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FULL BENCH—Appeals against decision of Commission—

2007 WAIRC 00218

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2007 WAIRC 00218
CORAM	:	THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
HEARD	:	TUESDAY, 23 JANUARY 2007
DELIVERED	:	MONDAY, 12 MARCH 2007
FILE NO.	:	FBA 33 OF 2006 AND FBA 34 OF 2006
BETWEEN	:	IAN ANDERSON Appellant AND ROGERS SELLER & MYHILL PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Commissioner S J Kenner
Citation	:	2006 WAIRC 05535/(2006) 86 WAIG 3047
File No	:	B 309 OF 2006 AND U 309 OF 2006

CatchWords:

Industrial Law (WA) – Appeal against decision of the Commission – Alleged harsh, oppressive or unfair dismissal – Appellant summarily dismissed – Whether appellant breached policy of respondent by sending email – Assessing seriousness of the breach – Whether email contained '*racial slur*' or '*ethnic slur*' – Whether email '*solicited support for a political cause*' – Consideration of events leading up to the sending of the email – Whether termination on notice '*appropriate remedy*' – Issue of compensation.

Industrial Law (WA) – Relevant policy of the respondent – Consideration of reasons for policy – Vicarious liability – Workplace discrimination issues – International conventions relating to racial discrimination – Construction of the respondent's policy – Examination of the words used in the policy and relevant definitions.

Industrial Law (WA) – Grounds of Appeal – Application to amend grounds during course of the hearing – Imprecise drafting of particulars to ground of appeal – Factors to consider when deciding to grant leave to amend grounds of appeal – Discretionary power of Full Bench to grant leave – Consideration of particular facts and circumstances of each case – Drafting grounds of appeal in accordance with *Industrial Relations Commission Regulations 2005* – Importance of proper grounds of appeal.

Industrial Law (WA) – Appeal against a discretionary decision – Exercise of a discretion based upon an evaluative judgment – Relevant authorities considered – Issues relating to questions of law and fact in appeals – What conclusions at first instance are reviewable by the Full Bench.

Industrial Law (WA) - Majority decision that Commissioner erred in finding email policy breached – Context within which words are to be judged in policy – Issues of ethnic diversity in society – Alternatively dismissal on notice was unfair – Consideration of relevant circumstances effecting fairness of dismissal - Whether breach by appellant was minor or trivial in the circumstance.

Legislation:

Industrial Relations Act 1979 (WA) (as amended), s23A, s23A(6), s35, s27(1)(a)(iv), s29(1)(b)(i), (ii), s49(5), (6), (6a)

Industrial Relations Commission Regulations 2005, r102(2), (3)

Equal Opportunity Act 1984 (WA), s36, s37, s161

Racial Discrimination Act 1979 (Cth), s7, s9, s15, s18, s18A

Result:

FBA 33 of 2006: Appeal dismissed

FBA 34 of 2006: Appeal upheld

Representation:

Counsel:

Appellant	:	Mr G Stubbs (of Counsel), by leave
Respondent	:	Mr M D Cuerden (of Counsel), by leave

Solicitors:

Appellant	:	Dwyer Durack
Respondent	:	Douglas Workplace and Litigation Lawyers

Case(s) referred to in reasons:

ASIC v Doyle [2001] WASC 187

Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165

BHP Iron Ore Pty Ltd v CMETSU (2001) 81 WAIG 3031

Bogunovich v Bayside Western Australia Pty Ltd (1998) 79 WAIG 8

Casinos Austria International (Christmas Island) Pty Ltd & Others v Christmas Island Resort Pty Ltd & Anor [1998] WASC 387

Curtis v Ausdrill Ltd (2006) 86 WAIG 3133

Edwards v The Queen (1992) 173 CLR 653

Fisher & Paykel Australia Pty Ltd v Skinner (2006) 87 WAIG 1

Fox v Percy (2003) 214 CLR 118

Garbutt v Stothers (1996) IRCA 960416

Grierson v International Exporters Pty Ltd (2006) 86 WAIG 2935

Gromark Packaging v FMWU, WA Branch (1992) 73 WAIG 220

Gronow v Gronow (1979) 144 CLR 513

House v The King [1936] 55 CLR 499

Koowarta v Bjelke-Petersen (1982) 153 CLR 168

Mabo v Queensland (No. 2) (1992) 175 CLR 1

Matthews v Cool or Cosy Pty Ltd and Another (2004) 84 WAIG 2152; (2004) 136 IR 156

Mifsud v Campbell (1991) 21 NSWLR 725

Miles and Others t/a Undercliffe Nursing Home v FMWU, WA Branch (1985) 65 WAIG 385

Norbis v Norbis (1986) 161 CLR 513

Sealanes (1985) Pty Ltd v SDAEA (WA) and Others (2005) 86 WAIG 5

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Simons v Ismail Holdings Pty Ltd t/a Envelope Specialists (1998) 78 WAIG 2332

Skinner v Broadbent [2006] WASCA 2

Vella v Department of Employment, Vocational Education, Training and Industrial Relations (Qld) [19994] HREOCA 22

Vetter v Lake MacQuarie City Council (2001) 202 CLR 439

WA v Ward (2002) 213 CLR 1

Warren v Coombes and Another (1979) 142 CLR 531

Waters v Public Transport Corporation (1991) 173 CLR 349

Wilmott v Bank of Western Australia (2001) 81 WAIG 1684

Case(s) also cited:

Coal and Allied Operations Pty Ltd v AIRC and Others (2000) 203 CLR 194

La Rose v Kiam Corporation Ltd [2001] WAIRC 04391

Reasons for Decision

RITTER AP AND SCOTT C

1 Introduction

1 These appeals are about the termination of employment of the appellant by the respondent. The respondent is a privately owned company which has been in business for more than 100 years. It is a retailer, distributor and wholesaler of ceramic tiles, "*tap ware*", and bathroom accessories and products, with showrooms and warehouse facilities in at least a number of states in Australia and overseas.

2 The appellant was first employed by the respondent on 10 March 2005 as a retail sales representative. He commenced his employment in Melbourne and then transferred to Perth. The appellant's employment was terminated by the respondent on 10 March 2006. The termination of his employment was effected summarily, in that he did not receive any notice or payment in lieu of notice.

3 The reason for the termination of the appellant's employment was because on 3 March 2006 he sent an email to all of the other employees of the respondent and five friends who did not work for the respondent. The contents of the email were found by the respondent to breach its Computer, Internet and Email Security Policy (*the CIES Policy*) and Equal Opportunity and Harassment Policy.

2 The Course of the Proceedings

4 After his dismissal, the appellant filed two applications with the Commission. The first, which was given application No B 309 of 2006, was an application pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (*the Act*) for an order in respect of a denied contractual benefit. The application sought an order for payment of the sum of $3010.76 for "*4 weeks pay in lieu of notice of termination*". This application was filed on 7 April 2006.

5 The second application was filed on the same date and given application No U 309 of 2006. This application was made pursuant to s29(1)(b)(i) of *the Act* and sought an order for reinstatement, re-employment or compensation in respect of a "*harsh, oppressive or unfair dismissal*". (Although these words are used in the application, and *the Act*, for ease of reference we will refer simply to an "*unfair*" dismissal or termination). The reasons for the assertion that the dismissal was unfair were set out in the application and will be referred to later. The application sought reinstatement or re-employment by the respondent or compensation if these remedies were impracticable.

6 Both applications were heard together by the Commission on 24 August 2006. At the conclusion of the hearing, the Commissioner reserved his decision. On 4 October 2006 the Commissioner published his reasons for decision.

7 On the same date the Commissioner published "*Declarations and Orders*" (the order). The terms of the order is set out later in these reasons. The order determined both applications B 309 of 2006 and U 309 of 2006. For present purposes it is sufficient to note that the unfair dismissal application was allowed, but compensation limited to the four weeks remuneration the appellant would have received if dismissed with notice. The denied contractual benefits claim was consequently dismissed.

8 On 24 October 2006 the appellant filed two notices of appeal to the Full Bench against the decision of the Commission as contained in the order. They were filed pursuant to s49 of *the Act*. The appeal against the order insofar as it determined application B 309 of 2006 was given number FBA 33 of 2006. The appeal against the order insofar as it determined application U 309 of 2006 was given number FBA 34 of 2006.

9 The grounds of appeal of both notices of appeal were identical. Also both appeals challenged only one of the orders made by the Commission on 4 October 2006. This was the order providing for the amount of the appellant's compensation. It is therefore difficult to see why two appeals were filed. This is especially so as one of the consequences of the filing of two appeals was that two appeal books have been prepared which contained almost identical materials.

10 Both appeals were heard together by the Full Bench. At the commencement of the hearing, counsel for the appellant confirmed that appeal FBA 33 of 2006 was unnecessary and could be dismissed without having any impact upon the proper determination of FBA 34 of 2006. For this reason it is appropriate to make an order for the dismissal of FBA 33 of 2006. We will set this out at the conclusion of these reasons. For ease of reference, we will from now on refer to FBA 34 of 2006 as "*the appeal*".

11 The grounds of appeal require the Full Bench to consider and analyse the circumstances leading to the sending of the email by the appellant, the contents of the email, the policies of the respondent which we have referred to, and whether there was a breach of policy, in the context of the reasons for decision of the Commission at first instance.

12 We will later say something more about the grounds of appeal and applications made at the hearing to amend them. For present purposes it is sufficient to have listed the relevant issues. We will now set out in some detail the background which will facilitate their proper consideration and analysis.

3 The Unfair Dismissal Application

13 The grounds for the unfair dismissal application were set out in paragraph [20] of the application. This stated:-

> "*I was dismissed because of an email I sent to other employees. The employer alleged this breached their policies in two respects. First as non-work use of email. The policy says limited non work use of email is permitted. Second they claim it contained a racial slur. I reject this claim. I was not given a proper opportunity to respond to those allegations. I was summarily dismissed with no notice and no payment in lieu. In any event, termination was a disproportionate response to the allegations and the employer failed to avail itself of alternatives.*"

14 A notice of answer was filed by the respondent. This set out the reason for dismissal, the process of decision-making, and attached relevant documents, including the policies mentioned earlier.

15 At the hearing of the two applications, the appellant was represented by counsel. The appellant was the only witness who gave evidence in support of his case. The respondent was not represented, but appeared through its managing director, Mr James Edmonds. Mr Edmonds was the only witness who gave evidence for the respondent.

16 Near the beginning of the hearing, the appellant's counsel said the appellant no longer sought reinstatement or re-employment as remedies in the unfair dismissal application. Compensation was the only remedy sought.

17 The respondent proceeded to give its evidence first on the basis that they had an onus to prove that the appellant's actions were such that they warranted summary dismissal. (See submissions made by counsel for the appellant at the hearing, at T8).

18 Despite this, to analyse the issues raised on the appeal, it makes more sense to provide a summary of the evidence of the appellant, relevant to the appeal, before doing the same for the respondent's evidence. It is convenient first, however, to consider the contract of employment and relevant policies.

19 The contract of employment, *the CIES Policy* and the Equal Opportunity and Harassment Policy were all documents received as exhibits by the Commission at first instance.

4 The Employment Contract

20 As stated the employment of the appellant with the respondent commenced on 10 March 2005. The terms of the contract of employment were in writing in the form of a document headed "*Contract of Employment*" (the contract). This was undated but said to be operative from March 2005. The contract said the appellant was appointed to the position of retail sales representative. The contract set out the appellant's duties in the form of a job description contained in schedule A to the contract. Clause 4 of the contract was headed "*Terms of Employment*". This clause set out, in the main, the hours which were to be worked by the appellant. Clause 7 of the contract referred to the appellant's remuneration and said that his annual salary was to be $38,000. Clause 19 was headed termination of employment. Clause 19(a) provided that:-

> "*Employment shall be terminated by the giving, by either party, of the following period of notice, or by the payment or forfeiture of an equivalent amount of pay in lieu of notice from any monies owing.*"

21 Following this subclause was a table. The effect of the table was that where there was a period of continuous service of less than one year, the period of notice was one week. Where the period of continuous employment was more than one year, the period of notice was four weeks. Clause 19(b) provided for an increased period of notice where the employee was more than 45 years of age. This did not apply to the appellant. Clause 19(c) provided that clauses 19(a) and (b)

did not apply during probationary employment, which was earlier referred to in clause 6. Clause 19(d) was in the following terms:-

> "*In addition, the Employer has the right to terminate the Employee's employment without notice for serious misconduct, for serious breach of the Employer's policies or procedures or serious or persistent breach of the Employee's terms and conditions of employment, and in such case the Employee's pay and other entitlements will be paid up to the time of termination only*."

22 Clause 20 of the contract was headed "*Warnings, Disputes or Grievances*". It set out a process for taking disciplinary action. Clause 20(a) was as follows:-

> "*i) Where disciplinary action is necessary, the management representative shall notify the Employee of the reason. Any counselling will be recorded on the Employee's personal file. The Employee will have the right to respond.*
>
> *ii) If the problem continues the matter will be discussed with the Employee and warning/warnings in writing will be given to him/her and recorded on his/her personal file.*
>
> *iii) The employee will have the right to respond. A witness may be present if requested.*
>
> *iv) In the event of the matter recurring, the employment may then be terminated. No dismissals are to take place without the authority of senior management.*
>
> *v) Instant dismissal of an Employee may still occur for the circumstances outlined in Clause 19(c).*"

23 Clause 21 was headed "*Company Policies*". It provided:-

> "*All company policies, written or verbal, as varied from time to time are deemed to form part of this Contract.*"

5 The Respondent's Policies

24 It was not in dispute before the Commission at first instance that a "*staff manual*" dated July 2004 applied to the employment of the appellant by the respondent. The staff manual included eight written policies of the respondent which included *the CIES Policy* and the Equal Opportunity and Harassment Policy, referred to earlier.

25 The staff manual was effectively in two parts. The first part contained a welcome, some observations about the respondent, its management structure and a guide to the terms of employment. The second part of the staff manual contained the eight policies. The third policy was *the CIES Policy*. The policy commenced by saying the respondent "*makes available to its staff computer equipment, software, Email and internet access. The provision of these facilities is to allow staff to be as productive as possible in the delivery of products and services to our customers*". The policy then contains some elaboration of this. The policy then says that:-

> "*As a condition of continued employment, each User is personally responsible to ensure that this policy is followed. Violation of this Policy will subject the User to discipline, up to and including termination of employment.*"

26 The policy then dealt with in turn "*Computers & Software*", "*The Internet and Users*", and "*Electronic Mail or Email*".

27 The "*Internet and Users*" part of the policy said the respondent "*has provided access to the Internet for authorised Users to support the business purposes of the firm. We have made the decision that the system should only be used for work and not for personal use during normal working hours*". This part of the policy then went on to set out policies and observations about "*Copyright*" and "*Prevention of Problems*". It then set out that the internet facilities at the respondent "*must not be used for any of the following uses or activities*". Eight uses or activities were then set out, none of which is relevant to the present appeal. The policy also said that users "*should safeguard against using the Internet to transmit personal comments or statements through Email or to post information to newsgroups that may be mistaken as the position of the firm*".

28 As stated, the next part of the policy was headed "*Electronic Mail or Email*". As the meaning of this part of the policy is very relevant to the determination of the appeal, it is appropriate to set it out in full:-

> "*ELECTRONIC MAIL OR EMAIL*
>
> *The primary purpose of electronic mail is to facilitate internal and external business-related communication. Accordingly, Email should be used primarily for matters of concern to [the respondent's] business. The use of email for personal, private or non-business should be only on a limited basis only.*

> *Email and other information systems of the company are not to be used in a way that may be disruptive, offensive to others, or harmful to morale.*
>
> *You must not display or transmit sexually explicit images, messages or cartoons or Email communications that may contain ethnic slurs or anything that may be construed as harassment or discredit others based on their race, national origin, sex, sexual orientation, age, disability, religious or political beliefs.*
>
> *The Email system cannot be used to solicit or convert others for commercial ventures, religious or political causes, outside organisations or other non-job related matters.*"

29 For ease of reference we will refer to this part of *the CIES Policy* as the "*email policy*" and later refer to its four paragraphs by the numbers 1, 2, 3 and 4.

30 The email policy then contained a warning to users about being careful when addressing and sending messages. The email policy then specified that external emails must contain a signature with a disclaimer. The terms of the disclaimer, as then applicable, were set out.

31 There was then another reference to emails. The policy said that emails "*are often seen as an "informal" way of communicating and can allow people to discuss things that would never be said in the lunchroom. Emails have resulted in devastating documentary evidence in harassment and discrimination claims. [The respondent's] computers are backed up daily onto magnetic tape and are stored indefinitely and remain the property of the firm. This means that Emails will be available years later for the purposes of litigation should this ever arise*." This was followed by a warning not to put anything in an email that would not be put in a letter. It was then said that it should be remembered that any email sent from the respondent identifies "*the firm*" and therefore the respondent would be connected with any inappropriate comments made via email. This section of the policy concluded with the advice, to "*think before you send*". The remainder of the policy is not relevant to the appeal.

32 As set out earlier the termination of the appellant's employment was partly because the respondent found the sending of the email breached the Equal Opportunity and Harassment Policy. The Commission made a finding at first instance that there was no breach of this policy. That finding has not been the subject of any cross-appeal, notice of contention or other challenge. Accordingly, it is unnecessary to consider the Equal Opportunity and Harassment Policy for the purposes of deciding the appeal.

6 The Appellant's Evidence

(a) Background

33 The appellant said he was originally employed by the respondent in Melbourne. He transferred to Western Australia on about 10 April 2005.

34 The appellant confirmed the terms and conditions of his employment as contained in the contract and that the staff manual applied to his employment.

(b) Previous Breach of Internet Policy – January 2006

35 The appellant was asked by his counsel whether he was involved in any "*disciplinary sort of meetings*" (T51). The appellant said he had an informal meeting with his manager, Ms Maree Corner, in January 2006. The appellant said Ms Corner spoke to him about his use of the internet and they had an informal disciplinary meeting. At the meeting he was told that he had used the internet too much. Ms Corner said she had noticed that he had used it "*a couple of times*" during work. The appellant said he had used the internet before Christmas to purchase a flight for his partner to come across from Melbourne to be with him for the Christmas period. The appellant said that was "*pretty much it*" (T51). The appellant said he was provided with a written performance improvement discussion document. The appellant said that as a result of the meeting Ms Corner "*brought up the idea again of returning back into the showroom as a retail consultant because I had previously changed my role within the company to the administration officer for the office and also business development support*" (T51/52). The appellant said he agreed to this because it was a chance to go back to what he knew best and to deal with people. The appellant said Ms Corner told him if his use of the internet did not decrease or stop altogether it would lead to a formal disciplinary meeting. The appellant then said "*like a first warning*" (T52).

36 After the appellant returned to the position he described, he said that Ms Corner came up to him in the showroom, a couple of weeks before his dismissal, and commented on how happy she was that he had returned to the showroom and that his interaction with customers was "*fantastic*" and it had been a great move for both of them (T52).

(c) The Incident – 2 March 2006

37 The appellant's evidence about an incident which happened and which was the reason why he sent the email is important. For this reason we will quote in full the transcript of the appellant's evidence in chief about this. This is as follows:-

> "*MS KENNY: Okay. What happened on Thursday the 2nd of March 2006?---I left work around 6 o'clock and rang up a friend, Vanessa*

Collins, who lives in Fremantle, and she said to come over because she was cooking up a couple of dishes and was having some friends come over so I joined the party. So I went down to East Fremantle and joined the dinner party, got there about 7 o'clock. Most of the other guests were there. We enjoyed a meal, we were having coffee out on the balcony of her house when Marley[?], the dog, her pet dog which is a toy poodle who was sitting beside me jumped up and went barking through the house but it wasn't her usual "There's someone at the door bark", it was a concerned bark. I looked up from where I was sitting and I had like a restricted view of the hallway which leads to the front door and I could see an arm doing a snatch and grab off the thing - - off the hallway table. At that point I knew something was wrong because it was a dark-skinned arm and there wasn't any guests in the house at the time that had that skin colour. And also the action was basically one particular[?] snatch and grab, they bolted to the front door and I could hear the door bang in the front and at that point I jumped out of my seat and took off in pursuit, yelling at the top of my lungs because I think that there was something wrong, that there was someone in the house by the arm that I'd seen and the reaction from the dog.

Okay. So you've jumped up out of your seat and you're running after someone, presumably?---Well, it was an intruder. Basically it was someone that was not invited into the house, who had walked in off the street. If it had been someone who was supposed to be in the house they would have still been sitting in the hallway by the time I'd got there but they'd run out onto the street and by the time I got to the front lawn they had disappeared out of sight. I heard someone crashing through bushes down on the corner so I ran in that direction. When I got there I could not see anyone so I just thought the guy had run off and had gotten away. At that stage a neighbour across the street was sitting on her balcony and she had watched the commotion going on from her balcony and yelled out that he was hiding in the bushes, she'd seen the guy jump into the bushes. So I ran round to the far side of the bushes which was on the corner to try and head the guy off and at that stage the rest of the dinner party arrived. We basically stood around this big clump of bushes, it was quite a large clump of bushes, and one of the guys who were at the dinner party also grabbed his car and had brought that down. So we tried to shine the lights in the bushes, trying to locate this person but he was hiding really well, and Vanessa was trying to coax him to come out because, well, at that stage we hadn't called the police but she saying, "The police have been called, come out." At that stage I returned to the house to get my mobile because it has a torch function on it, and when I came out of the house there was a guy who was 6 ft and dark in colour backing across the lawn yelling at everyone who was sort of following him up the lawn. And at that stage I just thought, "That's the guy that had been in the house" so I went running at him because I was going to try and grab hold of him, and then one of the girls screamed out, "Watch out, he's got a knife" and at that stage he hadn't seen me and he spun round and then started waving a knife at me. So I just stopped at that point, that was as far as I was going to go. He was trying to use - - he had a set of keys and he was trying to use the remote on the key to deactivate the car, the corresponding car to obviously get away and Kevin, who's Vanessa's partner, who's a very mild-mannered doctor, was getting really upset this guy was trying to steal one of the cars, it was actually his partner's son, James' car. At that stage the guy located the car, got in and was attempting to start it when Brian brought his car back up and tried to block it in because he was parked behind - - in between two cars, and tried to block him in from the outside. But the way this guy was behaving I just thought "He's going, like it or not" and because my car was the one at the front I didn't want it damaged so I sort of yelled at Brian to get out of the road because he was going. So Brian backed out of the road, the guy got the car started and took off down the street at a rate of knots. At that stage Brian followed the guy and James ran in, who's Vanessa's son, to get the phone, and rang the police. At that stage I said to Vanessa, "Go and grab your mobile because Brian might have his as well" so we could

> *let the police know where this guy was heading. When Vanessa came out of the house Brian had actually tried - - Brian was on the phone so they were - - we basically liaised with the police to get this guy caught which he was.*" (T53/54)

(d) Post Incident Occurrences – 2/3 March 2006

38 The appellant spoke to the police after they arrived at his friend's house at about 11.30pm. The appellant said this was a detailed process which finished at about 2.00am or sometime thereafter. The appellant said although he was offered a bed at the house where the party had been, he wanted to go home and have a hot shower and get into bed in his own house. The appellant said he felt "*violated*" and that "*this person had walked in off the street and broken into my friend's house, had pulled a knife on us and had stolen a car*" (T55).

