERGY -v- BHP Iron Ore Ltd - APPL 1393 of 2000;APPL 747 of 2001 - KENNER C - 08/05/01 - Metal Ore Mining.. 1393

Application re unfair dismissal and contractual benefits - Applicant argued that the passing comments given were not treated as warnings and that Respondent's attitude had changed once re-enrolment at university had taken place - Further, Applicant argued that Respondent had given a pay rise early and two bonuses prior to re-enrolment at university - Respondent argued that numerous verbal warnings were given to Applicant regarding lack of work performance and that they were pleased for Applicant that he was considering leaving to go to university and that the bonuses were at the lower end because of the poor work performance - Further, Respondent argued that they were forced to incur unnecessary costs by Applicant and his agent and sought costs to be awarded or offset - Commission found that the dismissal was unfair because Applicant had not been warned that his employment was in jeopardy due to underperformance This meant that the dismissal was unfair because of a procedural issue - Commission also found reinstatement was impracticable and awarded compensation - Further, Commission found that the circumstances did not warrant making an order for costs against Applicant - Order Issued - Mr BE Davies -v- Phoenix Paints Pty Ltd - APPL 2019 of 2000 - BEECH C - 07/05/01 – Paint... 1406

Application re unfair dismissal seeking compensation - Applicant argued that dismissal was harsh, oppressive and unfair because he was given little training and never given an opportunity to give his side of the story when presented with warnings and there were never any discussions regarding the warnings given - Respondent argued that many written and verbal warnings were given because of his abusive and unsatisfactory conduct and performance - Commission found that there were a number of alleged incidents in which Applicant was said to have engaged in unsatisfactory conduct and that none of these issues were ever put to Applicant or any further inquiries into the allegations - Further, Commission found that Applicant did not have any real and proper opportunity to answer the allegations or to obtain appropriate representation - Finally, as to remedy Commission found that reinstatement was impracticable and awarded compensation - Order Issued - Mr S Davey -v- Shire of Collie - APPL 1358 of 2000 - KENNER C - 22/06/01 - Local Government 1410

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MISCONDUCT—*continued*

Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and due outstanding contractual entitlements as the allegations that he was unable to comply with Respondent's request to keep the greens at standards required by them, as the greens were at sufficient standard as required - Further, Applicant argued that he had an extensive period of time as he was diagnosed with a life threatening illness - Respondent argued that dismissal was due to the fact that there was a history of dissatisfaction expressed at his level of performance and the standard required for the surfaces not being met and that he was not putting in enough time on the job - Commission found that sufficient time was given for Applicant to comply with Respondent's request and that Applicant was aware that his position was in jeopardy if he failed to comply - Dismissed - Mr JA Fuller -v- North Beach Bowling Club - APPL 1943 of 1999 - GREGOR C - 18/05/01 - Recreation 1413

Application re unfair dismissal and contractual benefits - Applicant argued that he was harshly, oppressively and unfairly dismissed and denied a benefit under his contract of service because Respondent failed to consider alternative punishment measures such as a warning and that termination was carried out in public - Further, Applicant worked long hours and should have been considered when final payment arranged - Respondent argued that Applicant was dismissed for incidents involving misconduct and negligence which included an attempt to blame an apprentice for food being delivered late, failure to secure and lock the premises and property and a lack of trust - Commission found that Respondent had reasons to lose trust in Applicant and it was clear Applicant had failed to secure premises on occasions and that Applicant was afforded an adequate opportunity to put his version of events - Further, Commission found that Applicant was entitled to the guaranteed minimum hours of work as paid out - Dismissed - Mr W Manson -v- Allclass Holdings Pty Ltd Trading as Gourmet Professional Catering Company W.A - APPL 1816 of 2000 - SMITH, C - 11/05/00 – Catering.. 1428

Conference referred re unfair dismissal seeking reinstatement - Applicant Union opposed the application going to the construction of s.23 of the IR Act - Applicant Union argued that Respondent did not have the standing to bring application to revoke the reinstatement order and submitted that an order for reinstatement was solely for the benefit of the unfairly dismissed employee - Further, Applicant Union argued that an alternative means of dealing with a failure to comply with such an order, does not create a right to not comply - Respondent argued that Commission should revoke and amend the order for reinstatement and award compensation for the loss or injury caused by the dismissal - Respondent argued that on its proper construction, reference to 'may' in s.23A(3), although expressed in directory terms, should be interpreted in a mandatory sense. - Further, Respondent argued that if s.23A(3) was to be interpreted such that 'may' means Commission had a discretion to issue a further order on revocation, then that discretion may be exercised simply as a consequence of the employer's failure to comply with the reinstatement order or its impracticability to comply with the order - Commission found that once it was satisfied that there had been a failure to comply as a matter of jurisdictional fact, Commission was then obliged to consider whether to revoke original order and that the terms of s.23A as a whole conferred on the employer a right to not comply with a reinstatement order - Commission rejected Respondent's submissions to revoke Commission's order - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 - KENNER C - 31/05/01 - Metal Ore Mining 1457

Conference Referred re unfair dismissal seeking compensation - Applicant Union argued that member was harshly, oppressively and unfairly dismissed because the decision to terminate was excessive regarding deliberate act of member and the isolated incident was taken out of context because member was an excellent employee over many years - Further, Respondent had already decided to terminate before giving member an opportunity to reply and other alternative options could have been considered to termination - Further, compensation was being sought because Respondent no longer operated the Roadhouse - Respondent argued that member was dismissed for misconduct and that the damage caused was destructive - Commission found that that member deliberately threw waste over a customer's truck and that was because customer had parked behind the back door obstructing the drain - Further, Respondent had determined prior to confronting member that he was to dismiss member for gross misconduct and that member was summarily dismissed for deliberately throwing waste - Issue considered by Commission was whether the punishment was appropriate and whether there was proper consideration in deriving the punishment - Commission found that dismissal was harsh and excessive as member was not given a fair go and that compensation should be awarded - Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Clifton Nominees Pty Ltd - CR 310 of 2000 - WOOD,C - 17/05/01 - Accommodatn, Cafes&Restaurants 1463

NATURAL JUSTICE

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because she was dismissed while on probation and was not given an opportunity to explain any of the allegations - Respondent argued that Applicant was dismissed because of the complaints and statements received from other management staff and patrons which showed that the Applicant did not have the support of other management staff - Commission found after hearing evidence from other staff that for the substantive and procedural reasons the dismissal was unfair and as reinstatement was impracticable Applicant was awarded compensation for the loss or injury which was caused by the harshness of the dismissal - The claim of contractual benefit had not been made out and was dismissed - Accordingly an Order was issued - Discontinued - Ms ALM Gloede -v- Mercure Inn, Karratha - APPL 859 of 2000 - BEECH C - 01/12/00 – Hotels.. 285

[2]Appeal against decision of the Commission (80WAIG3334) re wrongful dismissal of seven officers - Appellants argued the Commissioner erred in law and in excess of jurisdiction, that the application before him was not an industrial matter and that he had considered Affidavit and other material which was not evidence in the proceedings - Respondent union argued that the Commissioner of Police breached his agreement with those dismissed officers by not deciding this issue pursuant to s.23 of the Police Act 1892 and Regulations, and acted harshly or oppressively in acting pursuant to s.8 of that Act - Full Bench found that since the Commissioner of Police is not the Crown, discharging an officer cannot be seen as an act done at the will or pleasure of the Crown and accordingly it was wrong to do so without affording natural justice or procedural fairness, and further found that the Commissioner of Police was not the employer of Police Officers, the Minister was, that Police Officers were indubitably officers of the Crown and not employees, that there was no jurisdiction in the Commission to hear and determine the application, and having considered all of the material and submissions upheld the Appeal and quashed the decision at first instance, it being a nullity and having been made without jurisdiction - Ordered Accordingly - The Honourable Minister of Police & Other -v- Western Australian Police Union of Workers - FBA 38 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 14/11/00 – Police 356

[4]Application for stay of operation of Order made by the Chairperson of the "Coal Industry Tribunal" in Application No. 2/2001 (81WAIG731) pending appeal to Full Bench - Applicant argued on the following: "there was a serious question to be tried in respect of the grounds upon which the Applicant seeks a review of the Order, the circumstances justify the making of an order staying the operation of the Order as the Applicant has, and will, continue to suffer loss and damage should the Order not be stayed and the Respondent and its members will suffer no prejudice if the Order is so stayed" - Further, Applicant sought relief that the decision of the Tribunal should be stayed, insofar as it purports to restrain the Applicant from continuing the changes outlined in the letter dated 31 January 2001 referred to in the Order - Respondent opposed the application - President applied Principles pursuant to the "Coal Act" in applications for a stay, and reviewed relevant sections of the "Coal Act", the EBA and evidence and found on a number of reasons that there was no serious issue to be tried as there was an "industrial dispute" within the meaning of s.3 and s.10 of the Coal Act, and that jurisdiction existed and exists in the Tribunal to make such Order - Further, President found that it would not deprive a "successful party" of the fruits of an Order such as this and that Applicant had not established that an Order should be made in its favour because it had not established that the equity, good conscience and the substantial merits of the case, or that the balance of convenience lay with it - Dismissed - Griffin Coal Mining Company Pty Limited -v- The Coal Miners' Industrial Union of Workers of Western Australia, Collie - PRES 3 of 2001 - President - SHARKEY P - 01/03/01 - Coal Mining.. 832

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ORDER

Application re unfair dismissal - Applicant argued that he had attended work after Commission ordered reinstatement, however, the employer has failed to comply with the Order - Commission found on evidence that applicant's loss was at least 6 months remuneration and that the parties were in agreement as to the calculation of the loss, except that respondent sought consideration for Centrelink payments received by applicant - Commission found that it was inappropriate to deduct unemployment benefits received by applicant during the course of unemployment and accordingly, revoked the order for reinstatement - Further, Commission ordered that respondent pay applicant $31,509.17 as compensation for unfair dismissal and $2,217.04 as pay in lieu of notice, no later than 7 days from the date of the Order - Ordered Accordingly - Mr JL Butterfield -v- Pollock Nominees Pty Ltd ACN 008 842 911 - APPL 604 of 2000 - SCOTT C. - 23/02/01............................ 866

Application re unfair dismissal and contractual entitlements - Preliminary issue re discovery of documents - Applicants' Agent filed Notice of Application for an Order that respondent give discovery under oath of documents relating to Applicant's termination of employment and engagement of temporary employees - Respondent objected to such an Order and argued that there was a restructure which lead to the redundancy of the two individual position held by Applicants and that appropriate procedures have been followed and appropriate redundancy payments paid - Commission determined that Orders for discovery would only be made for documents which were relevant to the issues before the Commission and that the Order sought was in its view sufficiently broad to be oppressive, therefore, for a number of reasons the Order sought was rejected - Dismissed - Mr SI Borich -v- WesTrac Equipment Pty Ltd ACN 009 342 572 - APPL 293,294 of 2000 - BEECH C - 23/02/01 - Machinery & Equipment Mfg 934

Conference re withdrawal from an unregistered agreement - Applicant sought an Order that Respondent continue to be bound by and observe the terms and conditions of an unregistered industrial agreement, and an Interim Order to continue the effect of the Agreement pending the hearing and determination of the substantive claim - Preliminary issue re jurisdiction - Counsel for the Respondent argued that Commission lacked jurisdiction to entertain the matter, given that a ground of the application amounted to an application to enforce the BHP Iron Ore Enterprise Bargaining Agreement 1997 (EBA III) - Further, the application also sought the imposition of an agreement on non-consenting parties, therefore, the application was one involving the exercise of judicial power and beyond the jurisdiction of the Commission - Commission reviewed authorities and found on a number of reasons, that the present claim for an order was one that was properly characterised as one seeking an order of the Commission, to create future rights and obligations, albeit reflecting the terms and conditions of the Agreement and this would entail the exercise of arbitral and not judicial power - Further, because the Commission may be called upon to interpret the terms of EBA III, as part of the proceedings, does not of itself, fundamentally change the character of the matter, therefore the present claim was within the Commission's jurisdiction - Commission further reviewed authorities and found that the issue regarding the jurisdiction to impose a s.41 agreement on a non consenting party, does not arise in this matter - Order Issued - CONSTRUCTION, MINING, ENERGY & Others -v- BHP Iron Ore Pty Ltd – APPL C 60 of 2001 - KENNER C - 14/03/01 - Metal Ore Mining... 1056

Application for an order revoking an order reinstating an unfairly dismissed employee - Applicant Employer argued that S23A(3) of the IR Act created a right for it to refuse to obey an order for reinstatement and the Commission must therefore issue an order for compensation- Respondents argued that it was not open for the Applicant to bring the application, the Respondent Employee's attitude had been the subject of the original hearing, reinstatement was not a popularity issue and the Commission had discretion - Commission reviewed authorities and found that if the process of revocation was automatic it would render the power to reinstate nugatory and that power was discretionary - Commission found it was not open in the application to consider further evidence on a point that was already decided - Commission had considered the employee's attitude and behaviour and reinstatement had more potential benefit to him - Dismissed - Iluka Resources Limited & Other -v- Mr MA Rulyancich & Others - APPL 432 of 2001 - BEECH C - 01/06/01 - Other Mining 1397

Application re unfair dismissal - Applicant summarily dismissed by a recruitment agency that had a labour hire agreement contract with another company who had requested that the Applicant be removed - Applicant argued he had never seen the relevant Code of Conduct or Privacy documents, the dismissal was harsh, oppressive and unfair and sought reinstatement - Respondent argued that the Applicant had made a derogatory comment about a customer in the comments field of his notes screen which was against the other company's Code of Conduct and 'Privacy' instruction - Commission found that the evidence disclosed that the nature of engagement could not be characterised at law as casual employment - Commission found that Respondent abused the right to terminate the Applicant's employment because the customer made no complaint about the service, the Respondent made no enquiry about why the applicant made the note and failed to instruct its employees about the Code of Conduct - All the training Applicant received was prior to the creation of the Privacy instruction - - Commission found that reinstatement was not practicable and the Respondent should pay the Applicant compensation for loss at the date of hearing - Granted - Mr DJ Conole -v- Julia Ross Recruitment Pty Ltd & Other - APPL 450 of 2000 - SMITH, C - 25/05/01 - Recruitment Services.. 1402

OVERTIME

[2]Appeal against decision of Public Service Arbitrator (unreported) re variation of Award - Appellant argued that Public Service Arbitrator erred in law in declaring that the Commuted Overtime Allowance should be categorised as a general allowance to which principles 2, 5 and 6 of the State Wage Principles apply, that on the face of the clause and in the context of the Award, the allowance was a commuted allowance, paid in lieu of payments which would otherwise be made under the Overtime Allowance clause of the Public Service Award No. PSAA4 of 1989 and not an allowance with relation to either the nature of the work or conditions under which the work is performed - Further, Appellant sought a declaration that the application was not an issue to be progressed and determined under Principles 2, 5 and 6 of the State Wage Principles - Full Bench found that the PSA correctly held that the matter should proceed as if it were an issue under Principle 2 which attracts the attention of Principles 5 and 6; and that it was a general allowance and that the Principles should be applied accordingly - Further, the PSA was correct, on a fair reading of the Principles and the award as a whole, in so concluding, therefore there was no merit in the appeal - Full Bench applied authorities regarding the application for extension of time, which were opposed by the Respondents and found on a number of factors, the maintenance of the time limit of 21 days pursuant to s.49(3) of the Act would not work an injustice in this case and that the CSA had not established that the denial of the application would prejudice it - Dismissed - Civil Service Association of Western Australia Incorporated -v- Executive Director, Fisheries Western Australia & Other - FBA 37 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 08/12/00............................. 11

Application re unfair dismissal - Applicant argued that he was terminated unfairly, and sought compensation for lost wages, ongoing loss in his new position, one month's pay in lieu of notice and injury for suffering arising from the dismissal - Respondent argued that as the contract issue concerning overtime was unresolved he terminated Applicant and paid him one week's pay for notice as permitted under the contract of employment, and further referenced a letter as conclusive proof that overtime was not to be paid to applicant - Commission was satisfied that Applicant's performance was not in question, he received no warning or indication that his employment was in jeopardy and that he was dismissed unfairly, hence he should be paid the total of $1579.50 for denied contractual benefits and a total of $3,510 by way of compensation - Granted - Mr NR Lynam -v- Lataga Pty Ltd - APPL 555 of 2000 - WOOD,C - 29/11/00... 299

Complaint re Breach of Award - Preliminary issue re summary judgement - Industrial Magistrate heard submissions from both parties and found that Defendant have discharged the onus that there was a plausible ground of defence and granted Defendant unconditional leave to defend - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - 11/01/01 664

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OVERTIME—*continued*

Complaint re breach and enforcement of Award and Minimum Conditions of Employment Act - Complainant argued that Defendant failed to pay annual leave, sick leave and overtime - Complainant argued that Defendant had initiated and in effect orchestrated the termination so that it could be released from the obligations of Workers' Compensation and Rehabilitation Act and that entitlements accrued whilst on workers' compensation should be paid - Defendant argued and disputed that it had unilaterally terminated Complainant's employment at all, it argued that Complainant resigned from his position to take up employment with another employer as a security officer - Magistrate found that the parties terminated company on mutual agreement and the entitlements for annual leave, sick leave and payment in lieu of notice were not made out - Magistrate found that Complainant was entitled to unpaid overtime as proven because Defendant could not offset overaward and production bonuses payments made for a particular purpose against overtime payments - Proven in Part - Mr PA Jones -v- Barminco Pty Ltd - CP 38,212 of 2000 - Industrial Magistrate - Cicchini IM - 02/05/01 - Services to Mining........ 1183

[2]Appeal against decision of Commission (81 WAIG 721) re use of contractors - Appellant argued that the Commission erred by not determining the question of available reasonable hours and not placing sufficient weight on the evidence of a reversed overtime ban by the Respondent - Respondent argued that the contracting out was consistent with the provisions of the award - Full Bench found that the central issue was whether on the evidence it was open to find that no employee would suffer any "detrimental effect" within the meaning of the award in relation to his/her available hours of work by using contractors and that it was open to the Commission to so find - There was no question of a reduction in overtime, instead the Respondent proposed that the status quo be maintained - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - FBA 2 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 16/05/01 - Metal Ore Mining........ 1358

PRINCIPLES

[1]Appeal against Decision of Full Bench (80WAIG159) re wearing of badges by union members during hours of employment - Appellant argued whether the decision of the Full Bench was erroneous in law and whether the exercise of the Senior Commissioner's exercise of discretion in the relevant circumstances gave rise to reviewable errors of law - Respondent union argued that the matters before the Full Bench were essentially matters of industrial fairness concerning the introduction and use of a badge - Industrial Appeal Court found that the Full Bench fell into error in seeking to balance rights vested in the employer as a consequence of the contractual arrangements as against the reasons advanced by the employees for wearing the badge - Further the reasons for wearing the badge were not of the same contractual or normative order as the rights of the employer to determine what was required by way of grooming thus the appeal was allowed - Appeal Upheld - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality........ 4

[1]Application for stay of proceedings in Matter No. CR159/1999 pending determination of Appeal - Appellant argued for a stay of proceedings of the Decision of Full Bench until the determination of the appeal before IAC or further Order - Industrial Appeal Court found that it was quite satisfied that the circumstances, as well as the balance of convenience justified the stay of proceedings to be granted - Granted - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality........ 9

[2]Appeal against decision of the Commission (80WAIG3068) re unfair dismissal and contractual entitlements - Appellant argued that the learned Commissioner erred in fact and law in that he failed to give proper weight to the evidence and erred in fact and law in finding that a reasonable period of notice for the Respondent to remedy the situation would have been 3 months and in assessing the compensation for loss and injury - Respondent argued that the grounds of appeal were defective because they did not comply with Regulation 29 of the Industrial Relations Commission Regulations 1985 - Full Bench found that the grounds of appeal did comply and that they were provided and sufficiently detailed to enable the Respondent to know substantially the case which it had to answer - Full Bench concluded that this was a discretionary decision and that the Appellant had to establish that the exercise of the discretion at first instance had miscarried with the principles laid down - Full Bench concluded that no established error in the exercise of the discretion at first instance had been made out that would warrant the interference of the Full Bench - Dismissed - Olten Pty Ltd T/as MSA Security -v- Mr AJ Byfield - FBA 39 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 18/12/00 – Security........ 15

[3]Application re joinder to Award - Applicant Union argued that although the Contract Cleaners' (Ministry of Education) Award 1990 was limited to the named Respondents, it was regarded generally by the contract cleaning industry and the Education Department as the Award which sets the benchmark for wages and conditions for contract cleaning employees cleaning Government Schools and it was therefore necessary that when new contract cleaning employers gain contracts, the Award be extended to them by having them named as Respondents to the Award - Respondents argued amongst a number of reasons that the coverage of the Contract Cleaners' (General and Window Contractors) Award (the General Award) currently applies to the employers that the union is seeking to join to the award, that it was the General award which forms the award safety net and that the Contract Cleaners' (Ministry of Education) Award, 1990 was a consent award which applied only to the employers who consented to it - Further, that the General award has undergone a Minimum Rates Adjustment exercise and therefore it has properly set rates of pay whereas the Contract Cleaners' (Min. of Educ) Award, 1990 has not - Commission in Court Session was of the view that the material before it justified why the claim had not been progressed under s.41 of the Act or pursued under any other of the State Wage Principles - Further, that the equity, good conscience and substantial merits of the case lay with the Applicant such that the application should succeed - Granted - LIQUOR, HOSPITALITY & MISC -v- Airlite Cleaning Pty Ltd & Others - APPL 1431 of 1998 - Commission in Court Session - BEECH C/SCOTT C./KENNER C - 08/09/00 – Cleaning........ 35

Application to vary the Rangers (National Parks) Consolidated Award, 1987 by consent - Commission found that the award does not reduce conditions or disadvantage employees - Further, that this was a single enterprise specific award which was being varied by consent to give effect to structural efficiency initiatives or productivity based arrangements and the variation made to the State Wage Principles to recognise those circumstances was applicable - Award Varied and Consolidated - Department of Conservation and Land Management -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - APPL 1744 of 2000 - BEECH C - 24/11/00 – Government........ 655

[1]Appeal against Decision of Commission In Court Session (80WAIG4508) re terms and conditions of employment, redundancy payments and superannuation schemes - Appellants argued that CICS erred in law by purporting to give retrospective effect to order 1, that the base salary and roster allowance of each letter of offer employees be increased and erred in law in finding that following the merger, the Appellant's Mid-West operations were quickly restored to profitability or giving consideration to other factors when there was no evidence to support this finding - Further, Appellants argued that the Commission erred in law in making orders in relation to Iluka Resources Limited where there was no industrial matter between it and the Respondents and erred in law by acting on the irrelevant consideration that RGC Mineral Sands Ltd had previously offered a limited choice of superannuation funds to its employees and having regard to a Superannuation scheme which applied to Workplace Agreement employees and granting liberty to apply to the award employees of Iluka Resources Limited and Iluka Mid-West Limited when the industrial matter between Appellants and Respondents did not relate to the award employees - Industrial Appeal Court found that the CICS had the power to give retrospective effect to its order awarding an increase in salaries and allowances, that there was revealed an evidentiary basis on which the CICS could properly make the challenged finding that profitability was quickly restored for the Mid-West operations following the Merger - Further, IAC found that it was a matter for the CICS to find whether an order to enable letter of offer employees to become members of the Iluka Resources Limited fund was appropriate as a matter of equity, good conscience and the substantial merits of the case - IAC found that no grounds had been made out and failed to be persuaded thus Appeal dismissed - Dismissed - Iluka Midwest Limited & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 5 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Parker J. - 08/02/01 - Other Mining........ 763

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PRINCIPLES —*continued*

[2]Appeal against Decision of Commission (81WAIG327) re illegal disciplinary action - Application to extend time to appeal and to extend time to make application to extend time - Appellant Union argued that there were delays that contributed to the appeal being lodged out of time and that using the various principles referred to the appeal and application should be granted - Respondent opposed the Application to extend time within which to appeal and for leave to extend time within which to make application to extend time - Full Bench found that the object of a rule to extend time was to ensure that legislative provisions or rules which fix times for doing acts do not become incidents of injustice and that the discretion to extend time was given for the sole purposes of enabling the Commission to do justice between the parties - Full Bench concluded that there would be detriment and therefore injustice to Respondent in allowing an extension of time within which to appeal from a decision which Appellant Union had, in anticipation of such a decision being given accepted therefore, appeal was incompetent and dismissed - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 52 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/03/01 - Iron Ore........ 981

[4]Application for stay of operation of a direction of the Commission in Application Nos. 1693, 1710, 1711, 1712, and 1713 of 2000 (81WAIG936, 1068) pending Appeal to Full Bench - Appellant Employer argued that Commission in the exercise of its discretion failed to give proper weight and consideration to the following matters that, it was not in the public interest to order the discovery of confidential communications between employers and their industrial relations advisers and that such documents were not and could not be relevant to the matters at issue in the substantive case - Respondents argued that to stay the operation of the order might have the effect of delaying the final hearing and determination of the matter, a delay which could not be compensated for in money, even if Respondents were successful - President found that the principles applicable for a stay should be applied and that the decision appealed against was a discretionary decision and that to succeed on appeal Appellant would have to establish that the exercise of discretion was miscarried in accordance with the principles - Further, President found that an appellate court should exercise caution in undertaking to review a decision on a matter of practice or procedure and that the stay of operation had not been established and therefore, there should not be interference by the President with an interlocutory order - Dismissed - Cable Sands (W.A.) Pty Ltd -v- Mr R Sullivan & Others - PRES 5 of 2001 - President - SHARKEY P - 19/03/01 - Mineral........ 998

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services........ 1162

Application re unfair dismissal - Applicant argued that his dismissal was unfair because his termination was not a bone fide redundancy and that this related to a workers compensation claim made by him - Respondent argued that Applicant was dismissed by reason of a bona fide redundancy because there was a turndown in work and reduced demand for their products - Commission found that Respondent did experience a substantial reduction in business demand and that consideration by Respondent of alternatives to redundancy with employees were discussed, but, did not include Applicant - Commission turned to the relevant principles to unfair dismissal claims arising from a situation of redundancy and found that Respondent had a lawful obligation to discuss and warn of impending redundancies to employees which in relation to Applicant did not occur - Commission declared that Applicant was unfairly dismissed - Declaration Issued - Mr LF Free -v- Boral Aluminium Windows - APPL 1379 of 2000 - KENNER C - Construction Trade Services........ 1204

Conference re unfair dismissal - Applicant Union argued that dismissal of member was unlawful because it was contrary to the Order issued by Commission in CR350 of 2000 (81WAIG699) re exploring options and providing appropriate training to member - Further, Applicant Union argued that an Order be issued that member be reinstated to position held by him immediately prior to his dismissal and that the parties agree to the duties to be performed by member - Respondent argued and questioned the jurisdiction of the Commission to issue such an order and says that member was dismissed for continued and wilful refusal to obey a lawful and reasonable instruction - Commission found that it had the jurisdiction to issue such an order and issued an order that Respondent not dismiss member from his employment which also allowed the parties liberty to apply to vary, cancel or revoke this Order - Interim Order issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - C 89 of 2001 - BEECH C - 30/04/01 – Hospitality........ 1248

Application pursuant to Section 27 re application being set aside and hearing date vacated and that a directions hearing be listed - Applicant argued that an error was made on an order dated 16 February 2001 and the order for discontinuance be revoked and returned for conciliation - Respondent argued Commission does not have the power to entertain application 440 of 2001, as by virtue of order 16 February 2001 Commission was functus officio in respect to the section 29 application - Commission found that that there was an error and having regard for section 26 of the IR Act, the original order discontinuing section 29 application be revoked - Order Issued - Mr J Lane -v- Aussie Online Ltd - APPL 440 of 2001 - WOOD,C - 17/05/01 – Technology........ 1424

PROCEDURAL MATTERS

[3]Conference referred re "fit for work policy" - Applicant Unions raised objection to certain aspects of the policy on the ground that those aspects impose an unfair and unreasonable burden on their employees - Further, Applicant Unions argued that the existing level catches cannabis users who have long since ceased to be intoxicated or otherwise adversely affected by the drug and they point to, and rely on, the fact that a measurement of the level of THC in urine was not a measurement of the level of impairment - Respondent argued that the nature of its operations, and in particular the duties and responsibilities of its employees, are such as to require a low level for THC so as to minimise the risk that an employee who has recently consumed drugs was allowed to work, that if the cut-off level were set at a higher level than was now the case, recent drug consumers could escape detection and moreover, that any departure from the level set by the Australian Standard would unduly expose it to an action for breach of duty of care in an appropriate case - Commission in Court Session were persuaded that a cut-off level of THC at 50ng/ml in the context of the Respondent's policy was industrially unreasonable, although the confirmation threshold of 15ng/ml was not unjust - Further, CICS were not convinced that the blood alcohol concentration level in the policy as it currently stands was either harsh or unfair to either the employee who gives a positive reading or to innocent fellow employees - Granted in Part - AUTO, FOOD, METAL, ENGIN UNION & Others -v- Argyle Diamond Mines Pty Limited - CR 75 of 2000 - Commission in Court Session - FIELDING C/KENNER C/SMITH, C - 05/12/00 – Mining........ 324

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PROCEDURAL MATTERS—*continued*

[2]Application for Orders pursuant to Section 72A of the Industrial Relations Act - Full Bench issued a numbers of orders and directions to expedite the determination of the Application on 5 September 2000 - Full Bench also adjourned hearing at the request of both parties - Full Bench granted and ordered procedural applications - Applicant Union sought orders that the Merchant Service Guild (MSG) has the right to represent under the Act, to the exclusion of the Civil Service Association (CSA) the industrial interests of all Fisheries Officers employed in the Fisheries Department of Western Australia by the Executive Director Fisheries who are eligible for membership of the MSG and that the CSA does not have the right under the Act to represent the industrial interests of any Fisheries Officers - The grounds for the application are that the Applicant Union is best placed to represent the industrial interest of the Fisheries Officers because in the context of the enterprise the Applicant is the recognised principle union in relation to maritime employees and can commit greater resources and overall industry experience to protect the interests of those employees engaged in the maritime industry and would be better placed to promote and facilitate successful enterprise bargaining and that the orders sought are consistent with the objects of the Act - CSA argued that it had constitutional coverage of the Fisheries Officers and is a large existing organisation which does and is able to provide a wide variety of services and which has substantially provided resources to enable that to occur - Full Bench found that the CSA at all material times, had and has the capacity to properly and efficiently represent Fisheries Officers and has done so - Further, Full Bench found that the Fisheries Officers are ineligible to join MSG under its eligibility rule and that the MSG has no constitutional coverage of Fisheries officers - Full Bench concluded that the Applicant Union did not establish a substantial case - Dismissed - Merchant Service Guild of Australia, Western Australian Branch, Union of Workers -v- (Not applicable) - FBM 3 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 15/02/01 - Government Administration.... 380

Application re unfair dismissal - Preliminary issue re Production of Documents - Respondent sought copies of Applicants taxation returns for the tax years ended 1998, 1999 and 2000 - Commission noted that neither the Notice of Application nor the Notice of Answer raised any issues regarding Applicant's financial circumstances and it could not see how these documents could be relevant to an issue which might legitimately arise on the hearing of the Application - Dismissed - Mr MJ Carberry -v- TJ & HP Abbott Transport - APPL 1403 of 2000 - BEECH C - 16/01/01 - Road Transport.. 729