39 The appellant then said that he also called his partner in Melbourne after he got home and it was "*good to talk to someone*" and that it "*got me to sleep in the end*" (T55).

(e) Going to Work – 3 March 2006

40 The appellant went to work the next morning which was Friday, 3 March 2006. The appellant left his house a little late for work because it took him a while to get ready. The appellant said he "*really didn't want to go to work*", but Ms Corner was away in Melbourne and another co-worker was away on annual leave "*so without me being there it would leave the showroom short-staffed. So I thought it best to actually go to work and I'm sort of the philosophy that to distract yourself from your problems keep busy so that's why I ended up going to work*" (T55).

41 The appellant described what happened when he first went to work. He said as it was a Friday before a long weekend there were not many people in the showroom. He said he spoke to the other staff about what had happened the night before. He said that "*it felt good to talk about it because I didn't realise sort of the impact it was - - it was having on me. I just felt angry one minute and then I felt really upset the next so I was kind of on a real roller coaster*" (T55/56).

(f) Writing and Sending the Email – 3 March 2006

42 The appellant headed off to do his usual routine at work. The appellant said he was sitting at his desk and checked his emails because it was a popular way for people at the respondent to communicate. That was when he had the idea to try and make something positive out of the whole experience and send off an email to the employees of the respondent. The appellant said the typing of the email probably took about 10 to 15 minutes as he had a typing speed of 90 words per minute with 95% accuracy. He said that the reason for sending the email was "*to try and raise people's awareness about what had happened. If we had taken the simple precaution of locking the front door the whole incident wouldn't have happened. But also just that I didn't want to not do anything about it because it was a horrible thing to go through, I wouldn't wish it on anyone, and I thought out of respect of everyone, especially the people within the company*" he would send the email (T56).

43 The appellant said he sent the email to all staff because he thought it was relevant for everybody to try and raise their awareness. He said he also copied and pasted the email to five friends who were not staff members.

(g) The Email – 3 March 2006

44 A printed copy of the email had been tendered as exhibit R3 during the respondent's case. The email said it was from the appellant. The email tendered was a copy of that received by Mr Angus Parker, the general manager of the respondent. It had a date on it of Friday, 3 March 2006 at 2.31pm. The email said, consistent with the appellant's evidence, that it was sent to "*All Staff*". The subject was "*Dinner with a Twist*". We will now set out the contents of the email in its entirety. This is necessary to properly consider and analyse the issues in the appeal:-

> "*Hi Everyone,*
>
> *This is an email that I would like everyone to read and seriously think about it. It is not an urban legend and it is not one of those things that happened to a friend of a friend. This happened to me last night and is head lining this morning's news in Perth (Friday 03/03/06).*
>
> *Last night I was at a dinner party in the very nice neighbourhood of East Fremantle. We were out on the balcony finishing off the night with coffee when my friends dog, that was with us, started to go berserk heading for the front door. I looked and saw and (sic) arm doing a snatch and grab from the hallway table at the front of the house. Unfortunately it was a coloured arm that did not belong in the house.*
>
> *The next thing, I was out of me (sic) seat running and yelling at the intruder who had walked through the unlocked front door. He ran out of the house with my self hot on the trail, leaving the rest of the dinner party wondering what the hell was going on. By the time I got outside he was already out of sight. Hearing the sound of someone going through bushes at the corner, I headed down the street in hot pursuit. Unfortunately, I lost track of him, but thankfully a neighbour who had been observing the commotion from across the street saw him hide in some bushes. By that*

> *time, the rest of the dinner party joined me and we surrounded the bushes telling him to come out, when one of the other guest (sic) arrived with his car and was shining the light into the bushes.*
>
> *This is where things took a turns (sic) and he came out of the bushes brandishing a large knife that surprised us all. We all of course moved back and he made back down the street towards the cars that were parked at the front of my friend's house. He was using the remote on the keys he had swiped to locate the car by deactivating the alarm. He then jumped in the vehicle and proceeded to try and start it. The other dinner guest who was in his car drove up the street and blocked the car in. I yelled at him to get out of the road as this guy is getting out of here one way or another. He reversed in time as the guy took of (sic) at a rate of knots. At this stage, the dinner guest in his car decided to follow the stolen car and another called the police. With some clever liaising with the police and the guest tailing the car, the police apprehended the guy and his (sic) is in custody facing court today charged with armed robbery and aggravated burglary.*
>
> *The point of sending you all this email is not to scare you and turn your house into fort knox and live in fear. Things are getting worse out there and its time we stopped turning a blind eye and start making a stand against it. The world is crumbling under violence and terrorism and we should not take our way of life for granted. I want this email to raise your awareness and think a little.*
>
> a. *Do take to (sic) precautions to secure your home when you are away and also when you are at home.*
>
> b. *Introduce yourself to your neighbours and swap phone numbers and keep an eye out for one another.*
>
> *These are two simple things that could of stopped the (sic) this event from happening. The worst thing you can do is do nothing and simply turn a blind eye. Do your part to keep the Australian spirit and way of life alive and most of all, but most of all, be sensible about the actions you take. Doing nothing should never be an option.*
>
> *With thanks"*

45 It will be necessary to later consider the meaning and effect of the email in detail. For ease of reference we will number the paragraphs of the email from 1 to 7, with number 6 being constituted by the two dot points, as a separate paragraph.

46 The email then set out the appellant's name. Under that was the respondent's Perth address, website, telephone and facsimile numbers and a statement about confidentiality and viruses. From its appearance, and consistent with the respondent's policy, the statement seems to have been something appended to all emails sent from the respondent.

(h) Evidence About the Email

47 The appellant was asked by his counsel about some of the things included in the email. The appellant said the dinner he was having was in East Fremantle, "*a nice part of town where you didn't have to worry about this sort of thing happening*" (T57).

48 With respect to the use of the expression "*coloured arm*", the appellant said this tied in with why the dog was barking. The appellant said he wanted to state "*what alerted me to something being wrong*". The appellant said this was the dog barking and also that he saw an arm "*that was darker in colour and it was just - - it acted suspicious. It was snatching something off the table and then whoever it was attached to went bolting out the front door*" (T57).

49 The appellant was also asked about the last paragraph in the email and the reference to the "*Australian spirit*". The appellant said that "*we have it really easy in this country. We have a great way of life, that sort of thing. We can live without the fear of war and all that sort of stuff and just with everything that's been going on in the world like S11 and all that sort of thing it's just - - it's like if you want - - if we want to keep living the way we're living we need to be conscious of what's going on around us. We can't keep turning a blind eye and in saying to keep the Australian spirit alive it's just like, well, we have a reputation of being doers not watchers or see-ers or do nothings, so the idea was me being Australian is to do the best I can at all times and don't just stand back and watch something happen just because it's not happening to me. And it's just like we shouldn't have to worry about locking our front doors and turning houses into Fort Knox and that sort of thing, but unfortunately it's the way of the times but it's still no excuse to accept it*" (T57/58).

50 The appellant said that the version of the email he sent to his friends contained a sound byte of a news report about the incident.

51 The appellant was asked by his counsel how he was feeling at work. The appellant said he was upset, angry and on edge. He said that he did not eat much that morning, could not touch a coffee and that he was "*sort of really jittery and wired. That's the only way I can put it*" (T58).

52 The appellant said the version of the email tendered as an exhibit had 2.31pm written on it because it was received at that time in Melbourne on Mr Parker's email account. He said it was actually morning in Perth when the email was sent.

(i) Returning to Work and Suspension – 7 March 2006

53 The appellant gave some evidence about the work he did during the rest of Friday, 3 March 2006. The appellant said it was a long weekend and he returned to work on Tuesday, 7 March 2006.

54 The appellant spoke about a telephone conversation with Mr Parker that morning. Mr Parker called and said he had concerns about the email. Mr Parker said the email breached the two company policies, was a concern to management and the appellant was being suspended immediately until a meeting could be held on Friday, 10 March 2006. It was to be held on Friday when Ms Corner was back in Perth. The appellant was instructed to leave straight away and hand in his security keys. The appellant left work after briefly attending to some things and retrieving his staff manual to look at the policies of the respondent.

55 The appellant said he was horrified that what he had done had been deemed a racial statement and he was mortified at the idea that he may have offended someone (T61/62). The appellant said he had sent the email out with good intentions and trying to raise people's awareness about security in the home and it had resulted in blowing up in his face (T62).

56 The appellant recalled he said to Mr Parker in the telephone call that he was horrified that the email had been deemed a racial statement and he was really apologetic if it had actually offended anybody.

57 A letter was sent by Mr Parker which confirmed the disciplinary process which would be followed, although the appellant said he did not receive it until after his dismissal (T62).

(j) The Apology – 9 March 2006

58 Before the meeting on 10 March 2006 the appellant sent a facsimile to management on 9 March 2006. A letter of the same date was sent with it. The appellant did this to try and give them "*an understanding of where I was coming from from the unsettling events of the night beforehand to being really tired and hard to focus at work and trying to explain how I'd - - why I had worded the email I had, that - - that I wasn't trying to make a statement or a political comment or anything like that, I was just trying to give people an idea of what had happened to me, how it had happened and why it's important to sort of raise people's awareness about it …*" (T63).

59 The letter was addressed to the respondent's "*management and staff*". It was signed by the appellant and concluded with the line "*With my sincerest apologies*". The balance of the letter was as follows:-

> "*The events that have passed in the last week have left me in a state of shock and devastation. It has been like a living nightmare to find myself in this current situation. I am writing this letter to give you a brief account of the events that have taken place, in the hope that you can gain an understanding of my motivation which has resulted in this predicament.*
>
> *On Thursday the 2nd of March 2006, a circle of friends and I experienced an armed robbery and aggravated burglary in my friends home. It is an event that occurred in what seemed seconds but reliving it has occupied many hours. It is an experience that I would not wish on anyone and it has left me very concerned for my personal safety and those that surround me. By the time I had finished talking to the police and filing a statement, it was well after 2am. At home I fell into bed exhausted although some hours did pass before I fell into a restless sleep.*
>
> *I awoke to my alarm clock radio with our story headlining the morning news. All the memories came flooding back and I busied myself preparing for work. I did not feel fit for work but I knew that it was one staff members day off and another was away on annual leave. I did not want to leave the showroom short staffed. I am also a strong believer in keeping oneself busy in trying times.*
>
> *The events of that night could have ended a lot worse than what they had. I found myself defenceless in a situation I had never been in before. I sent the email impulsively after the distressing events of the previous night. I was trying to turn my negative experience into a positive by trying to help others avoid such unexpected and potentially dangerous situations.*

> *I chose the company email because it touches a lot of staff members that I know directly and I thought it would encourage others to stop and think because it happened to a fellow member of Rogerseller. I wanted to raise awareness of personal safety at home.*
>
> *In sending the email, I did not intentionally mean to break company policy and I certainly did not mean to cause offence from a poorly worded sentence. On reflection, I realise that to use the company email was not an appropriate course of action.*
>
> *I want to apologise honestly and heartily and say that I am truly sorry for my action and any harm it may have caused.*
>
> *I value and respect Rogerseller as a company and I hope to continue to serve the company in a diligent and proper manner.*"

(k) The Disciplinary Meeting – 10 March 2006

60 The appellant was shown some notes of the meeting which were taken by another employee of the respondent. The appellant accepted that they were a simplified version of what had been said at the meeting. About the policies which the respondent had said were breached by the email, the appellant said in his evidence he "*could sort of see it from where they were coming from, that the email was open to interpretation but at that stage I couldn't say anything in (sic) contrary to what they were accusing me of*" (T66).

(l) The Notes of the Meeting – 10 March 2006

61 The notes of the meeting were contained in a document headed "*Confidential*" and on the next line "*Report – Performance Improvement Discussion*". It appears to be a proforma document. The document says the meeting took place on 9 March 2006 but this was a mistake (T65). The document commences with a box containing the employee's name, position, manager and the date and time of discussion. The document said the people present were the appellant, Ms Corner and Ms Caitlin Scully, an employee in "*Human Resources*" in Melbourne, via telephone. The document contained an introduction to the discussion and a summary of the process. In a section of the document headed "*List Reason(s) for Performance Discussion*" there was, in summary, a reference to the conversation with Mr Parker about the email and the observation that it had been in breach of the "*Computer, internet/intranet and email security policy*" and the "*Equal opportunity and harassment policy*". It is recorded the appellant confirmed that "*the policy*" was on the respondent's intranet. The appellant confirmed that he knew the policies were in the staff manual which he had taken home.

62 The document recorded there were "*two key issues that breach these policies*". The first was the reference to the "*coloured arm*". It was said that this could be interpreted to be a form of harassment which includes any reference to racist or other offensive jokes or comments. The document recorded that it was said the appellant needed "*to remember that comments which may not offend one person, may be unwelcome or offensive to someone else*". The document said Mr Edmonds, Mr Parker and others expressed immediate concern about the content of the email as it was against the values of the respondent and the way they prided themselves on treating other people. The information in the email to all staff could lead to complaints of harassment against the appellant and "*the business*" as the appellant was a representative of the respondent.

63 Secondly, emails were not to be transmitted which may contain ethnic slurs or anything that may be construed as harassment or discredit others based on their race, etc. The use of the email was clearly in breach of the "*computer and email policy*" as it was sent to every staff member who would then have to spend time reading it. The appellant spent time at work writing it and "*think of the collective time wasted*". It was said that this was clearly unacceptable.

64 There was also reference to the previous breach of the "*Computer Internet/Intranet and email security policy*" on 12 January 2006. It was noted in the document that "*we went through the policy in a group environment*". The document recorded Ms Corner as saying she was disappointed this had happened after that process as it had been made "*clear at that time that any further breaches from you would be unacceptable*".

65 The document recorded the appellant as agreeing with the question "*Do you see why your email was seen to be in breach of these policies?*". The document recorded the respondent (through Ms Corner) wanted to ask the appellant for his feedback and any information that would help with their decision. The appellant was asked whether he had anything else to say other than the letter that had been sent dated 9 March 2006. The appellant is recorded as saying "*No, just wasn't thinking about it. Sorry if I caused stress/caused people to be upset*". The appellant was recorded as saying that he did it "*out of respect for people*". The document records Ms Corner as saying that it was unacceptable and disrespectful in fact to send the email out "*under the Rogerseller banner*". The document records the appellant as being "*very upset*". Ms Corner was recorded as saying that they were "*here to help/here to listen*". The appellant is recorded as reiterating that he did not "*intentionally cause trouble/it was never my intention. I didn't want to upset people. I did something I shouldn't have done. Didn't think of it as breaching policies*". The appellant reiterated that he sent the email out of respect for people and wanted to raise awareness. Ms Corner insisted that the sending of the email "*actually does disrespect people*". The document records the appellant said he "*was and still am terrified. Just wanted to create awareness. I can see how much trouble it has caused. Understand where you guys are coming from & I'm truly sorry. Truly sorry*".

(m) The Dismissal – 10 March 2006

66 The meeting concluded with the appellant being told the respondent was considering what to do and they would take about half an hour to do so. The appellant went away for half an hour. The appellant returned and was informed that his employment had been terminated, effective immediately.

67 The appellant gave evidence that he cleared out his locker and said goodbye to people. The appellant said he then went home and "*spent most of the afternoon in tears because basically my whole world had been dropped on its head and I don't know, I was off the planet for a couple of days, just because things had gone so wrong*" (T67).

(n) Post Termination

68 The appellant gave evidence about taking up an offer of post employment counselling made by the respondent, the obtaining of Centrelink benefits, and attempts to find alternative employment.

69 The appellant's final payslip for the period ending 15 March 2006 was tendered. The appellant confirmed that he was not paid in lieu of notice. The appellant remained unemployed until 24 July 2006. He then commenced employment and was paid a higher salary in his new job. This was why he was no longer seeking a reinstatement order.

(o) Cross-Examination

70 Mr Edmonds put to the appellant a note of the disciplinary meeting in January 2006. This recorded that prior to Christmas and every day after the Christmas break the appellant had been bringing in cases of CDs to upload, spending time on this when he was maintaining that he was too busy to perform some of his work duties. The document also recorded that the appellant admitted he had been uploading music CDs onto his computer for personal use whilst working.

71 The appellant was also asked about the use of the word "*unfortunately*" in connection with the expression "*coloured arm*" in the email. The appellant explained that there was an arm which did not belong in the house. It was the second indicator to him that something was wrong after the dog. The appellant was asked why the skin colour was relevant. The appellant said because "*it wasn't of a person who was attending the party*" (T79).

(p) The Commissioner's Questions

72 At the conclusion of the appellant's cross-examination the Commissioner asked the appellant some questions. In particular, the Commissioner asked the appellant about that part of the email which referred to "*making a stand against it*". The Commissioner said that "*it might be inferred by some it was an incitement for people to do something, or could be construed in that manner*". The appellant said it was more of a "*do something clause and then I go on to say "But be - - be smart in your actions" because I'm not about to encourage vigilantes to go running out to the street and whatever else, but it's just whatever you do think about it, and if I had had a chance to think about that in hindsight now I'd never ever have sent the email in the first place*" (T83).

7 The Evidence of Mr Edmonds

73 It is not necessary to refer to the evidence of Mr Edmonds which did not cover different ground to or disputed the evidence of the appellant. A summary of his other evidence follows.

(a) The Email

74 Mr Edmonds said the email was a lengthy document. Mr Edmonds said the appellant was well aware or should have been well aware of the potential "*this action*" could bring in terms of his potential possible termination (T15/16). Reference was made to clause 19(d) of the employment contract. Reference was also made to what was called the "*Computer Internet and Intranet Policy*". We infer this was the same policy as *the CIES Policy*. Mr Edmonds said the email "*contained personal views that were clearly in breach of our security policy but more importantly to me, were in breach of our equal opportunity policy. The email was discriminatory, offensive and it was unwelcome to the staff that received it. It was inconsistent with our values as a company and the fact that it was openly distributed and sent as well to external members of the company showed that it was in clear breach*".

(b) Mr Edmonds' Opinion About the Email

75 In answer to a question from the Commissioner, Mr Edmonds said he was "*horrified*" to see the email arrive on his desk. He said he immediately took umbrage to the reference to "*coloured arm*" and "*the clear political overtones in the closing paragraphs*" (T17).

76 Mr Edmonds said he strongly believed this was a serious breach and put him and his duty of care as a director, owner and manager of the business at risk. Mr Edmonds said he employed more than 80 people of varied ethnic and cultural backgrounds. Mr Edmonds said his duty of care was to provide his employees with a safe workplace, free from this type of "*unsolicited discrimination*" (T17). Mr Edmonds said the values he held were clearly represented in all of the contracts of employment and all of the policies in place to provide a safe workplace. Mr Edmonds also referred to the email being sent to people outside the respondent and it presented "*a risk to the goodwill and name of the*" respondent (T17).

77 Mr Edmonds also said that he was concerned by the length of the email and the time taken to prepare the email, to download a sound byte and attach a sound byte. Mr Edmonds said there was a planned and calculated process taking place contrary to the appellant's commitment to his role and job and performance. Mr Edmonds said it was certainly

not a spur of the moment act. It was clearly one that was planned and executed when other activities should have been undertaken (T17). Mr Edmonds also referred to the fact that it was sent to every member of the company and the disruption and time taken in reading such lengthy "*prose*" was also considered (T17).

(c) Reasons for Dismissal

78 Mr Edmonds said given "*the seriousness of the breach, and the fact that this matter had been the subject of a lot of talk and - - and attention from the company at large, it was considered that summary dismissal was the only outcome that could be taken*" (T21/22).

(d) Cross-Examination

79 There was examination of Mr Edmonds about the terms of the email policy and how he construed the email and the policy. It is not necessary to set this evidence out for the proper determination of the appeal.

8 The Reasons for Decision

(a) The Application

80 The reasons for decision of the Commissioner commenced with a reference to the two applications.

(b) The Facts

81 The Commissioner summarised the facts. Neither party took issue with the summary in the appeal. The summary set out the respondent's business, the fact of the written contract, the staff manual and the policies contained in the manual. The summary also set out what had happened to the appellant at the dinner on 2 March 2006. The Commissioner referred to the fact that the appellant had little sleep before attending for work on 3 March 2006. The Commissioner referred to the appellant's evidence about how he felt on that morning. The Commissioner quoted the email in full.

82 The Commissioner also recorded that the appellant said the email was sent to some friends outside of the respondent with a sound recording.

83 The Commissioner then referred to the process which followed the appellant sending the email including the conversation with Mr Parker and the letter from Mr Parker about the disciplinary process. There was also a reference to Mr Edmonds' evidence and his opinion of the email.

84 The Commissioner referred to the meeting which took place on 10 March 2006 and set out what was recorded in the document prepared during the meeting. The Commissioner referred to the appellant's intentions in sending the email and explanation of why he had referred to the "*coloured arm*" and "*making a stand*". The Commissioner referred to the appellant being remorseful for his conduct and having apologised to the respondent for it.

85 The Commissioner also referred to the letter dated 9 March 2006. The Commissioner then referred to the appellant's dismissal on 10 March 2006.

86 The Commissioner concluded this section of his reasons by saying that subsequent to his dismissal, the appellant sought alternative employment and commenced in a new position on or about 24 July 2006 with an annual salary in excess of that earned by him in his employment with the respondent. The Commissioner made a finding that this had occurred.

(c) Principles Stated

87 The next section of the Commissioner's reasons was headed "*Consideration*". In paragraphs [16] and [17] of his reasons the Commissioner said:-

> "*16 Whether or not the applicant's dismissal was harsh, oppressive or unfair turns on whether the employer has exercised its contractual right to terminate the contract of employment contrary to the principles set out in Miles & Ors t/as The Undercliffe Nursing Home v FMWU (1985) 65 WAIG 385. Additionally, given that the dismissal was effected summarily for misconduct, there is an obligation on the employer to establish on the balance of probabilities that the misconduct complained of actually occurred: Newmont Australia Ltd v The AWU (1988) 68 WAIG 677. Additionally, in a case such as this, the lawfulness of the dismissal is a relevant consideration however not all unlawful dismissals will be unfair and vice versa: R v The Industrial Court of South Australia; ex parte General Motors Holden (1975) 10 SASR 582.*
>
> *17 The issues in this case are as follows:*
>
> *(a) did the conduct of the applicant, properly characterised, constitute a breach of the respondent's policies?;*
>
> *(b) if it did, was the breach sufficient to warrant summary dismissal?; and*

> *(c) if it was not sufficient to warrant summary dismissal, did the applicant's conduct warrant dismissal on notice?*"

88 In the appeal, neither party took issue with the observations about the law by the Commissioner in paragraph [16].

(d) Breach of the Harassment Policy

89 The Commissioner quoted the relevant parts of *the CIES Policy* and the Equal Opportunity and Harassment Policy. The Commissioner set out his reasons for finding the appellant's conduct did not constitute "*harassment*" for the purpose of the respondent's Equal Opportunity and Harassment Policy. As stated that finding has not been challenged. During the course of the Commissioner's discussion about this issue, he said there was "*nothing to suggest that the email sent by the [appellant] was received by any person within the staff of the respondent who regarded the communication as unwelcome, intimidating or offensive or otherwise complained about it. I do not include the management's response to the email in this regard, as clearly their concern was compliance with the policy, not a complaint of harassment in any particular sense*" ([24]).

(e) Breach of *the CIES Policy*

90 The Commissioner at paragraph [25] said the policy was designed to prevent the use of the respondent's internet and email system in an inappropriate manner. The Commissioner said there was no requirement, for a breach of this policy to occur, that a recipient of a communication be aggrieved in any particular manner. This was in contradistinction to the "*Harassment Policy*". The Commissioner said it was the use by an employee, or more appropriately, misuse, of the computing system that might give rise to a breach of the policy. The Commissioner said it was clear that sending an email as the appellant did, "*if it contains material falling within the terms of the policy, may constitute a breach of the policy*".

91 At paragraph [26] the Commissioner made some observations about the policy:-

> "*Firstly, the policy makes it plain in accordance with its terms, that the primary use of the respondent's computing equipment, software and email etc, is for business purposes only. There is provision in the policy for use of email for personal purposes on a limited basis. It is also very clear that the purpose of the email policy is to ensure that such communications are free from the kinds of subject matter there set out. The respondent submitted that the applicant must have spent some time composing and typing this email, and correspondingly, would naturally involve some time during working time, in every recipient of it reading it.*"

92 The Commissioner said he did not accept the appellant's "*evidence that the email was simply a spur of the moment communication*" ([27]). The Commissioner said that from its terms it was clearly a well thought out and constructed communication with a "*serious message contained within it*". The Commissioner said the manner of composition, detail involved in the narration, and the final paragraphs extolling the virtues of the Australian way of life and requesting readers to "*make a stand against it*" are strongly suggestive of a communication into which had been put considerable thought ([27]). The Commissioner referred to the time of the sending of the email and that "*it would appear it was not sent shortly after*" the appellant arrived for work ([27]). The Commissioner said the email "*invites the reader to consider and take seriously the message intended by the communication*" ([27]). It was "*certainly not a light hearted brief communication with all staff*" ([27]).

93 The Commissioner said he accepted the appellant's evidence that he did not intend any offence by the content of the email ([28]). The Commissioner also said he accepted the appellant's evidence that he was "*remorseful and apologetic for the difficulties caused by his conduct*" ([28]). The Commissioner then said that "*in terms of policies of this kind, and equal opportunity law generally, intention is not an element to be established*". The Commissioner cited in support of this proposition *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165 and *Waters v Public Transport Corporation* (1991) 173 CLR 349, which are both about whether policies of employers breached equal opportunity legislation. The Commissioner then said:-

> "*A principal purpose of policies of this kind, put in place by employers in the workplace, is to ensure that employees do not, even inadvertently, inappropriately use an employer's resources which may have the effect of causing harm or offence to others. This in turn, places an employer in a position where it may be held vicariously liable for the conduct of its employees in some circumstances. It must always be borne in mind in cases of this kind, as indeed the respondent's policy records, that things said or done by one person, without any intention to offend or harm, may be interpreted by another person in an entirely different way, depending perhaps for example, on their cultural background. That is why sensitivity to these matters is required at all times in the workplace.*" ([28]).

94 The content of paragraphs [29]-[31] is important to the determination of grounds 1 and 2 of the appeal. They are as follows:-

> "*29 Returning to the email itself as exhibit R3, I consider that reference to "coloured arm" could be interpreted by a recipient of the email as a racial slur. The reference was very specific. This is despite the [appellant's] evidence that he did not intend in any way to convey such an impression. Secondly, the penultimate and final paragraphs in my opinion, in accordance with the plain language of the email, read in the context of the email as a whole, clearly seek to solicit support by other staff of the respondent for people to in effect, "stand up and defend themselves". In my opinion, read in context, these two paragraphs do contain overtones of soliciting support for a political cause, not in a party political sense, but may be construed more generally in terms of citizen's rights and the requirement for vigilance to defend those rights, in particular in one's home.*
>
> *30 These matters are clearly inappropriate content for a communication in the workplace. They carry with them the clear potential for a recipient to misinterpret its content. I also take into account the un-contradicted evidence of Mr Edmonds that the respondent's employees come from a diverse range of cultural backgrounds.*
>
> *31 I therefore regard the email sent by the [appellant] on 3 March 2006 as being in breach of the respondent's Computer, Internet and Email Security Policy as set out above.*"

(f) Summary Dismissal

95 The Commissioner then commenced a section of his reasons headed "*Did The Breach Warrant Summary Dismissal?*" After setting out the relevant law and quoting clause 19(d) of the contract, the Commissioner said in paragraph [34] that he accepted the appellant was aware of the respondent's policies at the time when he sent the email. The Commissioner explained why he made that finding. The Commissioner said he also took into account "*as a relevant consideration, that the events of the evening of 2 March 2006 must have been a traumatic experience for the [appellant] and no doubt others involved at the time. Whilst to some extent this might be seen as a mitigating circumstance, the fact remains that the [appellant] did prepare and send the email which he did, in the knowledge that it must have been inconsistent with the respondent's relevant policies. It was a deliberate and not an inadvertent act*" ([34]). The Commissioner said although there was no harassment, there was potential for offence to be taken to the communication and important that policies of the kind adopted by the respondent, be enforced to reinforce their importance in the workplace.

96 The Commissioner said, however, that in all of the circumstances he did not consider the appellant's actions warranted summary dismissal without notice for serious misconduct ([35]). The Commissioner said that "*having considered all of the background to this matter, the ultimate sanction of summary dismissal was, in the present circumstances, too severe a penalty*" ([35]). The Commissioner said the appellant had lost the benefit of salary in lieu of notice which he would have otherwise been paid. The Commissioner said "*for these reasons, the dismissal of the [appellant] was unlawful and also unfair to that extent*" ([35]).

(g) Did the Breach Warrant Dismissal on Notice?

97 This heading immediately followed paragraph [35]. The next paragraph of the Commissioner's reasons was:-

> "*36. Whilst the Commission has concluded that the [appellant's] dismissal was wrongful at law, and to that extent was unfair, in my opinion, having regard to the fact that the [appellant] was aware of the relevant policies; that he consciously prepared and sent the email which he did that clearly contained inappropriate material; and that the [appellant] had been previously counselled as to a breach of the respondent's computing policies regarding internet usage; and that the respondent must enforce such policies as a component of their integrity, I consider that termination of the [appellant's] employment on notice would have been the appropriate outcome in this case.*"

98 The Commissioner said he did not accept the appellant's submission that there had been a denial of procedural fairness ([37]). The appeal does not question this finding.

(h) Compensation

99 The final two substantive paragraphs of the Commissioner's reasons were as follows:-

> "*38. Accordingly, having concluded that the [appellant] ought properly have been lawfully and fairly dismissed on notice or by payment in lieu of notice, the Commission will declare the [appellant] to have been harshly, oppressively and unfairly dismissed by reason of his summary dismissal, and will order compensation by way of payment in lieu of notice that the [appellant] would otherwise have received if the employment was terminated lawfully. Given that it was not in dispute that the [appellant] would have been entitled to the sum of $3,010.76 by way of four weeks' salary in lieu of notice, I find that to be the [appellant's] loss for the purposes of s 23A(6) of the Act. Whilst the [appellant] also claimed that he had suffered injury as a consequence of the dismissal, I am not persuaded that the circumstances of the [appellant's] dismissal warrant any award of compensation on this ground: Burazin v Blacktown City Guardian Pty Ltd 142 ALR 144 at 151-152 (FCFC), and the approval by the Full Court of the dicta of Lee J in Aitken v CMETSWU (1995) 63 IR 1 at 9; Bogunovich v Bayside Western Australia Pty Ltd 79 WAIG 8; Nicholas Richard Lynam v Lataga Pty Ltd (2001) 81 WAIG 986.*
>
> *39 Finally, as the award of compensation to the [appellant] effectively satisfies his claim under s 29(1)(b)(ii) of the Act for denied contractual benefits, this application will be dismissed.*"

9 The Terms of the Order

100 As stated earlier the reasons were published on 4 October 2006 together with the order.

101 The orders and declarations were that the Commission:-

> "*1 DECLARES that the applicant was harshly, oppressively and unfairly dismissed by reason of his summary dismissal from his employment as a retail sales consultant on or about 10 March 2006.*
>
> *2 DECLARES that reinstatement or re-employment is impractical.*
>
> *3 ORDERS the respondent to pay to the applicant the sum of $3,010.76 as compensation for loss less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 21 days of the date of this order.*
>
> *4 ORDERS that application B 309 of 2006 be and is hereby dismissed.*"

10 The Grounds of Appeal

102 The notice of appeal contained four grounds. These grounds were amended, by leave of the Full Bench, during the course of the hearing of the appeal. The grounds of appeal as amended are as follows:-

> "*1. The Commission erred in fact or law in concluding at paragraph 29 of the Decision that: "coloured arm" could be interpreted by a recipient of the email sent by the Appellant on 3 March 2006 ("the email") as a racial slur.*
>
> ***Particulars***
>
> *(i) The Respondent's Computer, Internet and Email Security Policy ("**Policy**") does not contain a reference to "racial slur" but does contain a reference to "ethnic slur".*
>
> *(ii) The words "coloured arm" in the context of the email cannot be interpreted as an ethnic slur.*
>
> *2. The Commission erred in fact or law in concluding that the penultimate and final paragraphs of the email, in accordance with the plain language of the email, read in the context of the email as a whole, clearly seek to solicit support by other staff of the respondent for people to in effect "stand up and defend themselves" and read in context these two paragraphs contain overtones of soliciting support for a political cause and may be*

construed in terms of citizen's rights and the requirement for vigilance to defend those rights, in particular in one's home.

Particulars

(i) The Respondent's Policy states that "the email system cannot be used to solicit or convert others for commercial ventures, religious or political causes, outside organisation or other non-job related matters".

(ii) The penultimate and last paragraph of the Appellants email cannot on any interpretation be soliciting or converting others for a political cause.

3. The Commission erred in law in concluding that the Appellant breached the Policy.

4. In the alternative to paragraph 3 above, that the Commission erred in law in concluding that because the Appellant had breached the respondent's Policy that an appropriate remedy was to terminate the Appellant's employment on notice

Particulars

(a) In deciding that the Appellant breached the Policy, the Commission failed to consider when stating that it would have been appropriate for the Respondent to dismiss the Appellant on notice whether that was harsh, oppressive or unfair."

(b) The breach of the email policy was minor or trivial.

(c) The appellant did not previously breach the email component of the respondent's computer, internet and email security policy.

(d) The appellant did not intend to breach the email policy."

11 The Amendment Applications

103 The first amendment sought was to include the words "*or law*" after the word "*fact*" in the first line of ground 1. The application to amend in these terms was made fairly early on in the submissions of counsel for the appellant, and was not opposed by counsel for the respondent. As counsel for the appellant explained, if this amendment was made then there would be no need for the Full Bench to consider ground 3 which did not then add anything to grounds 1 or 2. Leave was granted to amend ground 1.

104 The other amendment sought was to add particulars (b), (c) and (d) to ground 4. As filed, the notice of appeal simply contained as "*particulars*" what is now particular (a). This amendment was sought at the commencement of the respondent's submissions to the Full Bench. The reason for the amendment was because the appellant's counsel apprehended, after discussion with the Full Bench during his submissions, that the particulars as they were drafted did not encapsulate all of the arguments which supported ground 4. The precise terms of the amendment sought had not been articulated by the time the respondent's counsel commenced his submissions. At that point, the respondent's counsel quite properly submitted that the appellant's counsel should set out precisely what amendment was being sought. The Full Bench then adjourned briefly to allow the appellant's counsel to draft the amendment sought. Upon resumption a handwritten document was provided to the Full Bench and the respondent's counsel. After further discussion with both counsel the amendment sought was allowed. We informed counsel, on behalf of the Full Bench, that the amendment was allowed for at least the reason that the respondent did not oppose the amendment sought.

105 Counsel for the respondent had explained, in the best traditions of the bar if we may say so, that he did not oppose the amendment because he was in a position to provide countering submissions on behalf of the respondent, to the added particulars. The respondent's counsel, upon invitation by the Full Bench, specifically said that he did not wish to have the opportunity to make additional written submissions about the added particulars. Counsel explained that one reason for this was that his instructing solicitor was located in Melbourne and had flown to Perth for the hearing of the appeal.

12 Leave to Amend Grounds of Appeal

106 The reasons why we joined in the decision to grant leave to amend ground 4 were not limited to the lack of opposition to the amendment by the respondent. In our opinion when considering an application to amend a ground of appeal, at the hearing of the appeal, there are a number of factors to consider. These include:-

(a) The time when notice was first given to the Full Bench and the respondent of the intention to apply for the amendment.

(b) The explanation, if any, for seeking the amendment including why it is sought at the hearing of the appeal.

(c) Whether the proposed amendment constitutes a reasonably arguable ground of appeal.

(d) The consequences to the appellant of the non-granting of leave to amend.

(e) The extent of any prejudice to the respondent.

(f) Any measures which may be taken to eliminate or reduce the prejudice to the respondent.

(g) Issues of delay and costs.

107 In the present case it seemed that the reason for seeking the amendment application was that the particulars to ground 4 had not been drafted with sufficient precision. If leave to amend the particulars to the ground was not granted then this had the potential to harm the prospects of the appellant succeeding in the appeal. As the appellant is represented by solicitors who drafted the grounds of appeal, the reason for seeking the amendment at a late stage cannot be attributed to the appellant himself. There is often a harshness to a party if the actions of their solicitor or agent are visited against them. On the other hand, ordinarily, a party is bound by the way they conduct their case including the conduct of their case by their counsel, solicitors or agent. Our opinion was that the ground, if the amendments sought were granted, was clearly arguable.

108 As stated, the exercise of the discretion to grant leave to amend a ground of appeal is affected by how late the amendment is sought. In this case the amendment was not sought until the conclusion of the appellant's oral submissions. That is very late indeed. The timing of the amendment application brings into sharp focus the question of the fairness to the respondent by the amendment sought. Although the timing of seeking the amendment to the ground was late, it should be said that the amendments sought did not to any significant degree, if at all, cross the bounds of what was contained in the appellant's outline of written submissions. This document was filed in the Commission 24 hours prior to the hearing of the appeal, although it seems that it was not served on the respondent's solicitors or counsel until the early afternoon of the day before the hearing. (There was a Note attached to the Notice of Hearing requiring an outline of submissions to be filed and served 24 hours before the hearing of the appeal). This gave the respondent's counsel some, albeit not as much as he was entitled to, notice of the arguments to be presented on behalf of the appellant. To some extent, this decreased the disadvantage that the respondent faced in meeting the arguments raised in the outline of submissions and in the amended ground of appeal, if leave was granted.

109 As stated above the respondent through its counsel did not oppose the amendment sought. This was a very important factor. It was not, however, the only relevant factor. If the respondent had opposed the amendment sought, we may well have still formed the view that it was appropriate to grant leave. This is, however, a hypothetical question which it is not necessary to consider further. In some cases the potential prejudice to a respondent could be overcome by an adjournment of the hearing of the appeal or allowing time within which to answer amended grounds by way of written submissions. In considering these remedial actions, questions of time delays and potential cost to the respondent will be relevant factors.

110 Overall, however, perhaps no more can be said than that the power of the Full Bench to grant leave to amend grounds of appeal is a discretionary power which will be exercised having regard to the particular facts and circumstances of each case. The factors outlined above are likely to be relevant to the exercise of the discretion but this is not intended to set out an exhaustive checklist.

111 On the particular facts and circumstances of this case and particularly given the respondent's non-opposition to the amendments sought, in our opinion it was appropriate to exercise the discretion to grant leave to amend ground 4.

13 The Drafting of Grounds of Appeal

112 None of what we have said, however, should be taken to underestimate the importance of careful drafting of grounds of appeal. The *Industrial Relations Commission Regulations 2005* emphasises this. Regulation 102(2) provides that the notice of appeal must clearly and concisely set out the grounds of appeal and what alternative decision the appellant seeks. Regulation 102(3) provides that without affecting the operation of subregulation (2), it is not sufficient to allege that a decision or part of it is against the evidence or the weight of evidence or that it is wrong in law. The notice must specify the particulars relied on to demonstrate that it is against the evidence and the weight of evidence and the specific reasons why it is alleged to be wrong in law.

113 The reason for the content of the regulations is reasonably clear. The grounds of appeal map the boundaries and chart the course of the hearing and determination of the appeal. The grounds and particulars provide proper notice to the respondent and the Full Bench of the issues relevant to a determination in the appeal. They should ordinarily be succinctly expressed. Part of the reason for the delineation of grounds of appeal is to provide procedural fairness to a respondent so that they know the case they need to meet in an appeal. Ordinarily, the Full Bench would have no authority to allow an appeal other than on the basis of the grounds of appeal as drafted, or argued and understood by the parties. Moreover in all cases the Full Bench must act in a way which is procedurally fair.

114 In our experience, far too frequently, when appellants are represented by counsel, solicitors or agents, the grounds of appeal are not drafted with sufficient care.

14 Appeal Against a Discretionary Decision

115 Both the appellant and the respondent recognised that a determination by the Commission that a dismissal is unfair under s23A of *the Act* is discretionary. It is a discretionary decision because it involves an evaluative judgment being made by the Commissioner, constituting the Commission. (See for example *Gromark Packaging v FMWU, WA Branch* (1992) 73 WAIG 220, per Franklyn J, Nicholson and Owen JJ agreeing at 223).

116 In *Sealanes (1985) Pty Ltd v SDAEA (WA) and Others* (2005) 86 WAIG 5, the Full Bench said the following about a discretionary decision:-

> "*81 It is well established that the exercise of a discretion by the Commission at first instance cannot be disturbed on appeal simply because members of the Full Bench would have exercised the discretion in a different way to that of the Commission at first instance.*
>
> *82 In Coal and Allied Operations Pty Ltd v AIRC and Others (2000) 203 CLR 194, Gleeson, Gaudron and Hayne JJ spoke of the exercise of a discretionary decision in the following way at [19]:-*
>
> > *"In general terms, it refers to a decision making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result" (Jago v District Court (NSW) (1989) 168 CLR 23 at 76, per Gaudron J). Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made."*
>
> *83 At [21], Their Honours stated that:-*
>
> > *"Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision making process."*
>
> *84 In the same paragraph, Their Honours quoted the well known passage from House v The King [1936] 55 CLR 499 at 505, in which in a joint judgment of Dixon, Evatt and McTiernan JJ, there were set out the types of errors which would permit an appeal court to allow an appeal against an order made in the exercise of a discretionary judgment (see also Kirby J in Coal and Allied at [72]).*"

117 The reference to the "*well known passage from House v The King*" in paragraph [84] of *Sealanes* was quoted in the written submissions of both the appellant and the respondent in this appeal. It is helpful in this appeal to set out the passage from the reasons of the joint judgment of Dixon, Evatt and McTiernan JJ at pages 504-505 as follows:-

> "*The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred*."

118 In *Norbis v Norbis* (1986) 161 CLR 513 at 518-519, Mason and Deane JJ referred to the principles set out in *House v The King* and, with respect to an appeal against a discretionary order said:-

> "*According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal*."

119 This would in our opinion include the error of an "*unreasonable or plainly unjust*" result as referred to in *House v The King*, quoted above.

120 Both the appellant and the respondent agreed *House v The King* applied in the present appeal.

121 In an unfair dismissal application it is the final determination of the Commission about whether the dismissal is fair or not which involves the exercise of a discretion based upon an evaluative judgment. (See for example *Gromark* at page 223). In all cases, however, there will or may be a number of steps along the way to the making of the evaluative judgment. Without attempting to be exhaustive, these steps could include factual findings; the construction of an employment contract; the construction of an award or other industrial instrument; the meaning of policies of an employer; whether the policies form part of the contract of employment; and whether there has been a lawful termination of employment. The latter is, as explained by the Commissioner in paragraph [16] of his reasons, quoted above, relevant to but not determinative of whether a dismissal is unfair. If a Commissioner makes an error of fact or law in their consideration of, or conclusions on any of these steps, the final exercise of the discretionary evaluative judgment will be within the locus of the principles described in *House v The King*. An appeal may therefore be allowed and in appropriate circumstances the discretion exercised afresh by the Full Bench. (See s49(5), (6), and (6a) of *the Act*).

15 Questions of Law and Fact and the Appeal

122 Grounds 1 and 2 assert error in law and fact. The distinction between an error of law and fact is elusive. (See *Vetter v Lake MacQuarie City Council* (2001) 202 CLR 439). It is not necessary, however, to decide whether each ground alleges error of law or fact as an appeal may lie to the Full Bench on either basis.

123 Nevertheless, there are a number of authorities which confirm, however, that the construction of a contract, a "*contractual document*", or other documents are questions of law. This includes the construction of *the CIES Policy*, including the email policy. (See *Jennings v Credit Corp Australia Pty Ltd* (2000) 48 NSWLR 709; *N Guthridge Ltd v The Wilfley Ore Concentrator Syndicate Ltd* (1906) 3 CLR 583, *Robe River Iron Associates v AMWSU* (1987) 67 WAIG 1097 per Kennedy J at 1101 and *Permanent Building Society (in liq) v Wheeler* (1992) 10 WAR 109 at 118, affirmed on appeal at (1992) 10 WAR 145 at 156.)

124 As stated, grounds 1 and 2 also argue that the Commissioner erred in fact in reaching certain conclusions. If the conclusions about whether the contents of the email breached the email policy, are findings of fact, they are not in any way dependent on the credibility of witnesses. An attack upon these conclusions therefore does not face the practical difficulties that an appeal against a factual finding based in part upon credibility does. (See *Skinner v Broadbent* [2006] WASCA 2 at [32]-[37] and *Grierson v International Exporters Pty Ltd* (2006) 86 WAIG 2935 at [50]ff).