[2]Appeal against Decision of Industrial Magistrate (unreported) and Appeal against Decision of Commission (80WAIG4419) re unfair dismissal - Preliminary application - Respondent argued on a number of grounds including that the appeal was incompetent and that it had been brought frivolously and vexatiously with the object of delaying and prejudicing the fair trial of the proceedings before the Magistrate - Further, Respondent sought orders that Appeal No. FBA 7/2000 be struck out and that Appellant pay the costs of and incidental to the proceedings - Full Bench found on a number of reasons that the appeal was competent, that it was premature and unnecessary, at this stage, to rule on the issues of frivolous and vexatious, and that there was prejudice by the prospect of irremediable exclusion, therefore, having regard to the equity, good conscience and the substantial merits of the case, dismissed the application to dismiss for want of prosecution - Appeal Nos. FBA7 and FBA43 of 2000 - Respondent argued that there was irresistible inference that the appeal was brought frivolously and vexatiously, that Appellant's appeal should not be allowed to be withdrawn and that, given the length of time that the breach of the procedural rules had continued, the reasons for the breach and the fact that respondent and the administration of the court's business had been prejudiced, then both appeals should be struck out - Appellant's Counsel argued that he had no objection to the appeals being dismissed rather than withdrawn and he offered no argument in support of the appeals - Full Bench found that the most satisfactory way of dealing with the appeals with some finality, and to which course there was no objection in any event, was to dismiss the appeals by way of determination of the appeals - Dismissed - Chubb Security Australia Pty Ltd -v- Mr PR Danson - FBA 7,43 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 26/07/00 - Other Business Services . 783

Application re unfair dismissal - Applicant argued that he had attended work after Commission ordered reinstatement, however, the employer has failed to comply with the Order - Commission found on evidence that applicant's loss was at least 6 months remuneration and that the parties were in agreement as to the calculation of the loss, except that respondent sought consideration for Centrelink payments received by applicant - Commission found that it was inappropriate to deduct unemployment benefits received by applicant during the course of unemployment and accordingly, revoked the order for reinstatement - Further, Commission ordered that respondent pay applicant $31,509.17 as compensation for unfair dismissal and $2,217.04 as pay in lieu of notice, no later than 7 days from the date of the Order - Ordered Accordingly - Mr JL Butterfield -v- Pollock Nominees Pty Ltd ACN 008 842 911 - APPL 604 of 2000 - SCOTT C. - 23/02/01............................ 866

Application re unfair dismissal - Preliminary issue re jurisdiction - Respondent argued that Commission lacked jurisdiction to deal with the applications as both employees were casual and pursuant to the Federal Workplace Relations Act 1996 and Regulations, were excluded from the operation of unfair dismissal procedures, there being a direct inconsistency between the Federal and State Acts - Respondent argued that consumption of alcohol on duty and a series of events which amounted to behaviour and an attitude on the part of applicant (Mr Rushton) was the reason for termination - Applicant (Mr Rushton) defended the allegations and for most part agreed that they occurred but he viewed them as trivial - Applicant (Mr Cairns) argued that he felt intimidated and threatened by another officer following an incident, that after respondent investigated the incident, he was told that he would stay on and be offered work but that never happened - Commission reviewed authorities, relevant sections of the Federal Act, the Australian Constitution and found that there was no inconsistency between the Federal Workplace Relations Act 1996 and the WA I.R. Act 1979 and hence the Commission had jurisdiction to hear the matter - Commission determined (in a further Reasons for Decision) that the nature of the applicants' employment relationship in all aspect was casual - Further, Commission found on evidence that the respondent was not prepared to continue to roster Mr Cairns away from his intimidator and unless Mr Cairns had that guarantee then he was not prepared to work for the respondent, therefore, there had been no dismissal of Mr Cairns and hence that being the fact there was no jurisdiction for the Commission and accordingly dismissed his application for want of jurisdiction - Commission further found that Mr Rushton did consume alcohol and fall asleep whilst on duty, therefore, having regard to the Undercliffe case (65WAIG385) the decision to dismiss him on notice was not unfair, harsh or oppressive in all circumstances - Applications Dismissed - Mr A Cairns -v- The West Australian Turf Club - APPL 795,809,827 of 2000 - WOOD,C - 15/09/00 – Sport.. 867

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because he would not sign a workplace agreement - Respondent argued on evidence that the workplace agreement had nothing to do with the dismissal as such - Commission found that the Applicant was dismissed as a result of the conversation between it and the Respondent and the issues raised by the Respondent as to the reasons for the dismissal were at least arguably valid - Further, that Applicant's lack of any positive response in relation to the Victoria traffic incident at the time in the context of the other issues raised by the Respondent led the Commission to conclude that the Applicant had not persuaded it that his dismissal was unfair - Dismissed - Mr MJ Carberry -v- TJ & HP Abbott Transport - APPL 1403 of 2000 - BEECH C - 09/03/01 – Transport............ 871

Application re unfair dismissal - Applicant argued that her employment was terminated in a harsh and unfair manner and the dismissal was both substantively and procedurally unfair because the tasks she completed under the performance management ought to have been accepted by the Respondent and her employment should not have been terminated - There was no argument from the Respondent - Commission found that Applicant had not demonstrated any substantive unfairness in her dismissal, that Applicant was counselled in a reasonable and courteous manner, she was given ample opportunity to respond to issues raised with her, she took the opportunity provided, she was set reasonable time frames and tasks in consultation with her and she had the opportunity to have someone present with her during important meetings, therefore, there was no procedural unfairness - Dismissed - Ms C Nichols -v- Derbarl Yerrigan Health Service Inc - APPL 1536 of 1999 - SCOTT C. - 15/02/01 - Health Services 889

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PROCEDURAL MATTERS—*continued*

Conference referred re unfair dismissal and contractual entitlements - Matter remitted back to Commission with instruction that it be dealt with "according to law" and in accordance with the reasons for decision of the Full Bench - Applicant sought compensation for loss of income and in addition, for injury sustained as a result of his dismissal - Further, Applicant Union argued that whatever formula was used to assess compensation, Applicant was entitled to the maximum allowable under the Industrial Relations Act - Respondent argued that the Applicant should be compensated for something less than the maximum allowable under the Act and drew attention to the fact that he was subject to criticism which led to other proceedings in the Commission before his termination - Commission reviewed various tests cases, relevant sections of the I.R. Act and Workplace Relations Act 1996 and found that the onus was on the employer to establish that the employee had failed to mitigate his loss and the employer had simply not discharged that onus - Further, that in the present case, the task of assessing compensation was made more difficult than usual because the evidence as to the Applicant's earnings at the time of dismissal and subsequently are at best scant, and that may be due in part to the fact that so much time had lapsed since Applicant's dismissal - Commission concluded that Respondent should pay Applicant compensation for dismissal found to have been unfair by the Full Bench - Granted. - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Barminco Pty Ltd - CR 186 of 1998 - FIELDING C - 05/11/98 - Services to Mining 916

Conference referred re safety and welfare issues associated with the operation of single officer Police stations throughout Western Australia and in particular the Yalgoo Police station - Applicant union sought orders that the Respondent be ordered to appoint additional residing Police officers at Yalgoo, Gascoyne Junction and Dwellingup Police stations - Respondent argued that the deployment of members of the Police Force was the prerogative of the Commissioner of Police and objected to the issue of any order - Commission conducted inspections in the surrounding districts and at each of the above named Police stations and found from evidence and from the statistics provided, that the threat level of assault on Police officers was at least no higher in single officer Police stations than it was for Police Officers generally - Commission concluded that in the great majority of cases the situation was handled quite adequately by the command structure and to ensure that it does so there must be on-going audit of middle level commanders to ensure that police officers who are in single police stations working by themselves are adequately supervised and supported, if not, situations of unsafe work practice and welfare issues would arise quickly - Commission did not issue orders sought but noted that it remained open to the WAPU in individual circumstances to make notifications to this Commission and the matters would be dealt with on an individual basis - Dismissed - Western Australian Police Union of Workers -v- The Hon. Minister for Police - CR 15 of 2000 - GREGOR C - 02/03/01 – Police 921

[2]Appeal against Decision of Commission (81WAIG327) re illegal disciplinary action - Application to extend time to appeal and to extend time to make application to extend time - Appellant Union argued that there were delays that contributed to the appeal being lodged out of time and that using the various principles referred to the appeal and application should be granted - Respondent opposed the Application to extend time within which to appeal and for leave to extend time within which to make application to extend time - Full Bench found that the object of a rule to extend time was to ensure that legislative provisions or rules which fix times for doing acts do not become incidents of injustice and that the discretion to extend time was given for the sole purposes of enabling the Commission to do justice between the parties - Full Bench concluded that there would be detriment and therefore injustice to Respondent in allowing an extension of time within which to appeal from a decision which Appellant Union had, in anticipation of such a decision being given accepted therefore, appeal was incompetent and dismissed - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore Pty Ltd - FBA 52 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/03/01 - Iron Ore........ 981

Application re contractual entitlements - Applicant argued that she was to be paid remuneration equal to 50% of her gross takings, that upon the introduction of compulsory superannuation the practice commenced to pay superannuation calculated on the statutory percentage applied to the gross earnings, that later it unilaterally commenced deducting the required percentage from her earnings - Further, Applicant argued that she was thereafter under paid because the amount should have been calculated on and paid in excess of to the 50% of her gross takings whereas it was deducted from the takings - Applicant sought benefits which had not been paid to her at the completion of her engagement - Respondent argued that upon the introduction of compulsory superannuation contributions it was agreed that it would pay the compulsory superannuation percentage on top of the 50% billing, however, after May 1995 a review led to a decision that payment on top of the 50% was outside the original agreement and the practice began deducting superannuation contributions from the gross billing achieved by Applicant - Commission found on evidence that the Applicant's contract was never changed at law and the Applicant was always entitled to have her superannuation assessed on top of the 50% billings - Further, Applicant was entitled to the benefit of that contract now, and the parties agreed that the sum of money in dispute was $17,877.35, therefore, Commission ordered that the practice pay the Applicant that sum of money - Granted - PW De Boer -v- Third Ave Surgery - APPL 1465 of 1999;APPL 829 of 2000 - GREGOR C - 20/03/00 - Health Services 1027

Application re unfair dismissal and contractual entitlements - Commission listed the application For Mention Only and the Applicant had been asked to show cause why the application should not be struck out for want of prosecution - Parties were asked by Commission to provide further particulars - Commission after considering the parties submissions, concluded on a number of reasons that Applicant's lack of interest in his application for a period of at least 6 months could not be passed over especially given the Respondent's current position and that while there may be some reason on the authorities to differentiate between claims of unfair dismissal and claims for denied contractual entitlements particularly as a claim for a denied contractual entitlement was not subject to the 28 day time limitation imposed upon an applicant claiming unfair dismissal, Commission was unable to differentiate between these two claims for this purpose - Further, Commission acknowledged that the sum of money claimed was not insignificant, however, that was as much a reason for an Applicant to vigorously pursue the claim as anything else and the size of the amount claimed was an added reason why it concluded that Applicant, for whatever reason, was merely not interested for an unwarranted period of time in pursuing its claim - Struck out for want of prosecution - Mr P Hammond -v- Goldfields Scaffolding Pty Ltd (ACN 058 634 101) - APPL 419 of 2000 - BEECH C - 15/03/01 - Construction Trade Services 1030

Application re unfair dismissal - Parties made submissions to the Commission for further and better particulars - Applicant argued he was harshly, oppressively and unfairly dismissed and sought six weeks' compensation - Respondent argued that the application should be struck out and Applicant's claim be dismissed in that the further and better particulars raise a different case to that raised in the Applicant's original application - Commission, after hearing the submissions concluded that further proceedings were not necessary or desirable in the public interest and that for a number of reasons set out in its Reasons For Decision, it would make an order pursuant to s.27(1)(a)(ii) of the Act to dismiss the Applicant's claim - Dismissed as not being necessary or desirable in the public interest - Mr M Pietracatella -v- W.A. Italian Club Incorporated A.O. 350010F - APPL 959 of 2000 - SMITH, C - 28/03/01 - Other Services 1046

Application re unfair dismissal and contractual entitlements divided re monies paid equal to shares and options - Applicant argued that notice was given that he wished to exercise the liberty granted in relation to the options and shares and sought an order for the benefit denied be paid in an amount of money equal to the value of the shares and options - Further, the issue to be determined was of jurisdiction and whether the Commission had the power to award a sum of money where specific performance of a benefit under a contract cannot be ordered - Respondent argued that the Commission did not have the jurisdiction to hear and determine the matter because it was not a claim for a benefit he was entitled to under his contract of service, that is, he claimed instead a sum of money equal to the value of shares and options - Further, Respondent argued that the jurisdiction was not available because a claim for damages for a breach of contract was not an industrial matter as defined in that it did not relate to rights and duties of employers' employees, instead it related to failure to allow benefits under contract of services, that is damages for breach of contract and that it did not sufficiently relate to rights and duties of an employer and employee - Commission referred to various authorities and found that the Commission had the jurisdiction and power to deal with this matter and that this was an industrial matter capable of being referred under section 29 - Order Issued - Ms E Gribble -v- Eileen and Doug Krepp - APPL 74 of 1999 - GREGOR C - 12/03/01 – Technology 1050

PROCEDURAL MATTERS—*continued*

Application re unfair dismissal seeking Orders for discovery of documents - Applicant argued that dismissal was harsh, oppressive and unfair and that at the time of dismissal there were outstanding contractual benefits - Commission after considering the parties submissions, ordered that Respondent give discovery of all documents relating to the establishment and operation of certain projects, including financial records, the Applicant's personal file and all documents and memoranda relating to the administration of the employment contract - Further, Commission ordered that insofar as particulars were concerned the Respondent would provide to the Applicant particulars of the date and the reasons why any other employee was made redundant on or about 31 May 2000 and that Respondent specified all matters or occurrences in its organisation that gave rise to the conclusion that the position was redundant - Granted in Part - Mr GM Cann -v- Blackburne Real Estate (Licencee: Joburne Pty Ltd - APPL 936,937 of 2000 - GREGOR C - 12/03/01 - Property Services 1066

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services 1162

Application re unfair dismissal - Applicant argued he was unfairly dismissed - Respondent argued that Applicant was a contractor and not an employee - Commission found on balance that Applicant was a contractor and not an employee - Dismissed for want of jurisdiction - Mr S Beacroft -v- Fletcher International WA - APPL 1864 of 2000 - BEECH C - 01/05/01 1196

Applications re unfair dismissal - Applicants argued that dismissal was harsh, oppressive and unfair - Respondent argued that at the time the decision was made to terminate Applicants, the financial state of the company was poor and the company had little cash flow as it was building stock and not making sales - Commission reviewed authorities, clauses 32 and 32A of the Award and found that the termination of Applicant (Myles) was unfair because Respondent failed to pay him a severance payment - Further, the manner of dismissal was harsh because no discussions took place as required by clauses 32 and 32A of the Award and s.32 of the Minimum Conditions of Employment Act, and ordered that Applicant (Myles) be paid a global award by Respondent as compensation and that his contractual benefits claim dismissed - In the case of Applicant (Wigham), Commission was satisfied that he had made out a case that the selection process for dismissal was unfair - Further, Commission found that Applicant (Wigham) was unfairly dismissed, that reinstatement was impracticable and ordered that he be paid by the Respondent eight weeks' remuneration and eight weeks' ordinary pay, together with $10.00 tool allowance and $25.00 service allowance for each week - Orders Issued - Mr TW Wigham -v- SFM Engineering Pty Ltd - APPL 1375,1384 of 2000 - SMITH, C - 06/04/01 - General Construction 1241

[1]Appeal against decision of Full Bench (79 WAIG 2313) re dismissed appeal to Full Bench re finding of unfair dismissal, upon failure of Appellant to appear - Appellant argued the Appellant failed to receive notice to attend the hearing of Full Bench due to change of address and medical factors and that dismissing the appeal without giving him the right to be heard denied him natural justice - IAC found that in the circumstances the Full Bench was entirely justified in making the order and did not commit any error of law or exceed its jurisdiction - IAC found no question of law - Dismissed - Kamel Lebeidi - Sugar Gum Restaurant -v- Ms RA Napoli - IAC 9 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 01/02/01 - Accommodatn, Cafes&Restaurants 1357

Application pursuant to Section 27 re application being set aside and hearing date vacated and that a directions hearing be listed - Applicant argued that an error was made on an order dated 16 February 2001 and the order for discontinuance be revoked and returned for conciliation - Respondent argued Commission does not have the power to entertain application 440 of 2001, as by virtue of order 16 February 2001 Commission was functus officio in respect to the section 29 application - Commission found that that there was an error and having regard for section 26 of the IR Act, the original order discontinuing section 29 application be revoked - Order Issued - Mr J Lane -v- Aussie Online Ltd - APPL 440 of 2001 - WOOD,C - 17/05/01 – Technology 1424

Application re unfair dismissal and preliminary hearing on jurisdiction - Applicant argued that he thought he was given time on 16 January 2001 to decide whether he wanted to end his employment and that 18 January 2001 was date of termination - Respondent refuted and argued that Applicant was given the option of working out the notice or leaving straight away, where Applicant agreed to take payment in lieu and leave - Commission found that Applicant was paid in lieu of notice and the termination date was 16 January 2001 and Commission was without jurisdiction - Dismissed for want of jurisdiction - Mr J Rakitic -v- Perth Auto Alliance (Centre Ford Northbridge) - APPL 292 of 2001 - WOOD,C - 16/05/01 - Motor Vehicle Rtlg & Services 1445

PUBLIC HOLIDAYS

Conference referred re additional public holiday - Applicant Union argued that the Respondent was bound by the City of Stirling (Building Maintenance Section) Enterprise Agreement No AG 118 of 2000 which provided for an additional public holiday, namely a union picnic day - Further Union argued that it attempted to seek discussions with Respondent to schedule a date when the workers could take that holiday - Respondent argued that it had refused to meet with the Union because of its assertion that the inclusion of the Union's picnic day was a mistake and that it was therefore not bound to abide by the terms of the agreement - Commission found that there was a genuine mistake made and that the mistake was contained in the registered document - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- City of Stirling - CR 200 of 2000 - GREGOR C - Local Government 1268

[2]Appeal against decision of Commission (81 WAIG 679) re unfair dismissal claim - Appellant argued, interlaid, the Commission failed to give proper consideration to the Respondent's obligations for training, teaching and counselling the Appellant and sought compensation - Respondent argued the Appellant was on a probationary period and had not performed to required standards - Majority Full Bench found the Commission should have found the Appellant was not counselled or informed sufficiently as to the standards which he was required to meet - Full Bench found the Appellant had not been warned, given sufficient reason for dismissal and the employer acted in a procedurally and substantially unfair manner - Full Bench found sparse reasons for decision made it difficult to find the discretion did not miscarry and that the Appellant should be compensated for loss equal to the balance of the probationary period -Upheld and decision varied - Mr MJ East -v- Picton Press Pty Ltd - FBA 3 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 04/05/01 - Printg, Publishg & Rcdd Media 1367

PUBLIC HOLIDAYS—*continued*

Application re unfair dismissal and preliminary hearing on jurisdiction - Applicant argued that he thought he was given time on 16 January 2001 to decide whether he wanted to end his employment and that 18 January 2001 was date of termination - Respondent refuted and argued that Applicant was given the option of working out the notice or leaving straight away, where Applicant agreed to take payment in lieu and leave - Commission found that Applicant was paid in lieu of notice and the termination date was 16 January 2001 and Commission was without jurisdiction - Dismissed for want of jurisdiction - Mr J Rakitic -v- Perth Auto Alliance (Centre Ford Northbridge) - APPL 292 of 2001 - WOOD,C - 16/05/01 - Motor Vehicle Rtlg & Services........ 1445

PUBLIC INTEREST

[2]Appeal against Decision of Commission (80WAIG4829) re Dismissed application re Unfair Dismissal - Appellant argued that the learned Commissioner erred in law in dismissing the Appellant's claim pursuant to section 27 and erred in law in failing to exercise jurisdiction pursuant to section 26 - Further, the learned Commissioner erred in law and in fact in failing to give sufficient weight to the evidence of the Appellant with respect to the conciliation conference and application of the equitable doctrine of promissory estoppel - Respondent argued that an agreement was reached between the parties at the conciliation conference in the AIRC at the satisfaction of the Appellant and the Respondent acted on good faith - Full Bench found that it was open for the Commissioner to find as she did and that there was no error in the exercise of her discretion and the Appeal was not made out - Dismissed - Mr B Campbell -v- Kimberley Building Supplies - FBA 48 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 06/02/01 - Building Structure Services 353

[2]Application for Orders pursuant to Section 72A of the Industrial Relations Act - Full Bench issued a numbers of orders and directions to expedite the determination of the Application on 5 September 2000 - Full Bench also adjourned hearing at the request of both parties - Full Bench granted and ordered procedural applications - Applicant Union sought orders that the Merchant Service Guild (MSG) has the right to represent under the Act, to the exclusion of the Civil Service Association (CSA) the industrial interests of all Fisheries Officers employed in the Fisheries Department of Western Australia by the Executive Director Fisheries who are eligible for membership of the MSG and that the CSA does not have the right under the Act to represent the industrial interests of any Fisheries Officers - The grounds for the application are that the Applicant Union is best placed to represent the industrial interest of the Fisheries Officers because in the context of the enterprise the Applicant is the recognised principle union in relation to maritime employees and can commit greater resources and overall industry experience to protect the interests of those employees engaged in the maritime industry and would be better placed to promote and facilitate successful enterprise bargaining and that the orders sought are consistent with the objects of the Act - CSA argued that it had constitutional coverage of the Fisheries Officers and is a large existing organisation which does and is able to provide a wide variety of services and which has substantially provided resources to enable that to occur - Full Bench found that the CSA at all material times, had and has the capacity to properly and efficiently represent Fisheries Officers and has done so - Further, Full Bench found that the Fisheries Officers are ineligible to join MSG under its eligibility rule and that the MSG has no constitutional coverage of Fisheries officers - Full Bench concluded that the Applicant Union did not establish a substantial case - Dismissed - Merchant Service Guild of Australia, Western Australian Branch, Union of Workers -v- (Not applicable) - FBM 3 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 15/02/01 - Government Administration.... 380

[2]Appeal against Decision of Commission (80WAIG4504) re dismissed application re unfair dismissal - Appellant Union argued that the Commission at first instance erred when it gave no or insufficient weight to the evidence in relation to the following: "that there was no risk to safety of the life or limb of Mr. Rac or that there was no damage to Company plant or equipment of any kind, that this was the first breach of tagging procedure by Mr. Reichelt, and that the automatic penalty of dismissal for a tagging procedure breach was contrary to the rules of natural justice or criminal justice" - Further, Appellant Union argued that the disciplinary enquiry was in error as to its understanding of the range of disciplinary penalties that could be applied and that the speculation by the Commission as to "the tray could have dropped and killed Mr. Rac" was not credible on the evidence given by Mr. Reichelt and Mr. Rac and that the decision be quashed and a determination that the dismissal was unfair and an order of reinstatement of Mr. Reichelt to his former position be issued - Full Bench found that this was an appeal against a discretionary decision and was unable to interfere with a discretionary decision unless that appellant had established that the Commission at first instance erred according to the principles - Further, Full Bench found that the finding depends on the credibility of witnesses and the finding must stand unless it can be shown that the Commissioner had failed to use or had palpably misused his advantage or had acted on evidence or which was glaringly improbable - Full Bench concluded that the Appellant had not established that the exercise of the Commissioner's discretion at first instance miscarried according to the principles laid down and that the appeal was not made out as there was no appealable error in the exercise of the discretion - Appeal Dismissed - CONSTRUCTION, MINING, ENERGY -v- BHP Pty Ltd - FBA 45 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 02/03/01 - Metal Ore Mining........ 773

[4]Application for stay of operation of a direction of the Commission in Application Nos. 1693, 1710, 1711, 1712, and 1713 of 2000 (81WAIG936, 1068) pending Appeal to Full Bench - Appellant Employer argued that Commission in the exercise of its discretion failed to give proper weight and consideration to the following matters that, it was not in the public interest to order the discovery of confidential communications between employers and their industrial relations advisers and that such documents were not and could not be relevant to the matters at issue in the substantive case - Respondents argued that to stay the operation of the order might have the effect of delaying the final hearing and determination of the matter, a delay which could not be compensated for in money, even if Respondents were successful - President found that the principles applicable for a stay should be applied and that the decision appealed against was a discretionary decision and that to succeed on appeal Appellant would have to establish that the exercise of discretion was miscarried in accordance with the principles - Further, President found that an appellate court should exercise caution in undertaking to review a decision on a matter of practice or procedure and that the stay of operation had not been established and therefore, there should not be interference by the President with an interlocutory order - Dismissed - Cable Sands (W.A.) Pty Ltd -v- Mr R Sullivan & Others - PRES 5 of 2001 - President - SHARKEY P - 19/03/01 - Mineral........ 998

Application re unfair dismissal - Parties made submissions to the Commission for further and better particulars - Applicant argued he was harshly, oppressively and unfairly dismissed and sought six weeks' compensation - Respondent argued that the application should be struck out and Applicant's claim be dismissed in that the further and better particulars raise a different case to that raised in the Applicant's original application - Commission, after hearing the submissions concluded that further proceedings were not necessary or desirable in the public interest and that for a number of reasons set out in its Reasons For Decision, it would make an order pursuant to s.27(1)(a)(ii) of the Act to dismiss the Applicant's claim - Dismissed as not being necessary or desirable in the public interest - Mr M Pietracatella -v- W.A. Italian Club Incorporated A.O. 350010F - APPL 959 of 2000 - SMITH, C - 28/03/01 - Other Services........ 1046

REDUNDANCY/RETRENCHMENT

[2]Appeal against decision of Commission (80WAIG3106) re unfair dismissal - Appellant employer appealed against that decision on the grounds that the learned Commission erred by finding that dismissal was unfair despite evidence of a genuine redundancy, exceeding his jurisdiction and interfering with the Appellant's decision to terminate, determining that Appellant was obliged to make compensatory payment for the purposes of redundancy and awarding Respondent a sum of $9477.00, thus requiring Appellant to apply for an order to stay the decision pending determination of this Appeal - Respondent argued that he had been unfairly dismissed due to difficulties in the relationship between the parties which manifested in five major episodes during the course of his employment - Full Bench found that Appellant had not treated Respondent fairly, that dismissal was unfair, reinstatement was impracticable, that the decision at first instance was arrived at by an erroneous exercise of discretion and therefore varied the decision and substituted the figure of $1,114.92 for the figure of $9477.00 in the decision - Appeal upheld and decision at first instance varied - WA Access Pty Ltd (ACN 009 392 830) -v- Mr MR Vaughan - FBA 34 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/11/00 – Spraypainting........ 373

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REDUNDANCY/RETRENCHMENT—*continued*

[3]Application to vary awards re Redundancy - Applicant Union sought to amend awards in the pastry cooking industries to remove the exemption which applied in the Redundancy clause to employers with less than 15 employees - Applicant argued that increased automation of dough making and mixing, faster, larger automatic ovens and the use of pre-mixes, are changes which have resulted in less skilled employees being utilised in place of qualified tradespersons - Respondent argued that because there was a shortage of qualified tradespeople, any such tradesperson made redundant would have no difficulty in finding employment in a very short time - Commission found amongst a number of reasons that equity and substantial merits of the case justify the applications being granted and concluded that the exemption ought to be removed from these awards - Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Baking Industry Employers' Association of Western Australia - APPL 146,147,148 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/01/00 - Baking 399

Application re unfair dismissal seeking compensation and denied contractual entitlements - Applicant argued that the Respondent contrived an arrangement to deny her a redundancy payment and that she was not competent to perform the duties of the final job offered to her - Respondent argued that there would not be a redundancy but, there would be a position made available to the Applicant and would also provide the necessary support and that the Applicant was capable of performing the job being offered - Commission preliminarily found that this was a matter of either a redundancy or an income loss but not the two together and that the Applicant was either going to be given a redundancy payment or a job - Commission found that the Applicant had not proven her case and that the Applicant had in effect resigned in that she needed to accept the job or in fact the employment relationship was going to end- Dismissed for want of jurisdiction - Mrs E Noteboom -v- Thorn Australia Pty Ltd - APPL 1506 of 2000 - WOOD,C - 20/02/01 – Electronic 893

Conference referred re termination by redundancy - Applicant Union argued that Applicant's position was full -time at the time she commenced her long service leave, that it was to that position that she returned following her leave, that the decision taken by Respondent was to make redundant that full-time position, therefore, Applicant's redundancy entitlements are to be calculated on the basis of the full-time hours she had previously worked - Further, Applicant Union sought a Declaration that the reference to "each year of completed years of service" referred to in Clause 5(a) - Severance Pay of the ECCRU Enterprise Bargaining Agreement 1999 means "each calendar year of employment" - Commission found on evidence that Applicant was notified of the reduction in her hours, that the change did not so much restructure the position but reduced its hours from 37.5 to 22.5 and that the position which was abolished by Respondent was the one which had 22.5 hours per week - Further, Commission reviewed Clause 5 of the ECCRU Enterprise Bargaining Agreement 1999 and found the "completed service" referred to in that clause refers to the employee attending for work and performing work pursuant to her contract of employment, therefore, Applicant was entitled to two weeks' pay for each year where her service was complete for that year, that is for each year that she attended for work and worked in accordance with her contract of employment - Commission adjourned the matter inviting the parties to provide an agreed minute of any Order to issue in the matter but subsequently Applicant filed a Notice of Discontinuance - Discontinued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Ethnic Child Care Resource Unit - CR 32 of 2000 - BEECH C - 08/11/00 - Community Services 919

Application re unfair dismissal and contractual entitlements - Preliminary issue re discovery of documents - Applicants' Agent filed Notice of Application for an Order that respondent give discovery under oath of documents relating to Applicant's termination of employment and engagement of temporary employees - Respondent objected to such an Order and argued that there was a restructure which lead to the redundancy of the two individual position held by Applicants and that appropriate procedures have been followed and appropriate redundancy payments paid - Commission determined that Orders for discovery would only be made for documents which were relevant to the issues before the Commission and that the Order sought was in its view sufficiently broad to be oppressive, therefore, for a number of reasons the Order sought was rejected - Dismissed - Mr SI Borich -v- WesTrac Equipment Pty Ltd ACN 009 342 572 - APPL 293,294 of 2000 - BEECH C - 23/02/01 - Machinery & Equipment Mfg 934

Application re unfair dismissal - Applicant argued that dismissal was harsh, oppressive and unfair as he was not consulted about being made redundant, nor were alternatives considered and as reinstatement was impracticable, that it sought compensation as a remedy - Respondent argued that an investigation into the West Australian operation found that the Company was in worse shape than expected, sought immediately to introduce some cost reduction strategies and after applicant indicated that he wished to leave the company and be paid out a redundancy, he was formally given notice that his position had been made redundant with one month's notice of termination - Commission found that applicant had raised the issue of his resignation though he did not intend to resign, that the actions of respondent around that time were in response to applicant's suggestion that he would leave and his request for a redundancy sweetener, that though the process adopted to terminate his services lacked some sensitivity applicant had not proven his case that the dismissal was harsh, oppressive or unfair - Dismissed - Mr JF Booth -v- Brownbuilt Pty Ltd (A.C.N. 002 558 894) T/as Brownbuilt Metalux Industries - APPL 24 of 2000 - WOOD,C - 27/03/01 - Sheet Metal Fabrication 1015