125 The conclusions, drawn from facts not in dispute and the construction of the email policy, are open to full appellate review. The Full Bench may consider and review the facts for itself to ascertain whether an error has been made, in its opinion, in the drawing of the conclusion. (See by analogy *Warren v Coombes and Another* (1979) 142 CLR 531 at 551 and *Fox v Percy* (2003) 214 CLR 118 at [25]). The Full Bench is in as good a position as the Commissioner at first instance to decide whether the email breached the email policy. This is consistent with the role of the Full Bench in determining an appeal which is a "*rehearing*". (See *Fox v Percy* at [20]-[22]; but note the contents of s49(4) of *the Act*, which arguably may mean that appeals to the Full Bench are "*stricto sensu*", as described in *Fox v Percy* at [20]).

16 The Purpose of the Appeal

126 In the present appeal some care needs to be exercised in looking at precisely what is appealed against. As made clear by counsel for the appellant in opening his submissions, the appeal sought to disturb only the compensation order made by the Commission. The appellant did not of course seek to disturb the declaration of the Commission that the appellant was unfairly dismissed. Although the issue will be referred to in greater detail in considering ground 4, the Commissioner seems to have limited the appellant's compensation because of his opinion that whilst it was unfair for the respondent to have summarily dismissed the appellant, dismissal upon four weeks notice for the publication of the email, which the Commissioner found was in breach of the email policy, would not have been unfair. As discussed earlier, the finding that dismissal would not have been unfair involves a discretionary decision and an evaluative judgment and therefore attracts the principles set out in *House v The King*. These principles therefore have relevance in determining this appeal despite the fact that it is not, ultimately, an appeal against a declaration that an employee was or was not unfairly dismissed.

17 Ground 1

127 This ground attacks the finding made by the Commissioner in paragraph [29] of his reasons that "*reference to "coloured arm" could be interpreted by a recipient of the email as a racial slur*". This was one of the reasons why at paragraph [31], the Commissioner found the sending of the email by the appellant was in breach of *the CIES Policy*.

(a) Ground 1 - Particular (i)

128 The first particular to the ground is that the policy does not contain a reference to a "*racial slur*" but does contain a reference to "*ethnic slur*". The reasoning behind the particular seems to be that the Commissioner made some error in deciding that an email containing a racial slur breached the policy.

129 The policy will be examined in detail in analysing the second particular to ground 1. For present purposes it is relevant to note that the policy does refer to an "*ethnic slur*". It also refers to "*Email communications that … discredit others based on their race …*". A racial slur would discredit others based on their race and therefore infringe the email policy.

130 The respondent also submitted that an ethnic slur would include a racial slur.

131 The appellant did not forcefully press this particular at the hearing of the appeal. Indeed, the appellant's written submissions referred to the Australian Concise Oxford Dictionary, 2nd edition, as containing the definition of "*ethnic*" as "*having a common national or cultural tradition*" and "*relating to race or culture*". In the Macquarie Dictionary, online edition, the expression "*ethnic group*" is defined to mean "*a group of people, racially or historically related, having a common and distinctive culture*". It therefore appears that a racial slur could be a subset of an ethnic slur, and therefore for that reason as well, breach the email policy.

132 In our opinion particular (i) has not been established.

(b) Ground 1 - Particular (ii)

133 The appellant pressed much more forcefully particular (ii) to ground 1. The particular is that the words "*coloured arm*" in the context of the email cannot be interpreted as an "*ethnic slur*". The wording of the particular relates to the previous particular about the policy not containing a reference to a racial slur but to an ethnic slur. The finding made by the Commissioner, however, was that the email contained a racial slur and thereby breached *the CIES Policy*. By not upholding particular (i), we have determined that the Commissioner was not in error in finding that if the email contained a racial slur then it would have breached *the CIES* email policies. The respondent did not argue that the appellant was, because of the particulars as drafted, prevented from arguing that the Commissioner's conclusion that the email contained a "*racial slur*" was in error.

134 To determine this particular requires consideration of the content and meaning of the policy and the email.

135 It is appropriate to first consider the reasons for the policy and then its meaning.

(c) The Reasons for the Policy

136 In considering particular (ii) to ground 1 it is important to have regard to some of the reasons for the respondent, as an employer, having the email policy, with particular reference to the prohibition on sending emails containing an ethnic slur or discrediting others based on race. The reasons were succinctly summarised by the Commissioner in his reasons at [28]. Fleshed out in more detail, they include:-

(a) To promote and provide a fair and reasonable working environment for all employees, so as to minimise the prospect of an employee being discriminated against on the grounds of race, etc, or the development of a workplace culture in which racism, etc, was accepted.

(b) To enhance the productivity of employees. There are a couple of aspects to this. One is the assumption that employees will be more productive if they do not spend time on the internet and/or writing emails which are not related to work. Secondly, however, there does seem to be an acceptance in the policy that the sending of some personal emails can actually make an employee more productive. An example discussed with counsel during the hearing was that a person who wants to invite a large number of family members to their place over the weekend can do so by way of a single email, sent to many, rather than perhaps numerous telephone calls; the former obviously taking less time.

(c) (i) To minimise the prospect that the respondent, as an employer could become vicariously liable, under equal opportunities legislation, for discrimination engaged in by one or more employees against another or others. Having policies in the workplace which are implemented and enforced and which do not tolerate, for example, racism are very important in limiting the potential for vicarious liability.

(ii) For example, s37 of the *Equal Opportunity Act 1984* (WA) makes it unlawful for an employer to discriminate (as defined in s36 of that Act) against an employee in certain circumstances, on the grounds of race. Section 161 is about vicarious liability and provides:-

> "***161. Vicarious liability***
>
> *(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent —*
>
> *(a) an act that would, if it were done by the person, be unlawful under this Act (whether or not the act done by the employee or agent is unlawful under this Act); or*
>
> *(b) an act that is unlawful under this Act,*
>
> *this Act applies in relation to that person as if that person had also done the act.*
>
> *(2) Subsection (1) does not apply in relation to an act of a kind referred to in*

> *paragraph (a) or (b) of that subsection done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.*"

(iii) The drafting, implementation and enforcement of anti-racist policies are important for an employer to establish "*reasonable steps*".

(iv) Additionally, the *Racial Discrimination Act 1975* (Cth) creates liabilities for employers, in certain circumstances, for racial discrimination involving work (see ss9, 15, 18, 18A). Section 18A makes an employer vicariously liable for the actions of an employee or agent if they engage in unlawful conduct, under the Act, in connection with their duties unless the employer "*took all reasonable steps to prevent the employee or agent from doing the act*".

(v) In *Vella v Department of Employment, Vocational Education, Training and Industrial Relations (Qld)* [1994] HREOCA 22 Inquiry Commissioner Wolfe considered a complaint made under the *Racial Discrimination Act* involving of ss9, 15, 18 and 18A of that Act. The complainant was employed by the respondent for about three and one-third years and complained he had been discriminated against on the basis of his race or ethnic origin by his treatment at the Ithaca College of TAFE in January and February of 1991, which led to the termination of his employment. One matter which was in issue was the basis upon which a practical skills evaluation was conducted by a Mr Anderson who was also employed by the respondent. In the course of the reasons for decision, which upheld the complaint, Inquiry Commissioner Wolfe said:-

> "*But an employer may be directly responsible under the Act for tolerating a racially hostile working environment which is the product of individual acts of racially discriminatory nature, whether or not they are committed by persons under the direct control of the employer. This flows from the duty of an employer to take steps to ensure that its workplace is free of all forms of racial discrimination of which the employer is aware or should be aware, and an omission to act appropriately can constitute discriminatory conduct: Hill v. Water Resources Commission (1985) EOC 92-127; M -v- R & Anor [1988] EOC 92-229; Laher v. Barry James Mobile Cranes Pty Ltd [1994] EOC 92-596.*"

Inquiry Commissioner Wolfe, after further consideration of the facts, said the respondent "*did not take all reasonable steps to prevent Mr Anderson's conduct against [Mr Vella] which was actuated by race or ethnic origin, from continuing*".

(vi) Also applicable by analogy is the discussion about liability for sexual harassment in The Laws of Australia, Labour Law, Chapter 26.2, at paragraph [106]. Citing the essay by Ms Sue Walpole entitled "*Sex Discrimination and Related Workplace Issues*" in Naughton R (ed), Workplace Discrimination and the Law (Melbourne: Centre for Employment and Labour Relations Law, 1995) at page 9, it is said about equal opportunities legislation in Australia (footnotes omitted):-

> "*Generally, the legislation renders employers or principals liable for the harassing conduct of employees or agents unless the employer or principal can show that reasonable steps were taken to prevent the conduct. This necessitates that employers be pro-active, rather than reactive. This might involve issuing a written policy, establishing internal grievance procedures to which all employees have ready access, conducting staff training on equal opportunity issues and monitoring workplace environments.*"

(d) (i) It is appropriate that employers in Australia have and enforce policies which promote the standards set in the International Convention on the Elimination of all Forms of Racial Discrimination (signed in New York on 7 March 1966, and in force generally on 4 January 1969 and in force for Australia on 30 October 1975).

(ii) By s7 of the *Racial Discrimination Act 1975*, approval was given to the ratification by Australia of the convention. The convention is contained in a schedule to the *Racial Discrimination Act*. The signing of the convention by Australia was the primary reason why the *Racial Discrimination Act* was held by the High Court to be constitutionally valid. (See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168).

(iii) In the preamble to the convention reference is made to the Universal Declaration of Human Rights that proclaims, amongst other things, that all human beings are entitled to all rights and freedoms without distinction in particular as to race, colour or national origin. Article 2.1 of the convention provides that the signatories "*condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races …*". Article 6 of the convention requires the signatories to provide effective protection and remedies within their jurisdiction through competent national tribunals and other state institutions, against any acts of racial discrimination which violate the human rights and fundamental freedoms contrary to the convention, as well as the right to seek from such tribunals, just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

(iv) The *Racial Discrimination Act* is an attempt to provide for the protection to individuals envisaged by Article 6 of the convention. The legislation, in providing for primary and vicarious liability for employers for racist acts against employees, in some circumstances, seeks to affect employer conduct and thereby reduce racism being engaged in or tolerated by employers. Prudent employers should therefore embrace the type of policy at issue in this appeal.

(v) It is also entirely appropriate for employers in a nation state which has signed the convention to have and implement anti-racist policies. In Australia this is particularly so because of the importance of employers, with their power and influence, in affecting the actions and attitudes of the Australian public.

137 For all these reasons it was appropriate for the respondent to have and enforce a strong and broad computer and email policy which was aimed at, amongst other things, the elimination or diminution of the dissemination of racially offensive material. The policy, from its terms and the evidence of Mr Edmonds, reflects an understanding by the respondent of the destructive, demeaning, and insidious nature of racism.

138 In our opinion these more general observations form an important backdrop to a consideration of the meaning of the terms of the email policy and whether the appellant's behaviour, in sending the email, was contrary to the email policy insofar as it was about racism.

(d) The Construction of the Policy

139 In our opinion the following points are relevant to understanding the meaning and effect of *the CIES Policy* and the email policy, which is part of it:-

(a) *The CIES Policy* states that a breach of the policy will subject the user to discipline up to and including termination of employment. Accordingly the policy envisages that not every breach of it will necessarily result in the termination of employment. The implication is that the required discipline will depend upon an assessment of all relevant circumstances in an individual case. This would include the nature and quality of the breach of the policy and the employment record of the employee in question.

(b) The email policy is to be construed having regard to *the CIES Policy* as a whole.

(c) Paragraph 3 of the email policy takes some unravelling to determine its content. In our opinion greater clarity is provided to its meaning if the paragraph is set out as follows:-

> 3. You must not display or transmit:-
>
> (a) Sexually explicit images, messages or cartoons; or
>
> (b) Email communications that may:-
>
> (i) contain ethnic slurs; or
>
> (ii) contain anything that may be construed as harassment; or
>
> (iii) discredit others based on their race, national origin, sex, sexual orientation, age, disability, religious or political beliefs.

(d) In our opinion the use of the word "*may*" applies to each of 3(b)(i), (ii) and (iii).

(e) The appellant's alleged ethnic/racial breach of the email policy was of clause 3(b)(i) and/or (iii) of the paragraph set out in the above form.

(f) Sharkey P in *BHP Iron Ore Pty Ltd v CMETSWU* (2001) 81 WAIG 3031 at [59] said:-

> "*However the policy document, whilst it should be interpreted liberally as an industrial document, should be interpreted like any other document or instrument in order to ascertain its meaning (for a similar approach to awards see Norwest Beef Industry Ltd and Derby Meat Processing Co Ltd v AMIEU 64 WAIG 2124 (IAC)). It is, however, quite clearly not a document drafted by skilled lawyers. It is a document drafted by lesser skilled draftspersons. It is drafted by or on behalf of an employer to be read, understood, used and applied on a daily basis in the*

> *workplace. It is trite to observe that one can only understand what the Policy says and directs by reading it.*"

In this appeal therefore it is necessary to look at the words used in the policy. The meaning of the policy is ascertained by considering the words used in their ordinary sense, having regard to the context in which they appear, *the CIES Policy* as a whole, and with an eye to the policy being a document to be used and applied at the workplace. There was no evidence about how the policy was drafted, but such evidence is generally irrelevant to construing the meaning of a document. (See *PBS v Wheeler* at 119).

(g) The email policy provides that the "*primary purpose*" of email is to facilitate internal and external business related communication. It states that email should be used "*primarily*" for matters of concern to the respondent's business. The use of the word "*primarily*" implies that some use of email for other than these purposes is acceptable. This implication is confirmed by the express words of the next sentence which provides for "*other uses*" of email which "*should be only on a limited basis*".

(h) The email policy then specifies that email communications "*are not*" and "*must not*" be used in certain ways. The expressions "*are not*" and "*must not*" contain a prohibition in absolute terms in a way that the words "*primary*" and "*primarily*", used earlier in the policy, do not.

(i) The use of the word "*may*" in paragraphs 2 and 3 of the email policy broadens the net of the prohibited conduct. It is not just emails which are in fact (for example) disruptive or offensive which are prohibited but those which "*may*" have these effects. It is noted that the word "*may*" is not present in paragraph 4 of the email policy, with respect to, amongst other things, "*political causes*". This is relevant to appeal ground 2, as is set out later.

(j) There was discussion during the hearing of the appeal as to the standard which should be applied to the use of the word "*may*" in paragraphs 2 and 3 of the email policy. Both counsel agreed that the standard "*to a reasonable person*" should be applied; although in assessing the characteristics of the reasonable person, regard should be had to the reasonable differences in sensitivities between some individuals or cultural, racial or ethnic groups. The appellant's argument with respect to ground 1(ii), was in effect that no reasonable person could form the view that the reference to the "*coloured arm*" in the email breached the email policy.

140 The policy, for understandable reasons including those set out earlier, potentially covers a broad range or spectrum of conduct. This spectrum would include both deliberately drafted and extreme racist material exhorting others to engage in racial vilification and a comment in an email which was not particularly offensive. An example might be a statement that "*I think Australia will beat Holland in the cricket world cup because the Dutch are not very good at cricket*". Most would regard this comment as fairly innocuous yet it does offend the policy because it discredits others based on their national origin.

141 Given the policy covers a broad spectrum of conduct, it is necessary for the respondent, as an employer, to consider the seriousness of a breach of the policy and the reasons and circumstances for and surrounding the breach of the policy, in determining the fair and appropriate disciplinary action for any breach. The same applies to the Commission in determining whether any dismissal for breach of the policy was unfair.

142 These lengthy observations about the purpose, reasons for and construction of the policy now facilitate a better consideration of particular (ii) to ground 1. To reiterate, this particular asserted that the "*words "coloured arm" in the context of the email cannot be interpreted as an ethnic slur*". As alluded to earlier it was accepted in effect by the respondent's counsel at the hearing that the reference to "*ethnic slur*" included the finding by the Commissioner that it was a "*racial slur*".

(e) Ground 1 (ii) - The Submissions of the Parties

143 The appellant submitted in summary that the phrase "*coloured arm*" cannot be interpreted as an ethnic or racial slur, as it is purely descriptive and in its context simply describes an observation of something seen by the appellant on the evening of 2 March 2006, and a reason he took certain action. It was submitted the phrase "*coloured arm*" was not a descriptor of a race or ethnic grouping but could equally denote a "*suntanned*" or "*albino*" arm. It was submitted that to say all people of a particular ethnic background are thieves, could be an ethnic slur or "*all people with black skin are thieves*" could be a racial slur. By contrast it was submitted that to say "*a coloured arm, that was not meant to be there reached out and stole my bag*" is no more than a description of an event in which a coloured arm was a part. It was submitted that no reasonable person could conclude the phrase in its context contained a racial or ethnic slur.

144 The respondent submitted the email had "*layers of meaning*" (T41) and it was open to the Commissioner, and he was correct to find, that the words "*coloured arm*" could be interpreted by a recipient of the email as a racial slur. It was submitted the words "*coloured arm*" refers to black skin colour. It was submitted this was a characteristic associated with race. We accept this submission and not the appellant's counsel's attempt to say it could have meant "*suntanned*" or "*albino*".

145 The respondent submitted that when skin colour is used as a designator, the context must be considered to determine if the reference is derogatory in nature. It was submitted that some of the other expressions and words used in the email in addition to the phrase "*coloured arm*" subtly established the potentially racist nature of the words used. Reference was made in particular to "*the very nice neighbourhood of East Fremantle*" and that the arm "*did not belong in the*

house". It was submitted that there was in effect an implication that a "*coloured person*" "*did not belong*" in the "*nice neighbourhood of East Fremantle*" as a coloured person had committed the offence described.

146 The respondent's counsel also submitted that the concept of belonging and "*dark skinned people in Australia and many places – has significance. It's a question of where do dark skinned people belong; where do Aboriginal people belong*" (T42).

147 In his reply, counsel for the appellant submitted that to construe the email in this way involved a form of mental gymnastics which did not constitute a reasonable construction of it. It was submitted at this point and on other occasions by the appellant's counsel that to so construe the email involved unreasonableness and "*extreme political correctness*".

148 We are not convinced that the use of a label like "*political correctness*" is helpful to determine the present appeal. The expression is defined in the Macquarie Dictionary, online edition, to mean "*conformity to current beliefs about correctness in language and behaviour, especially with regard to sexism, racism and ageism etc*". In our opinion it is an expression which has shades of meaning when used, with the context of its use shaping the meaning. In its more extreme forms, "*political correctness*" can be used as a label to denigrate those who, for example, support an elimination of racist language. We do not find the label helpful in deciding whether the reasonable reader might think the email discredited others by race.

(f) Analysis of Ground 1 - Particular (ii)

149 We have tried to focus our attention upon how a hypothetical reasonable person would act upon receipt of the email. Firstly we think it must be taken that a reasonable reader would look at the words used in context. To say this, however, is not to ignore that some words or expressions have the character that their mere use might breach the email policy.

150 In this email, that directs attention to the use of the word "*coloured*" when referring to a person's arm. The respondent's counsel submitted and we accept that "*coloured*" is synonymous with "*black skinned*" (T41). In our opinion, in contemporary Australia, and having regard to the sensitivities of the individual and racial, ethnic or cultural sensitivities, simply using the word "*coloured*" is not something which might contain an ethnic slur or discredit others based on race. It is, as submitted by the appellant, simply a descriptive word. In this regard we note that the word "*coloured*" as it appears in the Macquarie Dictionary, online edition, relevantly means "*wholly or partly of non-white descent, as a person native to Africa, India, the Pacific Islands, etc*". There is no part of the definition which indicates the word itself is derogatory. The same might be said of calling someone "*black*", "*Asian*" or "*Aboriginal*". These words, on their own, do not contain any ethnic or racial slur.

151 This is because, to use a description which designates, directly or indirectly, a race or ethnic group does not necessarily involve any slur upon, or discrediting of, that race or ethnic group.

152 Furthermore, in the email, the description of the arm as being "*coloured*", as opposed to the person, supports the view that the word in context is simply being used in a descriptive non-discriminatory way. It is the "*coloured arm*" which the email said did not belong in the house, not significantly a "*coloured person*".

153 We also are of the view that a reasonable reader would not allow non-offensive descriptive words to leap from the email and form a "*headline*" in their mind of a racist connotation.

154 It is relevant to look at the other words used in the email to describe the person who perpetrated the offence, to understand the context of the use of the word "*coloured*".

155 The email makes no other reference to the colour of the person. The words used to describe the offender in the email after the reference to their "*coloured arm*" are "*the intruder*", "*he*", "*him*", "*this guy*", and "*the guy*". This highlights the lack of emphasis upon the colour of the person, other than to describe an arm which "*did not belong in the house*".

156 We accept the respondent's submission that references to the nice neighbourhood of East Fremantle and the arm not belonging in the house must also be taken into account. But, by the same token, it is inappropriate to simply highlight these aspects of the email and divorce them from other words used, or the purpose of the email as a whole, drawn from the words used in it.

157 As to the issue raised by the respondent's counsel, referred to earlier of, "*where do Aboriginal people belong*", we have had careful regard to the submission. We understand that "*belonging*" is an important issue to Aboriginal people in Australia who have a "*spiritual*" connection to their traditional lands (*WA v Ward* (2002) 213 CLR 1 at [580]). Also the acts of dispossession of Aboriginal people from their traditional lands have been judicially described as "*the darkest aspect of the history of this nation*" (*Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Deane and Gaudron JJ at 109). We are therefore alive to the type of issue raised by the respondent's counsel and the need for sensitivity when issues of belonging and indigenous Australians are involved. But the question is not whether these sensitivities exist, but whether there was a breach of the email policy. This would occur where the email had the potential, to a reasonable indigenous reader, to be discrediting of their race.

158 With this in mind it is clear to us that the purpose of the email is to, as it states, raise awareness. It describes the setting and some of the circumstances of what happened. The fact that this occurred in what is described as the very nice neighbourhood of East Fremantle provides part of the setting for assessing the gravity of what the author of the email had undergone. The reference in the email to the "*coloured arm*" is part of the process of reasoning which the author

engaged in, in deciding an offence was being committed. That process seems to be hearing the dog going "*berserk*" heading for the front door, seeing "*and (sic) arm doing a snatch and grab from the hallway table at the front of the house*", and then because the arm was "*coloured*" it "*did not belong in the house*". In our opinion it cannot be reasonably inferred that the word "*coloured*" was used in other than a descriptive and non-derogatory way. In our opinion, in the context, and with respect to others who take a different view, it is not reasonably open to infer that the author was saying that a person with a "*coloured arm*" would not generally, as opposed to on this specific occasion, belong in a house in the very nice neighbourhood of East Fremantle. It was just that this particular "*coloured arm*" did not on that evening belong in the house in the very nice neighbourhood; and that the very nice neighbourhood provided the setting for the shock of the offence perpetrated on the author of the email and his friends.

159 We have also had regard to the balance of the email including the references to "*violence*", "*terrorism*", not turning a "*blind eye*" and the "*Australian spirit*". In our opinion none of these references, individually or together, convert the reference to the "*coloured arm*" into something which might reasonably be construed to be an ethnic slur or discredit someone based on their race.

160 As stated, the context of the email, relevant to an understanding of the potential effect of the use of the expression "*coloured arm*", includes what the author says in the email, as being "*the point of it*". This is to "*raise awareness*" and to "*think a little*". The two dot points of precautions which the author of the email suggests in paragraph 6, are what might be regarded as sensible precautions which the police could provide to the public.

161 For all of these reasons in our opinion, and with respect, a reasonable reader of the email could not construe the expression "*coloured arm*", in the context of the email as a whole, as containing an ethnic slur or discrediting others based on their race or national origin.

162 In our opinion therefore the Commissioner, with great respect, erred in concluding that the reference to "*coloured arm*" breached the respondent's *CIES Policy*. In paragraph [29] of the Commissioner's reasons, he said that the reference to "*coloured arm*" could be interpreted by a recipient of the email as a racial slur. The way in which the Commissioner has phrased this question, indicates to us, with respect, that he has not erred in the question posed. It was in our opinion the answer to the question which was, with respect, in error.

163 As to this, what the Commissioner primarily said in his reasons to justify this conclusion was that the "*reference was very specific*". This does not, with respect, take into account all of the matters which in our opinion were relevant, as set out above. The Commissioner also said in paragraph [30] that there was "*clear potential for a recipient to misinterpret its content*". The Commissioner also had regard to the respondent's employees coming from a diverse range of cultural backgrounds. The issue of potential misinterpretation and a range of cultural backgrounds were, in our respectful submission, relevant matters for the Commissioner to take into account in considering paragraphs 2 and 3 of the email policy.

164 In our opinion, however, a reasonable reader of the email, given the content and context of the email as a whole, could not misinterpret it so as to consider that it contained "*a racial slur*" as found by the Commissioner.

165 The opinion of Mr Edmonds, on the meaning and effect of the email, was not relevant to a determination of what a reasonable reader might think. This is not of course to say Mr Edmonds was an unreasonable reader. It is simply that what is required is an objective determination by the Commission. In the same way it would have been irrelevant to take into account the appellant's opinion, or those of the other 80 employees of the respondent, or people on the street, on this issue. Also, Mr Edmonds was, because of his position, particularly sensitive to the possibility of a breach of the email policy.

166 We accept, as the Commissioner seems to have approached the matter, that it is also necessary to look at the impression created by the email as a whole, rather than simply engage in the type of textual and contextual analysis set out above. Engaging in this exercise does not, however, change our opinion that the Commissioner erred in finding the reference to the "*coloured arm*" could be interpreted as a "*racial slur*".

167 For these reasons, in our opinion ground 1(ii) has been established.

168 The consequences of this for the orders made by the Commissioner will be considered after an analysis of the other grounds of appeal.

18 Ground 2

(a) The Ground

169 This ground has been set out in full earlier. It appeals against the finding by the Commissioner that paragraph 4 of the email policy was also breached because of the way in which the email concluded. To repeat, the Commissioner's finding in paragraph [29] was that "*the penultimate and final paragraphs in my opinion, in accordance with the plain language of the email, read in the context of the email as a whole, clearly seek to solicit support by other staff of the respondent for people to in effect, "stand up and defend themselves". In my opinion, read in context, these two paragraphs do contain overtones of soliciting support for a political cause, not in a party political sense, but may be construed more generally in terms of citizen's rights and the requirement for vigilance to defend those rights, in particular in one's home*".

170 This directs attention to the words used in and meaning of paragraph 4 of the email policy.

(b) Construction of Paragraph 4 of the Email Policy

171 We make the following observations about paragraph 4 of the email policy:-

(a) Paragraph 4 contains an independent category of prohibited content for emails in addition to paragraphs 1, 2 or 3. The conduct is prohibited because of the use of the word "*cannot*".

(b) By way of distinction to paragraphs 2 and 3 the word "*may*" is not used in this paragraph. The paragraph does not therefore direct attention to what communications "*may contain*" or how they "*may be construed*". In *Casinos Austria International (Christmas Island) Pty Ltd & Ors v Christmas Island Resort Pty Ltd & Anor* [1998] WASC 387, Owen J said:-

> "*The text books on the elements of drafting (for example, Robinson, Drafting, 1980 at p71) express the draftperson's golden rule in the phrase "never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning.""*"

This observation assists the construction that paragraph 4 is narrower in scope than paragraphs 2 and 3.

(c) The paragraph says the "*Email system cannot be used to solicit or convert others …*". The words "*be used to solicit or convert*" in our opinion refer to the purpose of the use of the email system. The words "*be used to*" in the context convey a purpose, similarly to expressions like "*to cause*". (See *Edwards v The Queen* (1992) 173 CLR 653 at 657 per Mason CJ, Brennan, Gaudron and McHugh JJ; *ASIC v Doyle* [2001] WASC 187 per Roberts-Smith J at [194], [205]). This construction is supported by the meaning of the words "*solicit or convert*".

(d) The word "*solicit*" is relevantly defined in the Macquarie Dictionary, online edition, to mean "*to seek to influence or incite to action, especially unlawful or wrong action*", or to "*make petition or request, as for something desired*".

(e) The word "*convert*" is defined in the Macquarie Dictionary, online edition, to relevantly mean "*to cause to adopt a different religion, party, opinion, etc, especially one regarded as better*", or "*to change into something of different form or properties*", or "*to change in character; cause to turn from an evil life to a righteous one*".

(f) The prohibition therefore directs attention to the purpose in the use of the email system not its actual or potential causative effect. (See by analogy *Edwards* at page 657).

(g) The categories of the things which paragraph 4 prohibits employees from using the email system to "*solicit or convert others*" for are:-

(i) Commercial ventures.

(ii) Religious or political causes.

(iii) Outside organisations; or

(iv) Other non-job related matters.

(h) It is evident again that this covers a broad spectrum of conduct. As discussed with counsel during the hearing, it could possibly include somebody advising the other members of the workforce by email that they had a car for sale; or a statement in an email to work colleagues that the Carlton Football Club was the best in Australia, and suggesting people should become members of it. At the other extremes it could include something as dangerous or offensive as a suggested plan for the assassination of a political figure.

(i) Relevant to the appeal is whether the email system was used by the sending of the email to solicit or covert others for "*political causes*". This requires the giving of meaning to the expression "*political cause*", or a "*political cause*" and whether what the email expressed constituted an attempt at solicitation for or conversion to it.

(j) A "*cause*" is relevantly defined in the Macquarie Dictionary, online edition, to be "*that side of a question which a person or party supports; the aim, purpose, etc of a group*".

(k) The word "*political*" is descriptive of the type of "*cause*" for which the person must seek to solicit or convert another, to breach the policy. Relevantly, "*political*" means according to the Macquarie Dictionary, online edition, "*of or relating to the governing of a nation, state, municipality*", "*exercising or seeking power in the governmental or public affairs of a nation: a political party*", "*relating to or connected with a political party or its principles, aims, activities etc: a political campaign*", "*affecting or involving the state of government*", "*engaged in or connected with civil administration*", "*having a definite policy or system of government*", and "*of or relating to citizens: political rights*".

(l) Soliciting for or seeking conversion to a political cause means in our opinion, in the context, to seek support for an identifiable political entity, viewpoint or right. It is broader than, although includes, seeking support for a political party or candidate. It includes seeking support for a political system; for example someone saying Australians should support democracy in another country. It includes seeking support for political rights, for example, "*all people of age 16 should be entitled to vote*". The dictionary definition of "*political*" also includes

"*of or relating to citizens: political rights*". This definition focuses on rights, not just the fact of being a citizen. Accordingly, an email would not infringe the email policy simply because it refers to a citizen or citizens, collectively or individually. For example an email soliciting support for a work "*sundowner*" would be about the employee's workmates, who are citizens, but not a "*political cause*". It is only if the email solicits support for something about a citizen in a political context, such as their political opinions, rights or system, that paragraph 4 of the email policy is infringed.

(c) Ground 2 - The Submissions of the Parties

172 The appellant submitted no reasonable person could construe the final two paragraphs of the email to be seeking to solicit support for a political cause. It was also pointed out that the finding of the Commissioner was not that there had been soliciting for a political cause but that the paragraphs "*do contain overtones of soliciting support*". Although the appellant did not make this point, the finding by the Commissioner reflected the evidence of Mr Edmonds (at T17) where he said that he thought there were "*clear political overtones in the closing paragraphs*". This evidence had been referred to earlier by the Commissioner in his reasons at paragraph [9]. We do not think, however, that the Commissioner's finding at paragraph [29] reflects the error that he accepted Mr Edmonds' evidence that the email policy had been breached rather than determining this issue for himself from the words used in the email policy and email.

173 The appellant referred to the Australian Concise Oxford Dictionary, 2nd edition, definition of "*overtone*" as meaning amongst other things "*a subtle or elusive quality or implication*".

174 The appellant then referred to the Macquarie Dictionary, 2nd edition, definitions of "*political*" and "*cause*" which are similar to those we have cited earlier.

175 The appellant submitted that there is no group or side of a question for which support was being advocated in the email. The appellant referred to the suggestions contained in the dot points in the email. In his written submissions the appellant said that "*a man has been involved in a violent robbery which he felt warranted relating to workmates with some advice as to how those workmates might avoid the situation themselves. It is a message that one might expect to get from the police about home security and neighbourhood watch, a message that is about as apolitical as one could get*".

176 The appellant then referred again to the Commissioner's finding going no further than that there were "*overtones*" of soliciting support for a political cause and that no reasonable person could construe the advice given as a political cause, nor the suggestions to do something as soliciting or converting.

177 The respondent's written submissions referred to the following expressions in the email as being relevant to this ground:-

(a) "*… it's time we stopped turning a blind eye and start making a stand*".

(b) "*The world is crumbling under violence and terrorism*".

(c) "*We should not take our way of life for granted*".

(d) "*Do your part to keep the Australian spirit and way of life alive*".

178 At the hearing the respondent also pointed to the reference to "*terrorism*" in the email.

179 The respondent submitted it was open to the Commissioner to find that the comments contained "*overtones of soliciting support for a political cause*". The respondent pointed out that although this was not a party political cause it was a more "*general political agenda in terms of citizen's rights*".

180 The respondent submitted that an unstated premise to the appellant's contention was that the reference to "*political causes*" in the policy should be construed in a narrow party political sense. We do not accept this criticism of the appellant's position. It is clear to us that the appellant was not endeavouring to construe "*political causes*" so narrowly but nevertheless submitted that there was no soliciting for a political cause in this instance.

181 When questioned about this ground, the respondent's counsel had in our view some difficulty in clearly articulating what political cause the email was said to be soliciting support for. At one point counsel referred to "*citizen's rights*" and "*citizen vigilance*" (T47). It was also conceded by counsel that if the email attempted to persuade a person to a "*point of view*" it was "*very unclear what it was*" (T49). He submitted, however, that it was "*to take a stand*" "*and maintain the Australian way of life and the Australian spirit*" (T49). The respondent's counsel then added "*whatever that is supposed to mean*" (T49).

(d) Analysis of Ground 2

182 In our opinion in determining this ground it is necessary to focus with some precision on what the Commissioner said in paragraphs [29]-[31] of his reasons. He firstly said the email sought to "*solicit support by other staff of the respondent for people to in effect "stand up and defend themselves"*". The Commissioner then said the paragraphs "*contain overtones of soliciting support for a political cause … in terms of citizen's rights and the requirement for vigilance to defend those rights, in particular in one's home*".

183 In paragraph [30] the Commissioner referred to these matters involving inappropriate content for a workplace communication and clear potential for misinterpretation of content. In paragraph [31] the finding of breach of the email

policy was made. We make the following observations about these paragraphs of the reasons, in the context of paragraph 4 of the email policy:-

(a) It is not clear in paragraph [29] whether the Commissioner is making findings about two political causes or one. The Commissioner refers to seeking support from people to "*stand up and defend themselves*", and also "*citizen's rights and the requirement for vigilance to defend those rights*". On balance we think there was only one political cause being referred to, which was differently expressed. This is in part because the Commissioner was referring to the same two paragraphs of the email and said he considered them in accordance with the email's "*plain language*" and context as a whole.

(b) If this is so the finding is, as the appellant submitted, one of containing "*overtones of soliciting support for a political cause*". The word "*overtones*" adds a gloss to the policy. The dictionary definition cited by the appellant has been set out above. The relevant Macquarie Dictionary, online edition, definition is "*additional meaning or implication*". We accept that an email could by subtle implication breach the policy by being a use of the email system to solicit or convert others for political causes, although this may effect the seriousness of the breach of the policy.

(c) The reference in paragraph [30] to "*[t]hese matters*" must be taken to refer to both the "*racial slur*" and the "*overtones of soliciting support for a political cause*" findings. Paragraph [30] refers to the "*potential for a recipient to misinterpret its content*". Paragraph [31] says that "*therefore*" the email sent was in breach of *the CIES Policy*. As set out earlier the prospect of reasonable misinterpretation was relevant to paragraphs 2 and 3 of the email policy because of the use of the word "*may*". But this was not relevant to a breach of paragraph 4, which was as stated earlier drafted in more definite terms and focuses on the purpose of the use of the email system. Understood in this way, a person who sent an email not for the purpose of soliciting or converting others for a political cause would not breach the policy if a recipient misinterpreted the email and thought it did. Accordingly, the misinterpretation point of the Commissioner, insofar as it referred to paragraph 4 of the email, was, with respect, in error.

184 The ground directs its attention more generally though to whether the last two paragraphs of the email, in context, could be properly construed as soliciting or converting others for a political cause.

185 The email may be divided into these parts. The first paragraph is introductory. The second, third and fourth paragraphs of the email describe the event which happened to the appellant. These paragraphs include the reference to the "*coloured arm*". The fifth paragraph of the email (excluding the dot points) attempts to set out the purpose in sending the email. To some extent this paragraph refers back to the first in which it is said it was an email that the author would like everyone to "*seriously think about*". The sixth paragraph (constituted by the two dot points) contains practical suggestions of the actions which the appellant says people should take. The seventh and final paragraph refers to these practical suggestions and provides reasons why the appellant considers that people should not be "*doing nothing*".

186 In our opinion the content of the two dot points comprising paragraph 6 is the key to discerning the purpose of the sending of the email.

187 As the appellant has submitted the two suggestions constituted by the dot points are apolitical, practical and sensible suggestions which could be made by a community police officer. The nature of these suggestions is important in considering the purpose, meaning and effect of the somewhat vaguer expressions and references used in paragraphs 5 and 7 of the email.

188 The email does refer to things getting worse "*out there*", and urges the reader to stop turning a "*blind eye*" and "*start making a stand against it*". There is then a reference to the "*world crumbling under violence and terrorism*" and people not taking a way of life for granted.

189 In isolation the reference to "*terrorism*" has the potential to be part of an email soliciting support for a political cause. The use of the word cannot, however, be considered in isolation.

190 The reference to not turning a "*blind eye*" is first contained in paragraph 5. It is referred to again in paragraph 7 following the two dot points. The meaning of not turning a "*blind eye*" and the purpose of using the expression take shape from the content of the dot points and also the juxtaposition of "*blind eye*" to the dot points.

191 Not turning a "*blind eye*", in the context of the email as a whole, in our opinion must mean to take the actions set out in the dot points. The reference to the keeping of the "*Australian spirit*" and "*way of life*" alive also gain meaning by the content of the two dot points. Also the second part of the sentence in which the "*Australian spirit*" is referred to states "*and most of all, but most of all, be sensible about the actions you take*". There is then a reference to doing nothing not being an option.

192 The reference to "*doing nothing*" takes its flavour from the earlier references to not turning a "*blind eye*", which in turn must be understood in the context of the two actions which the email advocates in the dot points.

193 Understood in this sense, in our opinion the references to "*terrorism*" and keeping "*the Australian spirit and way of life alive*" do not constitute a use of the email system to "*solicit or convert others for … political causes*". The use of the email system by sending the email was to highlight what happened to the appellant and advocate what a person might do to avoid this happening to them.

194 In arriving at this view we have looked very carefully at what it is the email says and the context in which the email contains the words and phrases it does.

195 We have also had regard to the difficulty which the respondent's counsel had in articulating the "*political cause*" which the email could be said to solicit support for. We do not, with respect, agree with the Commissioner's view that it was "*citizen's rights and the requirement for vigilance to defend those rights*". Sending an email with the purpose of advocating the taking of simple steps to avoid a break in cannot in our respectful opinion be properly characterised as the political cause identified by the Commissioner.

196 In arriving at this conclusion we have also considered a point not directly raised by the respondent. This is the "*notorious fact*" of the rise in Australian political discussions of an/the Australian "*spirit*", "*values*" and "*way of life*". They may be said to be part of the growth of a version of nationalism which seeks to exclude from the Australian idiom those who do not possess these amorphous qualities. The political discussions in which the references are made are often about immigration and especially refugee policies, and legislation which governments have said are needed to combat the threat of terrorism.

197 If the purpose of sending the email was to attract support for this arm of nationalism or a nationalistic spirit, it would be in breach of paragraph 4 of the email policy. The respondent did not, however, place reliance on this. In any event, read as a whole, the use of the email system constituted by the sending of the email does not solicit or convert others to this political cause. It is, we repeat, to relate what happened to the appellant and advocate simple practical preventative measures.

198 As stated, in our respectful opinion, the Commissioner erred in finding that paragraph 4 of the email policy was breached.

199 This ground has therefore been established. As with ground 1(ii), the ramifications of reaching this conclusion are later considered.

19 Ground 3

200 We have already made reference to this ground in the context of the appellant's counsel's statement that if the amendment to ground 1 was allowed, ground 3 did not need to proceed. The ground does not therefore need to be separately discussed. As pointed out in the respondent's written submissions, the ground as drafted contained no particulars, and for that reason was liable to be struck out as being contrary to the *Industrial Relations Commission Regulations 2005* referred to earlier; and see also s27(1)(a)(iv) of *the Act*.

20 Ground 4

(a) An Alternative Ground

201 This ground commences with the statement that it is an alternative ground to ground 3. As ground 3 was not proceeded with, ground 4 should be construed as being in the alternative to grounds 1 and 2. No point was taken by the respondent about the opening words of ground 4, in light of the fact that ground 3 was not being proceeded with, and in our opinion nothing more needs to be said about this.

202 The ground itself directs attention to whether the termination of the appellant's employment on notice was "*an appropriate remedy*". The particulars to the ground contain the reasons why the appellant submits this is so. The use of the word "*remedy*" is perhaps not apt in the context, but nothing turns on this.

(b) The Broader Compensation Issue

203 Some of the appellant's written submissions on this ground, however, refer to a broader issue. This is whether, having found the summary termination of employment of the appellant was unfair, the Commissioner failed to act in accordance with s23A of *the Act*, to determine what was the loss caused by the dismissal and determine the appellant's compensation on that basis. (See s23A(6) of *the Act*).

204 In this context the written submissions referred to the principles applied by Sharkey P in assessing compensation in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 at pages 8/9 and *Simons v Ismail Holdings Pty Ltd t/a Envelope Specialists* (1998) 78 WAIG 2332 at 2333/2334. The submissions did not, however, refer to the amendments to *the Act* made since those two decisions, nor, perhaps understandably, *Curtis v Ausdrill Ltd* (2006) 86 WAIG 3133, a recent decision of the Full Bench about s23A of *the Act*.

205 At the commencement of the hearing of the appeal, the respondent's counsel drew our attention to the submissions going beyond the ground of appeal. He said the respondent did not have the opportunity to properly prepare for these submissions. The respondent's counsel said he was not served with the submissions until the afternoon before the hearing of the appeal.

206 The submissions we have referred go beyond the scope of ground 4 of the appeal. Although there was an amendment to the ground, it was not an amendment which brought these submissions within the ground. We do not therefore think these submissions should be addressed. Accordingly, it is not necessary, in this appeal to consider the opinions expressed by the Full Bench in *Bogunovich* and *Ismail* about the method of assessment of compensation, given the amendments to s23A of *the Act*.

(c) The Basis of the Award of Compensation

207 The Commissioner found the summary dismissal of the appellant to be unfair, in all of the circumstances described in paragraphs [34] and [35] of the reasons.

208 In the next paragraph, the Commissioner, for reasons we will refer to later, said he considered "*that termination of the [appellant's] employment on notice would have been the appropriate outcome in this case*". Although not expressed quite in this way, the Commissioner seems to have found that a dismissal on notice would have been appropriate and therefore not unfair. In assessing the compensation to be paid to the appellant the Commissioner seems to have followed a similar approach to that which he more fully described in his reasons as a member of the Full Bench in *Bogunovich* at page 13. The Commissioner there said that all the circumstances of the case needed to be considered in assessing compensation. The Commissioner then gave an example of a finding by the Commission that a dismissal was unfair because of the manner or process leading to the dismissal rather than the substantive reasons for the dismissal itself. The decision of *Shire of Esperance v Mouritz* (1991) 71 WAIG 891 was referred to.

209 The Commissioner then said in *Bogunovich* at page 13:-

> "*In such a case, it may be open to find as a fact on the evidence, that the unfairly dismissed employee could have been fairly dismissed by the employer shortly after the actual dismissal in any event.*
>
> *In a case such as this, it would be open for the Commission to find that the unfairly dismissed employee's loss is limited to that period between the date of the employee's actual dismissal, and when he or she could have been fairly dismissed in any event. In the same context, the circumstances of the case may be such that it is open for the Commission to find, that based upon the evidence before it, it was more likely than not that but for the unfair dismissal, the employee may have left the employment of the respondent voluntarily at some future time. Alternatively, it may well be that in accordance with an unfairly dismissed employee's duty to mitigate his or her loss, that the employee obtains other employment immediately or a short time after the dismissal. In such a case, there may be no loss or indeed only minimal loss caused by the unfair dismissal, and the Commission could find accordingly.*"

210 We accept, with respect, that these observations of the Commissioner remain relevant in an assessment of compensation under the now s23A of *the Act*. (See the Full Bench decision in *Fisher & Paykel Australia Pty Ltd v Skinner* (2006) 87 WAIG 1 at paragraphs [3], [77]-[78]).

211 Due to his finding that dismissal upon notice would be appropriate, the Commissioner decided the loss "*caused by the [unfair] dismissal*", in terms of s23A(6) of *the Act*, was limited to the appellant's loss of remuneration from his former employment with the respondent for four weeks. The correctness of inserting "*[unfair]*" in the previous sentence seemed to be what was in part questioned in the appellant's broader submissions on ground 4, which we have decided are beyond the scope of the ground.

(d) *Matthews v Cool or Cosy Pty Ltd* (2004) 136 IR 156

212 There is another aspect of the way in which the Commissioner determined the applications which we draw attention to. This issue was not raised by the parties, but was raised at the hearing of the appeal by Beech CC. In the penultimate paragraph of the Commissioner's reasons he states that as the award of compensation effectively satisfies the claim under s29(1)(b)(ii) of *the Act* for denied contractual benefits, that application is dismissed. The application made under s29(1)(b)(ii), referred, as the employment condition claimed to be "*due*", to payment in lieu of notice of termination. This was valued in the application at $3010.76 for four weeks pay in lieu of notice of termination.