Application re unfair dismissal - First Applicant argued that the notice of termination was given to them without explanation and he disputed he had been paid any money for redundancy - Second Applicant argued that he was never given any suggestion that his position was in jeopardy, that no director of the respondent made any complaint to him about the standard of his work and he was told by Mr John Polmear that he would like both applicants to run the company while he was away in the Eastern States - Respondent argued that the Goods and Services Tax on 1stJuly 2000 severely impacted on the operations of his company and as a consequence was forced to reduce its workforce to preserve the financial viability of the operation - Commission found on the balance of probabilities, that applicants were dismissed for performance failure and were not given the opportunity to say anything about respondent's assessment of their standard of work, which can only be seen to be procedurally unfair, but after careful consideration of the balance in the whole of the circumstances of the terminations, given that there be a fair go all round and not just to one party or the other, that there was not unfairness to the point where the Commission would find that the terminations were harsh or unfair - Dismissed - Mr JP Lynch -v- Twinside Retaining Walls & Fences - APPL 1477,1483 of 2000 - GREGOR C - 04/04/01 - Construction Trade Services 1038

Applications re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair and claimed compensation equal to a reasonable redundancy payment, denied contractual entitlements, long service leave and payment for relocation - Applicant argued that there was alternate work available for him to do and that he should of been retained in employment over another employee and that no reasonable alternatives were provided by Respondent and also given an impression that a promotion would be offered only to then be dismissed - Respondent argued that it had restructured its organisation and as a result Applicant's position became redundant and payment in lieu of notice and severance payment was made - Commission found that the claim for unfair dismissal was made out against Respondent being in breach of the implied term referred to and being made redundant when Applicant was expecting to given a wider role and that there was an inadequacy of severance payment made - Further, Commission found that reinstatement was not sought and that there had been a genuine redundancy, Commission therefore considered the remedy of compensation and that a further eight week's salary be paid by way of a redundancy payment - Order Issued - Mr A Birnie -v- A.W.I. Administration Services Pty Ltd - APPL 1198,1457 of 2000 - BEECH C - Metal Ore Mining 1198

Application re unfair dismissal - Applicant argued that his dismissal was unfair because his termination was not a bone fide redundancy and that this related to a workers compensation claim made by him - Respondent argued that Applicant was dismissed by reason of a bona fide redundancy because there was a turndown in work and reduced demand for their products - Commission found that Respondent did experience a substantial reduction in business demand and that consideration by Respondent of alternatives to redundancy with employees were discussed, but, did not include Applicant - Commission turned to the relevant principles to unfair dismissal claims arising from a situation of redundancy and found that Respondent had a lawful obligation to discuss and warn of impending redundancies to employees which in relation to Applicant did not occur - Commission declared that Applicant was unfairly dismissed - Declaration Issued - Mr LF Free -v- Boral Aluminium Windows - APPL 1379 of 2000 - KENNER C - Construction Trade Services 1204

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REDUNDANCY/RETRENCHMENT—*continued*

Application re contractual entitlements - Applicant argued that when she was given written notice that her position was to reduce from a full-time position of 37.5 hours per week to 22.5 hours per week, she was entitled to a "partial redundancy" payment of $5,551.00 calculated on the basis of the 15 hours per week she lost at 2 weeks' pay for each of her 9 years' service - Respondent opposed the claim and argued that at all relevant times, Applicant was a part -time employee whose hours could be, and were varied both up and down and that there was no redundancy - Further, Respondent argued that Applicant was aware of the fact that she was a part-time employee and that Applicant had accepted that her hours of work could be increased or decreased with appropriate notice - Commission found on the evidence and material before it that in the terms of the enterprise bargaining agreement provisions, Applicant was not made redundant when her hours was reduced, therefore she was not, and accordingly she was not entitled to a benefit under her contract of employment - Further, the evidence had not shown that the reduction in hours was part of a two-stage plan to eventually make the position redundant, nor that it was of itself a redundancy under the enterprise bargaining agreement - Dismissed - L Kambourakis -v- Ethnic Child Care Resource Unit - APPL 2022 of 2000 - BEECH C - 08/05/01 - Community Services 1216

Applications re unfair dismissal - Applicants argued that dismissal was harsh, oppressive and unfair - Respondent argued that at the time the decision was made to terminate Applicants, the financial state of the company was poor and the company had little cash flow as it was building stock and not making sales - Commission reviewed authorities, clauses 32 and 32A of the Award and found that the termination of Applicant (Myles) was unfair because Respondent failed to pay him a severance payment - Further, the manner of dismissal was harsh because no discussions took place as required by clauses 32 and 32A of the Award and s.32 of the Minimum Conditions of Employment Act, and ordered that Applicant (Myles) be paid a global award by Respondent as compensation and that his contractual benefits claim dismissed - In the case of Applicant (Wigham), Commission was satisfied that he had made out a case that the selection process for dismissal was unfair - Further, Commission found that Applicant (Wigham) was unfairly dismissed, that reinstatement was impracticable and ordered that he be paid by the Respondent eight weeks' remuneration and eight weeks' ordinary pay, together with $10.00 tool allowance and $25.00 service allowance for each week - Orders Issued - Mr TW Wigham -v- SFM Engineering Pty Ltd - APPL 1375,1384 of 2000 - SMITH, C - 06/04/01 - General Construction........ 1241

Conference referred re utilization of Ongoing Change Agreement II - Applicant argued that the proposed transfer of twelve employees from Respondent's MEW Section to mining operations at its Mt Newman site for a six months trial constituted a forced redundancy and that it arises as a consequence of the engagement by Respondent of contractors in the MEW to perform work previously performed by employees and was not supportable under the Agreement - Respondent argued that Union party had consented, subject to certain conditions, to permit Respondent to initiate one to three months trials of changes in the workplace and also denied that the proposed trial involved forced redundancies - Commission found that the main issues were whether the terms of the OC II contemplated the change as proposed by Respondent and whether the proposal falls into one of the exclusion's contained in OC II or it constituted "wholesale contracting out" in the MEW - Commission found that proposed transfers to the employees were not consistent with the terms of the Ongoing Change Agreement II and the proposed changes should be the subject of negotiations between the parties - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 264 of 2000 - KENNER C - Metal Ore Mining..... 1254

Application for reinstatement or compensation on the grounds of unfair dismissal - Applicant argued that despite there being yearly contracts, the Applicant's employment should be regarded as continuous up until the time of termination, there was no evidence that the Applicant performed poorly and relevant decisions were not taken by a validly constituted management committee under the Respondent's constitution - Applicant argued that the "spill and fill" was merely a device to get rid of the Applicant and that there was a breach of the MCE Act - Respondent argued that it had engaged in a genuine restructuring of its operations to provide better service and there was in fact no dismissal - Respondent further argued that the Applicant had failed to mitigate her loss and had been paid a substantial redundancy package - Commission found failure to consult as required under the MCE Act led to the conclusion that the dismissal was unfair and that the manner of the termination left a lot to be desired - Commission found reinstatement was impractical, but only injury warranted compensation - Granted in part - Ms LF Oliver -v- Coolgardie Community Care Incorporated - APPL 1075 of 2000 - KENNER C - 10/05/01 - Community Services ... 1435

Application re unfair dismissal - Applicant argued that dismissal was unfair because she had not taken too many sick leave days unnecessary and that other employees should have been terminated due to downsizing before her as she had the longest service - Further, Applicant argued that she was dismissed because she was pregnant - Respondent argued that it needed to reduce staff and that the process also continued after Applicant's dismissal and the number of sick leave days taken were not relevant or important to the process of downsizing - Further, Respondent argued that he was unaware that Applicant was pregnant when notice was given - Commission found that the number of sick days taken was not a relevant issue and that the process regarding downsizing was not unfair - Further, Commission found that Respondent was not aware of the Applicant's pregnancy and that it was not an issue in the overall need to reduce staff - Dismissed - Ms K Ruston -v- Leader Lounge Furnishings - APPL 1547 of 2000 - BEECH C - 17/05/01 - Furniture 1448

Conference Referred re alleged unfair dealings with redundancy payments - Applicant Union argued that the Regulations 20(7)(a) of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 had been unfairly and improperly applied to one of its members and that severance pay should have been calculated at the rate for a Regional Signal Superintendent - Respondent argued that Commission did not have the jurisdiction to hear and determine the application under s.44 of the IR Act because of the operation of s.95(3) of the Public Sector Management Act, in the alternative, member had not acted continuously in the position of Regional Signal Superintendent - Commission found that the pre-condition to a severance payment at a higher rate than the substantive rate of pay was not continuous service, but, continuous payment of the allowance and that severance payment at the higher rate of pay had not been met and in all circumstances it had not been demonstrated that the Regulations had been or improperly applied - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- Westrail - Western Australian Government Railways Commission - CR 348 of 2000 - SMITH, C - 25/05/01 - Rail Transport 1460

REINSTATEMENT

Application re unfair dismissal - Applicant argued that he was summarily dismissed and sought reinstatement if it was practicable, or alternatively the maximum level of compensation - Respondent argued that Applicant solicited a cash job for an ant treatment at a private company in Cannington, was suspended on pay and asked to provide a reason why he should not be terminated - Commission found that having heard all the evidence, came to the conclusion that Applicant did solicit for a cash payment, that the act of solicitation amounted to conduct of stealing as a servant and warranted summary dismissal - Commission was satisfied that for the above reasons Respondent did not act unfairly, harshly or oppressively in dismissing Applicant - Dismissed - Mr SP Davies -v- Nationwide Environmental Management Pty Ltd - APPL 862 of 2000 - WOOD,C - 08/12/00 – Pesticides........ 281

Application re unfair dismissal and denied contractual entitlements - Applicants argued that they were dismissed following an abusive encounter at the restaurant with one of the Respondent's directors - Respondent argued that both Applicants resigned in that encounter, or if they were dismissed, dismissal was justifiable because they had been drinking in the restaurant contrary to specific instructions - Commission found that both Applicants were dismissed for misconduct, that though their dismissals were warranted, the manner in which they were both dismissed was quite oppressive, however, their claims of unfairness for the substantive reasons they have argued are not made out - Commission was satisfied that reinstatement was impracticable and ordered $500 to be paid to each Applicant as compensation for the injury arising from the manner of their dismissals - Granted - Ms KR Riley -v- Royale Enterprises Pty Ltd - APPL 1599,1600 of 1999 - BEECH C - 18/11/00 - Accommodatn, Cafes&Restaurants........ 305

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REINSTATEMENT—*continued*

[2]Appeal against Decision of Commission (80WAIG5633) re unfair dismissal and contractual entitlements - Appellant argued that the Applicant was to be reinstated at the site said to be owned by Goldfields Pty Ltd and not the Appellant, that the shortage of work has been misunderstood to be at that site and not the Kalamunda site, that the amount ordered to be repaid, being the loss of earnings, should be reduced by the amounts for annual leave and notice in lieu, which was paid in termination pay, that the amount should also be reduced by the unemployment benefits received for the corresponding period and that reinstatement was not possible due to the fact that Appellant has ceased to operate - Further, the Commission erred at first instance in that it ordered that amounts said to have been lost or not paid to the Respondent between the date of dismissal and the date of the order appealed against be paid - Applicant conceded to the ground which alleged that the Commissioner erred in ordering the payment of monies which the Commissioner ordered be paid, being the wages and other remuneratory items not paid or lost by Applicant because of unfair dismissal - Full Bench found that this ground was based on the City of Geraldton v Cooling (80WAIG5341) which was authority for the proposition that an order for compensation following a dismissal was not within power if an order for reinstatement was made, as it was here, thus, the appeal was upheld on this ground and the order varied - Further, Full Bench found that the Order for reinstatement was not made as a result of any miscarriage of discretion in the Commission at first instance and that the other grounds of appeal had not been made out and were dismissed - Upheld in part otherwise dismissed - Pollock Nominees Pty Ltd ACN 008 842 911 -v- Mr JL Butterfield - FBA 50 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 05/02/01.......... 369

Application re unfair dismissal - Applicant argued dismissal was unfair because he was never warned about being dismissed for not having provided his statement and no one put to him that he was in any way obstructing the inquiry process and sought an Order for reinstatement pursuant to s.23A of the Industrial Relations Act - Respondent argued Applicant was summarily dismissed for gross misconduct as he was engaged in an altercation with another employee and the fight occurred within a potentially dangerous area - Commission heard evidence from a number of witnesses, carefully considered all of the relevant documentary evidence, had regard to all of the circumstances and found that Applicant's summary dismissal was harsh, oppressive and unfair and as there was no submission from the Respondent that the lapse of time would make reinstatement impracticable or there would not be work available to the Applicant in the classification he formerly occupied, ordered reinstatement - Granted - Mr W Hull -v- City of Mandurah - APPL 706 of 1998 - KENNER C - 09/02/01 - Construction Trade Services 693

[1]Appeal against Decision of Commission In Court Session (80WAIG4508) re terms and conditions of employment, redundancy payments and superannuation schemes - Appellants argued that CICS erred in law by purporting to give retrospective effect to order 1, that the base salary and roster allowance of each letter of offer employees be increased and erred in law in finding that following the merger, the Appellant's Mid-West operations were quickly restored to profitability or giving consideration to other factors when there was no evidence to support this finding - Further, Appellants argued that the Commission erred in law in making orders in relation to Iluka Resources Limited where there was no industrial matter between it and the Respondents and erred in law by acting on the irrelevant consideration that RGC Mineral Sands Ltd had previously offered a limited choice of superannuation funds to its employees and having regard to a Superannuation scheme which applied to Workplace Agreement employees and granting liberty to apply to the award employees of Iluka Resources Limited and Iluka Mid-West Limited when the industrial matter between Appellants and Respondents did not relate to the award employees - Industrial Appeal Court found that the CICS had the power to give retrospective effect to its order awarding an increase in salaries and allowances, that there was revealed an evidentiary basis on which the CICS could properly make the challenged finding that profitability was quickly restored for the Mid-West operations following the Merger - Further, IAC found that it was a matter for the CICS to find whether an order to enable letter of offer employees to become members of the Iluka Resources Limited fund was appropriate as a matter of equity, good conscience and the substantial merits of the case - IAC found that no grounds had been made out and failed to be persuaded thus Appeal dismissed - Dismissed - Iluka Midwest Limited & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 5 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Parker J. - 08/02/01 - Other Mining.......... 763

Application re unfair dismissal and reinstatement - Applicant argued that dismissal was unfair and excessive because he rejected any suggestion that he was intentionally sleeping on the job during paid working time - Further, Applicant argued that he was resting whilst awaiting final run which was a common occurrence early in the morning and unaware of any other reported incidents - Respondents argued that Applicant was dismissed for serious misconduct for having been found asleep during paid working time instead of attending to work duties and taking into account other incidents that have taken place - Commission found it difficult to reach the conclusion that the Applicant was deliberately or intentionally sleeping on the job and that little had been done in discipline in relation to the other incidents - Further, Commission found that the Respondents were in error in regarding the other incidents and that the dismissal was harsh - Commission ordered reinstatement as the primary remedy and the parties were given an opportunity to agree on the form of the order - Granted and reinstatement ordered - Mr MA Rulyancich -v- Iluka Resources Limited & Other - APPL 1895 of 2000;CR 313 of 2000 - BEECH C - 23/02/01 - Other Mining 874

Application re contractual entitlements - Applicant argued that he was denied benefits as contained in the Sales Representative Employment Agreement of 17 May 1999 - Respondent argued that on each occasion that it dismissed applicant, it relented and reinstated him - Commission found that applicant had made out his claim in relation to the alleged dismissal which occurred in September 1999 and remained entitled to 8% advertising incentive and also the 3% over-rider commission, but after the December 1999 dismissal, his entitlement to both claimed conditions of employment ended then - Granted in Part and Adjourned - Mr GS Hincks -v- Darrell Crouch and Associates Pty Ltd - APPL 1320 of 2000 - BEECH C - 31/01/01.......... 885

Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed and that he was made redundant without any prior consultation in breach of ss 40-42 of the Minimum Conditions of Employment Act 1993 - Further, Applicant sought reinstatement to his position or in the alternative, the maximum of six months compensation - Respondent argued that there was a restructure, the company had to cut cost and the Applicant was chosen for redundancy because he was the poorest performer and he was costing the company nearly twice as much as those that were performing better that him - Commission reviewed authorities and found on evidence that the Respondent had discharged their onus in proving there was a valid redundancy, that the redundancy was effected to save costs and that Applicant was made redundant largely, but not solely, for cost reasons - Further, Commission reviewed the Minimum Co Employment Act 1993 and found that Applicant had not proven his case that someone else should have been chosen for redundancy or that he should have been given another position, therefore, weighing up all the circumstances in the matter, Commission did not consider that Applicant's selection for redundancy was unfair, harsh or oppressive - Dismissed - Mr GE Garbett -v- Midland Brick Company Pty Ltd - APPL 791 of 2000 - WOOD,C - 09/05/01 - Non-Metallic Min Product Mfg.......... 1206

Application re unfair dismissal seeking reinstatement and contractual entitlements - Applicant argued that dismissal was unfair and that he was also entitled to long service leave - Applicant argued that the Respondent's inquiries were inadequate in relation to the investigation and finding by the Principal that Applicant was guilty of sexual misconduct in respect of a student at the College - Respondent argued that Applicant failed to provide any information that could provide a defence to the allegations of misconduct at the time of the investigation when the opportunity was given - Further, Respondent argued that all matters were considered in making the decision to terminate including the nature of the allegations, the evidence presented, the failure to respond satisfactorily to the allegations within a reasonable time frame, the impact on the family concerned, the impact on the school and its staff, and the duty of care owed to the children in the college - Commission found that Respondent had conducted itself in a proper manner and Applicant was given reasonable opportunity to provide a defence and that it had not abused its right to terminate - Further, Commission found that the employment relationship had irretrievably broken down and that the trust could not be restored - As to the long service leave, Commission found that the Commission did not have the jurisdiction to hear and determine the claim of long service leave, as this was an enforcement or recovery of wages under an award and that it should be pursued in the Industrial Magistrate's Court pursuant to section 83 of the I.R. Act - Dismissed - Mr R Newton -v- Roman Catholic Bishop of Bunbury - APPL 18 of 2000 - SMITH, C – Education.......... 1226

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REINSTATEMENT—*continued*

Conference re unfair dismissal - Applicant Union argued that dismissal of member was unlawful because it was contrary to the Order issued by Commission in CR350 of 2000 (81WAIG699) re exploring options and providing appropriate training to member - Further, Applicant Union argued that an Order be issued that member be reinstated to position held by him immediately prior to his dismissal and that the parties agree to the duties to be performed by member - Respondent argued and questioned the jurisdiction of the Commission to issue such an order and says that member was dismissed for continued and wilful refusal to obey a lawful and reasonable instruction - Commission found that it had the jurisdiction to issue such an order and issued an order that Respondent not dismiss member from his employment which also allowed the parties liberty to apply to vary, cancel or revoke this Order - Interim Order issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - C 89 of 2001 - BEECH C - 30/04/01 – Hospitality.................... 1248

Conference referred re unfair dismissal seeking reinstatement - Applicant Union argued that their member was unfairly dismissed because the Respondent's response to his actions was disproportionate to the gravity of the conduct and that the conduct in question occurred outside the workplace and that the policy was not entirely clear in this regard which added to the unfairness of the dismissal - Respondent argued that the member had engaged in conduct in breach of the Policy with knowledge of the terms of the Policy and further submitted that the conduct and behaviour was premeditated and designed to harass and intimidate other employees which included using the word "scab" - Respondent also argued that reinstatement was not a viable option if the dismissal was unfair - Commission found that the member was dismissed for making unwelcome remarks and using derogatory and offensive words to employees who had accepted workplace agreements - Commission found having regard to all the circumstances, including the length of service and unblemished employment record that the Respondent's decision to dismiss was harsh, oppressive and unfair - Further, the utterances of the member were not accompanied by any threats, other verbal abuse or intimidation - As to the question of remedy, Applicant Union sought reinstatement, whilst Respondent opposed it - Commission ordered reinstatement - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 KENNER C - Metal Ore Mining... 1262

[2]Appeal against decision of Commission (81 WAIG 1262) re unfair dismissal claim - Appellant argued that Commission did not have jurisdiction to order reinstatement once the Appellant had agreed to pay compensation - Full Bench reviewed IR Act, authorities and found that the Commission acted within power, correctly and validly exercising the unconditional power conferred by s23A(1)(b), a power not conditioned by s 23A(1a)(b) - Dismissed - BHP Iron Ore Pty Ltd -v- AUTO, FOOD, METAL, ENGIN UNION - FBA 21 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 21/05/01 - Metal Ore Mining... 1363

Applications re unfair dismissal claim - Applicant argued that dismissal was harsh, oppressive and unfair and sought reinstatement and compensation - Respondent argued that a disciplinary inquiry convened under an Industrial Relations Agreement found that the Applicant had breached the Company's Non-Harassment Policy, was involved in the distribution of offensive material, marking an affidavit with offensive comments and had lied about any involvement in those matters - Commission found there was no evidence that the Applicant in any way did or was associated with the distribution of the material around the site or that the "target" of the harassment ever knew of the notations on the affidavit - Commission found the Applicant was dismissed for conduct that did not breach the policy and the dismissal was harsh, oppressive and unfair - Commission found the Respondent knew of the deceit and could not resurrect it ex post facto - Commission found that an application to re-open the case upon the Respondent's agreement to pay compensation should be treated as part of the substantive matter, it should not do so in all the circumstances and the Applicant should be reinstated - However, Commission found the Applicant's conduct in misleading the Respondent could not be condoned and he should receive a written warning to be placed on his personal file to the effect that any further conduct of that kind will lead to termination of his employment - Ordered Accordingly - CONSTRUCTION, MINING, ENERGY -v- BHP Iron Ore Ltd - APPL 1393 of 2000;APPL 747 of 2001 - KENNER C - 08/05/01 - Metal Ore Mining... 1393

Application for an order revoking an order reinstating an unfairly dismissed employee - Applicant Employer argued that S23A(3) of the IR Act created a right for it to refuse to obey an order for reinstatement and the Commission must therefore issue an order for compensation- Respondents argued that it was not open for the Applicant to bring the application, the Respondent Employee's attitude had been the subject of the original hearing, reinstatement was not a popularity issue and the Commission had discretion - Commission reviewed authorities and found that if the process of revocation was automatic it would render the power to reinstate nugatory and that power was discretionary - Commission found it was not open in the application to consider further evidence on a point that was already decided - Commission had considered the employee's attitude and behaviour and reinstatement had more potential benefit to him - Dismissed - Iluka Resources Limited & Other -v- Mr MA Rulyancich & Others - APPL 432 of 2001 - BEECH C - 01/06/01 - Other Mining 1397

Application re unfair dismissal - Supplementary reasons for decision re question of compensation - Respondent requested a motion to reopen matter to make further submissions concerning the quantum of compensation - Respondent argued that there was no loss that Applicant can point to because in the period in which he was unemployed he did not attempt to mitigate his loss - Commission found that Applicant did not continue to suffer an impact upon his professional reputation and that during the period of time in question he did not make sufficient efforts to mitigate his loss, thus, the compensation awarded was decreased - Order Issued - Mr I Lawless -v- Ghirardi Restaurant Pty Ltd (ACN 081 550 469) - APPL 1822 of 1999 - GREGOR C - 03/05/01 - Accommodatn, Cafes&Restaurants 1426

Application for reinstatement or compensation on the grounds of unfair dismissal - Applicant argued that despite there being yearly contracts, the Applicant's employment should be regarded as continuous up until the time of termination, there was no evidence that the Applicant performed poorly and relevant decisions were not taken by a validly constituted management committee under the Respondent's constitution - Applicant argued that the "spill and fill" was merely a device to get rid of the Applicant and that there was a breach of the MCE Act - Respondent argued that it had engaged in a genuine restructuring of its operations to provide better service and there was in fact no dismissal - Respondent further argued that the Applicant had failed to mitigate her loss and had been paid a substantial redundancy package - Commission found failure to consult as required under the MCE Act led to the conclusion that the dismissal was unfair and that the manner of the termination left a lot to be desired - Commission found reinstatement was impractical, but only injury warranted compensation - Granted in part - Ms LF Oliver -v- Coolgardie Community Care Incorporated - APPL 1075 of 2000 - KENNER C - 10/05/01 - Community Services ... 1435

Conference referred re unfair dismissal seeking reinstatement - Applicant Union opposed the application going to the construction of s.23 of the IR Act - Applicant Union argued that Respondent did not have the standing to bring application to revoke the reinstatement order and submitted that an order for reinstatement was solely for the benefit of the unfairly dismissed employee - Further, Applicant Union argued that an alternative means of dealing with a failure to comply with such an order, does not create a right to not comply - Respondent argued that Commission should revoke and amend the order for reinstatement and award compensation for the loss or injury caused by the dismissal - Respondent argued that on its proper construction, reference to 'may' in s.23A(3), although expressed in directory terms, should be interpreted in a mandatory sense. - Further, Respondent argued that if s.23A(3) was to be interpreted such that 'may' means Commission had a discretion to issue a further order on revocation, then that discretion may be exercised simply as a consequence of the employer's failure to comply with the reinstatement order or its impracticability to comply with the order - Commission found that once it was satisfied that there had been a failure to comply as a matter of jurisdictional fact, Commission was then obliged to consider whether to revoke original order and that the terms of s.23A as a whole conferred on the employer a right to not comply with a reinstatement order - Commission rejected Respondent's submissions to revoke Commission's order - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 - KENNER C - 31/05/01 - Metal Ore Mining 1457

Page

SAFETY

[3]Conference referred re "fit for work policy" - Applicant Unions raised objection to certain aspects of the policy on the ground that those aspects impose an unfair and unreasonable burden on their employees - Further, Applicant Unions argued that the existing level catches cannabis users who have long since ceased to be intoxicated or otherwise adversely affected by the drug and they point to, and rely on, the fact that a measurement of the level of THC in urine was not a measurement of the level of impairment - Respondent argued that the nature of its operations, and in particular the duties and responsibilities of its employees, are such as to require a low level for THC so as to minimise the risk that an employee who has recently consumed drugs was allowed to work, that if the cut-off level were set at a higher level than was now the case, recent drug consumers could escape detection and moreover, that any departure from the level set by the Australian Standard would unduly expose it to an action for breach of duty of care in an appropriate case - Commission in Court Session were persuaded that a cut-off level of THC at 50ng/ml in the context of the Respondent's policy was industrially unreasonable, although the confirmation threshold of 15ng/ml was not unjust - Further, CICS were not convinced that the blood alcohol concentration level in the policy as it currently stands was either harsh or unfair to either the employee who gives a positive reading or to innocent fellow employees - Granted in Part - AUTO, FOOD, METAL, ENGIN UNION & Others -v- Argyle Diamond Mines Pty Limited - CR 75 of 2000 - Commission in Court Session - FIELDING C/KENNER C/SMITH, C - 05/12/00 – Mining......................... 324

[2]Appeal against decision of Commission (80WAIG3106) re unfair dismissal - Appellant employer appealed against that decision on the grounds that the learned Commission erred by finding that dismissal was unfair despite evidence of a genuine redundancy, exceeding his jurisdiction and interfering with the Appellant's decision to terminate, determining that Appellant was obliged to make compensatory payment for the purposes of redundancy and awarding Respondent a sum of $9477.00, thus requiring Appellant to apply for an order to stay the decision pending determination of this Appeal - Respondent argued that he had been unfairly dismissed due to difficulties in the relationship between the parties which manifested in five major episodes during the course of his employment - Full Bench found that Appellant had not treated Respondent fairly, that dismissal was unfair, reinstatement was impracticable, that the decision at first instance was arrived at by an erroneous exercise of discretion and therefore varied the decision and substituted the figure of $1,114.92 for the figure of $9477.00 in the decision - Appeal upheld and decision at first instance varied - WA Access Pty Ltd (ACN 009 392 830) -v- Mr MR Vaughan - FBA 34 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/11/00 – Spraypainting... 373

Application re unfair dismissal - Applicant argued dismissal was unfair because he was never warned about being dismissed for not having provided his statement and no one put to him that he was in any way obstructing the inquiry process and sought an Order for reinstatement pursuant to s.23A of the Industrial Relations Act - Respondent argued Applicant was summarily dismissed for gross misconduct as he was engaged in an altercation with another employee and the fight occurred within a potentially dangerous area - Commission heard evidence from a number of witnesses, carefully considered all of the relevant documentary evidence, had regard to all of the circumstances and found that Applicant's summary dismissal was harsh, oppressive and unfair and as there was no submission from the Respondent that the lapse of time would make reinstatement impracticable or there would not be work available to the Applicant in the classification he formerly occupied, ordered reinstatement - Granted - Mr W Hull -v- City of Mandurah - APPL 706 of 1998 - KENNER C - 09/02/01 - Construction Trade Services 693

[2]Appeal against Decision of Commission (80WAIG4504) re dismissed application re unfair dismissal - Appellant Union argued that the Commission at first instance erred when it gave no or insufficient weight to the evidence in relation to the following: "that there was no risk to safety of the life or limb of Mr. Rac or that there was no damage to Company plant or equipment of any kind, that this was the first breach of tagging procedure by Mr. Reichelt, and that the automatic penalty of dismissal for a tagging procedure breach was contrary to the rules of natural justice or criminal justice" - Further, Appellant Union argued that the disciplinary enquiry was in error as to its understanding of the range of disciplinary penalties that could be applied and that the speculation by the Commission as to "the tray could have dropped and killed Mr. Rac" was not credible on the evidence given by Mr. Reichelt and Mr. Rac and that the decision be quashed and a determination that the dismissal was unfair and an order of reinstatement of Mr. Reichelt to his former position be issued - Full Bench found that this was an appeal against a discretionary decision and was unable to interfere with a discretionary decision unless that appellant had established that the Commission at first instance erred according to the principles - Further, Full Bench found that the finding depends on the credibility of witnesses and the finding must stand unless it can be shown that the Commissioner had failed to use or had palpably misused his advantage or had acted on evidence or which was glaringly improbable - Full Bench concluded that the Appellant had not established that the exercise of the Commissioner's discretion at first instance miscarried according to the principles laid down and that the appeal was not made out as there was no appealable error in the exercise of the discretion - Appeal Dismissed - CONSTRUCTION, MINING, ENERGY -v- BHP Pty Ltd - FBA 45 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 02/03/01 - Metal Ore Mining.. 773

Application re unfair dismissal - Preliminary issue re jurisdiction - Respondent argued that Commission lacked jurisdiction to deal with the applications as both employees were casual and pursuant to the Federal Workplace Relations Act 1996 and Regulations, were excluded from the operation of unfair dismissal procedures, there being a direct inconsistency between the Federal and State Acts - Respondent argued that consumption of alcohol on duty and a series of events which amounted to behaviour and an attitude on the part of applicant (Mr Rushton) was the reason for termination - Applicant (Mr Rushton) defended the allegations and for most part agreed that they occurred but he viewed them as trivial - Applicant (Mr Cairns) argued that he felt intimidated and threatened by another officer following an incident, that after respondent investigated the incident, he was told that he would stay on and be offered work but that never happened - Commission reviewed authorities, relevant sections of the Federal Act, the Australian Constitution and found that there was no inconsistency between the Federal Workplace Relations Act 1996 and the WA I.R. Act 1979 and hence the Commission had jurisdiction to hear the matter - Commission determined (in a further Reasons for Decision) that the nature of the applicants' employment relationship in all aspect was casual - Further, Commission found on evidence that the respondent was not prepared to continue to roster Mr Cairns away from his intimidator and unless Mr Cairns had that guarantee then he was not prepared to work for the respondent, therefore, there had been no dismissal of Mr Cairns and hence that being the fact there was no jurisdiction for the Commission and accordingly dismissed his application for want of jurisdiction - Commission further found that Mr Rushton did consume alcohol and fall asleep whilst on duty, therefore, having regard to the Undercliffe case (65WAIG385) the decision to dismiss him on notice was not unfair, harsh or oppressive in all circumstances - Applications Dismissed - Mr A Cairns -v- The West Australian Turf Club - APPL 795,809,827 of 2000 - WOOD,C - 15/09/00 – Sport... 867