213 The decision of the IAC in *Matthews v Cool or Cosy Pty Ltd* (2004) 136 IR 156, confirms that, an express contractual entitlement to notice, or the implied term in an employment contract for termination upon reasonable notice, are contractual benefits for the purposes of s29(1)(b)(ii) of *the Act*. (See for example Steytler J at paragraphs [18], [22], [24], [26]; Pullin J at paragraphs [49], [50], [54] and Heenan J at paragraphs [60], [74], [75]-[77]). The IAC also said the Commission could order the payment of damages for breach of these terms. There is also a suggestion, however, at least in the reasons of Heenan J at paragraphs [77] and [78], that in a case such as the present, it is appropriate to first determine the denial of contractual benefits claim and then, having determined that claim, assess whether there has been an unfair dismissal and if so what the loss caused by that dismissal was, having regard to the already assessed damages to be awarded for the denial of contractual benefits claim. If this was endorsed by *Cool or Cosy*, the Commissioner in these applications inverted the process and determined the unfair dismissal claim first. As, however, neither party made any point about this, it is unnecessary to consider the issue any further.

(e) The Terms of Ground 4 and Reasons of the Commissioner

214 This ground argued that, in all of the circumstances, the Commissioner was in error in finding, in effect, that a dismissal upon four weeks notice would not have been unfair. At the heart of this submission is the contention that

dismissal upon notice was a disproportionate sanction for the appellant, even if there had been a breach of the email policy.

215 To reiterate, as the appellant had contended in grounds 1 and 2 that there was no breach of the email policy as found by the Commissioner, ground 4 is properly to be regarded as an alternative to grounds 1 and 2. As we have found in favour of the appellant on grounds 1 and 2, it is strictly not necessary to decide ground 4. In our opinion, however, it is appropriate in this case to do so. We do so therefore on the assumption that there was a breach of paragraphs 3 and 4 of the email policy by the use of the expression "*coloured arm*" and by the solicitation for a "*political cause*", in the way described by the Commissioner.

216 It is necessary to examine what the Commissioner took into account in assessing whether dismissal on four weeks notice would have been appropriate. This process is assisted because the Commissioner, quite appropriately, set out the reasons which he said supported this conclusion. They are contained in paragraph [36] of the Commissioner's reasons. This has been quoted in full earlier. The paragraph sets out a number of factors which the Commissioner said he had "*regard to*". After describing these factors the Commissioner says that termination of employment on notice "*would have been the appropriate outcome*". In list form the factors were:-

(a) The appellant was aware of the relevant policies.

(b) The appellant consciously prepared and sent the email.

(c) The email clearly contained inappropriate material.

(d) The appellant had been previously counselled as to a breach of the respondent's computing policies regarding internet usage.

(e) The respondent must enforce such policies as a component of their integrity.

217 Each of factors (a), (b), (d) and (e) were relevant. The appellant challenges, however, in ground 4, particular (b) the Commissioner's assessment of the seriousness of the breach, which is to some extent referred to in factor (c) above. Ground 4 as a whole challenges the conclusion that dismissal on notice was appropriate if all relevant factors were taken into account.

(f) Ground 4, Particular (a)

218 Particular (a) to ground 4 contends the Commissioner failed to consider whether dismissal on notice was harsh, oppressive or unfair. Whilst the Commissioner did not expressly refer to the words "*harsh, oppressive or unfair*", in paragraph [36], the reference to an "*appropriate outcome*" in our opinion sufficiently satisfies the requirement to consider whether the dismissal was harsh, oppressive or unfair in the context of the reasons as a whole, including paragraphs [16] and [17] which we have quoted earlier.

219 The respondent also emphasised the experience of the Commissioner in contending that this particular was not established. In our opinion this submission does not carry a lot of weight. This is not to dispute that the Commissioner is very experienced. However, the experience of any Commissioner or judicial officer cannot be used to cloak their decision making with some kind of immunity. In a non-jury trial at least, it is the reasons expressed by a Commissioner or judicial officer which demonstrate whether they have erred, not their experience.

(g) Ground 4, Particular (b)

220 The particular asserts the breach of the email policy was minor or trivial. This directs attention to the seriousness of the breach. It was accepted by counsel for the respondent, when raised with him, that particular (b), as argued by the appellant, took into account all of the circumstances, including those personal to the appellant (T59). These will be referred to later.

221 In our opinion it was necessary for the Commissioner to assess the seriousness of the breach of the email policy, as part of an analysis of the nature and quality of the misconduct of the appellant. This in turn was relevant to a determination of whether the dismissal for misconduct was fair. This is consistent with the approach of Smith C in *Wilmott v Bank of Western Australia* (2001) 81 WAIG 1684, which also involved breach of an email policy. Not dissimilarly in *Garbutt v Stothers* (1996) IRCA 960416, in the context of the then provisions of the then *Industrial Relations Act 1988* (Cth), Ritter AP said:-

> "*Where there is a termination based on misconduct, for there to be a valid reason for termination, the misconduct must have a quality sufficiently serious to warrant the termination of employment. For example, it would be difficult to say that a secretary at a large office who stole one paperclip could be categorised by her employer as dishonest and a thief, and therefore there was a valid reason for termination of employment. In my opinion, there must be a qualitative aspect of the misconduct sufficient to warrant the sanction of termination.*"

222 Similar considerations arise in determining whether a dismissal has been unfair under *the Act*. Relevant to the issue are also the personal circumstances of the employee and the reasons why and circumstances in which the misconduct occurred. For example, if the hypothetical secretary Ritter AP referred to in *Garbutt* had 30 years of exemplary service prior to the "*theft*" of the paperclip, it would greatly support any contention that she was unfairly dismissed.

223 To fail to take into account the seriousness of the breach of policy would be to fail to have regard to a relevant consideration and therefore commit an error of the type explained in *House v The King*. Additionally, if the Commissioner reached a wrong conclusion in deciding how serious the misconduct was, or failed to take into account some relevant evidence in deciding this issue, error would also be present and the appeal could be allowed.

224 In paragraph [36] of his reasons, the Commissioner considered the seriousness of the breach to some extent. This is in factor (c) which we have set out earlier. There is reference to the email clearly containing "*inappropriate material*". The Commissioner did not, however, as in our respectful opinion he ought to have done, assess more fully where the appellant's conduct fitted within the spectrum covered by the email policy, so as to decide dismissal upon notice would have been fair.

225 In this regard it is important to recall that *the CIES Policy* itself provides that violation of the policy will subject the user to discipline, up to and including termination of employment. The contract has the same effect in relation to breach of policies. (See clause 19(d) quoted above).

226 In assessing the seriousness of the breach of the policy, as opposed to whether the policy was breached, it is relevant to have regard to the fact that the appellant did not intend the email to contain any racial slur. The Commissioner made this finding at paragraph [28] and it was not challenged in any cross-appeal, notice of contention or otherwise. The Commissioner then went on to say, in the same paragraph, that he also accepted the appellant was remorseful and apologetic for any difficulties caused by his conduct. The Commissioner then said, in effect, that intention was not an element to be established, when considering whether the policy had been breached. It is though, as stated, relevant to an assessment of the seriousness of the breach of the policy.

227 For example, there is a difference between an employee who, in a deliberate, defiant breach of the email policy sends an email which sets out to and does contain a serious racial slur. As against this is the present case where the racial slur, if there was any, was more indirect and an unintended error of judgment. Coupled with the understanding and remorse exhibited by the appellant, there is clearly a much greater prospect that the email policy would not be contravened in the same way again. This is also relevant in determining whether any dismissal on notice would have been fair.

228 The lack of evidence of anyone reporting being offended by the email is also relevant to assessing the seriousness of the breach of the policy. The evidence of Mr Edmonds' reaction to the email was discussed by the Commissioner in paragraph [24] of his reasons, as referred to earlier, and there is no appeal or notice of contention against this finding.

229 Whilst, quite properly, the respondent should be very concerned about the development or acceptance of a racist culture at the workplace, this does not mean, as the policy reflects, that in every case of breach of the policy it is necessary that dismissal should occur. The nature and circumstances of each case should be taken into account. Further, the respondent could clearly convey to all employees, with respect to an email like the one sent in this case, the unacceptability of it containing something which could be construed as a racist slur and record the discipline meted out to the employee, short of dismissal. This could include an official warning that any like conduct or further breach of the policy would, if serious, lead to dismissal. This would reflect the respondent's disapproval of the sending of the email. The email in question, if it breached the policy, could have been used in this way to further educate the workforce.

230 As stated and to reiterate, we are satisfied that in paragraph [36] of the Commissioner's reasons, he did, at least to some extent, take into account and assess the seriousness of the breach of the policy. We also consider that the Full Bench can decide on appeal whether the assessment made by a Commissioner of the seriousness of a breach of a policy was in error.

231 In the present case, in our opinion if the sending of the email did breach paragraphs 3 and 4 of the email policy then it was not a particularly serious breach. As stated this is partly because if there was a racial slur within the email and if it did solicit support for a political cause, these aspects of the email were not intended, were somewhat indirect and errors of judgment.

232 The racial slur, if any, was not particularly serious. The political cause, if any, for which support was solicited was not something extraneous to ordinary discussion of civic affairs in Australia. Nothing radical or dangerous was suggested.

233 Additionally, in assessing the conduct of the appellant as an employee who had breached the email policy, it was relevant for the Commission to consider all of the circumstances within which the breaches took place. Importantly in this case that included:-

(a) The terrifying incident which the appellant had undergone the night before the sending of the email.

(b) What the appellant said about how he felt when at work that day.

(c) The fatigue from lack of sleep because of the incident. The appellant could not be "*blamed*" for not having sufficient sleep before work, when the reasons for this were the incident that occurred, co-operating with the police afterwards, returning home and then telephoning his partner before going to bed.

(d) The appellant's motive in sending the email to raise awareness and prevent others suffering a similar incident.

(e) The remorse which the appellant had for the sending of the email if it breached the respondent's policy.

(f) This remorse was acted upon by the sending of the apology on 9 March 2006 directed to the management and all employees of the respondent.

(g) The appellant thought himself not to be in a fit state to attend work on the day when he sent the email, but did so in part because his manager and another employee in his section were going to be absent from work. He thought it appropriate in those circumstances to attend for work. This exhibited a degree of commitment to his employer and his employment which was relevant in assessing whether the appellant's dismissal was unfair.

234 Particular (b) to this ground takes into account the seven factors that we have listed above and argues that the breach of the email policy was minor or trivial. None of these seven factors were listed as being taken into account by the Commissioner in paragraph [36] of his reasons. This is relevant in deciding whether the Commissioner erred in his characterisation of the seriousness of the breach. In paragraph [34] but not paragraph [36] the Commissioner specifically had regard to the trauma of the incident. The failure to mention this in paragraph [36] suggests it might not have been taken into account in reaching the conclusion there expressed. As the other six factors listed were not mentioned by the Commissioner in paragraph [36], it can even more confidently be said that they were not taken into account.

235 The respondent's counsel submitted it was an unfair construction of the reasons to infer that the Commissioner had forgotten what he had found, about trauma, two paragraphs earlier (T38).

236 In our opinion, however, the question is not whether the Commissioner had "*forgotten*" the finding that the appellant had suffered trauma, but whether it was taken into account in reaching the conclusion he did in paragraph [36].

237 In our opinion the seven factors (in all) that we have listed were highly pertinent to an assessment of the seriousness of the policy breach and, in turn, whether a dismissal on notice would have been fair.

238 The non-mentioning of trauma and the other six factors suggests either that the Commissioner did not take them into account or that the Commissioner did not give them much weight in determining either the seriousness of the breach or whether the dismissal on notice was appropriate.

239 An appeal against a discretionary decision may succeed where there has been a failure to give "*proper weight*" to "*particular matters*". (See *Gronow v Gronow* (1979) 144 CLR 513 per Stephen J at 519). In our opinion the conclusion reached by the Commissioner, that dismissal on notice would have been fair, demonstrates either that he failed to properly determine the issue of the seriousness of the breach, having regard to all relevant factors; or that he failed to take into account all material pieces of evidence on the seriousness issue; or that he arrived, in error, at a conclusion that the breach was not "*minor*", in the sense in which the particular was understood and argued about by the parties.

240 On either of these three scenarios, particular (b), and therefore ground 4, has been established.

(h) Ground 4 – Particular (c)

241 Particular (c) of ground 4 refers to the assertion that the appellant had not previously breached the email component of *the CIES Policy*. It is correct that the Commissioner did not refer to this aspect of the matter in paragraph [36] of his reasons. However, the Commissioner did refer to the appellant previously being counselled as to a breach of the respondent's computing policies regarding internet usage. Whilst we accept that it was material to consider what aspect of the policy had been breached in the past, and whether the appellant had been counselled for this, we are not sure that we would have upheld this ground on the basis of particular (c) alone.

242 Determining this ground is made harder by the unresolved conflict of evidence at first instance about the nature of the breach of *the CIES Policy* in January 2006, the disciplinary action taken and what the appellant was told about any future breach of *the CIES Policy*. As we have set out earlier, some of the appellant's evidence on this issue was not contradicted, whereas other parts of it were, but only by a document being put to the appellant by Mr Edmonds, when the author of that document was not being called to give evidence. The Commissioner did not resolve this dispute in the evidence, but it was not argued that this of itself constituted error. (See *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728).

243 Given our conclusion on ground 4 (b), we think it prudent not to consider this particular any further.

(i) Ground 4 – Particular (d)

244 Particular (d) of ground 4 refers to the fact that the appellant did not intend to breach the email policy. We have already referred to this particular in the context in which it is also relevant to an assessment of the nature and extent of the breach of the email policy, relevant to determining particular (b). We need not repeat the observations which we have there made, and it is not necessary to separately consider this particular.

(j) Ground 4 - Conclusion

245 As stated therefore we would uphold ground 4. That is, even if grounds 1 and 2 had not succeeded, we would have allowed the appeal on ground 4 alone.

246 The respondent submitted that relevant to the question of whether dismissal on four weeks' notice was unfair, was the waste of the appellant's and other employees time in sending and reading the email. This was not expressly taken into

account by the Commissioner in deciding the fairness of dismissal on four weeks' notice in paragraph [36]. It is, however, a fact which the Full Bench can have regard to if it decides the Commissioner's discretion miscarried.

247 In our opinion this factor did not, when considered with the factors listed by the Commissioner at paragraph [36] and all the other evidence we have referred to, make a dismissal on notice fair. In making this assessment we have taken into account the post employment counselling received by the appellant, at the instigation of the respondent.

248 The amount of time spent by the appellant in writing and sending the email must be considered in light of how he felt that day, including his trauma and fatigue. Further, the time spent by employees in reading the email may not necessarily have been a "*waste*" of their time, if it alerted them to the possible consequences of not taking the actions contained in the dot points in the email. The submission suffers from the assumption that employees who do other than work continually when not on breaks are less productive economic units. This assumption is questionable at best. The submission also makes an assumption about how many employees read the email and how long they took to do so. There was no evidence about these matters, which effects the cogency of the submission.

249 In our opinion applying in this appeal the "*Undercliffe principles*" a dismissal on four weeks notice would not have been fair.

21 Disposition of the Appeal

250 We have decided that grounds 1 and 2 of the appeal should be upheld. We have also found, in the alternative, that ground 4 of the appeal should be upheld.

251 Upholding grounds 1 and 2 of the appeal, means that we have decided the Commissioner erred in finding there was a breach of the email policy. This finding was a lynchpin to the Commissioner's finding that a dismissal upon four weeks notice was not unfair. Once this lynchpin is removed, the finding of no unfairness if the dismissal was with notice falls away. Accordingly the appellant's compensation should not have been assessed having regard to this limitation.

252 The parties agreed that there was no issue before the Commission at first instance that the appellant had failed to properly mitigate his loss. It was also agreed that the appropriate loss, if the Full Bench were to allow the appeal, was the amount submitted at first instance. This was the gross amount of the appellant's loss of remuneration from his former employment from the date of dismissal until he was employed again in a position in which he received a higher salary. This figure was provided by the appellant's then counsel to the Commission at first instance (T91/2). It is also accepted by the parties that the amount ordered to be paid by the Commissioner at first instance ($3,010.76) has been paid and so that the appropriate "*balance*" to be ordered to be paid was $11,612.93.

253 The same outcome would be reached in our opinion if we had not allowed grounds 1 and 2, but instead had allowed ground 4. This is because in upholding ground 4, our conclusion is that the Commissioner erred in finding that termination on notice "*would have been the appropriate outcome in this case*". In our opinion a dismissal on notice for breach of the email policy in all the circumstances of the case, would not have been fair, by the *Undercliffe* standards. In assessing compensation therefore, the Commissioner made an error. The Full Bench may then substitute what it considers to be the appropriate compensation order (s49(5), (6) and (6a) of *the Act*).

254 The result therefore, if we had only found ground 4 to be upheld, is that the appropriate amount of compensation is the amount agreed between the parties at the hearing of the appeal.

22 Orders

255 In FBA 33 of 2006, an order should be made dismissing the appeal. Although it is not necessary to publish a minute of proposed order when the order is one of dismissal (see s35 of *the Act*) in this case in our opinion it is prudent to do so.

256 In our opinion the orders which should be made by the Full Bench in FBA 34 of 2006 are:-

1. The appellant have leave to amend the grounds of appeal to the form of the grounds set out in the reasons of the Acting President and Scott C.
2. The appeal is upheld.
3. Order 3 of the declarations and orders made by the Commission on 4 October 2006 is set aside.
4. The respondent within 21 days of the date of publication of this order, pay to the appellant the sum of $11,612.93, less any amount payable and actually paid to the Commissioner of Taxation, pursuant to the *Income Tax Assessment Act 1936* (Cth).

257 As this is the opinion of a majority of the Full Bench a minute of proposed orders will issue in these terms.

BEECH CC

258 The facts of the matter are set out sufficiently in the joint reasons of His Honour the Acting President and Scott C. The first ground of appeal alleges that the Commission at the first instance erred in fact in concluding at paragraph [29] that "*coloured arm*" could be interpreted by a recipient of the email as a racial slur. The appellant submits that the words "*coloured arm*" are purely descriptive and in context simply describe an observation of something seen by him and a reason that he acted as he did. Further, the Commission at first instance concluded that reference to "*coloured arm*" could be interpreted by a recipient of the email as a "*racial slur*" however the respondent's policy refers to "*ethnic slur*", not to "*racial slur*".

259 The words "*coloured arm*" need to be assessed in the context of the respondent's policy. The staff manual includes eight written policies including the computer, internet and email security policy; the use of electronic mail or email is a part of this policy. The injunction within the policy that *"[y]ou must not display or transmit sexually explicit images, messages or cartoons or email communications that may contain ethnic slurs or anything that may be construed as a harassment or discredit others based on their race, national origin, sex, sexual orientation, age, disability, religious or political beliefs*" is part of a policy which notes:-

a. that email and internet access is made available to staff and provision of these facilities "*is to allow staff to be as productive as possible in the delivery of products and services to our customers*".

b. that violation of the policy will subject the employee to discipline up to and including termination of employment.

c. that access to the internet is to support the business purposes of the firm and that the system should only be used for work and not for personal use during normal working hours.

d. that users should safeguard against using the internet to transmit personal comments or statements through email or to post information to newsgroups that may be mistaken as the position of the firm.

e. that the primary purpose of electronic mail is to facilitate internal and external business-related communication.

f. that the use of email for personal, private or non-business should be on a limited basis only.

g. that email is not to be used in a way that may be disruptive, offensive to others or harmful to morale.

h. That the email system cannot be used to solicit or convert others for other non-job related matters.

260 The emphasis within the policy to the primary use of both the internet and email (the policy itself linking the two as part of a whole) to business-related communication and, only for work and not for personal use during normal working hours, sets out one part of the context in which the words "*ethnic slurs*" are to be judged. The reference within the policy to emails "*hav[ing] resulted in devastating documentary evidence in harassment and discrimination claims*" provides another part of that context. Together they identify the importance to the respondent of the proper and appropriate use of the internet and email facilities provided to its employees.

261 Turning to the email sent, the Commission at first instance at paragraph [29], considered that reference to "*coloured arm*" could be interpreted by a recipient of the email as a racial slur. The policy speaks of email communications that "*may*", not could, contain ethnic slurs, although I see no useful distinction between the words "*could*" or "*may*"; both may be used to express possibility. And, although the appellant draws attention to the fact that the respondent's policy does not refer to a racial slur, I see no useful distinction to be made in this appeal between a "*racial slur*" and an "*ethnic slur*". I respectfully agree with the conclusion of the Acting President and Scott C that a racial slur could be a subset of an ethnic slur and therefore a breach of the policy.

262 I am unable to conclude that the Commission at first instance erred in the conclusion which he reached. Colour is a characteristic of an object. It can carry with it an indication of inherent quality, good or bad. It can identify that the coloured object is different because of its colour only and that it does not belong in a particular setting. Indeed this very quality is why the appellant himself referred to the arm's colour: in his evidence before the Commission at first instance, the appellant said that he was making the point that as it was a coloured arm (the appellant referred to the arm as "*dark-skinned*" in his evidence at T53) he knew something was wrong because there were no guests in the house at the time that had that skin colour. It was different and it did not belong there.

263 Describing a person by their arm as "*coloured*" describes that person's race or ethnicity, in this case a different race or ethnic origin from others. Issues of ethnic diversity are the stuff of popular comment and often social discontent in society. The effect of such a descriptor will depend upon the context in which it occurs. The context in which the appellant used the words "*coloured arm*" was in the context of stealing:-

> "*I looked and saw an arm doing a snatch and grab from the hallway table at the front of the house. Unfortunately it was a coloured arm that did not belong in the house.*"

264 The appellant links the crime with the colour of the person. He did not need to do so; to have merely written in the email "*unfortunately it was an arm that did not belong in the house*" would have achieved the result which the appellant, apparently, wished to achieve. Nevertheless, even if the appellant did not intend it to have that connotation, his reference to "*coloured arm*" in the context of committing a crime may, at the least, discredit another based upon race or national origin and therefore also may cast a slur. That is what the policy is designed to prevent occurring in the respondent's workplace and properly so.

265 I am therefore of the opinion that the appellant's use of the words "*coloured arm*" in the email that he sent may be construed to be an ethnic slur as the Commission at first instance concluded: reference to "*coloured arm*" could be interpreted by a recipient of the email as an ethnic slur (at [29]). Once that possibility is acknowledged, the substance to this ground of the appeal falls away.