Conference referred re dispute over the a written reprimand for an employee - Applicant argued that the employee was being victimised by reason of his membership of the applicant and sought removal of the reprimand from his personal file - Respondent denied allegations and opposed orders - Commission found that the respondent's application of the regulations had previously involved a less formal approach to discipline - Commission found on evidence that the tag in question did not comply with the relevant regulations and that there was a breach - However, it was important from an industrial point of view, and as a matter of fairness that such strict application of be consistent across the board - Commission found the issuance of the reprimand to be industrially unfair, but was not persuaded that it was motivated by the employees position as a union convenor - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 160 of 2000 - KENNER C - 23/04/01 - Metal Ore Mining... 1251

SICK LEAVE

Complaint re breach and enforcement of Award and Minimum Conditions of Employment Act - Complainant argued that Defendant failed to pay annual leave, sick leave and overtime - Complainant argued that Defendant had initiated and in effect orchestrated the termination so that it could be released from the obligations of Workers' Compensation and Rehabilitation Act and that entitlements accrued whilst on workers' compensation should be paid - Defendant argued and disputed that it had unilaterally terminated Complainant's employment at all, it argued that Complainant resigned from his position to take up employment with another employer as a security officer - Magistrate found that the parties terminated company on mutual agreement and the entitlements for annual leave, sick leave and payment in lieu of notice were not made out - Magistrate found that Complainant was entitled to unpaid overtime as proven because Defendant could not offset overaward and production bonuses payments made for a particular purpose against overtime payments - Proven in Part - Mr PA Jones -v- Barminco Pty Ltd - CP 38,212 of 2000 - Industrial Magistrate - Cicchini IM - 02/05/01 - Services to Mining.. 1183

SICK LEAVE—*continued*

Application re unfair dismissal - Applicant argued that dismissal was unfair because she had not taken too many sick leave days unnecessary and that other employees should have been terminated due to downsizing before her as she had the longest service - Further, Applicant argued that she was dismissed because she was pregnant - Respondent argued that it needed to reduce staff and that the process also continued after Applicant's dismissal and the number of sick leave days taken were not relevant or important to the process of downsizing - Further, Respondent argued that he was unaware that Applicant was pregnant when notice was given - Commission found that the number of sick days taken was not a relevant issue and that the process regarding downsizing was not unfair - Further, Commission found that Respondent was not aware of the Applicant's pregnancy and that it was not an issue in the overall need to reduce staff - Dismissed - Ms K Ruston -v- Leader Lounge Furnishings - APPL 1547 of 2000 - BEECH C - 17/05/01 - Furniture 1448

STANDDOWN

Application re unfair dismissal and contractual entitlements - Applicant sought compensation for unfair dismissal and also for a denied contractual benefit - Respondent argued that applicant was stood down and there was no termination - Commission found that applicant was unfairly terminated, that reinstatement would be totally impracticable, that the loss was a loss of pay of one hour as applicant was a casual, and ordered payment of $13.30 by respondent to applicant - Order Issued - Mrs M De Niese -v- Curtin Hotels Pty Ltd Trading as the Imperial Hotel - APPL 1645 of 2000 - WOOD,C - 27/02/01 - Accommodatn, Cafes&Restaurants........ 878

STAY OF PROCEEDINGS

[1]Application for stay of proceedings in Matter No. CR159/1999 pending determination of Appeal - Appellant argued for a stay of proceedings of the Decision of Full Bench until the determination of the appeal before IAC or further Order - Industrial Appeal Court found that it was quite satisfied that the circumstances, as well as the balance of convenience justified the stay of proceedings to be granted - Granted - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality........ 9

[4]Application re stay of operation of Order in Matter No. CR 186 of 1998 (78WAIG4478) pending Appeal to Full Bench - Applicant argued there was a serious issue to be tried effecting the compensation assessment, that Respondent may not be in a position to reimburse any money if Appeal was successful and that balance of convenience favoured the Applicant - President found Applicant failed to demonstrate there was serious issues to be tried upon Appeal nor that the operation of the decision at first instance should be stayed - Dismissed - Barminco Pty Ltd -v- The Australian Workers' Union, West Australian Branch, Industrial Union of Workers - PRES 1 of 2001 - President - SHARKEY P - 18/01/01........ 404

[4]Application for stay of operation of Decision of Commission in Matter No. CR308/2000 (81WAIG721) pending appeal to Full Bench - President reviewed Principles and found that for an application for stay to be granted, the strength of the case must raise a serious issue to be tried and that exceptional circumstances must be established by Applicant, however, for a number of reasons in this case, it had not been established that there was a serious issue to be tried or that the balance of convenience lay with the Applicant - Further, that the interests of the Applicant staying the operation of the declaration was overcome by the interests of the employer in availing itself of the benefit of the declaration, that there was no exceptional circumstances requiring that the Respondent be deprived of the fruits of its order and that the equity, good conscience and the substantial merits of the case lay with a dismissal of the application - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - PRES 2 of 2001 - President - SHARKEY P - 06/02/01 - Services to Mining........ 406

[4]Application to revoke Order re Stay of Operation (80WAIG1759) - Respondent sought to revoke Commission's Order in PRES 3 of 2000, by which Commission wholly stayed the operation of Order No. 473 of 1999 - President found that the delay in this matter was such that it would have enabled a successful application for want of prosecution to have occurred and appellant's appeal dismissed - Further, because of the inadequate explanation for the delay, the length of the delay and the period of respondent's deprivation of the fruit of his "judgment", President was of the opinion that, having regard to the interests of the parties pursuant to s.26(1)(c) of the Act and having regard to s.26(1)(a) of the Act, the equity, good conscience and substantial merits of the case reside with the respondent and therefore revoked the Order for a stay made on 26 April 2000 and ordered that monies be paid forthwith to respondent - Granted - YMCA of Perth -v- Mr M Cousins - PRES 3 of 2000 - President - SHARKEY P - 21/12/00 - Community Services 410

[4]Application for stay of operation of a direction of the Commission in Application Nos. 1693, 1710, 1711, 1712, and 1713 of 2000 (81WAIG936, 1068) pending Appeal to Full Bench - Appellant Employer argued that Commission in the exercise of its discretion failed to give proper weight and consideration to the following matters that, it was not in the public interest to order the discovery of confidential communications between employers and their industrial relations advisers and that such documents were not and could not be relevant to the matters at issue in the substantive case - Respondents argued that to stay the operation of the order might have the effect of delaying the final hearing and determination of the matter, a delay which could not be compensated for in money, even if Respondents were successful - President found that the principles applicable for a stay should be applied and that the decision appealed against was a discretionary decision and that to succeed on appeal Appellant would have to establish that the exercise of discretion was miscarried in accordance with the principles - Further, President found that an appellate court should exercise caution in undertaking to review a decision on a matter of practice or procedure and that the stay of operation had not been established and therefore, there should not be interference by the President with an interlocutory order - Dismissed - Cable Sands (W.A.) Pty Ltd -v- Mr R Sullivan & Others - PRES 5 of 2001 - President - SHARKEY P - 19/03/01 - Mineral........ 998

SUPERANNUATION

Application re contractual entitlement - Applicant argued he was owed a sum of $17,273.72 by way of denied contractual entitlement of superannuation contributions made on his behalf to the Fund - Respondent denied applicant's claim and argued that applicant had been paid all of the entitlements due to him under his contract of employment - Commission found that applicant had as an entitlement under his contract of employment superannuation contributions of 18% of his salary and was claiming an additional amount representing respondent's obligation under the SGA Act, but with no evidence to support it, and concluded that the application should be dismissed - Dismissed - Mr JJ Kelly -v- Aherns (Suburban) Pty Ltd - APPL 500 of 2000 - KENNER C - 05/02/01 - Retail Trade........ 698

[1]Appeal against Decision of Commission In Court Session (80WAIG4508) re terms and conditions of employment, redundancy payments and superannuation schemes - Appellants argued that CICS erred in law by purporting to give retrospective effect to order 1, that the base salary and roster allowance of each letter of offer employees be increased and erred in law in finding that following the merger, the Appellant's Mid-West operations were quickly restored to profitability or giving consideration to other factors when there was no evidence to support this finding - Further, Appellants argued that the Commission erred in law in making orders in relation to Iluka Resources Limited where there was no industrial matter between it and the Respondents and erred in law by acting on the irrelevant consideration that RGC Mineral Sands Ltd had previously offered a limited choice of superannuation funds to its employees and having regard to a Superannuation scheme which applied to Workplace Agreement employees and granting liberty to apply to the award employees of Iluka Resources Limited and Iluka Mid-West Limited when the industrial matter between Appellants and Respondents did not relate to the award employees - Industrial Appeal Court found that the CICS had the power to give retrospective effect to its order awarding an increase in salaries and allowances, that there was revealed an evidentiary basis on which the CICS could properly make the challenged finding that profitability was quickly restored for the Mid-West operations following the Merger - Further, IAC found that it was a matter for the CICS to find whether an order to enable letter of offer employees to become members of the Iluka Resources Limited fund was appropriate as a matter of equity, good conscience and the substantial merits of the case - IAC found that no grounds had been made out and failed to be persuaded thus Appeal dismissed - Dismissed - Iluka Midwest Limited & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 5 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Parker J. - 08/02/01 - Other Mining........ 763

CUMULATIVE DIGEST—*continued*

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SUPERANNUATION—*continued*

Application re contractual entitlements - Applicant argued that she was to be paid remuneration equal to 50% of her gross takings, that upon the introduction of compulsory superannuation the practice commenced to pay superannuation calculated on the statutory percentage applied to the gross earnings, that later it unilaterally commenced deducting the required percentage from her earnings - Further, Applicant argued that she was thereafter under paid because the amount should have been calculated on and paid in excess of to the 50% of her gross takings whereas it was deducted from the takings - Applicant sought benefits which had not been paid to her at the completion of her engagement - Respondent argued that upon the introduction of compulsory superannuation contributions it was agreed that it would pay the compulsory superannuation percentage on top of the 50% billing, however, after May 1995 a review led to a decision that payment on top of the 50% was outside the original agreement and the practice began deducting superannuation contributions from the gross billing achieved by Applicant - Commission found on evidence that the Applicant's contract was never changed at law and the Applicant was always entitled to have her superannuation assessed on top of the 50% billings - Further, Applicant was entitled to the benefit of that contract now, and the parties agreed that the sum of money in dispute was $17,877.35, therefore, Commission ordered that the practice pay the Applicant that sum of money - Granted - PW De Boer -v- Third Ave Surgery - APPL 1465 of 1999;APPL 829 of 2000 - GREGOR C - 20/03/00 - Health Services 1027

TERMINATION

[2]Appeal against decision of the Commission (80WAIG3068) re unfair dismissal and contractual entitlements - Appellant argued that the learned Commissioner erred in fact and law in that he failed to give proper weight to the evidence and erred in fact and law in finding that a reasonable period of notice for the Respondent to remedy the situation would have been 3 months and in assessing the compensation for loss and injury - Respondent argued that the grounds of appeal were defective because they did not comply with Regulation 29 of the Industrial Relations Commission Regulations 1985 - Full Bench found that the grounds of appeal did comply and that they were provided and sufficiently detailed to enable the Respondent to know substantially the case which it had to answer - Full Bench concluded that this was a discretionary decision and that the Appellant had to establish that the exercise of the discretion at first instance had miscarried with the principles laid down - Full Bench concluded that no established error in the exercise of the discretion at first instance had been made out that would warrant the interference of the Full Bench - Dismissed - Olten Pty Ltd T/as MSA Security -v- Mr AJ Byfield - FBA 39 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 18/12/00 – Security 15

[2]Appeal against decision of Commission (80WAIG416 & 4855) re unfair dismissal and contractual entitlements - Appellant argued that the learned Commissioner erred on numerous points and sought an Order that the claim of unfair dismissal be dismissed, that as the learned Commissioner misdirected himself and made substantial errors of law and fact, the Full Bench should substitute inferences correctly drawn to find that the Respondent constructively determined its contract of service unfairly with s.29 of the Act and to award compensation Further, Appellant sought an order to quash the Order at first instance to dismiss and an Order that the Respondent did dismiss the Appellant unfairly and should pay compensation - Respondent opposed the claims - Full Bench found that the Commissioner had correctly referred to and considered the applicable legal principles of constructive dismissal and determined on the facts before him that there was no constructive dismissal - Further, that there was no arguable case on Appeal, that the justice of the matter lay with the Respondent and pursuant to s.26(1)(a) of the Act and, having considered the interests of the parties under s.26(1)(c) of the Act, the applications to extend time was dismissed and, therefore, the appeal was incompetent as being out of time - Dismissed - Mr BF Stokes -v- The Typing Centre of Perth Pty Ltd T/A Australian International College of Commerce - FBA 47 of 2000 - Full Bench - SHARKEY P/KENNER C/SMITH, C - 30/11/00 – Colleges 22

Complaint re Breach of Minimum Conditions of Employment Act 1993 - Complainant argued that the Defendant deducted pay without lawful authority and failed to pay accrued annual leave and one week's wages - Complainant argued that she was working for the named Defendant, that she was advised that there was going to be some change to the ownership of the entity, however, to her knowledge those arrangements had not been finalised - Defendant argued that the Defendant was not the Complainant's employer at all during that material period - Defendant argued there were two separate entities and that they were entirely separate - Industrial Magistrate found that the evidence overwhelmingly in favour of Complainant and accepted that there was an underpayment of untaken annual leave and an entitlement of a week's pay - Proven and Granted - Ms NA Roberts -v- Snogrin Pty Ltd t/a Eclipse Hardware - CP 98 of 2000 - Industrial Magistrate - Cicchini IM - 29/11/00 – Hardware 274

Application re contractual entitlements - Applicant argued that commission sales to the amount of $405,861 were outstanding - Respondent argued that it would be unreasonable to pay Applicant commission monies post termination, as the Applicant was not present to do the work required to complete the sale arrangements - Commission found that the custom and practice of this employment relationship was not to pay commissions post termination, that whilst the contract was silent on this point it could be implied as part of the contract and whilst the Applicant may not have been aware of this during his employment, he enjoyed the arrangement of the contract whereby he was paid a guaranteed fortnightly amount - Further, that there was no evidence before the Commission as to whether the threshold for the year, which the Agent for the respondent says was worked on a calendar year, had been met, that the calculation was only done on a monthly reconciled basis and the whole structure of the contract was only performed on whilst the Applicant was employed by the respondent - Dismissed - Mr RJ Birkett -v- Stegbar Pty Ltd - APPL 186 of 2000 - WOOD,C - 08/12/00........ 276

Application re unfair dismissal - Applicant argued that she was harshly, oppressively or unfairly dismissed - Respondent argued that she took into account in making her decision to terminate applicant, the complaints from customers, a red light incident and prior warnings - Commission found that at least four customers had found applicant's commentary offensive and having considered all of the evidence, concluded that applicant had not discharged the onus of proof that respondent acted harshly, oppressively or unfairly in terminating her employment - Dismissed - Ms PA Connor -v- Trams West Pty Ltd ACN 066 271 458 - APPL 618,633 of 2000 - SMITH, C - 29/12/00 –Tourism........ 277

Application re unfair dismissal - Applicant argued that he was summarily dismissed and sought reinstatement if it was practicable, or alternatively the maximum level of compensation - Respondent argued that Applicant solicited a cash job for an ant treatment at a private company in Cannington, was suspended on pay and asked to provide a reason why he should not be terminated - Commission found that having heard all the evidence, came to the conclusion that Applicant did solicit for a cash payment, that the act of solicitation amounted to conduct of stealing as a servant and warranted summary dismissal - Commission was satisfied that for the above reasons Respondent did not act unfairly, harshly or oppressively in dismissing Applicant - Dismissed - Mr SP Davies -v- Nationwide Environmental Management Pty Ltd - APPL 862 of 2000 - WOOD,C - 08/12/00 – Pesticides 281

Application re unfair dismissal - Applicant argued that he was dismissed unfairly - Respondent argued that Applicant repudiated his employment by refusing to go to Sydney for 3 -4 weeks unless he was paid more money - Commission found that the work to be done in Sydney represented a marketing development opportunity and that the wording in Applicant's Letter of Appointment was within the terms of his contract of employment to go to Sydney for 3-4 weeks for business development purposes - Commission reached the conclusion that applicant refused to obey the lawful and reasonable request of his employer, this was a repudiation of his contract of employment, that such refusal was a misconduct which justified dismissal, he had not demonstrated that he was dismissed and that his dismissal was unfair - Dismissed - Mr J Davey -v- Romteck Pty Ltd ACN 009 202 117 - APPL 1029 of 2000 - BEECH C - 18/10/00 - Electronic Equpmnt Manufacture 283

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because she was dismissed while on probation and was not given an opportunity to explain any of the allegations - Respondent argued that Applicant was dismissed because of the complaints and statements received from other management staff and patrons which showed that the Applicant did not have the support of other management staff - Commission found after hearing evidence from other staff that for the substantive and procedural reasons the dismissal was unfair and as reinstatement was impracticable Applicant was awarded compensation for the loss or injury which was caused by the harshness of the dismissal - The claim of contractual benefit had not been made out and was dismissed - Accordingly an Order was issued - Discontinued - Ms ALM Gloede -v- Mercure Inn, Karratha - APPL 859 of 2000 - BEECH C - 01/12/00 – Hotels........ 285

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TERMINATION—*continued*

Application re unfair dismissal and contractual entitlements - Applicant argued that he conducted consultancy work for the Respondent whilst he was still in Adelaide and in December 1999 was engaged to work in Perth, but in March 2000 Respondent reneged on an agreement allowing him to take the company vehicle to Adelaide to relocate his family, and on his return to Perth offered him a new contract which he did not accept, and therefore sought relocation expenses under the contract, compensation for lost income on unfair dismissal and loss of six months use of car - Respondent argued that the contract included a three month probation period and use of mobile phone and car for company business only - Commission found the contract did not include provisions for relocation expenses, that Applicant took the car to Adelaide against the clear intention of his employer who was entitled to summarily dismiss him at that point and that Applicant was not dismissed unfairly - Dismissed - Mr M Howard -v- Allied Contracting Services - APPL 529 of 2000 - WOOD,C - 08/12/00 – Contracting 290

Application re unfair dismissal - Applicant argued that he was harshly, oppressively and unfairly dismissed after an accident and was not accorded a right of hearing regarding the allegations or afforded an opportunity to put his version of events but was given a pre written notice of termination - Respondent argued that the Applicant was summarily dismissed for misconduct after he drove a ride-on lawn mower and collided with the Grounds Maintenance Manager – Further, Respondent argued that there were no mitigating circumstances that it could have taken into account that would have excused the Applicant's deliberate act - Commission found on evidence that Applicant deliberately drove the ride-on mower at the Grounds Maintenance Manager and that Respondent had not unfairly exercised its right to dismiss the Applicant - Dismissed - Mr JF Jones -v- Spotless Service Australia Ltd ACN 005 309 320 - APPL 320 of 2000 - SMITH, C - 12/12/00 – Service 292

Application re unfair dismissal - Applicant argued dismissal was harsh, oppressive and unfair because she withdrew her resignation after the decision of the Respondent not to accept it and presented herself for work in accordance with that decision after the two months unpaid leave expired but was requested to leave the premises - Respondent argued Commission did not have jurisdiction to deal with the matter as the Applicant resigned from the employment - Commission found that although the Applicant sought to withdraw her resignation, her purported withdrawal was ineffective as the Respondent's Office Manager accepted her resignation and although it was tentatively argued on behalf of the Applicant that a new contract of employment was entered into when the Applicant was asked to report for work, that argument was not supported by the evidence - An Order was issued dismissing the application - Dismissed - Ms VE Little -v- Women's Legal Services Inc (WA) - APPL 550 of 2000 - SMITH, C - 12/12/00 – Legal.. 296

Application re unfair dismissal - Applicant argued that he was terminated unfairly, and sought compensation for lost wages, ongoing loss in his new position, one month's pay in lieu of notice and injury for suffering arising from the dismissal - Respondent argued that as the contract issue concerning overtime was unresolved he terminated Applicant and paid him one week's pay for notice as permitted under the contract of employment, and further referenced a letter as conclusive proof that overtime was not to be paid to applicant - Commission was satisfied that Applicant's performance was not in question, he received no warning or indication that his employment was in jeopardy and that he was dismissed unfairly, hence he should be paid the total of $1579.50 for denied contractual benefits and a total of $3,510 by way of compensation - Granted - Mr NR Lynam -v- Lataga Pty Ltd - APPL 555 of 2000 - WOOD,C - 29/11/00... 299

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because he was in a "resign or be fired" type of situation so he decided to finish up and be paid out - Respondent argued that Applicant had been treated almost like a "Family Member" and was respected for his seniority and it never intended to terminate his employment - Commission found that in the circumstances of the history of the three employees taking leave during quiet times even if leave was not usually extended and the consideration with which the Applicant had been treated by the Respondent over the years, it was unreasonable for the Applicant to have refused to take further leave and the Applicant's resignation was not in substance a dismissal, therefore dismissed the claim for unfair dismissal and contractual entitlements - Dismissed - Mr N Pitcher -v- Wyldes Window Treatments & Vertical Drapes ACN 059 668 290 - APPL 1265 of 2000 - BEECH C - 21/12/00 - Textile Manufacturing.. 302

Application re unfair dismissal and denied contractual entitlements - Applicants argued that they were dismissed following an abusive encounter at the restaurant with one of the Respondent's directors - Respondent argued that both Applicants resigned in that encounter, or if they were dismissed, dismissal was justifiable because they had been drinking in the restaurant contrary to specific instructions - Commission found that both Applicants were dismissed for misconduct, that though their dismissals were warranted, the manner in which they were both dismissed was quite oppressive, however, their claims of unfairness for the substantive reasons they have argued are not made out - Commission was satisfied that reinstatement was impracticable and ordered $500 to be paid to each Applicant as compensation for the injury arising from the manner of their dismissals - Granted - Ms KR Riley -v- Royale Enterprises Pty Ltd - APPL 1599,1600 of 1999 - BEECH C - 18/11/00 - Accommodatn, Cafes&Restaurants.. 305

Application re contractual entitlements - Applicant argued that he was owed monies under his contract of employment - Respondent argued that when Applicant advised him he wanted to retire, he responded by saying to the Applicant he was prepared to offer him a generous redundancy package on the basis that he stay on as a consultant and assist in the transfer of clients and business, but Applicant breached the conditions of the redundancy package, and in the alternative, was summarily dismissed - Commission found that Applicant repudiated the terms of his employment, in particular he repudiated the terms of the redundancy package – Further, Commission found that the relief sought by Applicant should be refused on grounds that a breach of fiduciary duty had been committed - Dismissed - Mr G Sargant -v- Lowndes Lambert Australia Pty Ltd – APPL 633 of 2000 - SMITH, C - 29/12/00 – Insurance 311

Application re unfair dismissal - Applicant argued dismissal was unfair because she received little training during the four days she worked - Respondent argued that Applicant was provided with repeated training over the four days - Commission found that Applicant did not receive the training which possibly ought to have been given and therefore was not given a proper opportunity to prove herself over those four days – Further, that Applicant was not informed that her performance was not satisfactory and that she needed to improve, therefore the dismissal was unfair and as Applicant found new employment it did not represent an ongoing loss for her and ordered that Respondent pay one further week's wages to the Applicant - Granted - Mrs RI Van Den Broeck -v- Highway Gynaecology - APPL 1030 of 2000 - BEECH C - 12/12/00 – Medical......................... 319

Conference referred re illegal disciplinary action - Applicant union challenged the veracity of the written "final warning" issued by Respondent to its member and denied that its member was guilty of intimidating behaviour towards fellow employees - Further, Applicant Union submitted that the conduct which led to the "final warning" should be seen in the context of industrial action over what was a very sensitive issue in the Respondent's workplaces - Applicant Union sought an Order directing Respondent to rescind the "final warning" - Respondent argued that an investigation carried out during the course of the industrial action concluded that the union member was guilty of "intimidating behaviours and of abusive language" and as a consequence he was issued with the "final warning" - Further, Respondent argued that the union's member was in breach of the "BHP Iron Ore Non- Harassment Policy" - Commission found the union member's conduct, at least in the car-park, constituted harassment if not also intimidation of the employees to whom he directed his abuse - Commission further found in all circumstances, particularly having regard to union member's prior good record, the nature of and the circumstances in which the transgressions complained of were committed, that it would not be unreasonable if he was warned that should he be guilty of any further instances of intimidatory and/or threatening behaviour inconsistent with the Respondent's Non-Harassment Policy, his employment was liable to be terminated - Upheld - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore - CR 20 of 2000 - FIELDING C - 29/09/00 - Iron Ore... 327

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TERMINATION—*continued*

[2]Appeal against Decision of Commission (80WAIG4829) re Dismissed application re Unfair Dismissal - Appellant argued that the learned Commissioner erred in law in dismissing the Appellant's claim pursuant to section 27 and erred in law in failing to exercise jurisdiction pursuant to section 26 - Further, the learned Commissioner erred in law and in fact in failing to give sufficient weight to the evidence of the Appellant with respect to the conciliation conference and application of the equitable doctrine of promissory estoppel - Respondent argued that an agreement was reached between the parties at the conciliation conference in the AIRC at the satisfaction of the Appellant and the Respondent acted on good faith - Full Bench found that it was open for the Commissioner to find as she did and that there was no error in the exercise of her discretion and the Appeal was not made out - Dismissed - Mr B Campbell -v- Kimberley Building Supplies - FBA 48 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 06/02/01 - Building Structure Services 353

[2]Appeal against decision of the Commission (80WAIG3334) re wrongful dismissal of seven officers - Appellants argued the Commissioner erred in law and in excess of jurisdiction, that the application before him was not an industrial matter and that he had considered Affidavit and other material which was not evidence in the proceedings - Respondent union argued that the Commissioner of Police breached his agreement with those dismissed officers by not deciding this issue pursuant to s.23 of the Police Act 1892 and Regulations, and acted harshly or oppressively in acting pursuant to s.8 of that Act - Full Bench found that since the Commissioner of Police is not the Crown, discharging an officer cannot be seen as an act done at the will or pleasure of the Crown and accordingly it was wrong to do so without affording natural justice or procedural fairness, and further found that the Commissioner of Police was not the employer of Police Officers, the Minister was, that Police Officers were indubitably officers of the Crown and not employees, that there was no jurisdiction in the Commission to hear and determine the application, and having considered all of the material and submissions upheld the Appeal and quashed the decision at first instance, it being a nullity and having been made without jurisdiction - Ordered Accordingly - The Honourable Minister of Police & Other -v- Western Australian Police Union of Workers - FBA 38 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 14/11/00 – Police 356

[2]Appeal against Decision of Commission (80WAIG5633) re unfair dismissal and contractual entitlements - Appellant argued that the Applicant was to be reinstated at the site said to be owned by Goldfields Pty Ltd and not the Appellant, that the shortage of work has been misunderstood to be at that site and not the Kalamunda site, that the amount ordered to be repaid, being the loss of earnings, should be reduced by the amounts for annual leave and notice in lieu, which was paid in termination pay, that the amount should also be reduced by the unemployment benefits received for the corresponding period and that reinstatement was not possible due to the fact that Appellant has ceased to operate - Further, the Commission erred at first instance in that it ordered that amounts said to have been lost or not paid to the Respondent between the date of dismissal and the date of the order appealed against be paid - Applicant conceded to the ground which alleged that the Commissioner erred in ordering the payment of monies which the Commissioner ordered be paid, being the wages and other remuneratory items not paid or lost by Applicant because of unfair dismissal - Full Bench found that this ground was based on the City of Geraldton v Cooling (80WAIG5341) which was authority for the proposition that an order for compensation following a dismissal was not within power if an order for reinstatement was made, as it was here, thus, the appeal was upheld on this ground and the order varied - Further, Full Bench found that the Order for reinstatement was not made as a result of any miscarriage of discretion in the Commission at first instance and that the other grounds of appeal had not been made out and were dismissed - Upheld in part otherwise dismissed - Pollock Nominees Pty Ltd ACN 008 842 911 -v- Mr JL Butterfield - FBA 50 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 05/02/01.......... 369

[2]Appeal against decision of Commission (80WAIG3106) re unfair dismissal - Appellant employer appealed against that decision on the grounds that the learned Commission erred by finding that dismissal was unfair despite evidence of a genuine redundancy, exceeding his jurisdiction and interfering with the Appellant's decision to terminate, determining that Appellant was obliged to make compensatory payment for the purposes of redundancy and awarding Respondent a sum of $9477.00, thus requiring Appellant to apply for an order to stay the decision pending determination of this Appeal - Respondent argued that he had been unfairly dismissed due to difficulties in the relationship between the parties which manifested in five major episodes during the course of his employment - Full Bench found that Appellant had not treated Respondent fairly, that dismissal was unfair, reinstatement was impracticable, that the decision at first instance was arrived at by an erroneous exercise of discretion and therefore varied the decision and substituted the figure of $1,114.92 for the figure of $9477.00 in the decision - Appeal upheld and decision at first instance varied - WA Access Pty Ltd (ACN 009 392 830) -v- Mr MR Vaughan - FBA 34 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 14/11/00 – Spraypainting.......... 373

Appeal by the Applicant union pursuant to s.23B of the Industrial Relations Act - Applicant union sought to reverse the decision of the Respondent to reduce the salary of its member and be reprimanded - These penalties were imposed after a finding of misconduct made pursuant to the Education Act following an inquiry under Section 7C - Applicant union argued that the penalty imposed on its member was disproportionate to the offence, in the event if it was concluded that the misconduct occurred and further argued that the reduction in salary grade imposed by the Respondent was a "blunt instrument" and taken cumulatively, and would lead to a substantial financial impost on its member - Commission heard evidence from a number of people and although the evidence to the incident was conflicting, Commission considered the evidence carefully, paid regard to the content of the inquiry report by the independent inquirer and found that the conduct of the Applicant union's member was not "mild but firm" as it described in Reg32 of the Regulations and the re-enactment of the incident was an error of judgement and was not an appropriate response by the teacher - Accordingly an Order was issued dismissing the appeal - Dismissed - The State School Teachers Union of W.A. (Incorporated) -v- Hon Min for Education - APPL 1204 of 2000 - KENNER C - 05/02/01 – School.......... 672

Application re unfair dismissal - Preliminary point re jurisdiction was raised by the Respondent and it was agreed by both parties to allow the Commission to decide the point on the basis of written submissions - Applicant maintained that the date on which he was advised that his employment was to be terminated in two week's time was not the date on which he was terminated - Respondent maintained that was the date on which the Applicant was terminated therefore the application was lodged outside the 28 day time limitation - Commission found on the basis of written submissions that the Applicant's employment was in fact terminated on the date he was advised and that the application was lodged out of time - Accordingly an Order was issued striking out the application for want of jurisdiction - Dismissed - Mr BE Campin -v- Auto Auctions (WA) Pty Ltd (ACN 082 824 468) t/as WA Auto Auctions - APPL 1591 of 2000 - BEECH C - 29/01/01.......... 674

Application re unfair dismissal - Applicant and Respondent agreed that the Applicants employment was on a casual basis, however Applicant argued she was unfairly dismissed after refusing to obey a direction of the manager which she believed was incorrect - Commission found dismissal to be harsh and thus unfair, and as reinstatement was impracticable ordered compensation - Commission found that position was casual and business winding down employment may only have continued for one week after termination and ordered compensation as such - Granted - Ms M Darby -v- Rocket Transport Services Pty Ltd T/A Rocket Couriers - APPL 1213 of 2000 - BEECH C - 12/01/01 - Services to Transport 676

Application re unfair dismissal and contractual entitlements - Applicant argued that she had created an invoice without reference to her employer because it was the practice of other employers for whom she had worked that staff rates were applicable - Nevertheless, she apologised, offered to pay for the difference, promising not to do such a thing again and nothing further was said on the subject for a further eight days until her dismissal - Respondent argued that dismissal was because of the invoice, that he could no longer trust her and told her that he had been advised that because dismissal was for reasons of misconduct he had no need to pay entitlements - Commission found that summary dismissal eight days later was harsh and therefore unfair, and as reinstatement was impracticable respondent should pay applicant four days' wages and 3.07 days' annual leave entitlements - Granted in Part - Ordered Accordingly - Ms K Dutton -v- Adrian J Domney T/A Euro Automotives Repair - APPL 1032 of 2000 - BEECH C - 16/01/01 – Automotive.......... 678

CUMULATIVE DIGEST—*continued*

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TERMINATION—*continued*

Application re unfair dismissal - Applicant argued that dismissal was without warning and unfair because he needed at least another month to test whether he was capable of achieving the necessary sales figures to prove his worth - Respondent argued applicant had been repeatedly told, albeit informally, that there were concerns about his work ethic, that he was spending too much time in the office and, as a result, not achieving the necessary sales figures which should have been in the order of $100,000 a month - Commission found, having regard to the fact that applicant was on probation and he brought in only $20,000-odd in business in 2 months, that respondent was not irrational in concluding that the arrangement was not going to work out - Further, Commission was not convinced that respondent abused its contractual right when it terminated applicant's employment - Dismissed - Mr MJ East -v- Picton Press Pty Ltd - APPL 1509 of 2000 - FIELDING C - 19/01/01 - Printg, Publishg & Rcdd Media 679

Application re unfair dismissal and contractual entitlements - Applicant argued that there was no consultation and no alternatives were offered, that termination decision had already been made and the meeting of 12/5/2000 was only to deal with matters to do with pay - Respondent argued that the operation of the Bureau was now different from what it was when managed by applicant as funds for marketing had been taken away by Mandurah Council, the Bureau had been scaled down in respect of hours, contracts and accounting arrangements and a sub -committee now managed the place - Commission found that the procedure adopted by the Board was lacking in unfairness in its entirety, that reinstatement was impracticable as there was no job for applicant to go back to and awarded compensation by way of injury and denied contractual entitlement - Ordered Accordingly - Mrs WK Faulkner -v- Mandurah Tourist Bureau Inc Executive Committee - APPL 912 of 2000 - WOOD,C - 22/11/00 – Tourism........ 680

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair and sought Orders pursuant to section 29 for unfair dismissal and contractual entitlements - Respondent made a preliminary point that the application should be dismissed as it named two Respondents and did not conform with the statutory pre-requisite that an unfair dismissal proceeding under s.29 of the I.R.Act can only be against one Respondent - Commission after considering the whole of the circumstances ordered that the motion by the Respondent that the application be dismissed was dismissed and the second named Respondent be deleted from the Application - Ordered accordingly - Mr M Forgione -v- Chocolate Graphics (WA) Pty Ltd & Other - APPL 1676 of 1999;APPL 1125 of 2000 - GREGOR C - 25/07/00........ 682

Applications re contractual entitlements - Applicants argued that they were entitled to payment of a retainer and two weeks' pay in lieu of notice as these entitlements arose from their contracts of employment - There was no appearance or argument from Respondent - Commission determined the nature of the relationships between the parties and found that the relationships were those of employees and employers respectively - Further, Commission found that the Applicants were each employees of the Respondents, that the Applicants were entitled to the payments of a retainer and payments in lieu of notice - Ordered accordingly - Mr AP Gilbride -v- Fast Net Publishers Group - APPL 94,177,231,232 of 2000 - SCOTT C. - 21/07/00 - Printg, Publishg & Rcdd Media 686

Application re unfair dismissal - Applicant argued dismissal was unfair because he raised issues of safety in the workplace and a lack of equipment and had thereafter been victimised and was dismissed - There was no appearance or argument on behalf of the Respondent - Commission found that the Applicant's version of events was on the balance of probabilities correct and the Respondent had acted upon wrong information given to him and had breached its right to terminate the contract of employment in such a way that it abused that right - Commission further found that the dismissal was unfair and since there was no position to which the Applicant could be reinstated granted compensation - Granted - Mr RB Hansen -v- Noongar Enterprise Aboriginal Corporation trading as Unity of First People of Australia - APPL 601 of 2000 - GREGOR C - 24/01/01 - Other Services 691

Application re unfair dismissal - Applicant argued dismissal was unfair because he was never warned about being dismissed for not having provided his statement and no one put to him that he was in any way obstructing the inquiry process and sought an Order for reinstatement pursuant to s.23A of the Industrial Relations Act - Respondent argued Applicant was summarily dismissed for gross misconduct as he was engaged in an altercation with another employee and the fight occurred within a potentially dangerous area - Commission heard evidence from a number of witnesses, carefully considered all of the relevant documentary evidence, had regard to all of the circumstances and found that Applicant's summary dismissal was harsh, oppressive and unfair and as there was no submission from the Respondent that the lapse of time would make reinstatement impracticable or there would not be work available to the Applicant in the classification he formerly occupied, ordered reinstatement - Granted - Mr W Hull -v- City of Mandurah - APPL 706 of 1998 - KENNER C - 09/02/01 - Construction Trade Services 693

Application re contractual entitlement - Applicant argued he was owed a sum of $17,273.72 by way of denied contractual entitlement of superannuation contributions made on his behalf to the Fund - Respondent denied applicant's claim and argued that applicant had been paid all of the entitlements due to him under his contract of employment - Commission found that applicant had as an entitlement under his contract of employment superannuation contributions of 18% of his salary and was claiming an additional amount representing respondent's obligation under the SGA Act, but with no evidence to support it, and concluded that the application should be dismissed - Dismissed - Mr JJ Kelly -v- Aherns (Suburban) Pty Ltd - APPL 500 of 2000 - KENNER C - 05/02/01 - Retail Trade........ 698

Conference referred re termination of employment - Applicant Union argued that the termination of Applicant was harsh, oppressive and unfair and contrary to s.84AA of the Workers Compensation Act, s.41 of the Minimum Conditions of Employment Act and Clause 34 of the Burswood International Resort Casino Employees Industrial Agreement 2000 - Further, that the Respondent's action was taken substantially because Applicant was the President of (BRUE) and was being discriminated against and the process and planning for his termination was flawed in that it was not shared with him and he was not trained to apply for other positions nor did the Company sought to find him an alternative position - Respondent argued that with the arrival of a new CEO, and constraint on the budget, the managers were required to review their operations and, subsequently the manager Environmental Services made changes to his operation which impacted on the Applicant's duties - Further, Applicant was to be terminated unless he found suitable alternative position, as he could not fulfil the requirements of his original contract as an Environmental Systems Attendant due to his injury - Commission reviewed authorities, Acts and found on evidence that it was plausible and more likely that the Applicant's duties were diminished due to a legitimate drive for efficiency, that there had been no discrimination due to him being a delegate and that evidence proved that his duties had not been cut because of this - Commission exercised its judgement according to equity, good conscience and the substantial merits of the case and found that, to so swiftly terminate Applicant's employment if he himself does not find an alternative position, particularly given the spirit of s.84AA, would be harsh and unfair - Further, the Respondent should have engaged in a fuller exploration of options for Applicant and recommended that this take some months including appropriate training - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 350 of 2000 - WOOD,C - 02/02/01 - Accommodatn, Cafes&Restaurants........ 699

Application re unfair dismissal - Applicant argued dismissal was unfair because the job he was previously performing still exists and was now performed by a less qualified person and sought compensation - Respondent denied that dismissal was unfair and argued that the restructure was bona fide, that Applicant was told he was surplus to the requirements after the restructure and that it took steps to find applicant alternative employment which regrettably proved fruitless - Further, that Applicant was paid five and a half weeks pay in lieu of notice and eight and three quarter weeks of redundancy pay which was fair and equitable in all the circumstances - Commission, after considering the whole of the circumstances found on evidence that the dismissal was not unfair - Dismissed - Mr P Manvell -v- Transfield Pty Ltd - APPL 961 of 2000 - FIELDING C - 30/01/01 – Building........ 706

CUMULATIVE DIGEST—*continued*

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TERMINATION—*continued*

Application re unfair dismissal - Applicant argued dismissal was unfair because she had to resign as a result of harsh and intolerable behaviour of people at work, therefore it was constructive dismissal - Respondent argued that it was not the Applicant's employer and in any event, the Applicant was not dismissed either constructively or otherwise - Commission found that when the Applicant expressed intention to leave, more than reasonable efforts were made by the Respondent to convince her to stay, including taking some leave to think about the situation and had the Applicant taken the suggestions made, in all likelihood no termination of employment would have eventuated - Further, even if it was the Respondent who terminated the employment, then the Applicant failed at the appropriate time to take necessary steps to rely upon the Respondent's conduct - An Order was issued dismissing the application - Dismissed - Ms LC Meyers -v- Lyrical Holdings Pty Ltd - APPL 1025 of 2000 - SCOTT C. - 01/02/01 - Personal & Household Good W/sg........ 707

Application re unfair dismissal - Applicant argued that he had a very good work record and was trusted by respondent, that after his 3 day absence from the office an argument had occurred for which he had apologised the next day and work had continued as normal until he was unfairly dismissed for which he believes was due to his concerns of unsafe work practices - Respondent argued that after an argument with applicant following his 3-day absence he noticed a sediment in the bottom of his teacup prepared by applicant which looked suspiciously like a pellet of rat poison and felt that he could not trust him anymore and dismissed him - Commission was satisfied that applicant was not dismissed due to his 3 days' absence but due to the discovery of residue of rat poison in the cup of hot drink he made for respondent - Further, applicant was guilty of misconduct, that he was not dismissed summarily, that dismissal was justified and not unfair - Dismissed - Mr TQ Tran -v- Shalimar Trading - APPL 1082 of 2000 - BEECH C - 23/01/01 – Textile........ 711

Application re unfair dismissal - Applicant argued that he was ill with influenza and migraines and that without warning or cause, he received a letter from respondent terminating his employment, therefore termination was unfair - Respondent argued that applicant's employment came to an end following an absence of over two weeks and after the applicant did not attend a sales meeting, it concluded that applicant had abandoned his employment - Commission found that applicant's own evidence established that he was not ill on 18, 19, 20 or 21 July 2000, yet he did not report for work on those days, nor did he make any attempt to contact respondent or any person at the office - Further, that applicant had been instructed by respondent that he was required to attend all sales meetings and inform respondent of all absences, therefore having regard to all the foregoing Commission was satisfied that application should be dismissed - Dismissed - Mr SM White -v- Terence Rush Trading As Roy Weston Belmont - APPL 1196 of 2000 - SMITH, C - 25/01/01 - Real Estate Agency........ 714

[2]Appeal against Decision of Commission (80WAIG4504) re dismissed application re unfair dismissal - Appellant Union argued that the Commission at first instance erred when it gave no or insufficient weight to the evidence in relation to the following: "that there was no risk to safety of the life or limb of Mr. Rac or that there was no damage to Company plant or equipment of any kind, that this was the first breach of tagging procedure by Mr. Reichelt, and that the automatic penalty of dismissal for a tagging procedure breach was contrary to the rules of natural justice or criminal justice" - Further, Appellant Union argued that the disciplinary enquiry was in error as to its understanding of the range of disciplinary penalties that could be applied and that the speculation by the Commission as to "the tray could have dropped and killed Mr. Rac" was not credible on the evidence given by Mr. Reichelt and Mr. Rac and that the decision be quashed and a determination that the dismissal was unfair and an order of reinstatement of Mr. Reichelt to his former position be issued - Full Bench found that this was an appeal against a discretionary decision and was unable to interfere with a discretionary decision unless that appellant had established that the Commission at first instance erred according to the principles - Further, Full Bench found that the finding depends on the credibility of witnesses and the finding must stand unless it can be shown that the Commissioner had failed to use or had palpably misused his advantage or had acted on evidence or which was glaringly improbable - Full Bench concluded that the Appellant had not established that the exercise of the Commissioner's discretion at first instance miscarried according to the principles laid down and that the appeal was not made out as there was no appealable error in the exercise of the discretion - Appeal Dismissed - CONSTRUCTION, MINING, ENERGY -v- BHP Pty Ltd - FBA 45 of 2000 - Full Bench - SHARKEY P/FIELDING C/SCOTT C. - 02/03/01 - Metal Ore Mining........ 773

Complaint re Breach of Workplace Agreement Act - Complainant argued that the Defendant unfairly, harshly or oppressively terminated the employment contrary to the provisions implied in the workplace agreement - Complainant argued that at a meeting at which he was dismissed he asked whether he was being accused of stealing and he was told he was not - Defendant argued that the Complainant was not dismissed but, asked to explain the discrepancies that were recorded on the til and computer printouts, then the Complainant was given an opportunity to think about it and the actions taken by the Complainant was of resignation and this was supported by his lack of response - Industrial Magistrate found that on the evidence he could not conclude whether there was a dismissal or a resignation but on the evidence the Complainant had not established he was unfairly dismissed and the complaint not proved - Dismissed - Mr CJ Guerrini -v- Modillion Holding P/L - CP 272 of 2000 - Industrial Magistrate - Cicchini IM - 07/03/01 - Services to Transport........ 853

Complaint re unfair dismissal and breach of Workplace Agreement - Complainant argued that he was unfairly dismissed contrary to the provisions of the Workplace Agreements Act 1993 - Defendant argued that Complainant failed to mention on the pre-placement medical examination form of an incident resulting in an operation for injury to his right knee and again failed to provide details of that injury and the subsequent arthroscopy on the workers compensation claim form - Further, the claim was inconsistent with the notification of the earlier report that he had injured his right knee when, in fact, on that occasion he reported that he had injured his left knee - Industrial Magistrate found that omissions made by the Complainant were not such that Defendant had no other remedy, that his non-reporting did not endanger the safety of the workplace, that on balance dismissal was unfair in all the circumstances and ordered Defendant to pay compensation to the Complainant - Reasons for Decision Issued - Mr SD Oxtoby -v- Viceroy Australia Bounty (Victoria) Pty Ltd (ACN 089 020 860) - CP 219 of 2000 - Industrial Magistrate - Tarr IM - 18/01/01........ 855

Complaint re breach of Workplace Agreements Act 1993 - Complainant argued that he was unfairly dismissed without warning or valid reason and sought compensation on the basis that it was impracticable to re-employ or reinstate him given that he has now found alternative employment - Defendant denied that it unfairly dismissed complainant and argued that it simply exercised its right under the probation clause of the workplace agreement not to continue with complainant's employment - Industrial Magistrate found that complainant was terminated without any proper verbal or written warnings and without proper notice, that the probationary term of contract was simply used to justify complainant's dismissal and accordingly, complainant's claim alleging unfair dismissal was made out by reason of lack of procedural fairness as well as on the substantive merits of the case - Further, IM found that no documentation or pay slips have been produced and there has been no evidence to show exact hours worked during the relevant period, therefore complainant had failed to establish his claim regarding compensation - Reason for Decision Issued - Mr M Rea -v- Canon Foods Pty Ltd - CP 226 of 2000 - Industrial Magistrate - Cicchini IM - 21/02/01 – Retailing........ 856

Application re unfair dismissal - Applicant argued that he had attended work after Commission ordered reinstatement, however, the employer has failed to comply with the Order - Commission found on evidence that applicant's loss was at least 6 months remuneration and that the parties were in agreement as to the calculation of the loss, except that respondent sought consideration for Centrelink payments received by applicant - Commission found that it was inappropriate to deduct unemployment benefits received by applicant during the course of unemployment and accordingly, revoked the order for reinstatement - Further, Commission ordered that respondent pay applicant $31,509.17 as compensation for unfair dismissal and $2,217.04 as pay in lieu of notice, no later than 7 days from the date of the Order - Ordered Accordingly - Mr JL Butterfield -v- Pollock Nominees Pty Ltd ACN 008 842 911 - APPL 604 of 2000 - SCOTT C. - 23/02/01........ 866

CUMULATIVE DIGEST—*continued*

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TERMINATION—*continued*

Application re unfair dismissal - Preliminary issue re jurisdiction - Respondent argued that Commission lacked jurisdiction to deal with the applications as both employees were casual and pursuant to the Federal Workplace Relations Act 1996 and Regulations, were excluded from the operation of unfair dismissal procedures, there being a direct inconsistency between the Federal and State Acts - Respondent argued that consumption of alcohol on duty and a series of events which amounted to behaviour and an attitude on the part of applicant (Mr Rushton) was the reason for termination - Applicant (Mr Rushton) defended the allegations and for most part agreed that they occurred but he viewed them as trivial - Applicant (Mr Cairns) argued that he felt intimidated and threatened by another officer following an incident, that after respondent investigated the incident, he was told that he would stay on and be offered work but that never happened - Commission reviewed authorities, relevant sections of the Federal Act, the Australian Constitution and found that there was no inconsistency between the Federal Workplace Relations Act 1996 and the WA I.R. Act 1979 and hence the Commission had jurisdiction to hear the matter - Commission determined (in a further Reasons for Decision) that the nature of the applicants' employment relationship in all aspect was casual - Further, Commission found on evidence that the respondent was not prepared to continue to roster Mr Cairns away from his intimidator and unless Mr Cairns had that guarantee then he was not prepared to work for the respondent, therefore, there had been no dismissal of Mr Cairns and hence that being the fact there was no jurisdiction for the Commission and accordingly dismissed his application for want of jurisdiction - Commission further found that Mr Rushton did consume alcohol and fall asleep whilst on duty, therefore, having regard to the Undercliffe case (65WAIG385) the decision to dismiss him on notice was not unfair, harsh or oppressive in all circumstances - Applications Dismissed - Mr A Cairns -v- The West Australian Turf Club - APPL 795,809,827 of 2000 - WOOD,C - 15/09/00 – Sport... 867

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because he would not sign a workplace agreement - Respondent argued on evidence that the workplace agreement had nothing to do with the dismissal as such - Commission found that the Applicant was dismissed as a result of the conversation between it and the Respondent and the issues raised by the Respondent as to the reasons for the dismissal were at least arguably valid - Further, that Applicant's lack of any positive response in relation to the Victoria traffic incident at the time in the context of the other issues raised by the Respondent led the Commission to conclude that the Applicant had not persuaded it that his dismissal was unfair - Dismissed - Mr MJ Carberry -v- TJ & HP Abbott Transport - APPL 1403 of 2000 - BEECH C - 09/03/01 – Transport............ 871

Application re unfair dismissal and reinstatement - Applicant argued that dismissal was unfair and excessive because he rejected any suggestion that he was intentionally sleeping on the job during paid working time - Further, Applicant argued that he was resting whilst awaiting final run which was a common occurrence early in the morning and unaware of any other reported incidents - Respondents argued that Applicant was dismissed for serious misconduct for having been found asleep during paid working time instead of attending to work duties and taking into account other incidents that have taken place - Commission found it difficult to reach the conclusion that the Applicant was deliberately or intentionally sleeping on the job and that little had been done in discipline in relation to the other incidents - Further, Commission found that the Respondents were in error in regarding the other incidents and that the dismissal was harsh - Commission ordered reinstatement as the primary remedy and the parties were given an opportunity to agree on the form of the order - Granted and reinstatement ordered - Mr MA Rulyancich -v- Iluka Resources Limited & Other - APPL 1895 of 2000;CR 313 of 2000 - BEECH C - 23/02/01 - Other Mining 874

Application re unfair dismissal and contractual entitlements - Applicant sought compensation for unfair dismissal and also for a denied contractual benefit - Respondent argued that applicant was stood down and there was no termination - Commission found that applicant was unfairly terminated, that reinstatement would be totally impracticable, that the loss was a loss of pay of one hour as applicant was a casual, and ordered payment of $13.30 by respondent to applicant - Order Issued - Mrs M De Niese -v- Curtin Hotels Pty Ltd Trading as the Imperial Hotel - APPL 1645 of 2000 - WOOD,C - 27/02/01 - Accommodatn, Cafes&Restaurants.. 878

Application re unfair dismissal - Applicant argued that she was unfairly dismissed - Respondent argued that applicant breached health regulations, put other staff members at risk when in anger she threw a quantity of brandy into an extremely hot pan causing flames 3 to 4 feet into the air, and her temper and rudeness were disruptive in the workplace and resulted in complaints from other staff members about her behaviour - Commission found on evidence that applicant was prone not to follow direction and was prone to argue about the directions that were given to her, leading to her dismissal, and as she was a casual employee was afforded one hour's notice - Dismissed - BR Dopsaj -v- Robyn & Merv Finlay El Cabbalo Roadhouse - APPL 1597 of 2000 - WOOD,C - 16/02/00 – Restaurant.. 879

Application re unfair dismissal - Applicant argued that his summary dismissal for alleged misconduct was unfair because he was not given an opportunity to discuss that or given a proper induction or training on the job and was not given counselling or support from his superiors - Further, Applicant sought reinstatement originally but argued at hearing that this would be impracticable and sought six months compensation as alternative - Respondent argued that Applicant had not conducted himself in a professional manner and dismissal was the only real option considered due to the seriousness of the Applicant's actions - Commission found that the Applicant knew full well of the seriousness with which the employer might view his financial predicament, that the employer had every right to lose trust in him, and that he clearly knew that his job was in jeopardy, therefore the dismissal was not unfair, harsh or oppressive - Dismissed - Mr BJ Gardner -v- Police & Nurses Credit Society Ltd - APPL 1937 of 1999 - WOOD,C - 14/03/01 – Finance 880

Application re contractual entitlement - Applicant sought orders for alleged unpaid contractual benefits - Commission found that there were proceedings between the parties in the District Court which amongst other things encompass the whole of this matter, that that application was alive and was being pursued by applicant by way of him seeking advice from Counsel - Further, that applicant had sought advice once before about proceedings in the District Court and as a result the matter was adjourned - Commission was satisfied that because of the history in these Reasons, the application should be dismissed for want of prosecution - Dismissed - Mr RT Healey -v- Tribune Resources N.L - APPL 131 of 1999 - GREGOR C - 20/02/99................ 884

Application re contractual entitlements - Applicant argued that he was denied benefits as contained in the Sales Representative Employment Agreement of 17 May 1999 - Respondent argued that on each occasion that it dismissed applicant, it relented and reinstated him - Commission found that applicant had made out his claim in relation to the alleged dismissal which occurred in September 1999 and remained entitled to 8% advertising incentive and also the 3% over-rider commission, but after the December 1999 dismissal, his entitlement to both claimed conditions of employment ended then - Granted in Part and Adjourned - Mr GS Hincks -v- Darrell Crouch and Associates Pty Ltd - APPL 1320 of 2000 - BEECH C - 31/01/01.............. 885

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that the dismissal was unfair because it was not warranted as it did not relate to any performance issues and that there was nothing unusual or unacceptable about his actions given the normal practice and expectations of the business - Respondent argued that the Applicant was dismissed summarily because he was on licensed premises, after hours and with company, and that he consumed and provided drinks which he did not pay for at that time and this was a breach of trust - Commission found that the Applicant was not given an opportunity to address what may or may not have happened and that it he had been charged with the operation of the whole business and that the dismissal was unfair - Commission found that it was impractical for the Applicant to be reinstated and compensation and contractual entitlements were awarded - Granted - Mr M Lewis -v- West Shore Group - APPL 1395 of 2000 - WOOD,C - Accommodatn, Cafes&Restaurants 887

Application re unfair dismissal - Applicant argued that her employment was terminated in a harsh and unfair manner and the dismissal was both substantively and procedurally unfair because the tasks she completed under the performance management ought to have been accepted by the Respondent and her employment should not have been terminated - There was no argument from the Respondent - Commission found that Applicant had not demonstrated any substantive unfairness in her dismissal, that Applicant was counselled in a reasonable and courteous manner, she was given ample opportunity to respond to issues raised with her, she took the opportunity provided, she was set reasonable time frames and tasks in consultation with her and she had the opportunity to have someone present with her during important meetings, therefore, there was no procedural unfairness - Dismissed - Ms C Nichols -v- Derbarl Yerrigan Health Service Inc - APPL 1536 of 1999 - SCOTT C. - 15/02/01 - Health Services 889

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TERMINATION—*continued*

Application re unfair dismissal seeking compensation and denied contractual entitlements - Applicant argued that the Respondent contrived an arrangement to deny her a redundancy payment and that she was not competent to perform the duties of the final job offered to her - Respondent argued that there would not be a redundancy but, there would be a position made available to the Applicant and would also provide the necessary support and that the Applicant was capable of performing the job being offered - Commission preliminarily found that this was a matter of either a redundancy or an income loss but not the two together and that the Applicant was either going to be given a redundancy payment or a job - Commission found that the Applicant had not proven her case and that the Applicant had in effect resigned in that she needed to accept the job or in fact the employment relationship was going to end- Dismissed for want of jurisdiction - Mrs E Noteboom -v- Thorn Australia Pty Ltd - APPL 1506 of 2000 - WOOD,C - 20/02/01 – Electronic 893

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that his dismissal was both unfair and unlawful in that he never received any payment after being dismissed, that he never received any reasons for his dismissal, that Respondent did not provide him with any particulars relating to his alleged performance or conduct shortcomings, that he was not advised that his employment was in jeopardy and was not provided with any reasonable opportunity to respond to the allegations made by Respondent - Respondent opposed the claims and argued that Applicant had misused the expense system, had abused his position of trust as a general manager, thus, the dismissal was justified and Applicant was not entitled to any payment and was substantially indebted to the Respondent - Commission found that Applicant work performance was not an issue relied on by Respondent and that the system for expenses claims at Respondent was based on judgement and the exercise of discretion as to whether an expense should be claimed against Respondent - Further, having considered all the evidence, Commission found that it did not consider that Applicant was guilty of conduct warranting summary dismissal and that Applicant had not engaged in a wilful course of conduct in relation to his expenses to have justified Respondent in applying the employer' s ultimate sanction and thus, the dismissal was wrongful or unlawful at common law - Commission rejected the submissions of claim and counterclaim by Respondent to set-off any entitlement awarded in favour of Applicant by the sum allegedly owed to Respondent - Upheld in Part and Order Issued - Mr I Phippard -v- BGC (Australia) Pty Ltd - APPL 1958 of 1999 - KENNER C - 24/01/01.. 895

Application re unfair dismissal - Preliminary point re jurisdiction - Applicant argued he was dismissed unfairly, harshly and oppressively after failing an alcohol test on his way to the site - Respondent argued that, in accordance with Clause 15 of the John Holland Construction & Engineering Pty Ltd Rail Infrastructure Maintenance Agreement 1996-1999 [MFIA1] and Clause 5 of the Rail Infrastructure Maintenance Award 1996 [MFIA2], Commission did not have jurisdiction to deal with the matter - Commission reviewed relevant sections of the award and found that the relevant part of the award for the purposes of the matter at hand, was Clause 10 of the Award and not Clause 5 - Further, Commission reviewed authorities and found that a person subject to the award and agreement in question may still make an application pursuant to s29(1)(b)(i) of the I.R. Act, 1979 as there was no provision in the award or agreement, for that purpose, excluding them from the State Commission or directing the parties in cases of termination to the Australian Industrial Relations Commission, therefore Commission had jurisdiction to deal with the application - Reasons for Decision Issued - Mr PA Renwick -v- John Holland Construction & Engineering Pty Ltd ACN 004 282 268 - APPL 571 of 2000 - WOOD,C - 09/02/01 - General Construction 908

Conference referred re unfair dismissal and contractual entitlements - Matter remitted back to Commission with instruction that it be dealt with "according to law" and in accordance with the reasons for decision of the Full Bench - Applicant sought compensation for loss of income and in addition, for injury sustained as a result of his dismissal - Further, Applicant Union argued that whatever formula was used to assess compensation, Applicant was entitled to the maximum allowable under the Industrial Relations Act - Respondent argued that the Applicant should be compensated for something less than the maximum allowable under the Act and drew attention to the fact that he was subject to criticism which led to other proceedings in the Commission before his termination - Commission reviewed various tests cases, relevant sections of the I.R. Act and Workplace Relations Act 1996 and found that the onus was on the employer to establish that the employee had failed to mitigate his loss and the employer had simply not discharged that onus - Further, that in the present case, the task of assessing compensation was made more difficult than usual because the evidence as to the Applicant's earnings at the time of dismissal and subsequently are at best scant, and that may be due in part to the fact that so much time had lapsed since Applicant's dismissal - Commission concluded that Respondent should pay Applicant compensation for dismissal found to have been unfair by the Full Bench - Granted. - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Barminco Pty Ltd - CR 186 of 1998 - FIELDING C - 05/11/98 - Services to Mining... 916

Application re unfair dismissal and contractual entitlements - Preliminary issue re discovery of documents - Applicants' Agent filed Notice of Application for an Order that respondent give discovery under oath of documents relating to Applicant's termination of employment and engagement of temporary employees - Respondent objected to such an Order and argued that there was a restructure which lead to the redundancy of the two individual position held by Applicants and that appropriate procedures have been followed and appropriate redundancy payments paid - Commission determined that Orders for discovery would only be made for documents which were relevant to the issues before the Commission and that the Order sought was in its view sufficiently broad to be oppressive, therefore, for a number of reasons the Order sought was rejected - Dismissed - Mr SI Borich -v- WesTrac Equipment Pty Ltd ACN 009 342 572 - APPL 293,294 of 2000 - BEECH C - 23/02/01 - Machinery & Equipment Mfg 934

[2]Appeal against Decision of Commission (81WAIG299) re unfair dismissal and contractual entitlements - Appellant argued on a number of grounds that the Commission at first instance erred in fact and in law in finding that the appropriate measure of compensation for the harsh, oppressive and unfair dismissal of the Appellant was four week's remuneration - Further, Appellant sought that appeal be upheld and that the decision of the Commission that the Respondent pay to the Appellant compensation of four week's wages be set aside and in lieu thereof, the Respondent be ordered to pay to the Appellant a differing compensation amount - Full Bench reviewed authorities and found on evidence that the Commissioner erred in not finding that there was no evidence that a dismissal was contemplated or would have occurred but for the fact that the Respondent wished to force a variation in contract on Appellant against his will, that there was no evidence either that Appellant did not wish to continue in his employment and that it was more probable that the employment would and could have continued for at least twelve months - Full Bench further found that the dismissal was found and found correctly to have been substantially unfair, and that the Commissioner should have made a finding of loss based on the difference between wages earned and wages lost subsequent to the dismissal, therefore grounds of Appeal 1(a), (b) and (c), insofar as they apply, as to loss have been made out - Further, that the exercise of discretion at first instance, relating to ground 1(d) - injury, had been miscarried and that ground 2 was a submission and not a relevant ground - Upheld and Order at first instance varied - Mr NR Lynam -v- Lataga Pty Ltd - FBA 53 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/KENNER C - 29/03/01........... 986