266 I add that in my respectful opinion, when considering the respondent's internet and email policy, and the words "*coloured arm*" in relation to it, one should guard against not seeing the wood for the trees. A great deal of time

appears to have been spent in examining in fine detail each relevant individual word of the policy or of the email and the meanings of those words individually or in combination. I have found this an unhelpful approach. The caution in the policy is that an employee must not transmit email communications that "*may contain*" ethnic slurs or anything that may be construed as discrediting others based upon their race or national origin. I find it difficult to see how the respondent's policy could have been more appropriately worded: its use of the word "*may*" is in my view designed to prevent the respondent company from being embroiled in the very debate that has now occupied a proportion of the time before the Commission at first instance, and now the time of three members of this Commission on appeal.

267 The second ground of appeal goes to the conclusion of the Commission at first instance that the penultimate and final paragraphs clearly seek to solicit support by other staff of the respondent for people to in effect "*stand up and defend themselves*" which contain overtones of soliciting support for a political cause in terms of citizens' rights and the requirement for vigilance to defend those rights in particular in one's home (at paragraph [29]).

268 The appellant submits that no reasonable person could reach such a conclusion; even the Commission at first instance found only "*overtones*" of soliciting support for a political cause.

269 I refer to my earlier comments about the context in which the injunction in the policy is to be read. The respondent's internet and email facilities are to be used primarily for work-related purposes. There is limited personal use. The policies are directed to that end and attempt in a comprehensive way to prevent their use in a way contrary to that intent. The appellant, by his own admission, wished to send an email to all employees of the respondent "*to raise awareness*". It spoke of his view of the way of life in Australia compared with other things going on in the world, that "*we can't keep turning a blind eye*" and shouldn't just stand back and watch something happening but rather do something about it. The appellant believed people should "*make a stand against the bad things that are happening out there*" (T82).

270 With respect to those who hold a view to the contrary, I find it difficult to describe the sentiment expressed as anything other than "*political*" in the sense that the word relates to the state of the country or its civil administration and the citizens within it. The conclusion of the Commission at first instance, which found "*overtones*" of soliciting support for a political cause was one open to him on the evidence and no error in that has been established.

271 Ground 3 does not require separate consideration from what I have just said. In my view it cannot validly be said that the Commission erred in law in concluding that the appellant's email breached the policy.

272 Ground 4, as it was amended during the course of the proceedings, is that the Commission failed to consider whether to have dismissed the appellant on notice would have been harsh, oppressive or unfair, that the breach of the email policy was minor or trivial, that the appellant had not previously breached the email part of the policy and that the appellant had not intended to breach the email policy.

273 The task of the Commission at first instance was to decide whether the dismissal of the appellant was harsh, oppressive or unfair. The Commission concluded (at [35]) that the ultimate sanction of summary dismissal was too severe a penalty, that the appellant lost the benefit of salary in lieu of notice which he would otherwise have been paid and that the dismissal of the appellant was unlawful and also unfair to that extent.

274 Once the Commission concludes that the dismissal was unfair, which the Commission does at paragraph [35], s23A of *the Act* obliges the Commission to consider the remedies there set out. However, the Commission then asked itself a further question, that being whether the breach warranted dismissal on notice. He concluded that dismissal on notice would have been the appropriate outcome and thus assessed the appellant's loss as an amount equal to the salary in lieu of notice payable under the appellant's contract of service.

275 A better approach upon a finding that the appellant's dismissal was unlawful although not unfair, is to order an amount of money as a denied contractual benefit equal to the notice which should have been given, and on the basis that the ordering of that benefit satisfies any loss arising from the dismissal under s23A(6), dismissing the claim of unfair dismissal. This approach is consistent with the approach in *Matthews v Cool or Cosy Pty Ltd and Another* (2004) 84 WAIG 2152 per Steytler J at [29], Pullin J at [78]. Ultimately, however, I do not consider much turns upon the point and it was not raised by either party.

276 The conclusion of the Commission at first instance that termination of the appellant's employment on notice would have been the appropriate outcome in this case necessarily implies that had he been dismissed on notice it would not have been harsh, oppressive or unfair. I consider that conclusion was open to the Commission on the evidence. The appellant had, as I have found, breached the appellant's internet and email policy. I do not consider the breach to have been minor or trivial in its context. That context was not the appellant sending a personal email to family or a friend; it was an email sent to every employee of the company in the company's entire operations and to five friends outside the company. That was by any measure high handed.

277 The appellant was not employed in a senior or management position which might well have reason to send emails to all of the respondent's employees. He was employed as a retail sales consultant. From that position, there is nothing in the evidence to suggest he had any reason to send an email to all of the respondent's employees, from the Managing Director onwards. Further, the content of the email, apart from the breaches I have found, was not in support of the business purposes of the firm, was for personal use and not for work during normal working hours which, as the policy makes clear, is contrary to the basis upon which it is made available to him. It directly contradicted the policy statement that users should safeguard against using the internet to transmit personal comments or statements through

email. The use of email for personal, private or non-business matters is permitted but it should be on a limited basis only. I have some difficulty in the appellant's email sent to all of the respondent's employees being seen as personal, private or non-business use on a limited basis.

278 Furthermore, the appellant had been warned about excessive internet use in January 2006; the warning was only two months before he sent the email on 3 March 2006. He had also been uploading music CDs into his computer for personal use while working although the respondent's policy states:-

> "*No software is to be loaded into the computer without approval of the company secretary, and no external CDs or discs or memory sticks to be used on your PCs.*"

279 The appellant shows little, if any, regard for the respondent's policy notwithstanding the warning given to him. Indeed, the appellant's decision on 3 March 2006 to send the email seemed to have involved no consideration by him of the policy or even an awareness that by doing so he would be breaching it, again. The warning given to the appellant only some two months ago for his earlier breach appears to have gone quite unheeded.

280 The submission on the appellant's behalf that he did not intend to breach the email policy counts little in a context where it does not appear he paid any regard to it whatsoever. It is the case that the appellant is remorseful, and apologised for his action. That is to his credit. I also note that following the warning, the appellant had agreed to return to his previous position of retail consultant in the showroom and that his interaction with customers was "*fantastic*" which also is to his credit.

281 The Commission at [36] took into account the appellant's awareness of the relevant policies, that he consciously prepared and sent the email which contained inappropriate material, that he had been previously counselled about a breach of the policy and that the respondent must enforce such policies as a component of their integrity.

282 The Commission did not refer here to his earlier findings that the appellant was remorseful and apologetic and that the events must have been traumatic for the appellant. However, in the context of the appellant's disregard of the respondent's policies and the previous warning, I are not persuaded that a consideration of those factors could lead to a different outcome. The sending of the email was the third time he had acted contrary to the policy: he had used the internet too much and had been warned; he had uploaded CDs into the respondent's computer; on this third occasion he wrote and sent the email. In doing so he compounded his act by connecting his MP3 player to the respondent's computer and uploading a sound file from it. It is quite telling that when he was asked in cross-examination whether this was a repeat of the things about which he had been counselled, he replied that "*they are two different circumstances*". (T77). I have quoted the policy at paragraph [259] above and it shows his reply to be wrong.

283 It was argued that although the respondent's policy regarding email and internet use is a serious rule, the sending of the email was a trivial breach of it. This submission fails to recognise, in my respectful view, the effect of it having been sent to all employees in the respondent's operations and externally to five of the appellant's friends. I am unable to describe the appellant's actions as trivial, and do not consider it can be seen as trivial in the context of the respondent's policy, the appellant's awareness of it, his previous warning in relation to it, and his failure to even consider the respondent's policy when he decided to send the email.

284 I am of the view that the discretion of the Commission at first instance was quite properly exercised. I think the orders which he issued were open to him to make and I would accordingly dismiss the appeal.

2007 WAIRC 00253

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN ANDERSON
	APPELLANT
	-and-
	ROGERS SELLER & MYHILL PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	THURSDAY, 15 MARCH 2007
FILE NO	FBA 33 OF 2006
CITATION NO.	2007 WAIRC 00253

Decision	Appeal dismissed
Appearances	
Appellant	Mr G Stubbs (of Counsel), by leave
Respondent	Mr M D Cuerden (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 23 January 2007, and having heard Mr G Stubbs (of Counsel), by leave on behalf of the appellant, and Mr M D Cuerden (of Counsel), by leave on behalf of the respondent, and reasons for decision having been delivered on 12 March 2007, it is this day, 15 March 2007, ordered that:-

1. Appeal No 33 of 2006 is dismissed.

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

2007 WAIRC 00254

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN ANDERSON
	APPELLANT
	-and-
	ROGERS SELLER & MYHILL PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	THURSDAY, 15 MARCH 2007
FILE NO	FBA 34 OF 2006
CITATION NO.	2007 WAIRC 00254

Decision	Appeal upheld
Appearances	
Appellant	Mr G Stubbs (of Counsel), by leave
Respondent	Mr M D Cuerden (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 23 January 2007, and having heard Mr G Stubbs (of Counsel), by leave on behalf of the appellant, and Mr M D Cuerden (of Counsel), by leave on behalf of the respondent, and reasons for decision having been delivered on 12 March 2007, it is this day, 15 March 2007, ordered that:-

1. The appellant have leave to amend the grounds of appeal to the form of the grounds set out in the reasons of the Acting President and Scott C.
2. The appeal is upheld.
3. Order 3 of the declarations and orders made by the Commission on 4 October 2006 is set aside.

4. The respondent within 21 days of the date of publication of this order, pay to the appellant the sum of $11,612.93, less any amount payable and actually paid to the Commissioner of Taxation, pursuant to the *Income Tax Assessment Act 1936* (Cth).

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

FULL BENCH—Appeals against decision of Industrial Magistrate—

2007 WAIRC 00085

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KENJI AUTO PARTS LTD T/AS SSS AUTO PARTS (WA)
	APPELLANT
	-and-
	ANTHONY RAYMOND FISK
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER P E SCOTT
HEARD	FRIDAY, 17 NOVEMBER 2006; FINAL WRITTEN SUBMISSIONS FILED 13 DECEMBER 2006 AND 21 DECEMBER 2006
DELIVERED	THURSDAY, 8 FEBRUARY 2007
FILE NO.	FBA 26 OF 2006
CITATION NO.	2007 WAIRC 00085

Catchwords	Industrial Law (WA) - Statutory construction of s83C(2) of *Industrial Relations Act 1979* (WA) (as amended) - Whether "*the proceedings*" means proceedings as a whole or in part - Ascertaining the intention of the legislature - Structure of respondent's claim before the Industrial Magistrate's Court - Authorities on various meanings of "*proceedings*" - Appeal allowed - *Industrial Relations Act 1979* (WA) (as amended), s27(1)(a), s49(11), s81A, s81AA, s81B, s81CA, s83(1), (2), (3), (4), s83A, s83C, s83C(2), s83F(2), s84(4), s113(3) - *Industrial Relations Act 1988* (Cth), s347(1) - *Interpretation Act 1984* (WA), s5 - *Industrial Magistrates Court (General Jurisdiction) Regulations 2005*, r.4, r.11, r.13
Decision	Appeal allowed, respondent's application for an order for costs in the Industrial Magistrate's Court is dismissed
Appearances	
Appellant	Mr R Gifford, as agent
Respondent	Mr M Cox, (of Counsel), by leave

Supplementary Reasons for Decision

THE ACTING PRESIDENT:

The Issue

1 The Full Bench delivered its primary reasons for decision in this appeal on 1 December 2006. Following the publication of the reasons and a minute of proposed order, the Full Bench on 6 December 2006 made orders that:-

1. The appellant shall file and serve written submissions on the orders to be made by the Full Bench within 7 days.
2. The respondent shall file and serve written submissions in reply within 7 days after receipt of the appellant's written submissions.

2 The appellant filed written submissions on 13 December 2006 and the respondent on 21 December 2006.

3 The issues remaining for determination by the Full Bench are the construction of s83C(2) of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*), and in consequence thereof the orders which ought to be made given the primary reasons for decision of the Full Bench. Those reasons set out the way in which the Full Bench respectfully found that the Industrial Magistrate had erred in his determination of the respondent's application for costs.

4 It is appropriate to again set out s83C of *the Act* which is as follows:-

> "*83C. Costs of enforcement orders*
>
> *(1) Subject to subsection (2), an order under section 83, 83A or 83B may be made in any case with or without costs, but in no case shall any costs be given against the Registrar, a deputy registrar, or an industrial inspector.*
>
> *(2) In proceedings under section 83 or 83B costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the industrial magistrate's court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.*"

The Primary Reasons of the Full Bench

5 The respondent's application to the Industrial Magistrate's Court for costs was on the basis that "*the proceedings*" had been frivolously defended, because the defence of the application had no prospect of success. In making this argument counsel for the respondent referred to the four parts of the application which was before the Industrial Magistrate's Court. In its primary reasons the Full Bench decided that the Industrial Magistrate erred in finding that the defence by the present appellant of the claim for non-payment of the "*in charge*" allowance was frivolous. This was because the "*resolution of the claim depended upon an assessment of the totality of the evidence of Mr Emery, the respondent and the documentary evidence. The defence, based on at least some parts of Mr Emery's evidence was not manifestly groundless or doomed to fail*". ([90]).

6 This brought into question the orders which the Full Bench should make. As no clear submissions were made on this issue at the hearing of the appeal, the orders set out above were made.

7 In paragraphs [95] and [96] of its primary reasons the Full Bench made the following observations:-

> "*95 There is an issue as to whether the Industrial Magistrate was empowered to make a legal costs order if he found that part of the defence to the proceedings was not frivolous, as we think he ought to have. Section 83C(2) refers to "the proceedings" being frivolously defended, not a part of the proceedings. It may be therefore that unless the present proceedings as a whole were frivolously defended, the Industrial Magistrate was not empowered to make a legal costs order. This possibility is supported by the reasons of Madgwick J in CEEEIPPASU v Western Australian Specialty Alloys Pty Ltd, IRCA, WI 550 of 1994, Case 950571, 12 October 1995. His Honour there considered s347(1) of the former Industrial Relations Act 1988 (Cth), which had provided: "A party to a proceeding (including an appeal) in a matter arising under this Act shall not be ordered to pay costs incurred by any other party to the proceeding unless the first mentioned party instituted the proceeding vexatiously or without reasonable cause". In that case, all but one of a number of claims made was withdrawn after argument on the hearing of a notice of motion to strike them out on the basis of an absence of jurisdiction or no reasonable cause of action. His Honour decided that he could not make an order for a portion of the costs of the proceedings. His Honour said that the court did not have "power to order costs … essentially because it cannot be said that the entire proceeding, as distinct from separate claims within it, was brought without reasonable cause …". His Honour accepted the statement by Gray J in Bostik (Aust) Pty Ltd v Gorgevski (No 2) (1992) 36 FCR 439 at 445, that there "is no warrant in section 347 for treating several claims brought together in the one proceeding as if they were separate proceedings."*
>
> *96 On the other hand in Perrott, cited above, Sharkey P, in considering what was then s83(3) of the Act (the predecessor to s83C) at paragraph [37] (k) said it would be wrong to deny costs on the basis that 1 out of 53 claims had not been successful. His Honour did not however consider in any detail the meaning of the section, nor was*

> *there a consideration of the Commonwealth authorities cited above. If the conclusion reached in Perrot is to be followed with respect to s83C(2) however, the Industrial Magistrate's Court could have ordered costs for the components of the claim which were frivolously defended. If so, it would be now be open to the Full Bench to vary the orders made by the Industrial Magistrate's Court including the amount of the costs order. If either party submits this can and should occur, they should in the written submissions to be made, as referred to below, specify in what way and on what basis of law and fact the Full Bench should vary the orders.*"

8 The written submissions of the parties focused on the issues identified in these paragraphs.

The Appellant's Written Submissions

9 The appellant submitted that when part of the "*issues in contention*" are determined to have not been frivolously defended, the Industrial Magistrate is not empowered to make a legal costs order pursuant to s83C(2) of *the Act*. The appellant submitted that the claim relating to the "*in charge*" allowance was one of four claims dealt with in the proceedings and therefore formed a part of the proceedings.

10 The appellant noted that the term "*the proceedings*" in s83C(2) is not defined in *the Act*. Accordingly, it was said that there was no definition in *the Act* to assist the determination of the question as to whether the expression "*the proceedings*" relates to the proceedings in their entirety or to such proceedings in part.

11 It was submitted that it was appropriate in ascertaining the meaning of the expression to consider whether *the Act* gives recognition elsewhere to such a distinction. It was submitted that *the Act* did so in s27(1)(a), s49(11) and s83F(2). It was submitted that these examples indicated a scheme in *the Act* that where matters can be dealt with in part, this is expressly provided. It was submitted that s83C(2) contained no such provision. It was then submitted that in the absence of any contrary indication capable of being drawn from other provisions in *the Act* it was open to conclude that the term "*the proceedings*" must mean the entirety of the proceedings and not otherwise.

12 The appellant referred to the observations made by the Full Bench in paragraphs [95] and [96] of its primary reasons, quoted earlier.

13 On *CFMEU v Perrott* (2002) 83 WAIG 17, it was submitted that it was not an authority which established the meaning to be given to the expression "*the proceedings*". It was then submitted that the Full Bench should treat the Commonwealth authorities as being entirely on point and appropriate to follow in determining the present question.

14 In the alternative, the appellant submitted that if the Industrial Magistrate was empowered to make a costs order if part of the proceedings were frivolously defended, then s83C(2) provides no indication as to the basis upon which a costs order will be made. The appellant submits that one basis for determining the apportioning of the costs would be to relate the issue considered not to have been frivolously defended to the number of issues in total which were in contention before the Industrial Magistrate. Another would be to relate the value of the issue to the total value of the claim.

15 The appellant submits that the most logical outcome would be to relate it to the number of issues in contention. The appellant submits that from the consideration of the Full Bench's primary reasons, it is clear that there were two matters in contention, being the application of the storeman operator grade II classification and the application of the "*in charge*" allowance. It was submitted that it followed that in the event a costs order was to be made, it could be appropriately apportioned on the basis of "*one half each*". It was then submitted that it would be open to the Full Bench to reduce the Industrial Magistrate's costs order by half and therefore issue an order reflecting such an outcome.

The Respondent's Written Submissions

16 The written submissions of the respondent were divided into the consideration of two issues. The first was identified as being whether the Industrial Magistrate was empowered to order costs against a party if a part of that party's case is not frivolous or vexatious. The second was if the answer to issue one was in the affirmative, how should the court assess costs.

17 On the first issue it was submitted that *Perrott* was a cogent and binding authority of the Full Bench which was on point. It was also submitted that the Commonwealth authorities, some of which were referred to by the Full Bench in its primary reasons, were distinguishable in fact and law. It was submitted that the *Specialty Alloys* case, *Bostik, Maritime Union of Australia v Geraldton Port Authority (No 2)* [2000] FCA 16; 94 IR 404 and *Grout v Gunnedah Shire Council [No 3]* (1995) 59 IR 248; 129 ALR 372 all considered s347 in the then named *Industrial Relations Act 1988* (IRA) or the *Workplace Relations Act 1996* (WRA), prior to the amendments affected by the Work Choices legislation.

18 The respondent set out the terms of s347(1) as it was in the IRA or WRA, as follows:-

> "*(1) A party to a proceeding (including an appeal) in a matter arising under this Act shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.*"

19 A footnote in the above quotation after the word "*Act*" was inserted by the respondent to denote that although "*not relevant here, the version of s347(1) in the WRA 1996 includes at this point in the section: "(other than an application under section 170CP)"*".

20 The respondent then quoted s83C(1) and (2) of *the Act*. In bold, the respondent emphasised the words "*any case*" in s83C(1) and "*proceedings*", "*the proceedings*", "*proceedings*" (again) and "*or defended*" in s83C(2).

21 The respondent then submitted that it could be seen that s83C distinguishes between a "*case*" and "*proceedings*", and, unlike the Commonwealth section, uses the plural when referring to proceedings. It was submitted that the drafting of s83C showed that "*proceedings*" make up a "*case*", whereas in the Commonwealth authorities the "*proceeding*" equated to a "*case"*.

22 The respondent submitted that in contrast to the Commonwealth authorities, which each involved a single proceeding or justiciable matter, in the present case there were four proceedings which were:-

(a) A claim or proceeding for award underpayment relating to a period when the employer did not pay in accordance with the award minimum rates;

(b) A claim or proceeding for overtime payments;

(c) A claim or proceeding for "*Grade II*" rates of payment or alternatively "*higher duties*" allowances; and

(d) A claim or proceeding for an "*in charge*" allowance.

23 It was then submitted that the construction of s83C favoured by the respondent was reinforced by regulation 11 of the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (the *IMC Regulations*). Relevantly, this regulation provides that in a case other than a case under s77, s83, s83A, s83B or s83E, a court may order that costs be paid by a party if and only if, in the opinion of the court, the case has been frivolously or vexatiously instituted or defended, as the case requires, by that party.

24 These regulations were made by the Governor under s113(3) of *the Act.* (See *Nekros Pty Ltd v Baker* (2006) 86 WAIG 2957).

25 It is not however "*permissible to interpret the statute by reference to the regulations*". (*Hunter Resources Ltd v Melville* (1987-1988) 164 CLR 234 per Mason CJ and Gaudron J at 244). To the same effect, the Full Court of the Federal Court in *Secretary, Department of Health, Housing, Local Government and Community Services and Another v Kaderbhai and Another* (1994) 122 ALR 577 at 583 said:-

> "*In Webster v McIntosh (1980) 32 ALR 603; 49 FLR 317 Brennan J observed at ALR 606; FLR 321 that "the intention of parliament in enacting an Act is not to be ascertained by reference to the terms in which a delegated power to legislate has been exercised". The guidelines determined by the minister under the Act cannot govern the meaning of the Act's provisions*".

26 The regulations may however be considered for the purpose of ascertaining the nature of a legislative scheme. (See D C Pearce and R S Geddes, Statutory Interpretation in Australia, Butterworths, 6th Edition, 2006, paragraph [3.41]).

27 The respondent submitted that the proper construction of s83C was that when assessing an application for costs, the Industrial Magistrate must, where applicable, make an assessment of each component "*proceeding*" or matter making up the case.

28 It was submitted that s83C was not framed so as to require the Industrial Magistrate to be satisfied that all or the whole of the proceedings or matters in a case were frivolous or vexatious.

29 The respondent submitted that the words "*case*" and "*proceedings*" were not defined in *the Act* or the *IMC Regulations*. It was submitted that Moore J discussed at length in *Grout* that the words proceeding or proceedings do not have a fixed meaning; they have multiple meanings dependent upon the context in which they occur. It was submitted that even under the *IRA/WRA* there were several meanings for the word notwithstanding that it was defined in s360 in the following way:-

> "*Unless the contrary intention appears: 'proceeding' means a proceeding in court, whether or not between parties, and includes:-*
>
> *(a) an incidental proceeding in the course of, or in connection with, a proceeding; and*
>
> *(b) an appeal.*"

30 The respondent submitted that the use of the plural, "*proceedings*" in s83C, in the context of *the Act*, differentiated that from s347 of the *IRA/WRA*. It was submitted that in the Commonwealth authorities "*proceeding*" is equivalent to a "*case*", "*an action*", "*a matter*" in the sense of a discrete claim, as was apparent from the context "*a proceeding … in a matter under the Act*". The respondent quoted a passage of the reasons of Madgwick J in *Specialty Alloys* in support of this proposition.