[2]Appeal against Decision of Commission (80 WAIG 4482) re unfair dismissal and contractual entitlements claims - Appellant argued that the Commission erred in holding that it did not have jurisdiction to hear and determine the application - Appellant sought that the Full Bench overrule previous decisions if not distinguishable on the facts - Respondent argued that if the appeal was upheld, the matter should be remitted - Full Bench had already observed that it should not overrule a previous decision unless it had a conviction that that decision was wrong - Full Bench found that the actual work was performed geographically outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction - Full Bench found the Commission had correctly made findings on the claims and the Appellant should not be disadvantaged by re-opening matters – In Supplementary Reasons, Majority of Full Bench had granted an adjournment to seek legal advice - Upheld - Mr MA Tranfield -v- Ray Douglas Parker - FBA 46 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 03/04/01 - Oil and Gas Extraction 990

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TERMINATION—*continued*

Complaint re Breach of Workplace Agreement Act 1993 - Complainant argued that he was unfairly, harshly or oppressively dismissed and sought reinstatement or compensation and recovery of costs - Defendant argued that complainant's performance and conduct constituted serious breaches of his contract of employment, which justified his dismissal - Industrial Magistrate found on evidence that complainant acted in an honest, open and frank way with respect to the formation of his prospective counselling business - IM further found that defendant failed to call witnesses to substantiate claims to discharge its evidentiary burden concerning the issue, that there was no foundation for the termination of complainant's employment, and that on balance, complainant was unfairly dismissed - IM found that as reinstatement was not a realistic option, complainant was entitled to recover lost earnings - Proven - Mr PJ Moss -v- Serenity Lodge Inc - CP 216 of 1999 - Industrial Magistrate - Cicchini IM - 07/12/00 - Community Services........ 1006

Application re unfair dismissal - Applicant argued that dismissal was harsh, oppressive and unfair as he was not consulted about being made redundant, nor were alternatives considered and as reinstatement was impracticable, that it sought compensation as a remedy - Respondent argued that an investigation into the West Australian operation found that the Company was in worse shape than expected, sought immediately to introduce some cost reduction strategies and after applicant indicated that he wished to leave the company and be paid out a redundancy, he was formally given notice that his position had been made redundant with one month's notice of termination - Commission found that applicant had raised the issue of his resignation though he did not intend to resign, that the actions of respondent around that time were in response to applicant's suggestion that he would leave and his request for a redundancy sweetener, that though the process adopted to terminate his services lacked some sensitivity applicant had not proven his case that the dismissal was harsh, oppressive or unfair - Dismissed - Mr JF Booth -v- Brownbuilt Pty Ltd (A.C.N. 002 558 894) T/as Brownbuilt Metalux Industries - APPL 24 of 2000 - WOOD,C - 27/03/01 - Sheet Metal Fabrication........ 1015

Application re unfair dismissal and contractual entitlements - Applicant argued that after sustaining an injury at work, he had medical treatment and was provided with a medical certificate stating that he was unfit to work for four weeks - Further, after a short period off, he was told by the Respondent that if he "did not return to work he wouldn't have a job" - There was no appearance by the Respondent - Commission found that Applicant was not given a fair go and for him to be dismissed while incapacitated and under threat that he had to return to work was harsh and oppressive and ordered that Respondent pay to the Applicant 15 weeks salary and tool allowance within 21 days of the Order - Upheld and Dismissed - Mr B Smith -v- High Quality Brickwork - APPL 1425 of 2000 - COLEMAN CC - 08/03/01 - Construction Trade Services........ 1019

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that the employment was terminated without there being any valid reason connected with the capacity or conduct of Applicant or the operational requirements of the employer's business and that it failed to raise these concerns with Applicant or take any positive steps to ensure that Applicant was aware of those concerns and the implications of not taking appropriate action to address those concerns - Further, Respondent failed to give Applicant reasonable notice or pay in lieu of notice - Respondent argued that Applicant was formally warned about his performance and was also verbally warned on a number of occasions that he was required to improve his performance - Commission found that Applicant was aware his performance was unsatisfactory and had received memorandum that his job was at risk and that Applicant had not made out a case that Respondent abused its right to terminate his employment on grounds of poor performance - Dismissed - Mr IW Cannon -v- Linfox Transport (Australia) Pty Ltd (ACN 004 718 647) - APPL 1813 of 1999 - SMITH, C - 21/03/01 - Transport Industry........ 1020

Application re unfair dismissal and contractual entitlements - Commission listed the application For Mention Only and the Applicant had been asked to show cause why the application should not be struck out for want of prosecution - Parties were asked by Commission to provide further particulars - Commission after considering the parties submissions, concluded on a number of reasons that Applicant's lack of interest in his application for a period of at least 6 months could not be passed over especially given the Respondent's current position and that while there may be some reason on the authorities to differentiate between claims of unfair dismissal and claims for denied contractual entitlements particularly as a claim for a denied contractual entitlement was not subject to the 28 day time limitation imposed upon an applicant claiming unfair dismissal, Commission was unable to differentiate between these two claims for this purpose - Further, Commission acknowledged that the sum of money claimed was not insignificant, however, that was as much a reason for an Applicant to vigorously pursue the claim as anything else and the size of the amount claimed was an added reason why it concluded that Applicant, for whatever reason, was merely not interested for an unwarranted period of time in pursuing its claim - Struck out for want of prosecution - Mr P Hammond -v- Goldfields Scaffolding Pty Ltd (ACN 058 634 101) - APPL 419 of 2000 - BEECH C - 15/03/01 - Construction Trade Services........ 1030

Application re unfair dismissal - Applicant argued dismissal was unfair because there were no complaints about her work and she was never warned that her employment was in jeopardy and sought compensation - Respondent argued that it had a number of complaints about the Applicant which were not put to her, however, other complaints about her conduct were clearly put to the Applicant on a number of occasions - Respondent further argued that it did not advise the Applicant of the reasons for dismissal because of the potential for conflict that that would bring - Commission found that Respondent had good cause to terminate Applicant's employment, however, there had been a denial of procedural fairness which constituted unfairness in the dismissal as the Applicant was not given a warning or provided with a reason for termination - Further, Commission found that reinstatement was impracticable and ordered compensation - Granted - Mrs CD Joseph -v- Chelsea's For Hair and Beauty - APPL 1853 of 2000 - SCOTT C. - 27/03/01 – Hairdressing........ 1032

Application re unfair dismissal - Applicant argued that dismissal was unfair in all circumstances, he went to Paraburdoo on the understanding that he would have worked for six months, there was no agreement for a probation period and his treatment generally by Respondent did not allow him a proper opportunity to fulfil his contract of employment - Respondent argued on a number of reasons, including that there was no contract of employment setting out a fixed term of six months, that employment was offered to employees on an ongoing basis subject to successful completion of probation, this had been agreed with the Applicant in the telephone conversions leading to his engagement and the condition of employment relating to probation was specifically explained to him prior to him being engaged - Commission applied Principles and found that Respondent took every reasonable action to allow the Applicant to perform his contract of employment, that Applicant was the architect of his own misfortune, he did not present himself to work as required and that there had been no breach by Respondent of its obligations to act fairly to the Applicant - Dismissed - Mr E Kapsanis -v- Goldspace Pty Ltd T/as Paraburdoo Inn - APPL 1465 of 1999;APPL 829 of 2000 - GREGOR C - 20/03/01 – Hospitality........ 1033

Application re unfair dismissal - Applicant argued that he was dismissed without warning and considered that reinstatement would be impracticable and sought compensation for being harshly, oppressively and unfairly dismissed - Respondent argued that applicant was never employed as an employee, but was engaged as a contractor, was not required to produce company details or a taxation file number and did not receive annual or sick leave - Commission concluded after considering carefully all the submissions of the parties and the evidence, that it was not convinced that applicant was an employee or, on balance, had proven his case - Further, Commission found that applicant was engaged as a contractor, hence Commission did not have jurisdiction to hear the application - Dismissed - Mr RA Kellar -v- BDM Marketing Pty Ltd ACN 067 632 688 - APPL 481 of 2000 - WOOD,C - 16/03/01 - Business Services........ 1036

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TERMINATION—*continued*

Application re unfair dismissal - First Applicant argued that the notice of termination was given to them without explanation and he disputed he had been paid any money for redundancy - Second Applicant argued that he was never given any suggestion that his position was in jeopardy, that no director of the respondent made any complaint to him about the standard of his work and he was told by Mr John Polmear that he would like both applicants to run the company while he was away in the Eastern States - Respondent argued that the Goods and Services Tax on 1stJuly 2000 severely impacted on the operations of his company and as a consequence was forced to reduce its workforce to preserve the financial viability of the operation - Commission found on the balance of probabilities, that applicants were dismissed for performance failure and were not given the opportunity to say anything about respondent's assessment of their standard of work, which can only be seen to be procedurally unfair, but after careful consideration of the balance in the whole of the circumstances of the terminations, given that there be a fair go all round and not just to one party or the other, that there was not unfairness to the point where the Commission would find that the terminations were harsh or unfair - Dismissed - Mr JP Lynch -v- Twinside Retaining Walls & Fences - APPL 1477,1483 of 2000 - GREGOR C - 04/04/01 - Construction Trade Services 1038

Application re unfair dismissal - Applicant argued that he was harshly, unfairly and oppressively dismissed, that his summary dismissal was contrary to the terms of the employment contract, and sought to amend his particulars of claim - Respondents argued that applicant's refusal to allow them unrestricted access to the firm's files and failure to issue accounts as instructed in respect of files of the firm, left them with no alternative but to terminate his employment - Further, Respondent objected to applicant's application to amend and provide an alternative claim on the grounds that through his conduct, applicant had abandoned any claim that he was dismissed, that they had incurred considerable costs in preparing submissions for a preliminary argument as to whether dismissal occurred and filed a notice of answer and counterproposal - Commission found that after having regard to the competing interests of the parties, it was apparent that if the application to amend was not granted that the prejudice to applicant was greater than the prejudice to respondent, and decided to make an order granting leave to amend - Granted - Mr T Mijatovic -v- Peter Terrence Hare and Evelyn Lilly Tuba t/as E&S Legal Group - APPL 1659 of 2000 - SMITH, C - 23/02/01 – Legal 1043

Application re unfair dismissal - Parties made submissions to the Commission for further and better particulars - Applicant argued he was harshly, oppressively and unfairly dismissed and sought six weeks' compensation - Respondent argued that the application should be struck out and Applicant's claim be dismissed in that the further and better particulars raise a different case to that raised in the Applicant's original application - Commission, after hearing the submissions concluded that further proceedings were not necessary or desirable in the public interest and that for a number of reasons set out in its Reasons For Decision, it would make an order pursuant to s.27(1)(a)(ii) of the Act to dismiss the Applicant's claim - Dismissed as not being necessary or desirable in the public interest - Mr M Pietracatella -v- W.A. Italian Club Incorporated A.O. 350010F - APPL 959 of 2000 - SMITH, C - 28/03/01 - Other Services 1046

Application re contractual entitlements - Applicant argued she was owed a number of benefits under her contract of employment being payment for final week of her employment, two and a half days of sick leave entitlement, two weeks wages for retrenchment without notice, proportionate annual leave entitlement on termination and superannuation - There was no appearance or argument by the Respondent - Commission found that Applicant was not terminated for any other reason other than retrenchment, therefore entitled to the benefits under the contract of employment - Applicant acknowledged that the claim of superannuation was not within the jurisdiction of the Commission - Accordingly an Order was issued - Granted - Ms KJ Priest -v- Anovoy Pty Ltd - Peter Radosevich (Director) - APPL 2139 of 2000 - BEECH C 1049

Application re unfair dismissal and contractual entitlements divided re monies paid equal to shares and options - Applicant argued that notice was given that he wished to exercise the liberty granted in relation to the options and shares and sought an order for the benefit denied be paid in an amount of money equal to the value of the shares and options - Further, the issue to be determined was of jurisdiction and whether the Commission had the power to award a sum of money where specific performance of a benefit under a contract cannot be ordered - Respondent argued that the Commission did not have the jurisdiction to hear and determine the matter because it was not a claim for a benefit he was entitled to under his contract of service, that is, he claimed instead a sum of money equal to the value of shares and options - Further, Respondent argued that the jurisdiction was not available because a claim for damages for a breach of contract was not an industrial matter as defined in that it did not relate to rights and duties of employers' employees, instead it related to failure to allow benefits under contract of services, that is damages for breach of contract and that it did not sufficiently relate to rights and duties of an employer and employee - Commission referred to various authorities and found that the Commission had the jurisdiction and power to deal with this matter and that this was an industrial matter capable of being referred under section 29 - Order Issued - Ms E Gribble -v- Eileen and Doug Krepp - APPL 74 of 1999 - GREGOR C - 12/03/01 – Technology 1050

Application re unfair dismissal seeking Orders for discovery of documents - Applicant argued that dismissal was harsh, oppressive and unfair and that at the time of dismissal there were outstanding contractual benefits - Commission after considering the parties submissions, ordered that Respondent give discovery of all documents relating to the establishment and operation of certain projects, including financial records, the Applicant's personal file and all documents and memoranda relating to the administration of the employment contract - Further, Commission ordered that insofar as particulars were concerned the Respondent would provide to the Applicant particulars of the date and the reasons why any other employee was made redundant on or about 31 May 2000 and that Respondent specified all matters or occurrences in its organisation that gave rise to the conclusion that the position was redundant - Granted in Part - Mr GM Cann -v- Blackburne Real Estate (Licencee: Joburne Pty Ltd - APPL 936,937 of 2000 - GREGOR C - 12/03/01 - Property Services 1066

Application for reinstatement or compensation on the grounds of unfair dismissal - Applicant argued she was not made aware of all the matters alleged against her and considered by the board of the respondent in making its decision to dismiss her, nor given adequate opportunity to respond and there was substantial issues in dispute in each case - Commission found on evidence that each of four incidents were brought to the Applicant's attention when they occurred, the applicant was given notice that her conduct was unacceptable and that a further breach would result in termination - Commission found that the Applicants aggressive behaviour on a day and mischievous allegation constituted unacceptable behaviour - Commission found that in light of the history of incidents and her conduct, it could not be maintained that the respondent had abused its right to terminate the Applicant's employment - Dismissed - Ms SF Bangsa-Jayah -v- Peedac Pty Ltd (ACN 079 007 613) & Other - APPL 282 of 2000 - SMITH, C - 04/05/01 - Community Services 1190

Application re unfair dismissal - Applicant argued he was unfairly dismissed - Respondent argued that Applicant was a contractor and not an employee - Commission found on balance that Applicant was a contractor and not an employee - Dismissed for want of jurisdiction - Mr S Beacroft -v- Fletcher International WA - APPL 1864 of 2000 - BEECH C - 01/05/01........ 1196

Applications re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair and claimed compensation equal to a reasonable redundancy payment, denied contractual entitlements, long service leave and payment for relocation - Applicant argued that there was alternate work available for him to do and that he should of been retained in employment over another employee and that no reasonable alternatives were provided by Respondent and also given an impression that a promotion would be offered only to then be dismissed - Respondent argued that it had restructured its organisation and as a result Applicant's position became redundant and payment in lieu of notice and severance payment was made - Commission found that the claim for unfair dismissal was made out against Respondent being in breach of the implied term referred to and being made redundant when Applicant was expecting to given a wider role and that there was an inadequacy of severance payment made - Further, Commission found that reinstatement was not sought and that there had been a genuine redundancy, Commission therefore considered the remedy of compensation and that a further eight week's salary be paid by way of a redundancy payment - Order Issued - Mr A Birnie -v- A.W.I. Administration Services Pty Ltd - APPL 1198,1457 of 2000 - BEECH C - Metal Ore Mining 1198

CUMULATIVE DIGEST—*continued*

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TERMINATION—*continued*

Application re unfair dismissal - Applicant argued that his dismissal was unfair because his termination was not a bone fide redundancy and that this related to a workers compensation claim made by him - Respondent argued that Applicant was dismissed by reason of a bona fide redundancy because there was a turndown in work and reduced demand for their products - Commission found that Respondent did experience a substantial reduction in business demand and that consideration by Respondent of alternatives to redundancy with employees were discussed, but, did not include Applicant - Commission turned to the relevant principles to unfair dismissal claims arising from a situation of redundancy and found that Respondent had a lawful obligation to discuss and warn of impending redundancies to employees which in relation to Applicant did not occur - Commission declared that Applicant was unfairly dismissed - Declaration Issued - Mr LF Free -v- Boral Aluminium Windows - APPL 1379 of 2000 - KENNER C - Construction Trade Services.......... 1204

Application re unfair dismissal - Applicant argued that he was harshly, oppressively or unfairly dismissed and that he was made redundant without any prior consultation in breach of ss 40-42 of the Minimum Conditions of Employment Act 1993 - Further, Applicant sought reinstatement to his position or in the alternative, the maximum of six months compensation - Respondent argued that there was a restructure, the company had to cut cost and the Applicant was chosen for redundancy because he was the poorest performer and he was costing the company nearly twice as much as those that were performing better that him - Commission reviewed authorities and found on evidence that the Respondent had discharged their onus in proving there was a valid redundancy, that the redundancy was effected to save costs and that Applicant was made redundant largely, but not solely, for cost reasons - Further, Commission reviewed the Minimum Co Employment Act 1993 and found that Applicant had not proven his case that someone else should have been chosen for redundancy or that he should have been given another position, therefore, weighing up all the circumstances in the matter, Commission did not consider that Applicant's selection for redundancy was unfair, harsh or oppressive - Dismissed - Mr GE Garbett -v- Midland Brick Company Pty Ltd - APPL 791 of 2000 - WOOD,C - 09/05/01 - Non-Metallic Min Product Mfg.......... 1206

Applications re unfair dismissal - Applicants argued they have been harshly, oppressively and unfairly dismissed - Respondent argued that Commission lacked jurisdiction to deal with either application as Applicants were engaged as sub-contractors and not employees during their period of engagement - Commission reviewed authorities and evidence, and having regard to all the relevant indicia, was satisfied that at all material times the Applicants were employees working under a contract of service - Declaration Issued - Mr R Howe -v- Intercorp Services Pty Ltd trading as Westvision Painting Company - APPL 810,811 of 2000 - SMITH, C - 27/04/01 - Construction Trade Services.......... 1212

Application re contractual entitlements - Applicant sought denied benefits which he was entitled to under his contract of employment - Applicant argued that the commission earned by him for sales which were not complete at the time of his termination of employment had not been paid - Respondent argued that Applicant must complete each sale personally and that if a member of the sales team leaves and that person was replaced, the new person fitted into the team and fulfilled the orders - Commission found that commission was due on a measure and quote which was legitimate which was sold at the customer's house and that Applicant was entitled to commission on sales where he undertook the measure and quote and brought in the order to the business premises - Order Issued - Mr AE Jackson -v- Iustini Holdings Trading As Doors Plus - APPL 1885 of 2000 - SCOTT C. - Construction Trade Services.......... 1215

Application re unfair dismissal and contractual entitlements - Applicant argued that dismissal was unfair and application was made to clear his name of the accusation of stealing - Respondent argued that reasonable steps were taken to allow Applicant to respond to the allegations of stealing and over the course of time the story changed - Further, Respondent argued that after investigating the matter he came to the view that the product (tin) was taken without authority or permission to do so - Commission found that by applying the weight of evidence principles, all the factors upon which Respondent formed the view were accepted over Applicant's story - Dismissed - Mr DJ Kearns -v- Aarjen Pty Ltd - APPL 1970 of 2000 - WOOD,C - Retail Trade.......... 1218

Application re unfair dismissal - Applicant argued that termination was harsh, oppressive and unfair, that the effect was immediate without notice, that the unfairness was compounded through his inability to refute any allegations of misconduct because at the time of the dismissal none had been made and that he was not given any information concerning those allegations in the letter of termination - Respondent argued that the dismissal followed months of mismanagement and misconduct by Applicant - Commission reviewed authorities and found on evidence that on balance, Applicant was not given a "fair go" as an employee and his dismissal was, therefore harsh and unfair - Further, that reinstatement was impracticable and awarded compensation to the Applicant - In Supplementary Reasons For Decision, Respondent argued a motion to reopen and to make further submissions concerning the quantum of compensation - Respondent argued there was no loss that the Applicant could point to because in the period in which he was unemployed he did not attempt to sufficiently mitigate his loss - Commission applied the law relating to finding of loss and injury and the assessment of compensation and found that in all of the circumstances it was appropriate that an award be made to Applicant for loss and injury - Order Issued - Mr I Lawless -v- Ghirardi Restaurant Pty Ltd (ACN 081 550 469) - APPL 1822 of 1999 - GREGOR C - 19/01/01 - Accommodatn, Cafes&Restaurants.......... 1219

Applications re contractual entitlements - Applicant argued that Respondent failed to pay him contractual entitlements due under the terms of an employment arrangement - Respondent argued there was no employee/employer relationship, therefore Commission lacked jurisdiction to deal with either applications - Commission concluded after considering the facts in the context of the law to be applied, that the necessary ingredients to create an employee/employer relationship were missing between the Applicant and the Respondent, that Applicant only had access to this Commission if he was an employee and as he was not, there was no alternative but to dismiss both applications for want of jurisdiction - Dismissed for want of jurisdiction - Mr WT Lunt -v- WRS Pacific Pty Ltd ACN 009 248 999 - APPL 1827,1912 of 2000 - GREGOR C - 04/05/01.... 1223

Application re unfair dismissal seeking reinstatement and contractual entitlements - Applicant argued that dismissal was unfair and that he was also entitled to long service leave - Applicant argued that the Respondent's inquiries were inadequate in relation to the investigation and finding by the Principal that Applicant was guilty of sexual misconduct in respect of a student at the College - Respondent argued that Applicant failed to provide any information that could provide a defence to the allegations of misconduct at the time of the investigation when the opportunity was given - Further, Respondent argued that all matters were considered in making the decision to terminate including the nature of the allegations, the evidence presented, the failure to respond satisfactorily to the allegations within a reasonable time frame, the impact on the family concerned, the impact on the school and its staff, and the duty of care owed to the children in the college - Commission found that Respondent had conducted itself in a proper manner and Applicant was given reasonable opportunity to provide a defence and that it had not abused its right to terminate - Further, Commission found that the employment relationship had irretrievably broken down and that the trust could not be restored - As to the long service leave, Commission found that the Commission did not have the jurisdiction to hear and determine the claim of long service leave, as this was an enforcement or recovery of wages under an award and that it should be pursued in the Industrial Magistrate's Court pursuant to section 83 of the I.R. Act - Dismissed - Mr R Newton -v- Roman Catholic Bishop of Bunbury - APPL 18 of 2000 - SMITH, C – Education.......... 1226

Applications re unfair dismissal seeking compensation - Applicants argued that dismissal was unfair as both were dismissed without any warning because they had membership with the Construction, Forestry, Mining and Energy Union and an incident that involved an organiser of the CFMEU - Further, Applicants argued that they were employed on a permanent full time basis - Respondent argued that Applicants were both engaged on a day to day basis, effectively as casual employees and that they had no real entitlement to ongoing employment - Commission rejected the submissions by Respondent that Applicants were employed on a casual basis and that Applicants were dismissed harshly, oppressively and unfairly and that there was no good reason for their dismissal - Commission found that reinstatement was impracticable and awarded compensation to Applicants - Granted and Order Issued - Mr GK Smith -v- J&P Metals Pty Ltd - APPL 1377,1378 of 2000 - KENNER C - 20/04/01 - Construction Trade Services.......... 1238

CUMULATIVE DIGEST—*continued*

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TERMINATION—*continued*

Application for an adjournment re unfair dismissal - Commission heard from both parties, then considered the issues in the matter and found on balance that the prejudice to the Respondent would be greater if the adjournment was not granted than to the Applicant if the adjournment was granted - Granted - Mrs JM Temby -v- Albany and Districts Skills Training Committee Incorporated - APPL 1927 of 2000 - KENNER C - 27/04/00........ 1241

Applications re unfair dismissal - Applicants argued that dismissal was harsh, oppressive and unfair - Respondent argued that at the time the decision was made to terminate Applicants, the financial state of the company was poor and the company had little cash flow as it was building stock and not making sales - Commission reviewed authorities, clauses 32 and 32A of the Award and found that the termination of Applicant (Myles) was unfair because Respondent failed to pay him a severance payment - Further, the manner of dismissal was harsh because no discussions took place as required by clauses 32 and 32A of the Award and s.32 of the Minimum Conditions of Employment Act, and ordered that Applicant (Myles) be paid a global award by Respondent as compensation and that his contractual benefits claim dismissed - In the case of Applicant (Wigham), Commission was satisfied that he had made out a case that the selection process for dismissal was unfair - Further, Commission found that Applicant (Wigham) was unfairly dismissed, that reinstatement was impracticable and ordered that he be paid by the Respondent eight weeks' remuneration and eight weeks' ordinary pay, together with $10.00 tool allowance and $25.00 service allowance for each week - Orders Issued - Mr TW Wigham -v- SFM Engineering Pty Ltd - APPL 1375,1384 of 2000 - SMITH, C - 06/04/01 - General Construction........ 1241

Conference referred re unfair dismissal seeking reinstatement - Applicant Union argued that their member was unfairly dismissed because the Respondent's response to his actions was disproportionate to the gravity of the conduct and that the conduct in question occurred outside the workplace and that the policy was not entirely clear in this regard which added to the unfairness of the dismissal - Respondent argued that the member had engaged in conduct in breach of the Policy with knowledge of the terms of the Policy and further submitted that the conduct and behaviour was premeditated and designed to harass and intimidate other employees which included using the word "scab" - Respondent also argued that reinstatement was not a viable option if the dismissal was unfair - Commission found that the member was dismissed for making unwelcome remarks and using derogatory and offensive words to employees who had accepted workplace agreements - Commission found having regard to all the circumstances, including the length of service and unblemished employment record that the Respondent's decision to dismiss was harsh, oppressive and unfair - Further, the utterances of the member were not accompanied by any threats, other verbal abuse or intimidation - As to the question of remedy, Applicant Union sought reinstatement, whilst Respondent opposed it - Commission ordered reinstatement - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 KENNER C - Metal Ore Mining........ 1262

Conference referred re unfair dismissal - Applicant Union argued that its member was harshly, oppressively and unfairly dismissed and sought an order that he be reinstated and any orders or conditions that the Commission saw fit to impose - Respondent denied the claim and opposed the orders sought - Commission reviewed authorities, evidence and found on a number of reasons that the union member was not harshly, oppressively and unfairly dismissed - Dismissed - AUST MEAT INDUSTRY EMPL UNION -v- Geraldton Meat Exports - CR 4 of 2001 - SMITH, C - 04/05/01 - Food, Beverage and Tobacco Mfg 1271

Application re contractual entitlements - Applicant argued that he had been denied an over rider commission and an advertising allowance that had not been paid - Respondent argued that a reconciliation of the advertising allowances and the advertising expenses incurred showed that there had been an overpayment - Commission found that Applicant was entitled to part of his claim for contractual entitlements and ordered accordingly - Granted in part - Mr GS Hincks -v - Darrell Crouch and Associates Pty Ltd - APPL 1320 of 2000 - BEECH C - 18/05/00 - Real Estate Agency 1320

[1]Appeal against decision of Full Bench (79 WAIG 2313) re dismissed appeal to Full Bench re finding of unfair dismissal, upon failure of Appellant to appear - Appellant argued the Appellant failed to receive notice to attend the hearing of Full Bench due to change of address and medical factors and that dismissing the appeal without giving him the right to be heard denied him natural justice - IAC found that in the circumstances the Full Bench was entirely justified in making the order and did not commit any error of law or exceed its jurisdiction - IAC found no question of law - Dismissed - Kamel Lebeidi - Sugar Gum Restaurant -v- Ms RA Napoli - IAC 9 of 1999 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 01/02/01 - Accommodatn, Cafes&Restaurants 1357

[2]Appeal against decision of Commission (81 WAIG 1262) re unfair dismissal claim - Appellant argued that Commission did not have jurisdiction to order reinstatement once the Appellant had agreed to pay compensation - Full Bench reviewed IR Act, authorities and found that the Commission acted within power, correctly and validly exercising the unconditional power conferred by s23A(1)(b), a power not conditioned by s 23A(1a)(b) - Dismissed - BHP Iron Ore Pty Ltd -v- AUTO, FOOD, METAL, ENGIN UNION - FBA 21 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 21/05/01 - Metal Ore Mining........ 1363

[2]Appeal against decision of Commission (81 WAIG 679) re unfair dismissal claim - Appellant argued, interlaid, the Commission failed to give proper consideration to the Respondent's obligations for training, teaching and counselling the Appellant and sought compensation - Respondent argued the Appellant was on a probationary period and had not performed to required standards - Majority Full Bench found the Commission should have found the Appellant was not counselled or informed sufficiently as to the standards which he was required to meet - Full Bench found the Appellant had not been warned, given sufficient reason for dismissal and the employer acted in a procedurally and substantially unfair manner - Full Bench found sparse reasons for decision made it difficult to find the discretion did not miscarry and that the Appellant should be compensated for loss equal to the balance of the probationary period -Upheld and decision varied - Mr MJ East -v- Picton Press Pty Ltd - FBA 3 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 04/05/01 - Printg, Publishg & Rcdd Media........ 1367

[2]Appeal against decision of Commission (79 WAIG 2053) re allegedly denied contractual entitlements and applications to extend time to file appeal and appeal books - Matter brought on by Full Bench's own motion pursuant to a Practice Direction - Appellant did not appear, but argued in writing that the distance between Qld and WA and ill health were the reasons for the delay in attending to matters - Respondent argued nothing of merit was submitted in favour of the application to extend time to lodge the appeal, the appeal was five months out of time and therefore a nullity - Full Bench found the Appellant had been afforded every reasonable opportunity to prosecute the appeal, but failed to do so - Full Bench found the interests of the Respondent, the community, justice, which favoured the respondent and the equity, good conscience and substantial merits of the case required the appeal and applications to be dismissed - Dismissed not be dismissed - Full Bench found that the Appellant had been afforded every reasonable opportunity to prosecute the appeal, including a telephone hearing, but had failed to do so and the application should be dismissed in the public interest - Full Bench further found that the interests of the respondent the community and the Commission and the equity good conscience and substantial merits of the case required the dismissal of the appeal and all other applications before the Full Beech nothing was put that the Commission had Commission had exercised its discretion under s27 of the IR Act in error or that the grounds of appeal did not demonstrate an arguable case on appeal - Dismissed for want of - in error - Mr P Sobczuk -v- Carnarvon Medical Service Aboriginal Corporation - FBA 11 of 1999 - Full Bench - SHARKEY P/SCOTT C./SMITH, C - 11/06/01 - Health Services 1373

Complaint re Breach of Award - Complainant argued that Defendant had breached the Building Trades (Construction) Award 1987 No. R17 of 1978 in that Defendant failed to pay adult rates of pay as a full time employee and not as a casual employee, failed to provide annual leave and loading and public holidays and at the appropriate rates and other entitlements on termination - Defendant argued that there was no case to answer as there was not in existence an employment relationship between Complainant and Defendant and that there was no entitlement to the award claims - Industrial Magistrate found that Complainant was an employee and that the award would apply - IM further found that Complainant failed to show specific benefits that he was entitled to under the award in that there was no evidence to show which days were actually worked by Complainant and that without such evidence the Court could not determine what the actual entitlements were and that he had not established the amounts that were owing - No case to answer - Mr A La Guidara -v- Mr A Tripolitano - CP 161 of 2000;M 51 of 2001 - Industrial Magistrate - Cicchini IM - 17/05/01 – Building........ 1389

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TERMINATION—*continued*

Applications re unfair dismissal claim - Applicant argued that dismissal was harsh, oppressive and unfair and sought reinstatement and compensation - Respondent argued that a disciplinary inquiry convened under an Industrial Relations Agreement found that the Applicant had breached the Company's Non-Harassment Policy, was involved in the distribution of offensive material, marking an affidavit with offensive comments and had lied about any involvement in those matters - Commission found there was no evidence that the Applicant in any way did or was associated with the distribution of the material around the site or that the "target" of the harassment ever knew of the notations on the affidavit - Commission found the Applicant was dismissed for conduct that did not breach the policy and the dismissal was harsh, oppressive and unfair - Commission found the Respondent knew of the deceit and could not resurrect it ex post facto - Commission found that an application to re-open the case upon the Respondent's agreement to pay compensation should be treated as part of the substantive matter, it should not do so in all the circumstances and the Applicant should be reinstated - However, Commission found the Applicant's conduct in misleading the Respondent could not be condoned and he should receive a written warning to be placed on his personal file to the effect that any further conduct of that kind will lead to termination of his employment - Ordered Accordingly - CONSTRUCTION, MINING, ENERGY -v- BHP Iron Ore Ltd - APPL 1393 of 2000;APPL 747 of 2001 - KENNER C - 08/05/01 - Metal Ore Mining........ 1393

Application for an order revoking an order reinstating an unfairly dismissed employee - Applicant Employer argued that S23A(3) of the IR Act created a right for it to refuse to obey an order for reinstatement and the Commission must therefore issue an order for compensation- Respondents argued that it was not open for the Applicant to bring the application, the Respondent Employee's attitude had been the subject of the original hearing, reinstatement was not a popularity issue and the Commission had discretion - Commission reviewed authorities and found that if the process of revocation was automatic it would render the power to reinstate nugatory and that power was discretionary - Commission found it was not open in the application to consider further evidence on a point that was already decided - Commission had considered the employee's attitude and behaviour and reinstatement had more potential benefit to him - Dismissed - Iluka Resources Limited & Other -v- Mr MA Rulyancich & Others - APPL 432 of 2001 - BEECH C - 01/06/01 - Other Mining 1397

Application re unfair dismissal - Applicant argued that termination of his employment was unfair as his employment was terminated prior to the expiration of the probationary period and sought compensation for the wages he would have earned from date of termination to expiration of the one month probationary period - Respondent argued that the reason why Applicant's employment was terminated was because Applicant did not perform, in that sales figures for the plumbing section did not increase - Commission found that clearly Applicant was not given sufficient time to prove himself as a competent Plumbing Salesperson in Respondent's business, that Respondent unfairly terminated Applicant's employment and ordered that Respondent pay Applicant $710.75 for eight days pay as compensation - Order Issued - Mr D Allia -v- CD Dodd Pty Ltd T/A Ross's Salvage & Handyman - APPL 1999 of 2000 - SMITH, C - 06/06/01 – Plumbing........ 1400

Application re unfair dismissal - Applicant summarily dismissed by a recruitment agency that had a labour hire agreement contract with another company who had requested that the Applicant be removed - Applicant argued he had never seen the relevant Code of Conduct or Privacy documents, the dismissal was harsh, oppressive and unfair and sought reinstatement - Respondent argued that the Applicant had made a derogatory comment about a customer in the comments field of his notes screen which was against the other company's Code of Conduct and 'Privacy' instruction - Commission found that the evidence disclosed that the nature of engagement could not be characterised at law as casual employment - Commission found that Respondent abused the right to terminate the Applicant's employment because the customer made no complaint about the service, the Respondent made no enquiry about why the applicant made the note and failed to instruct its employees about the Code of Conduct - All the training Applicant received was prior to the creation of the Privacy instruction - - Commission found that reinstatement was not practicable and the Respondent should pay the Applicant compensation for loss at the date of hearing - Granted - Mr DJ Conole -v- Julia Ross Recruitment Pty Ltd & Other - APPL 450 of 2000 - SMITH, C - 25/05/01 - Recruitment Services........ 1402

Application re unfair dismissal - Applicant argued that Respondent had not paid two week's wages and that Respondent was aware of new address to post cheque - Respondent argued that cheque had been sent out in good faith to previous address - Commission found that Respondent should send cheque for the agreed sum to the address as provided by Applicant - Order Issued - Mr KJ Coughlan -v- Catalyst Recruitment Systems - APPL 1665 of 2000 - BEECH C - 07/06/01 - Recruitment Services 1405

Application re unfair dismissal and contractual benefits - Applicant argued that the passing comments given were not treated as warnings and that Respondent's attitude had changed once re-enrolment at university had taken place - Further, Applicant argued that Respondent had given a pay rise early and two bonuses prior to re-enrolment at university - Respondent argued that numerous verbal warnings were given to Applicant regarding lack of work performance and that they were pleased for Applicant that he was considering leaving to go to university and that the bonuses were at the lower end because of the poor work performance - Further, Respondent argued that they were forced to incur unnecessary costs by Applicant and his agent and sought costs to be awarded or offset - Commission found that the dismissal was unfair because Applicant had not been warned that his employment was in jeopardy due to underperformance This meant that the dismissal was unfair because of a procedural issue - Commission also found reinstatement was impracticable and awarded compensation - Further, Commission found that the circumstances did not warrant making an order for costs against Applicant - Order Issued - Mr BE Davies -v- Phoenix Paints Pty Ltd - APPL 2019 of 2000 - BEECH C - 07/05/01 – Paint........ 1406

Application re unfair dismissal seeking compensation - Applicant argued that dismissal was harsh, oppressive and unfair because he was given little training and never given an opportunity to give his side of the story when presented with warnings and there were never any discussions regarding the warnings given - Respondent argued that many written and verbal warnings were given because of his abusive and unsatisfactory conduct and performance - Commission found that there were a number of alleged incidents in which Applicant was said to have engaged in unsatisfactory conduct and that none of these issues were ever put to Applicant or any further inquiries into the allegations - Further, Commission found that Applicant did not have any real and proper opportunity to answer the allegations or to obtain appropriate representation - Finally, as to remedy Commission found that reinstatement was impracticable and awarded compensation - Order Issued - Mr S Davey -v- Shire of Collie - APPL 1358 of 2000 - KENNER C - 22/06/01 - Local Government 1410

Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and due outstanding contractual entitlements as the allegations that he was unable to comply with Respondent's request to keep the greens at standards required by them, as the greens were at sufficient standard as required - Further, Applicant argued that he had an extensive period of time as he was diagnosed with a life threatening illness - Respondent argued that dismissal was due to the fact that there was a history of dissatisfaction expressed at his level of performance and the standard required for the surfaces not being met and that he was not putting in enough time on the job - Commission found that sufficient time was given for Applicant to comply with Respondent's request and that Applicant was aware that his position was in jeopardy if he failed to comply - Dismissed - Mr JA Fuller -v- North Beach Bowling Club - APPL 1943 of 1999 - GREGOR C - 18/05/01 - Recreation 1413

Application re unfair dismissal - Applicant argued that dismissal was unfair because of his refusal to sign a subcontract agreement presented to him by Respondent and that it was not due to the alleged allegation of falsifying his timesheets - Respondent argued that his employment was not terminated on account of his failure to sign a so -called subcontract agreement, but, because Applicant had falsified his time sheets on a number of occasions and had claimed for payment for time not worked - Commission found that Applicant had falsified his time sheets and his claims for payment and his failure to comply with a lawful direction - Dismissed - Mr MR Henry -v- Hanssen Pty Ltd - APPL 1549 of 2000 - SCOTT C. - 15/05/01 - Construction Trade Services 1416

CUMULATIVE DIGEST—*continued*

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TERMINATION—*continued*

Application re unfair dismissal - Applicant argued that her dismissal from a position of permanent part time receptionist was harsh, unfair, for no valid reason, sought a declaration that dismissal was of that nature but did not seek reinstatement - Respondent argued that applicant's employment status throughout the employment period was one of a casual nature - Commission found that Applicant did not prove that her services were terminated at all, that she was not dismissed, she resigned, therefore the Commission had no jurisdiction and this application should be dismissed - Dismissed - Ms A Hoare -v- Noongar Land Council - APPL 764 of 2000 - GREGOR C - 12/06/01 - Community Services 1420

Application re unfair dismissal - Supplementary reasons for decision re question of compensation - Respondent requested a motion to reopen matter to make further submissions concerning the quantum of compensation - Respondent argued that there was no loss that Applicant can point to because in the period in which he was unemployed he did not attempt to mitigate his loss - Commission found that Applicant did not continue to suffer an impact upon his professional reputation and that during the period of time in question he did not make sufficient efforts to mitigate his loss, thus, the compensation awarded was decreased - Order Issued - Mr I Lawless -v- Ghirardi Restaurant Pty Ltd (ACN 081 550 469) - APPL 1822 of 1999 - GREGOR C - 03/05/01 - Accommodatn, Cafes&Restaurants 1426

Application re unfair dismissal and contractual benefits - Applicant argued that he was harshly, oppressively and unfairly dismissed and denied a benefit under his contract of service because Respondent failed to consider alternative punishment measures such as a warning and that termination was carried out in public - Further, Applicant worked long hours and should have been considered when final payment arranged - Respondent argued that Applicant was dismissed for incidents involving misconduct and negligence which included an attempt to blame an apprentice for food being delivered late, failure to secure and lock the premises and property and a lack of trust - Commission found that Respondent had reasons to lose trust in Applicant and it was clear Applicant had failed to secure premises on occasions and that Applicant was afforded an adequate opportunity to put his version of events - Further, Commission found that Applicant was entitled to the guaranteed minimum hours of work as paid out - Dismissed - Mr W Manson -v- Allclass Holdings Pty Ltd Trading as Gourmet Professional Catering Company W.A - APPL 1816 of 2000 - SMITH, C - 11/05/00 – Catering 1428

Application re unfair dismissal and contractual entitlements - Applicant argued that she had not been paid a benefit due to her under her contract of employment and that she had worked the hours but not been paid - No appearance from Respondent - Commission found that Applicant was entitled to the benefits claimed - Order Issued - Mrs J Loth -v- Childrens Therapy & Education Clinic - APPL 348 of 2001 - BEECH C - 08/06/01 – Education............ 1428

Application re unfair dismissal - Applicant argued that she was unfairly dismissed because the night of the dismissal was an unusually busy night and there were a number of reasons why things did not go particularly well that night, she was working under pressure, the Manager at the time was affected by alcohol and was abusive - Respondent argued that Applicant was dismissed for being too slow over the course of her employment - Commission was not persuaded on the evidence overall that the reason applicant was dismissed was simply the events of that night but that Respondent had been concerned from Applicant's first shift and rostered her for less hours after the first week, and found on the balance of probabilities that respondent had already reached the decision to dismiss Applicant prior to that evening - Further, Commission found that applicant had not discharged the onus upon her that dismissal was harsh, oppressive or unfair - Order Issued - Ms LA March -v- Hungry Hollow Tavern - APPL 1722 of 1999 - BEECH C - 06/06/01 - Accommodatn, Cafes&Restaurants 1431

Application for reinstatement or compensation on the grounds of unfair dismissal - Applicant argued that despite there being yearly contracts, the Applicant's employment should be regarded as continuous up until the time of termination, there was no evidence that the Applicant performed poorly and relevant decisions were not taken by a validly constituted management committee under the Respondent's constitution - Applicant argued that the "spill and fill" was merely a device to get rid of the Applicant and that there was a breach of the MCE Act - Respondent argued that it had engaged in a genuine restructuring of its operations to provide better service and there was in fact no dismissal - Respondent further argued that the Applicant had failed to mitigate her loss and had been paid a substantial redundancy package - Commission found failure to consult as required under the MCE Act led to the conclusion that the dismissal was unfair and that the manner of the termination left a lot to be desired - Commission found reinstatement was impractical, but only injury warranted compensation - Granted in part - Ms LF Oliver -v- Coolgardie Community Care Incorporated - APPL 1075 of 2000 - KENNER C - 10/05/01 - Community Services ... 1435

Applications re unfair dismissal claims and allegedly denied contractual entitlements - Applicant had been employed temporarily in a higher position - Respondent argued the Applicant was engaged on a temporary contract as Manager and the terms and conditions of the CASH award applied to the contract in its entirety - Commission found it was clear from the express terms of the contract for the Manager position that there was no provision for termination by giving notice - Commission found that unilaterally reverting the Applicant to the position of co -ordinator constituted a dismissal at law, but it was not in all the circumstances harsh, oppressive or unfair - Commission found the reason the Applicant was stood down was because of issues raised in respect of her duties as Manager and, in light of the fact that the Applicant was not directed to work as Co-ordinator after that time, the claim in respect of that position was made out - Commission found that the employment would have ended and that in light of the fact that the applicant had only served eight weeks of her probationary period an award of compensation for five weeks remuneration at the Co-ordinator rate should be granted - Granted in part - Ms P Pawaboot -v- Eastern Region Domestic Violence Services Network Inc. - APPL 1321,1725 of 2000 - SMITH, C - 04/05/01 - Community Services 1438

Application re unfair dismissal and preliminary hearing on jurisdiction - Applicant argued that he thought he was given time on 16 January 2001 to decide whether he wanted to end his employment and that 18 January 2001 was date of termination - Respondent refuted and argued that Applicant was given the option of working out the notice or leaving straight away, where Applicant agreed to take payment in lieu and leave - Commission found that Applicant was paid in lieu of notice and the termination date was 16 January 2001 and Commission was without jurisdiction - Dismissed for want of jurisdiction - Mr J Rakitic -v- Perth Auto Alliance (Centre Ford Northbridge) - APPL 292 of 2001 - WOOD,C - 16/05/01 - Motor Vehicle Rtlg & Services............ 1445

Application re unfair dismissal - Applicant argued that dismissal was unfair because she had not taken too many sick leave days unnecessary and that other employees should have been terminated due to downsizing before her as she had the longest service - Further, Applicant argued that she was dismissed because she was pregnant - Respondent argued that it needed to reduce staff and that the process also continued after Applicant's dismissal and the number of sick leave days taken were not relevant or important to the process of downsizing - Further, Respondent argued that he was unaware that Applicant was pregnant when notice was given - Commission found that the number of sick days taken was not a relevant issue and that the process regarding downsizing was not unfair - Further, Commission found that Respondent was not aware of the Applicant's pregnancy and that it was not an issue in the overall need to reduce staff - Dismissed - Ms K Ruston -v- Leader Lounge Furnishings - APPL 1547 of 2000 - BEECH C - 17/05/01 - Furniture 1448

Application re unfair dismissal and contractual entitlements - Applicant argued that she was harshly, oppressively and unfairly dismissed - Respondent denied there was a dismissal at all and that Applicant was having considerable difficulties in her working relationship with another manager - Commission found that there was a significant degree of conflict in the workplace between Applicant and Respondent, that Applicant did not truly resign from her employment but was dismissed and that the most likely date of dismissal was the date upon which Applicant received termination payments into her bank account - Commission also found that dismissal was harsh, oppressive and unfair, that reinstatement was impractical and ordered Applicant to be compensated for loss by $6,000 - Order Issued - Mrs JM Temby -v- Albany and Districts Skills Training Committee Incorporated - APPL 1927 of 2000 - KENNER C - 07/06/01 - Business Services 1449

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TERMINATION—*continued*

Conference referred re unfair dismissal seeking reinstatement - Applicant Union opposed the application going to the construction of s.23 of the IR Act - Applicant Union argued that Respondent did not have the standing to bring application to revoke the reinstatement order and submitted that an order for reinstatement was solely for the benefit of the unfairly dismissed employee - Further, Applicant Union argued that an alternative means of dealing with a failure to comply with such an order, does not create a right to not comply - Respondent argued that Commission should revoke and amend the order for reinstatement and award compensation for the loss or injury caused by the dismissal - Respondent argued that on its proper construction, reference to 'may' in s.23A(3), although expressed in directory terms, should be interpreted in a mandatory sense. - Further, Respondent argued that if s.23A(3) was to be interpreted such that 'may' means Commission had a discretion to issue a further order on revocation, then that discretion may be exercised simply as a consequence of the employer's failure to comply with the reinstatement order or its impracticability to comply with the order - Commission found that once it was satisfied that there had been a failure to comply as a matter of jurisdictional fact, Commission was then obliged to consider whether to revoke original order and that the terms of s.23A as a whole conferred on the employer a right to not comply with a reinstatement order - Commission rejected Respondent's submissions to revoke Commission's order - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 - KENNER C - 31/05/01 - Metal Ore Mining 1457

Conference Referred re unfair dismissal seeking compensation - Applicant Union argued that member was harshly, oppressively and unfairly dismissed because the decision to terminate was excessive regarding deliberate act of member and the isolated incident was taken out of context because member was an excellent employee over many years - Further, Respondent had already decided to terminate before giving member an opportunity to reply and other alternative options could have been considered to termination - Further, compensation was being sought because Respondent no longer operated the Roadhouse - Respondent argued that member was dismissed for misconduct and that the damage caused was destructive - Commission found that that member deliberately threw waste over a customer's truck and that was because customer had parked behind the back door obstructing the drain - Further, Respondent had determined prior to confronting member that he was to dismiss member for gross misconduct and that member was summarily dismissed for deliberately throwing waste - Issue considered by Commission was whether the punishment was appropriate and whether there was proper consideration in deriving the punishment - Commission found that dismissal was harsh and excessive as member was not given a fair go and that compensation should be awarded - Order Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Clifton Nominees Pty Ltd - CR 310 of 2000 - WOOD,C - 17/05/01 - Accommodatn, Cafes&Restaurants 1463

TRAINING

Application re unfair dismissal - Applicant argued dismissal was unfair because she received little training during the four days she worked - Respondent argued that Applicant was provided with repeated training over the four days - Commission found that Applicant did not receive the training which possibly ought to have been given and therefore was not given a proper opportunity to prove herself over those four days – Further, that Applicant was not informed that her performance was not satisfactory and that she needed to improve, therefore the dismissal was unfair and as Applicant found new employment it did not represent an ongoing loss for her and ordered that Respondent pay one further week's wages to the Applicant - Granted - Mrs RI Van Den Broeck -v- Highway Gynaecology - APPL 1030 of 2000 - BEECH C - 12/12/00 – Medical......................... 319

TRAVELLING

Application re unfair dismissal - Applicant argued that he was dismissed unfairly - Respondent argued that Applicant repudiated his employment by refusing to go to Sydney for 3 -4 weeks unless he was paid more money - Commission found that the work to be done in Sydney represented a marketing development opportunity and that the wording in Applicant's Letter of Appointment was within the terms of his contract of employment to go to Sydney for 3-4 weeks for business development purposes - Commission reached the conclusion that applicant refused to obey the lawful and reasonable request of his employer, this was a repudiation of his contract of employment, that such refusal was a misconduct which justified dismissal, he had not demonstrated that he was dismissed and that his dismissal was unfair - Dismissed - Mr J Davey -v- Romteck Pty Ltd ACN 009 202 117 - APPL 1029 of 2000 - BEECH C - 18/10/00 - Electronic Equpmnt Manufacture 283

UNIONS

[1]Appeal against Decision of Full Bench (80WAIG159) re wearing of badges by union members during hours of employment - Appellant argued whether the decision of the Full Bench was erroneous in law and whether the exercise of the Senior Commissioner's exercise of discretion in the relevant circumstances gave rise to reviewable errors of law - Respondent union argued that the matters before the Full Bench were essentially matters of industrial fairness concerning the introduction and use of a badge - Industrial Appeal Court found that the Full Bench fell into error in seeking to balance rights vested in the employer as a consequence of the contractual arrangements as against the reasons advanced by the employees for wearing the badge - Further the reasons for wearing the badge were not of the same contractual or normative order as the rights of the employer to determine what was required by way of grooming thus the appeal was allowed - Appeal Upheld - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality.................................... 4

[1]Application for stay of proceedings in Matter No. CR159/1999 pending determination of Appeal - Appellant argued for a stay of proceedings of the Decision of Full Bench until the determination of the appeal before IAC or further Order - Industrial Appeal Court found that it was quite satisfied that the circumstances, as well as the balance of convenience justified the stay of proceedings to be granted - Granted - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality.. 9

[2]Application for Orders pursuant to Section 72A of the Industrial Relations Act - Full Bench issued a numbers of orders and directions to expedite the determination of the Application on 5 September 2000 - Full Bench also adjourned hearing at the request of both parties - Full Bench granted and ordered procedural applications - Applicant Union sought orders that the Merchant Service Guild (MSG) has the right to represent under the Act, to the exclusion of the Civil Service Association (CSA) the industrial interests of all Fisheries Officers employed in the Fisheries Department of Western Australia by the Executive Director Fisheries who are eligible for membership of the MSG and that the CSA does not have the right under the Act to represent the industrial interests of any Fisheries Officers - The grounds for the application are that the Applicant Union is best placed to represent the industrial interest of the Fisheries Officers because in the context of the enterprise the Applicant is the recognised principle union in relation to maritime employees and can commit greater resources and overall industry experience to protect the interests of those employees engaged in the maritime industry and would be better placed to promote and facilitate successful enterprise bargaining and that the orders sought are consistent with the objects of the Act - CSA argued that it had constitutional coverage of the Fisheries Officers and is a large existing organisation which does and is able to provide a wide variety of services and which has substantially provided resources to enable that to occur - Full Bench found that the CSA at all material times, had and has the capacity to properly and efficiently represent Fisheries Officers and has done so - Further, Full Bench found that the Fisheries Officers are ineligible to join MSG under its eligibility rule and that the MSG has no constitutional coverage of Fisheries officers - Full Bench concluded that the Applicant Union did not establish a substantial case - Dismissed - Merchant Service Guild of Australia, Western Australian Branch, Union of Workers -v- (Not applicable) - FBM 3 of 2000 - Full Bench - SHARKEY P/SCOTT C./KENNER C - 15/02/01 - Government Administration.... 380

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UNIONS—*continued*

[2]Application pursuant to Section 71 of the I.R. Act - Applicant Union sought a declaration pursuant to s.71(2) of the Act, that "the Full Bench declares that it was of the opinion that the rules relating to the qualifications of persons for membership of the ALHMWU, Western Australian Branch being an organisation pursuant to the I.R. Act, 1979 are the same as those of the Western Australian Branch of the ALHMWU being an organisation pursuant to the Workplace Relations Act, 1996" - Application was not opposed - Full Bench found that the eligibility rules of the Applicant organisation and of the Federal organisation are substantially the same, and therefore satisfied that the eligibility rules in each case were deemed to be the same - Declaration Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- (Not applicable) - FBM 6 of 2000 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 07/02/01 – Unions................ 398

[2]Application for alteration of Union Rules - Full Bench were satisfied that s.55, s.56, s.59, in particular s.55(4)(a), (b), (c), (d) and (e), of the Act have been complied with, in particular, inter alia, that 30 days had expired from 28 February 2001 to the hearing of the application on 2 April 2001, that the application had been authorised in accordance with the rules of the Applicant organisation and that reasonable steps were taken to adequately inform the members as required by s.55(4) of the Act - Further, Full Bench were satisfied that the equity, good conscience and the substantial merits of the application, as well as the objects of the Act lay with granting the application - Granted - The Master Plumbers' and Mechanical Services Association of Western Australia (Union of Employers) -v- (Not applicable) - FBM 1 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 09/04/01 – Unions.. 1061

[1]Appeal against Decision of Full Bench (80 WAIG 4610) re exclusive right to represent employees - IAC reviewed authorities and found that the appellant being neither a party or being permitted to intervene in the proceeding had no right of appeal under S.90 of the Industrial Relations Act 1979 - IAC found the right to be heard could not lead to the appellant being considered a party or intervenor and the appeal was incompetent - IAC commented that there was reason to question whether the opportunity to be heard under s 72A(5) and other provisions would deny the Commission the power to join or allow the intervention of a person under s27(1)(j) & (k) - Dismissed - The Food Preservers' Union of Western Australia, Union of Workers -v - AUTO, FOOD, METAL, ENGIN UNION & Other - IAC 7 of 2000 - Industrial Appeal Court - Kennedy J./Scott J./Parker J. - 27/04/01 - Food, Beverage and Tobacco Mfg.. 1141

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services.. 1162

Applications re unfair dismissal seeking compensation - Applicants argued that dismissal was unfair as both were dismissed without any warning because they had membership with the Construction, Forestry, Mining and Energy Union and an incident that involved an organiser of the CFMEU - Further, Applicants argued that they were employed on a permanent full time basis - Respondent argued that Applicants were both engaged on a day to day basis, effectively as casual employees and that they had no real entitlement to ongoing employment - Commission rejected the submissions by Respondent that Applicants were employed on a casual basis and that Applicants were dismissed harshly, oppressively and unfairly and that there was no good reason for their dismissal - Commission found that reinstatement was impracticable and awarded compensation to Applicants - Granted and Order Issued - Mr GK Smith -v- J&P Metals Pty Ltd - APPL 1377,1378 of 2000 - KENNER C - 20/04/01 - Construction Trade Services 1238

Conference re unfair dismissal - Applicant Union argued that dismissal of member was unlawful because it was contrary to the Order issued by Commission in CR350 of 2000 (81WAIG699) re exploring options and providing appropriate training to member - Further, Applicant Union argued that an Order be issued that member be reinstated to position held by him immediately prior to his dismissal and that the parties agree to the duties to be performed by member - Respondent argued and questioned the jurisdiction of the Commission to issue such an order and says that member was dismissed for continued and wilful refusal to obey a lawful and reasonable instruction - Commission found that it had the jurisdiction to issue such an order and issued an order that Respondent not dismiss member from his employment which also allowed the parties liberty to apply to vary, cancel or revoke this Order - Interim Order issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - C 89 of 2001 - BEECH C - 30/04/01 – Hospitality.................... 1248

Conference referred re dispute over the a written reprimand for an employee - Applicant argued that the employee was being victimised by reason of his membership of the applicant and sought removal of the reprimand from his personal file - Respondent denied allegations and opposed orders - Commission found that the respondent's application of the regulations had previously involved a less formal approach to discipline - Commission found on evidence that the tag in question did not comply with the relevant regulations and that there was a breach - However, it was important from an industrial point of view, and as a matter of fairness that such strict application of be consistent across the board - Commission found the issuance of the reprimand to be industrially unfair, but was not persuaded that it was motivated by the employees position as a union convenor - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 160 of 2000 - KENNER C - 23/04/01 - Metal Ore Mining.. 1251

Conference referred re utilization of Ongoing Change Agreement II - Applicant argued that the proposed transfer of twelve employees from Respondent's MEW Section to mining operations at its Mt Newman site for a six months trial constituted a forced redundancy and that it arises as a consequence of the engagement by Respondent of contractors in the MEW to perform work previously performed by employees and was not supportable under the Agreement - Respondent argued that Union party had consented, subject to certain conditions, to permit Respondent to initiate one to three months trials of changes in the workplace and also denied that the proposed trial involved forced redundancies - Commission found that the main issues were whether the terms of the OC II contemplated the change as proposed by Respondent and whether the proposal falls into one of the exclusion's contained in OC II or it constituted "wholesale contracting out" in the MEW - Commission found that proposed transfers to the employees were not consistent with the terms of the Ongoing Change Agreement II and the proposed changes should be the subject of negotiations between the parties - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 264 of 2000 - KENNER C - Metal Ore Mining..... 1254

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UNIONS—*continued*

Conference Referred re alleged unfair dealings with redundancy payments - Applicant Union argued that the Regulations 20(7)(a) of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 had been unfairly and improperly applied to one of its members and that severance pay should have been calculated at the rate for a Regional Signal Superintendent - Respondent argued that Commission did not have the jurisdiction to hear and determine the application under s.44 of the IR Act because of the operation of s.95(3) of the Public Sector Management Act, in the alternative, member had not acted continuously in the position of Regional Signal Superintendent - Commission found that the pre-condition to a severance payment at a higher rate than the substantive rate of pay was not continuous service, but, continuous payment of the allowance and that severance payment at the higher rate of pay had not been met and in all circumstances it had not been demonstrated that the Regulations had been or improperly applied - Dismissed - COMM, ELECTRIC, ELECT, ENERGY -v- Westrail - Western Australian Government Railways Commission - CR 348 of 2000 - SMITH, C - 25/05/01 - Rail Transport 1460

UTILISATION OF CONTRACTORS

Conference Referred re contracting out of work within the Mine Productions area - Applicant argued that the utilisation of a contractor would detrimentally effect the availability of reasonable hours of work of its members contrary to the terms of clause 29 of the award - Respondent argued that the use of a contractor for this work was to better utilise the mineworker classification employees on their principal tasks involving the operation of equipment rather than cleaning reflectors and signs, and estimated that the efficiency savings for it would be approximately $650,000 net per annum - Commission found that employees of the proposed contractor would work "side by side" with employees of Respondent, there would be no diminution in terms of earnings or any effect on the normal working hours of employees, no Respondent's employees would suffer any detrimental effect by engagement of a contractor for sign and reflector cleaning and maintenance, and concluded that the work proposed to be contracted out by Respondent should proceed - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 308 of 2000 - KENNER C - 29/01/01 – Mining.... 721

Conference referred re utilization of Ongoing Change Agreement II - Applicant argued that the proposed transfer of twelve employees from Respondent's MEW Section to mining operations at its Mt Newman site for a six months trial constituted a forced redundancy and that it arises as a consequence of the engagement by Respondent of contractors in the MEW to perform work previously performed by employees and was not supportable under the Agreement - Respondent argued that Union party had consented, subject to certain conditions, to permit Respondent to initiate one to three months trials of changes in the workplace and also denied that the proposed trial involved forced redundancies - Commission found that the main issues were whether the terms of the OC II contemplated the change as proposed by Respondent and whether the proposal falls into one of the exclusion's contained in OC II or it constituted "wholesale contracting out" in the MEW - Commission found that proposed transfers to the employees were not consistent with the terms of the Ongoing Change Agreement II and the proposed changes should be the subject of negotiations between the parties - Declaration Issued - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 264 of 2000 - KENNER C - Metal Ore Mining..... 1254

[2]Appeal against decision of Commission (81 WAIG 721) re use of contractors - Appellant argued that the Commission erred by not determining the question of available reasonable hours and not placing sufficient weight on the evidence of a reversed overtime ban by the Respondent - Respondent argued that the contracting out was consistent with the provisions of the award - Full Bench found that the central issue was whether on the evidence it was open to find that no employee would suffer any "detrimental effect" within the meaning of the award in relation to his/her available hours of work by using contractors and that it was open to the Commission to so find - There was no question of a reduction in overtime, instead the Respondent proposed that the status quo be maintained - Dismissed - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - FBA 2 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/FIELDING C - 16/05/01 - Metal Ore Mining.. 1358

VICTIMISATION

Application re unfair dismissal - Applicant argued dismissal was unfair because she had to resign as a result of harsh and intolerable behaviour of people at work, therefore it was constructive dismissal - Respondent argued that it was not the Applicant's employer and in any event, the Applicant was not dismissed either constructively or otherwise - Commission found that when the Applicant expressed intention to leave, more than reasonable efforts were made by the Respondent to convince her to stay, including taking some leave to think about the situation and had the Applicant taken the suggestions made, in all likelihood no termination of employment would have eventuated - Further, even if it was the Respondent who terminated the employment, then the Applicant failed at the appropriate time to take necessary steps to rely upon the Respondent's conduct - An Order was issued dismissing the application - Dismissed - Ms LC Meyers -v- Lyrical Holdings Pty Ltd - APPL 1025 of 2000 - SCOTT C. - 01/02/01 - Personal & Household Good W/sg.. 707

Application re unfair dismissal seeking reinstatement and contractual entitlements - Applicant argued that dismissal was unfair and that he was also entitled to long service leave - Applicant argued that the Respondent's inquiries were inadequate in relation to the investigation and finding by the Principal that Applicant was guilty of sexual misconduct in respect of a student at the College - Respondent argued that Applicant failed to provide any information that could provide a defence to the allegations of misconduct at the time of the investigation when the opportunity was given - Further, Respondent argued that all matters were considered in making the decision to terminate including the nature of the allegations, the evidence presented, the failure to respond satisfactorily to the allegations within a reasonable time frame, the impact on the family concerned, the impact on the school and its staff, and the duty of care owed to the children in the college - Commission found that Respondent had conducted itself in a proper manner and Applicant was given reasonable opportunity to provide a defence and that it had not abused its right to terminate - Further, Commission found that the employment relationship had irretrievably broken down and that the trust could not be restored - As to the long service leave, Commission found that the Commission did not have the jurisdiction to hear and determine the claim of long service leave, as this was an enforcement or recovery of wages under an award and that it should be pursued in the Industrial Magistrate's Court pursuant to section 83 of the I.R. Act - Dismissed - Mr R Newton -v- Roman Catholic Bishop of Bunbury - APPL 18 of 2000 - SMITH, C – Education... 1226

Applications re unfair dismissal seeking compensation - Applicants argued that dismissal was unfair as both were dismissed without any warning because they had membership with the Construction, Forestry, Mining and Energy Union and an incident that involved an organiser of the CFMEU - Further, Applicants argued that they were employed on a permanent full time basis - Respondent argued that Applicants were both engaged on a day to day basis, effectively as casual employees and that they had no real entitlement to ongoing employment - Commission rejected the submissions by Respondent that Applicants were employed on a casual basis and that Applicants were dismissed harshly, oppressively and unfairly and that there was no good reason for their dismissal - Commission found that reinstatement was impracticable and awarded compensation to Applicants - Granted and Order Issued - Mr GK Smith -v- J&P Metals Pty Ltd - APPL 1377,1378 of 2000 - KENNER C - 20/04/01 - Construction Trade Services 1238

Conference referred re dispute over the a written reprimand for an employee - Applicant argued that the employee was being victimised by reason of his membership of the applicant and sought removal of the reprimand from his personal file - Respondent denied allegations and opposed orders - Commission found that the respondent's application of the regulations had previously involved a less formal approach to discipline - Commission found on evidence that the tag in question did not comply with the relevant regulations and that there was a breach - However, it was important from an industrial point of view, and as a matter of fairness that such strict application of be consistent across the board - Commission found the issuance of the reprimand to be industrially unfair, but was not persuaded that it was motivated by the employees position as a union convenor - Granted - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- BHP Iron Ore Ltd - CR 160 of 2000 - KENNER C - 23/04/01 - Metal Ore Mining... 1251

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VICTIMISATION—*continued*

Conference referred re unfair dismissal seeking reinstatement - Applicant Union argued that their member was unfairly dismissed because the Respondent's response to his actions was disproportionate to the gravity of the conduct and that the conduct in question occurred outside the workplace and that the policy was not entirely clear in this regard which added to the unfairness of the dismissal - Respondent argued that the member had engaged in conduct in breach of the Policy with knowledge of the terms of the Policy and further submitted that the conduct and behaviour was premeditated and designed to harass and intimidate other employees which included using the word "scab" - Respondent also argued that reinstatement was not a viable option if the dismissal was unfair - Commission found that the member was dismissed for making unwelcome remarks and using derogatory and offensive words to employees who had accepted workplace agreements - Commission found having regard to all the circumstances, including the length of service and unblemished employment record that the Respondent's decision to dismiss was harsh, oppressive and unfair - Further, the utterances of the member were not accompanied by any threats, other verbal abuse or intimidation - As to the question of remedy, Applicant Union sought reinstatement, whilst Respondent opposed it - Commission ordered reinstatement - Order Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Iron Ore Pty Ltd - CR 117 of 2000 KENNER C - Metal Ore Mining........ 1262

WAGES

Application re unfair dismissal and contractual entitlements - Applicant argued that he conducted consultancy work for the Respondent whilst he was still in Adelaide and in December 1999 was engaged to work in Perth, but in March 2000 Respondent reneged on an agreement allowing him to take the company vehicle to Adelaide to relocate his family, and on his return to Perth offered him a new contract which he did not accept, and therefore sought relocation expenses under the contract, compensation for lost income on unfair dismissal and loss of six months use of car - Respondent argued that the contract included a three month probation period and use of mobile phone and car for company business only - Commission found the contract did not include provisions for relocation expenses, that Applicant took the car to Adelaide against the clear intention of his employer who was entitled to summarily dismiss him at that point and that Applicant was not dismissed unfairly - Dismissed - Mr M Howard -v- Allied Contracting Services - APPL 529 of 2000 - WOOD,C - 08/12/00 – Contracting 290

[2]Appeal against Decision of Commission (80WAIG5633) re unfair dismissal and contractual entitlements - Appellant argued that the Applicant was to be reinstated at the site said to be owned by Goldfields Pty Ltd and not the Appellant, that the shortage of work has been misunderstood to be at that site and not the Kalamunda site, that the amount ordered to be repaid, being the loss of earnings, should be reduced by the amounts for annual leave and notice in lieu, which was paid in termination pay, that the amount should also be reduced by the unemployment benefits received for the corresponding period and that reinstatement was not possible due to the fact that Appellant has ceased to operate - Further, the Commission erred at first instance in that it ordered that amounts said to have been lost or not paid to the Respondent between the date of dismissal and the date of the order appealed against be paid - Applicant conceded to the ground which alleged that the Commissioner erred in ordering the payment of monies which the Commissioner ordered be paid, being the wages and other remuneratory items not paid or lost by Applicant because of unfair dismissal - Full Bench found that this ground was based on the City of Geraldton v Cooling (80WAIG5341) which was authority for the proposition that an order for compensation following a dismissal was not within power if an order for reinstatement was made, as it was here, thus, the appeal was upheld on this ground and the order varied - Further, Full Bench found that the Order for reinstatement was not made as a result of any miscarriage of discretion in the Commission at first instance and that the other grounds of appeal had not been made out and were dismissed - Upheld in part otherwise dismissed - Pollock Nominees Pty Ltd ACN 008 842 911 -v- Mr JL Butterfield - FBA 50 of 2000 - Full Bench - SHARKEY P/BEECH C/SMITH, C - 05/02/01........ 369

Complaint re Breach of Award - Preliminary issue re summary judgement - Industrial Magistrate heard submissions from both parties and found that Defendant have discharged the onus that there was a plausible ground of defence and granted Defendant unconditional leave to defend - Mr JS Strange -v- Moonstar Nominees Pty Ltd - CP 324 of 2000 - Industrial Magistrate - 11/01/01........ 664

Applications re contractual entitlements - Applicants argued that they were entitled to payment of a retainer and two weeks' pay in lieu of notice as these entitlements arose from their contracts of employment - There was no appearance or argument from Respondent - Commission determined the nature of the relationships between the parties and found that the relationships were those of employees and employers respectively - Further, Commission found that the Applicants were each employees of the Respondents, that the Applicants were entitled to the payments of a retainer and payments in lieu of notice - Ordered accordingly - Mr AP Gilbride -v- Fast Net Publishers Group - APPL 94,177,231,232 of 2000 - SCOTT C. - 21/07/00 - Printg, Publishg & Rcdd Media........ 686

[1]Appeal against Decision of Commission In Court Session (80WAIG4508) re terms and conditions of employment, redundancy payments and superannuation schemes - Appellants argued that CICS erred in law by purporting to give retrospective effect to order 1, that the base salary and roster allowance of each letter of offer employees be increased and erred in law in finding that following the merger, the Appellant's Mid-West operations were quickly restored to profitability or giving consideration to other factors when there was no evidence to support this finding - Further, Appellants argued that the Commission erred in law in making orders in relation to Iluka Resources Limited where there was no industrial matter between it and the Respondents and erred in law by acting on the irrelevant consideration that RGC Mineral Sands Ltd had previously offered a limited choice of superannuation funds to its employees and having regard to a Superannuation scheme which applied to Workplace Agreement employees and granting liberty to apply to the award employees of Iluka Resources Limited and Iluka Mid-West Limited when the industrial matter between Appellants and Respondents did not relate to the award employees - Industrial Appeal Court found that the CICS had the power to give retrospective effect to its order awarding an increase in salaries and allowances, that there was revealed an evidentiary basis on which the CICS could properly make the challenged finding that profitability was quickly restored for the Mid-West operations following the Merger - Further, IAC found that it was a matter for the CICS to find whether an order to enable letter of offer employees to become members of the Iluka Resources Limited fund was appropriate as a matter of equity, good conscience and the substantial merits of the case - IAC found that no grounds had been made out and failed to be persuaded thus Appeal dismissed - Dismissed - Iluka Midwest Limited & Other -v- CONSTRUCTION, MINING, ENERGY & Others - IAC 5 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Parker J. - 08/02/01 - Other Mining........ 763

Application re unfair dismissal and contractual entitlements - Applicant sought compensation for unfair dismissal and also for a denied contractual benefit - Respondent argued that applicant was stood down and there was no termination - Commission found that applicant was unfairly terminated, that reinstatement would be totally impracticable, that the loss was a loss of pay of one hour as applicant was a casual, and ordered payment of $13.30 by respondent to applicant - Order Issued - Mrs M De Niese -v- Curtin Hotels Pty Ltd Trading as the Imperial Hotel - APPL 1645 of 2000 - WOOD,C - 27/02/01 - Accommodatn, Cafes&Restaurants........ 878

Application re contractual entitlements - Applicant argued that he was denied benefits as contained in the Sales Representative Employment Agreement of 17 May 1999 - Respondent argued that on each occasion that it dismissed applicant, it relented and reinstated him - Commission found that applicant had made out his claim in relation to the alleged dismissal which occurred in September 1999 and remained entitled to 8% advertising incentive and also the 3% over-rider commission, but after the December 1999 dismissal, his entitlement to both claimed conditions of employment ended then - Granted in Part and Adjourned - Mr GS Hincks -v- Darrell Crouch and Associates Pty Ltd - APPL 1320 of 2000 - BEECH C - 31/01/01........ 885

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WAGES—*continued*

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that the dismissal was unfair because it was not warranted as it did not relate to any performance issues and that there was nothing unusual or unacceptable about his actions given the normal practice and expectations of the business - Respondent argued that the Applicant was dismissed summarily because he was on licensed premises, after hours and with company, and that he consumed and provided drinks which he did not pay for at that time and this was a breach of trust - Commission found that the Applicant was not given an opportunity to address what may or may not have happened and that he had been charged with the operation of the whole business and that the dismissal was unfair - Commission found that it was impractical for the Applicant to be reinstated and compensation and contractual entitlements were awarded - Granted - Mr M Lewis -v- West Shore Group - APPL 1395 of 2000 - WOOD,C - Accommodatn, Cafes&Restaurants 887

Application re unfair dismissal seeking compensation and contractual entitlements - Applicant argued that his dismissal was both unfair and unlawful in that he never received any payment after being dismissed, that he never received any reasons for his dismissal, that Respondent did not provide him with any particulars relating to his alleged performance or conduct shortcomings, that he was not advised that his employment was in jeopardy and was not provided with any reasonable opportunity to respond to the allegations made by Respondent - Respondent opposed the claims and argued that Applicant had misused the expense system, had abused his position of trust as a general manager, thus, the dismissal was justified and Applicant was not entitled to any payment and was substantially indebted to the Respondent - Commission found that Applicant work performance was not an issue relied on by Respondent and that the system for expenses claims at Respondent was based on judgement and the exercise of discretion as to whether an expense should be claimed against Respondent - Further, having considered all the evidence, Commission found that it did not consider that Applicant was guilty of conduct warranting summary dismissal and that Applicant had not engaged in a wilful course of conduct in relation to his expenses to have justified Respondent in applying the employer' s ultimate sanction and thus, the dismissal was wrongful or unlawful at common law - Commission rejected the submissions of claim and counterclaim by Respondent to set-off any entitlement awarded in favour of Applicant by the sum allegedly owed to Respondent - Upheld in Part and Order Issued - Mr I Phippard -v- BGC (Australia) Pty Ltd - APPL 1958 of 1999 - KENNER C - 24/01/01........ 895

Application re contractual entitlement - Applicant sought to recover $230.34 allegedly denied to him over 3 years and contended that respondent miscalculated the magnitude of fortnightly instalments by using a divisor of 26.071 rather than 26 - Respondent opposed the claim and argued that applicant had been paid his full entitlement of $28,000 and that the method of calculation it adopted was one commonly used in industry - Commission found that the method adopted by respondent for calculating the magnitude of instalments was correct, that the evidence revealed that applicant had in fact been paid $28,000 for each of the annums in question, albeit not entirely in the relevant annum, and that applicant had not established that he had been denied the benefit he alleged - Dismissed - Mr AJ Whittle -v- Rendezvous Hotels Management Pty Ltd Trading As Rendezvous Observation City Hotel - APPL 34 of 2001 - FIELDING C - 23/02/01 – Hotel........ 911

Application re unfair dismissal and contractual entitlements - Applicant argued that after sustaining an injury at work, he had medical treatment and was provided with a medical certificate stating that he was unfit to work for four weeks - Further, after a short period off, he was told by the Respondent that if he "did not return to work he wouldn't have a job" - There was no appearance by the Respondent - Commission found that Applicant was not given a fair go and for him to be dismissed while incapacitated and under threat that he had to return to work was harsh and oppressive and ordered that Respondent pay to the Applicant 15 weeks salary and tool allowance within 21 days of the Order - Upheld and Dismissed - Mr B Smith -v- High Quality Brickwork - APPL 1425 of 2000 - COLEMAN CC - 08/03/01 - Construction Trade Services........ 1019

[3]Application to vary award to insert Freedom Of Choice provisions - Applicant argued application was consistent with the RGC Case (80 WAIG 2437), that workers entering the industry were being denied the right to have their wages and conditions fixed by the Commission as correct and proper wages for the work performed - Applicant argued that the mandatory imposition of Workplace Agreements as pre -conditions of employment had contributed to the lowering of wages throughout the industry - Applicant Union argued the application was an extension of the award safety net to prospective employees - The Minister and various persons and organisations registered and unregistered sought to intervene - Respondents and intervenors argued that the Commission had no jurisdiction to vary the award as the proposed amendment did not give rise to an industrial matter or were beyond the Commission's power Respondents and intervenors argued that an offer of conditional employment did not constitute a refusal to employ - Further that the award was outdated and inflexible and did not satisfy the current demands of the industry - CICS allowed the intervention and joinder of various parties and gave reasons therefore - CICS reviewed authorities and found that the RGC Case could be distinguished and that the application related to a refusal to employ any class of persons and was therefore an industrial matter- CICS addressed the admissibility of evidence, public Interest, equity ,good conscience and the substantial merits of the case, the Wage Fixing Principles and found that the application should be granted - However, CICS found that having regard to the jurisdiction arguments in respect of the refusal to employ and the uncontroverted evidence that some prospective employees wished to be employed under the t the terms of a Workplace Agreement that the award should be varied in terms specified by the Commission - CICS determined that it could not retrospectively apply a recruitment provision and there were no special circumstances to grant retrospectivity - In supplementary reasons following Speaking to the Minutes, CICS a change sought reflected the intention of the Commission, no reason for the clause to be limited to named parties, whereas others would add a dimension not envisaged or would present practical problems - Granted in part - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Airlite Cleaning Pty Ltd & Others - APPL 975 of 2000 - Commission in Court Session - SCOTT C./KENNER C/SMITH, C - 19/04/01 - Property Services........ 1162

Application re contractual entitlements - Applicant argued that when she was given written notice that her position was to reduce from a full-time position of 37.5 hours per week to 22.5 hours per week, she was entitled to a "partial redundancy" payment of $5,551.00 calculated on the basis of the 15 hours per week she lost at 2 weeks' pay for each of her 9 years' service - Respondent opposed the claim and argued that at all relevant times, Applicant was a part -time employee whose hours could be, and were varied both up and down and that there was no redundancy - Further, Respondent argued that Applicant was aware of the fact that she was a part-time employee and that Applicant had accepted that her hours of work could be increased or decreased with appropriate notice - Commission found on the evidence and material before it that in the terms of the enterprise bargaining agreement provisions, Applicant was not made redundant when her hours was reduced, therefore she was not, and accordingly she was not entitled to a benefit under her contract of employment - Further, the evidence had not shown that the reduction in hours was part of a two-stage plan to eventually make the position redundant, nor that it was of itself a redundancy under the enterprise bargaining agreement - Dismissed - L Kambourakis -v- Ethnic Child Care Resource Unit - APPL 2022 of 2000 - BEECH C - 08/05/01 - Community Services........ 1216

Application re contractual entitlements - Applicant argued that he had been denied an over rider commission and an advertising allowance that had not been paid - Respondent argued that a reconciliation of the advertising allowances and the advertising expenses incurred showed that there had been an overpayment - Commission found that Applicant was entitled to part of his claim for contractual entitlements and ordered accordingly - Granted in part - Mr GS Hincks -v - Darrell Crouch and Associates Pty Ltd - APPL 1320 of 2000 - BEECH C - 18/05/00 - Real Estate Agency........ 1320

Complaint re Breach of Award - Complainant argued that Defendant had breached the Building Trades (Construction) Award 1987 No. R17 of 1978 in that Defendant failed to pay adult rates of pay as a full time employee and not as a casual employee, failed to provide annual leave and loading and public holidays and at the appropriate rates and other entitlements on termination - Defendant argued that there was no case to answer as there was not in existence an employment relationship between Complainant and Defendant and that there was no entitlement to the award claims - Industrial Magistrate found that Complainant was an employee and that the award would apply - IM further found that Complainant failed to show specific benefits that he was entitled to under the award in that there was no evidence to show which days were actually worked by Complainant and that without such evidence the Court could not determine what the actual entitlements were and that he had not established the amounts that were owing - No case to answer - Mr A La Guidara -v- Mr A Tripolitano - CP 161 of 2000;M 51 of 2001 - Industrial Magistrate - Cicchini IM - 17/05/01 – Building........ 1389

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WAGES—*continued*

Application re unfair dismissal - Applicant argued that termination of his employment was unfair as his employment was terminated prior to the expiration of the probationary period and sought compensation for the wages he would have earned from date of termination to expiration of the one month probationary period - Respondent argued that the reason why Applicant's employment was terminated was because Applicant did not perform, in that sales figures for the plumbing section did not increase - Commission found that clearly Applicant was not given sufficient time to prove himself as a competent Plumbing Salesperson in Respondent's business, that Respondent unfairly terminated Applicant's employment and ordered that Respondent pay Applicant $710.75 for eight days pay as compensation - Order Issued - Mr D Allia -v- CD Dodd Pty Ltd T/A Ross's Salvage & Handyman - APPL 1999 of 2000 - SMITH, C - 06/06/01 – Plumbing.. 1400

Application re contractual entitlements - Applicant argued that he had not been paid entitlements due to him which included unpaid wages, and accumulated holiday pay for three weeks - No appearance or response from Respondent - Commission found that entitlements were owed to Applicant and ordered accordingly - Granted - Mr J Kerr -v- Trinet Digital Ltd - APPL 342 of 2001 - WOOD,C - 11/05/01 – Computing.. 1423

Application re contractual entitlements - Respondent applied for costs incurred as a result of Applicant's non -attendance at the conference held in Albany - Applicant argued that the maximum distance from Denmark to Albany would be 110Kms and that it was not necessary for both principals to attend the conference and that preparation costs claimed were unreasonable in its entirety because conciliation conferences are designed to be an informal attempt to negotiate settlement between the parties and little or no preparation was required for the conference - Respondent argued that the following costs were incurred travel 152Km, shop assistant wages for two persons and preparation of information for the conference - Commission found in favour of the distance travelled claim and the claim for the shop assistant wages - Granted in part - Mr AW McConkey -v- M & A's of Denmark - APPL 1951 of 2000 - BEECH C - 07/06/01... 1434

WORKER PARTICIPATION

[1]Appeal against Decision of Full Bench (80WAIG159) re wearing of badges by union members during hours of employment - Appellant argued whether the decision of the Full Bench was erroneous in law and whether the exercise of the Senior Commissioner's exercise of discretion in the relevant circumstances gave rise to reviewable errors of law - Respondent union argued that the matters before the Full Bench were essentially matters of industrial fairness concerning the introduction and use of a badge - Industrial Appeal Court found that the Full Bench fell into error in seeking to balance rights vested in the employer as a consequence of the contractual arrangements as against the reasons advanced by the employees for wearing the badge - Further the reasons for wearing the badge were not of the same contractual or normative order as the rights of the employer to determine what was required by way of grooming thus the appeal was allowed - Appeal Upheld - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality.................................... 4

[1]Application for stay of proceedings in Matter No. CR159/1999 pending determination of Appeal - Appellant argued for a stay of proceedings of the Decision of Full Bench until the determination of the appeal before IAC or further Order - Industrial Appeal Court found that it was quite satisfied that the circumstances, as well as the balance of convenience justified the stay of proceedings to be granted - Granted - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 3 of 2000 - Industrial Appeal Court - Kennedy J./Anderson J./Owen J. - 01/08/00 – Hospitality.. 9

Conference referred re additional public holiday - Applicant Union argued that the Respondent was bound by the City of Stirling (Building Maintenance Section) Enterprise Agreement No AG 118 of 2000 which provided for an additional public holiday, namely a union picnic day - Further Union argued that it attempted to seek discussions with Respondent to schedule a date when the workers could take that holiday - Respondent argued that it had refused to meet with the Union because of its assertion that the inclusion of the Union's picnic day was a mistake and that it was therefore not bound to abide by the terms of the agreement - Commission found that there was a genuine mistake made and that the mistake was contained in the registered document - Dismissed - The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- City of Stirling - CR 200 of 2000 - GREGOR C - Local Government.. 1268

WORKERS COMPENSATION

Conference referred re termination of employment - Applicant Union argued that the termination of Applicant was harsh, oppressive and unfair and contrary to s.84AA of the Workers Compensation Act, s.41 of the Minimum Conditions of Employment Act and Clause 34 of the Burswood International Resort Casino Employees Industrial Agreement 2000 - Further, that the Respondent's action was taken substantially because Applicant was the President of (BRUE) and was being discriminated against and the process and planning for his termination was flawed in that it was not shared with him and he was not trained to apply for other positions nor did the Company sought to find him an alternative position - Respondent argued that with the arrival of a new CEO, and constraint on the budget, the managers were required to review their operations and, subsequently the manager Environmental Services made changes to his operation which impacted on the Applicant's duties - Further, Applicant was to be terminated unless he found suitable alternative position, as he could not fulfil the requirements of his original contract as an Environmental Systems Attendant due to his injury - Commission reviewed authorities, Acts and found on evidence that it was plausible and more likely that the Applicant's duties were diminished due to a legitimate drive for efficiency, that there had been no discrimination due to him being a delegate and that evidence proved that his duties had not been cut because of this - Commission exercised its judgement according to equity, good conscience and the substantial merits of the case and found that, to so swiftly terminate Applicant's employment if he himself does not find an alternative position, particularly given the spirit of s.84AA, would be harsh and unfair - Further, the Respondent should have engaged in a fuller exploration of options for Applicant and recommended that this take some months including appropriate training - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - CR 350 of 2000 - WOOD,C - 02/02/01 - Accommodatn, Cafes&Restaurants.............................. 699

Complaint re unfair dismissal and breach of Workplace Agreement - Complainant argued that he was unfairly dismissed contrary to the provisions of the Workplace Agreements Act 1993 - Defendant argued that Complainant failed to mention on the pre-placement medical examination form of an incident resulting in an operation for injury to his right knee and again failed to provide details of that injury and the subsequent arthroscopy on the workers compensation claim form - Further, the claim was inconsistent with the notification of the earlier report that he had injured his right knee when, in fact, on that occasion he reported that he had injured his left knee - Industrial Magistrate found that omissions made by the Complainant were not such that Defendant had no other remedy, that his non-reporting did not endanger the safety of the workplace, that on balance dismissal was unfair in all the circumstances and ordered Defendant to pay compensation to the Complainant - Reasons for Decision Issued - Mr SD Oxtoby -v- Viceroy Australia Bounty (Victoria) Pty Ltd (ACN 089 020 860) - CP 219 of 2000 - Industrial Magistrate - Tarr IM - 18/01/01... 855

Complaint re breach and enforcement of Award and Minimum Conditions of Employment Act - Complainant argued that Defendant failed to pay annual leave, sick leave and overtime - Complainant argued that Defendant had initiated and in effect orchestrated the termination so that it could be released from the obligations of Workers' Compensation and Rehabilitation Act and that entitlements accrued whilst on workers' compensation should be paid - Defendant argued and disputed that it had unilaterally terminated Complainant's employment at all, it argued that Complainant resigned from his position to take up employment with another employer as a security officer - Magistrate found that the parties terminated company on mutual agreement and the entitlements for annual leave, sick leave and payment in lieu of notice were not made out - Magistrate found that Complainant was entitled to unpaid overtime as proven because Defendant could not offset overaward and production bonuses payments made for a particular purpose against overtime payments - Proven in Part - Mr PA Jones -v- Barminco Pty Ltd - CP 38,212 of 2000 - Industrial Magistrate - Cicchini IM - 02/05/01 - Services to Mining... 1183

CUMULATIVE DIGEST—*continued*

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WORKPLACE AGREEMENT

Conference referred re illegal disciplinary action - Applicant union challenged the veracity of the written "final warning" issued by Respondent to its member and denied that its member was guilty of intimidating behaviour towards fellow employees - Further, Applicant Union submitted that the conduct which led to the "final warning" should be seen in the context of industrial action over what was a very sensitive issue in the Respondent's workplaces - Applicant Union sought an Order directing Respondent to rescind the "final warning" - Respondent argued that an investigation carried out during the course of the industrial action concluded that the union member was guilty of "intimidating behaviours and of abusive language" and as a consequence he was issued with the "final warning" - Further, Respondent argued that the union's member was in breach of the "BHP Iron Ore Non- Harassment Policy" - Commission found the union member's conduct, at least in the car-park, constituted harassment if not also intimidation of the employees to whom he directed his abuse - Commission further found in all circumstances, particularly having regard to union member's prior good record, the nature of and the circumstances in which the transgressions complained of were committed, that it would not be unreasonable if he was warned that should he be guilty of any further instances of intimidatory and/or threatening behaviour inconsistent with the Respondent's Non-Harassment Policy, his employment was liable to be terminated - Upheld - COMM, ELECTRIC, ELECT, ENERGY -v- BHP Iron Ore - CR 20 of 2000 - FIELDING C - 29/09/00 - Iron Ore........ 327

Complaint re Breach of Workplace Agreement Act - Complainant argued that the Defendant unfairly, harshly or oppressively terminated the employment contrary to the provisions implied in the workplace agreement - Complainant argued that at a meeting at which he was dismissed he asked whether he was being accused of stealing and he was told he was not - Defendant argued that the Complainant was not dismissed but, asked to explain the discrepancies that were recorded on the til and computer printouts, then the Complainant was given an opportunity to think about it and the actions taken by the Complainant was of resignation and this was supported by his lack of response - Industrial Magistrate found that on the evidence he could not conclude whether there was a dismissal or a resignation but on the evidence the Complainant had not established he was unfairly dismissed and the complaint not proved - Dismissed - Mr CJ Guerrini -v- Modillion Holding P/L - CP 272 of 2000 - Industrial Magistrate - Cicchini IM - 07/03/01 - Services to Transport........ 853

Complaint re unfair dismissal and breach of Workplace Agreement - Complainant argued that he was unfairly dismissed contrary to the provisions of the Workplace Agreements Act 1993 - Defendant argued that Complainant failed to mention on the pre-placement medical examination form of an incident resulting in an operation for injury to his right knee and again failed to provide details of that injury and the subsequent arthroscopy on the workers compensation claim form - Further, the claim was inconsistent with the notification of the earlier report that he had injured his right knee when, in fact, on that occasion he reported that he had injured his left knee - Industrial Magistrate found that omissions made by the Complainant were not such that Defendant had no other remedy, that his non-reporting did not endanger the safety of the workplace, that on balance dismissal was unfair in all the circumstances and ordered Defendant to pay compensation to the Complainant - Reasons for Decision Issued - Mr SD Oxtoby -v- Viceroy Australia Bounty (Victoria) Pty Ltd (ACN 089 020 860) - CP 219 of 2000 - Industrial Magistrate - Tarr IM - 18/01/01........ 855

Complaint re breach of Workplace Agreements Act 1993 - Complainant argued that he was unfairly dismissed without warning or valid reason and sought compensation on the basis that it was impracticable to re-employ or reinstate him given that he has now found alternative employment - Defendant denied that it unfairly dismissed complainant and argued that it simply exercised its right under the probation clause of the workplace agreement not to continue with complainant's employment - Industrial Magistrate found that complainant was terminated without any proper verbal or written warnings and without proper notice, that the probationary term of contract was simply used to justify complainant's dismissal and accordingly, complainant's claim alleging unfair dismissal was made out by reason of lack of procedural fairness as well as on the substantive merits of the case - Further, IM found that no documentation or pay slips have been produced and there has been no evidence to show exact hours worked during the relevant period, therefore complainant had failed to establish his claim regarding compensation - Reason for Decision Issued - Mr M Rea -v- Canon Foods Pty Ltd - CP 226 of 2000 - Industrial Magistrate - Cicchini IM - 21/02/01 – Retailing........ 856

Application re unfair dismissal and contractual entitlements - Applicant argued dismissal was unfair because he would not sign a workplace agreement - Respondent argued on evidence that the workplace agreement had nothing to do with the dismissal as such - Commission found that the Applicant was dismissed as a result of the conversation between it and the Respondent and the issues raised by the Respondent as to the reasons for the dismissal were at least arguably valid - Further, that Applicant's lack of any positive response in relation to the Victoria traffic incident at the time in the context of the other issues raised by the Respondent led the Commission to conclude that the Applicant had not persuaded it that his dismissal was unfair - Dismissed - Mr MJ Carberry -v- TJ & HP Abbott Transport - APPL 1403 of 2000 - BEECH C - 09/03/01 – Transport........ 871

Complaint re Breach of Workplace Agreement Act 1993 - Complainant argued that he was unfairly, harshly or oppressively dismissed and sought reinstatement or compensation and recovery of costs - Defendant argued that complainant's performance and conduct constituted serious breaches of his contract of employment, which justified his dismissal - Industrial Magistrate found on evidence that complainant acted in an honest, open and frank way with respect to the formation of his prospective counselling business - IM further found that defendant failed to call witnesses to substantiate claims to discharge its evidentiary burden concerning the issue, that there was no foundation for the termination of complainant's employment, and that on balance, complainant was unfairly dismissed - IM found that as reinstatement was not a realistic option, complainant was entitled to recover lost earnings - Proven - Mr PJ Moss -v- Serenity Lodge Inc - CP 216 of 1999 - Industrial Magistrate - Cicchini IM - 07/12/00 - Community Services........ 1006