31 The respondent then referred to each of the four Commonwealth authorities cited earlier and distinguished those authorities from the facts of the present appeal. It was submitted that each of the respondent's four claims or proceedings was discrete and independent in that none of them depended upon proof of any other for success; although the respective calculations of amounts due under each claim were affected by a determination of the rate of pay. It was submitted that each claim or proceeding was based on its own set of facts, and as such involved different, independent "*justiciable matters*" or controversies. It was submitted that in contrast the Commonwealth authorities dealt with costs applications against parties who were unsuccessful in relation to a frivolous claim that arose out of the same substratum of facts.

32 It was also submitted that s83C of *the Act* gives the Industrial Magistrate's Court discretionary powers to make orders as to costs, albeit within a confined state. It was submitted that the power ought not, as a matter of principle or statutory construction, be interpreted narrowly.

33 It was submitted that the narrower construction s83C of *the Act*, advanced by the appellant, would permit potential abuses of the law and injustice to parties. It was submitted that a party could raise one legitimate claim or defence that was not frivolous, and any number of frivolous (and/or vexatious) claims or defences (or even counterclaims) with the wrongful purpose of causing the other party unnecessary expense, or an attempt to gain some illegitimate strategic advantage. As to this issue, it should be made plain that any legal practitioner involved in the defence of court proceedings for such a purpose would probably be engaged in unprofessional conduct.

34 The respondent referred to the submission of the appellant as to the distinctions between s83C(2) and ss27, 49 and 83F of *the Act*, where the latter three sections refer to "*parts*" of a matter, decision or penalty. It was submitted that contrary to what the appellant seeks to make of those differences, inherent in the use of the term "*proceedings*" in s83C, and the context of the provisions in *the Act* and regulations, is a contemplation that there may be a singular proceeding or aspect to consider, to which costs could be attributed, while not doing so in relation to the whole of the proceedings.

35 With respect to the second issue, which was the assessment of costs, it was submitted the court has a discretion which can be exercised by considering the proportion of the overall amount of compensation ordered ($774.82 out of $3,295.11 or 23.5%), or by considering the proportion of the case that the non frivolous matter occupied. The latter it was submitted involved a more complex assessment of having regard to the "*pleadings*" and the hearing. It was submitted that the hearing of the "*in charge*" issue occupied less than 30% of the matter. The respondent submitted however that in any event the costs should not be reduced at all because:-

(a) The amount of costs awarded was modest considering the matter was heard over more than two days and involved "*substantial preparation*".

(b) The Magistrate did not order the whole sum of costs sought.

(c) Costs of $6,800 were awarded in *Perrott* on 15 January 2003.

(d) One would expect costs available 3½ years later to be larger than that amount.

36 The respondent concluded with a submission that the appropriate order was the appeal should be dismissed.

Statutory Construction

37 As identified by both parties in their written submissions, the present issue involves a matter of the statutory construction of s83C(2) of *the Act*.

38 This exercise involves a consideration of the words used in the section, and *the Act* as a whole, to endeavour to ascertain the intention of the legislature. (*Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]; and *Wilson v Anderson and Others* (2002) 213 CLR 401 at [8]). In *Attorney General (Queensland) v The Australian Industrial Relations Commission* (2002) 213 CLR 485, Kirby J at [113] emphasised that attention must be focused, when engaged in the task of statutory construction, "*upon the crucial language of the relevant provisions*". His Honour also emphasised that this should occur "*before other aids to construction are considered*". In the present appeal, neither advocate suggested that external sources be consulted for guidance as to the meaning of the sections. By "*external sources*" I apprehend that his Honour had in mind materials like explanatory memorandum to legislation and a Minister's second reading speech in Parliament.

The Context of Section 83C in *the Act*

39 In considering *the Act* as a whole, in my opinion it is relevant that Part III which includes s83C of *the Act* is a discrete part of *the Act* dealing with (as the heading states) enforcement of *the Act*, awards, industrial agreements and orders. The part presently comprises s81-s84A.

40 Section 81 provides for the establishment of an industrial magistrate's court by empowering the Governor to do so by proclamation. Section 81A provides that the industrial magistrate's court has the jurisdiction conferred on it by ss77, 80(1) and (2), 83, 83A, 83B, 83D, 83E, 96J, 97V(3), 97VJ(3), 97YC, 97YG, 110, 111 and 112 of *the Act*.

41 Section 81AA provides that in addition to its jurisdiction under *the Act*, an industrial magistrate's court has the jurisdiction conferred on it by Part IV of the *Long Service Leave Act 1958*, s36 of that Act and s196(2) of the *Children and Community Services Act 2004*.

42 Section 81B provides for the constitution of the industrial magistrate's court. It is to be constituted by an industrial magistrate and the Governor may on the joint recommendation of the President and the Chief Magistrate, appoint a person holding office as a magistrate to be an industrial magistrate.

43 Section 81CA provides for the procedure to be applied by the industrial magistrate's court. In s81CA(1) there is a distinction drawn between the "*general jurisdiction*" of the Court and the "*prosecution jurisdiction*". The "*general jurisdiction*" is defined to include s83(1) to (7). This includes the proceedings which were before the industrial magistrate at first instance.

44 Section 81CA(2) then provides that except as otherwise prescribed by or under this Act or another law, the powers of an industrial magistrate's court, and the practice and procedure to be observed by industrial magistrate's court when exercising general jurisdiction are those provided for by the *Magistrates Court (Civil Proceedings) Act 2004* as if the proceedings were a case within the meaning of that Act. The contents of s83C is in my opinion an example of the powers of the industrial magistrate's court, with respect to costs, being "*prescribed by*" *the Act*.

45 This is because the word "*prescribed*" is defined in s5 of the *Interpretation Act 1984* (WA) to mean in that Act and "*every other written law*":-

> "*(a) prescribed by or under the written law in which the word occurs; and*
>
> *(b) in a case where reference is made to anything prescribed by a written law other than the law in which the word occurs, includes anything prescribed by subsidiary legislation made under that other written law;*"

46 As referred to earlier, the present application was for an enforcement of the provisions of an award under s83(1). This subsection provides that certain legal persons or entities which are listed "*may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the provision of an instrument to which this section applies*". The latter expression is defined in s83(2) to include, relevant to the present appeal, an award.

47 Section 83(1) refers to a failure to comply with "*a provision*" and the enforcement of "*the provision*". These are reference to the singular, as indeed are references to "*the*" or "*a*" "*contravention*" or "*failure to comply*" in s83(4) and s83(5) of *the Act*. As set out however in s10(c) of the *Interpretation Act 1984* (WA) in any written law "*words in the singular number include the plural*". Therefore the reference to "*a provision*" in s83(1) can be taken to include the failure to comply with more than one "*provision*" of "*an instrument to which this section applies*". (See *Theiss Pty Ltd v AFMEPKU* (2006) 86 WAIG 2495 at [71])

48 The expression "*instrument to which this section applies*" is as stated defined in s83(2) to mean four different instruments including an award. Thus s83(1) allows for the situation where a single application may be made alleging a failure to comply with more than one provision of an award; as was the situation in the present application to the Industrial Magistrate's Court.

49 It is also relevant that s83(1) refers to the right of a person or legal entity to "*apply*". Similarly, s83(3) refers to an "*application*". Section 83(4) refers to the hearing of "*an application under subsection (1)*". As stated s83(1) refers to an application "*in the prescribed manner*".

50 The *IMC Regulations* provide the "*prescribed manner*" to make an application. Regulation 4 of the *IMC Regulations* sets out the meaning of a number of words and expressions contained in the regulations. The word "*application*" means an application made under Part 10 of the *IMC Regulations*. This part refers to the making of an application to the Court for an order other than a judgment after trial, or an order made in or as a consequence of a judgment, not being an order to set aside a default judgment. This was not the subject matter of the present application to the Industrial Magistrate's Court.

51 The word "*claim*" is defined in regulation 4 of the *IMC Regulations* to mean a "*claim made to a court by a party (whether a claimant, a defendant or another party)*". The "*claimant*" is defined to mean a person who commences a case. The word "*case*" is defined in regulation 4 to mean "*any proceedings in a Court involving or in connection with the Court's general jurisdiction as defined in the Act section 81CA(1)*". This "*general jurisdiction*", as set out in s83CA(1) includes the jurisdiction of the court under s83(1) of *the Act*.

52 A consideration of these definitions leads to the conclusion that, in the *IMC Regulations* it is a "*claim*" which is the prescribed manner of making an application for the purposes of s83(1) of *the Act*.

53 The power to make an order for underpayment is provided by s83A of *the Act*. Section 83A(1) refers to the making of an order in "*any proceedings brought under s83(1)*".

54 Part 3 of the *IMC Regulations* is headed "*Making and responding to claims*". Regulation 13 is about making a claim. Regulation 13(1) provides that:-

> "*If a party wants to make a claim the party must lodge the approved form.*"

55 The expression "*approved form*" is defined in regulation 4 to mean the "*form approved by the Chief Magistrate*". The expression "*Chief Magistrate*" in turn means the "*Chief Magistrate appointed under the Magistrates Court Act 2004 Schedule 1 clause 6(1) or a person who under Schedule 1 clause 8(2) of that Act is performing the functions of the Chief Magistrate*".

56 On 2 May 2005, his Honour Chief Stipendiary Magistrate Heath, issued a practice direction to take effect immediately. Paragraph [20] of the practice direction provided that with effect from 2 May 2005 the forms listed in the schedule to the practice direction and as set out in documents were "*approved forms*" for the purposes of the *IMC Regulations*. Form 1.1 was "*Originating Claim – Court*". The practice direction says that the "*originating claim*" form is to be done in three copies being a court copy and a copy for the claimant and respondent.

57 The form contains seven boxes to be completed. The first box provides for the insertion of a claim number and a date by which service of the form is to be effected. This is marked for "*court use only*". The remaining six boxes are to be completed by the claimant. The boxes provide for information to be given about the claimant, the respondent, the grounds, the relevant Act, the orders sought and the claimant's representative. With respect to grounds, the form says that "*this claim is made because the respondent has: (Tick the appropriate box)*". There is then set out three more boxes. The first is "*failed to comply with an award, agreement, instrument or order (specify)*". The second is "*contravened or failed to comply with another written law (specify)*". The third is "*done or failed to do something else (specify)*".

58 The box with respect to "*Act*" provides that the claimant should indicate what the "*claim is made pursuant to*". In the boxes which follow there are six choices, one of which is the "*Industrial Relations Act 1979*" and the final one is "*other (specify)*".

The Respondent's Claim

59 In the present case, the respondent, in accordance with *the Act*, *IMC Regulations* and practice direction of the Chief Stipendiary Magistrate, applied to the Court by completing the originating claim form. With respect to "*grounds*" the respondent ticked the first box and specified the "*Shop and Warehouse Wholesale and Retail Establishment Award*". With respect to the "*Act*" the respondent ticked the "*Industrial Relations Act 1979*". With respect to the orders sought, the respondent ticked the "*pay monies*" box and specified the amount of $2,889.05 and in the "*do something else (specify)*" box, ticked this and wrote "*pay costs*". In what appears from the appeal book to be an attachment to the originating claim, the respondent set out what was headed the "*underpayment apportioned*" This referred to ordinary hours, overtime hours and the "*in charge*" allowance and set out the award clauses relevant to these claims and the amount said to be underpaid. Another document which appears from the appeal book to have been appended to the originating claim said that the respondent failed:-

> "*1. Pay award increase for 5 weeks*
>
> *2. Pay overtime clause 13(4)*
>
> *3. Storeman operator grade II award rate clause 28(1)*
>
> *4. In-charge allowance clause 28(2)*"

60 As set out more fully in the primary reasons of the Full Bench, these were the four components of the respondent's claim before the Industrial Magistrate's Court.

Section 83C – Textual Analysis

61 The terms of s83C have been earlier set out. The first point to note is that s83C(1) is made to be subject to subsection (2). Section 83C(1) then refers to an order under s83, s83A or s83B. I have already referred to s83A. The orders contemplated by s83 are set out in s83(4) which provides for the industrial magistrate's court, if the contravention or failure to comply with the instrument to which the section applies is proved, to issue a caution or impose a penalty as the industrial magistrate's court thinks just but not exceeding $2,000 in the case of an employer, organisation or association and $500 in any other case or dismiss the application.

62 Section 83C(1) provides that these orders "*may be made in any case with or without costs*". There is then an exception which is not presently relevant.

63 Section 83C(2) commences by referring to "*proceedings under s83 or s83B*". It is noted that there is no reference to s83A. This is however because s83A(1) itself refers to an order for underpayment being made in "*proceedings brought under s83(1)*". Section 83C(2) then provides that "*costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless*". What follows therefore is an exception to the general position. That exception is when "*in the opinion of the industrial magistrate's court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party*". The subsection is therefore cast in the terms of a prohibition upon the ordering of costs unless the court forms the opinion set out. The opinion which needs to be formed is about "*the proceedings*". If the "*proceedings*" have the quality that in the opinion of the court they were frivolously or vexatiously instituted or defended, then the court is not prohibited from making a costs order.

64 As submitted by the respondent, the word "*proceedings*" can have shades of meanings, depending upon the context.

65 In support of this opinion are the reasons for judgment of Moore J in *Grout* at page 383, as cited and quoted by the respondent in their written submissions. There, Moore J respectfully adopted the remarks of Smart J in *Blake v Norris* (1990) 20 NSWLR 300 at 306 in relation to the meaning of "*proceeding*" as follows:-

> "*In Shroud's Judicial Dictionary, 5th ed, vol 4 at 2029-35, some 55 instances are given of the use of the words "proceeding" or "proceedings" in legislation, rules of court or documents having legal significance. The meaning depends on the context in which the word is used. In some cases it is equivalent to 'an action' whereas in others it may mean a step in an action. Sometimes it may include a counter claim. The Oxford Companion to Law (1980) by Professor Walker states (at 1002-3) that "proceedings" is sometimes used as including, or meaning, an action or prosecution, and sometimes as meaning a step in an action. The word 'proceeding' is capable of such a variety of meaning that dictionary definitions as to its ordinary or natural meaning are not of much use. They tend to highlight the number of meanings which the word can bear. Any assistance as to its meaning has to be derived from the statutory context and the objects of the legislation in question.*"

66 In *Re Struthers (liquidator of Paci Pty Ltd*) (No 3) [2005] NSWSC 1113, Brereton J had to consider the expression "*party to the proceedings*" in s1335(2) of the *Corporations Act 2001* (Cth). His Honour quoted the same passage from *Blake v Norris* and said:-

> "*[16] In Grout v Gunnedah Shire Council (1995) 129 ALR 372, Moore J in the Industrial Relations Court of Australia said [at 383] that one meaning of the word 'proceeding' which was suggested as its primary technical legal meaning was the invocation of the jurisdiction of a court by a process other than a writ, it being described as an 'action'*

> *if jurisdiction were invoked by writ [see also Herbert Berry Associates Ltd v Inland Revenue Commissioners [1977] 1 WLR 1437 at 1446; Forrest v Kelly (1991) 105 ALR 397 at 408; and Re Healy; ; Re Inquiry into Election in Australian Workers' Union (SA Branch) (1992) 40 IR 110 at 118].*
>
> *[17] While it might be said that the word "proceeding" is capable of variable and varying meanings, one starts from the position that, while the distinction between a proceeding and an action has not survived, generally speaking, a proceeding means the invocation of jurisdiction by an initiating process, rather than an interlocutory step in a proceeding so instituted, although sometimes it is capable of and does bear the latter meaning. This is consistent with at least a slight inclination in favour of viewing "proceeding" as relating to a litigation as a whole, and not to individual interlocutory steps in that litigation.*"

67 The final sentence of the quotation from *Blake v Norris* refers to the statutory context and objects of the legislation in question. I have already set out the statutory context of s83C(2) in some detail. The principal objects of *the Act* are set out in s6. There are 15 principal objects currently listed. Of these only principal object (d) seems to be material to the present appeal. This states that one of the principal objects of *the Act* is "*to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes*". It is apparent though that this principal object does not provide much assistance as to the construction of the section of *the Act* under consideration.

The Commonwealth Authorities

68 It is convenient now to consider the status of the Commonwealth authorities referred to by the parties.

69 I am persuaded by the respondent's written submissions that it would be unwise to use the Commonwealth authorities referred to as a significant guide to the construction of s83C(2).

70 There are a number of reasons for this. Firstly, the text of s83C(2) is different from s347 of the IRA/WRA. Secondly, the statutory schemes as a whole are different. Thirdly, even within the IRA/WRA there were indications that "*proceeding*" did not have a fixed meaning throughout that Act. This point is made by Moore J in *Grout* at pages 383-384. Fourthly, the word "*proceeding*" is used three times in s347 of the IRA/WRA. The first time it is used the reference is to a "*proceeding (including an appeal) in a matter arising under this Act*". On the subsequent two occasions the expression "*the proceeding*" must refer back to the "*proceeding in a*" matter referred to at the commencement of the section. This expression is in my opinion compendious. Moore J in *Grout* at page 384 referred to some of the sections of the IRA/WRA where the expression, or variations of it, appeared. His Honour said that these sections indicated that both the words "*matter*" and "*proceeding*" had a wide meaning. As referred to by his Honour, the word "*matter*" assumes some significance in Commonwealth legislation given the use of the word "*matter*" in s76 of the Constitution. These considerations do not apply with respect to the construction of s83C(2) of *the Act*.

71 Accordingly, I do not accept the submission of the appellant that the Commonwealth authorities are entirely on point and appropriate to follow in determining the present question.

CFMEU v Perrott

72 I will now consider the status of the Full Bench decision of *Perrott*, cited earlier. The appellant submitted that this was not an authority which established a meaning for the expression "*the proceedings*" in s83C(2). On the contrary, the respondent submitted it is a cogent and binding authority on point. To determine whether this submission is correct, it is necessary to analyse precisely what was decided in *Perrott*.

73 That appeal was against a refusal by the Industrial Magistrate's Court to make an order for costs. Before the court it had been contended that on 53 occasions the respondent had breached the *Building Trades (Construction) Award 1987* which, it was alleged, together with a document entitled the *C & S Perrott Industrial Agreement No AG 191 of 1997*, governed the terms of employment of a Mr Hayes. The status of Mr Hayes was the main issue at trial.

74 At the time of the decision by the Industrial Magistrate's Court not to award costs, and in the appeal before the Full Bench, it was s83(3) which legislated about the costs of proceedings brought to the court. This subsection was not in any material way different from s83C(2) of *the Act* as it now is. (See [13](c) of the reasons of Sharkey P).

75 As summarised by Sharkey P at [32], the Industrial Magistrate's Court found that the claims were not frivolously or vexatiously defended for five reasons. The first of these was that the claims were not wholly successful in that one was successfully defended. Secondly, the evidence in relation to that issue was inextricably mixed with the evidence going to other issues in dispute. Thirdly, the "*pivotal issue*" was whether Mr Hayes, the person found to be an employee, was an employee, but other issues were raised. Fourthly, the other issues raised, including promissory estoppel and set-off, were open to argument. Fifthly, the respondent not succeeding on those issues did not expose it to costs.

76 At [37] Sharkey P said that a number of things were "*clear*" in the case. His Honour then listed 13 things. One of these was that the evidence in relation to the successfully defended claim relating to seniority was not and could not be so inextricably mixed with the other issues in dispute that they could not have been defended on the limited basis on which the seniority claim for redundancy was ultimately successfully defended. Another was that there was "*no basis for any belief or opinion on the part of the respondent that Mr Hayes was a sub-contractor and the Magistrate's finding that the evidence was overwhelming*

was not criticised and could not have been properly criticised in submissions before the Full Bench". Another of the things was, importantly, that "*the appellant was successful in all claims except one out of 53. To deny costs on that basis was, in my opinion, wrong given the overwhelming success of the appellant. Put another way, it was wrong to decide that there should, all other things being equal, be no order for costs in relation to 52 successful claims when only one claim failed, and that was said to constitute a ground for refusing to order costs*". It was also said that the matter of promissory estoppel was not raised in relation to the merits but in mitigation. Sharkey P then concluded that for all of the reasons he had set out the defence was entirely vexatious and frivolous and should have been so found.

77 Sharkey P said at [39] that the matter should be remitted to the Industrial Magistrate's Court at Perth for an assessment of the quantum of costs and to otherwise deal with the matter according to law and his Honour's reasons.

78 Senior Commissioner Beech (as the Chief Commissioner then was) expressed shortly his reasons for agreeing that the appeal should be upheld. Beech SC at [42] referred to the reasons of the Industrial Magistrate that the claimant had not been wholly successful. Beech SC referred to the statement by the Industrial Magistrate that the evidence in relation to that issue (one of the applicability of a seniority clause of the award) was inextricably mixed with evidence going to other issues in dispute ([42]). Beech SC referred to the appellant's first ground of appeal being that the learned Magistrate placed too much weight on that issue. Beech SC then said that while "*it was correct to say that the appellant was not wholly successful, the appellant was successful in the other 52 breaches alleged. Therefore, although the appellant was indeed not wholly successful, it was only in one out (sic) 53 claims. As a proportion of the claims made, that is significant*" ([43]). Beech SC then said that of those 52 all but one related to claims of underpayments under the award, the success of which was contingent upon Mr Hayes being found to be an employee ([44]). Beech SC then referred to the reasons of the Industrial Magistrate in deciding that the seniority claim would not be upheld. Beech SC said that with "*great respect to his Worship*", the evidence in relation to the seniority issue was not evidence inextricably mixed with the evidence going to other issues in dispute ([45]). Beech SC also said that the defence of the respondent in relation to the 52 breaches, that Mr Hayes was not an employee, could not have succeeded ([47]). Beech SC said that the matter should be remitted to the Magistrate for an assessment of costs in proportion to the breaches alleged and which had been found proven ([47]).

79 Commissioner Scott agreed with both the reasons of Sharkey P and Beech SC, as well as the disposition of the appeal which they suggested. Sharkey P then said at [50] that the matter was to be remitted to the Industrial Magistrate's Court at Perth for assessment of the quantum of costs. Earlier in his reasons, Sharkey P had said the costs order sought was in the sum of $6,800.00 ([27]).

80 In my opinion, *Perrott* is technically not an authority which is directly on point. This is because, although the outcome is in favour of the present respondent's position, the reasons for decision of the Full Bench do not show any close analysis of the meaning of the relevant expression in the section now under consideration. It is significant however that the outcome in *Perrott* and in particular the way in which that outcome was expressed by Beech SC with whom Scott C agreed, contemplates that an apportioned costs order might be made where the proceedings have been largely, although not entirely, frivolously defended. It therefore has some persuasiveness as an authority.

The Proceedings – Final Analysis

81 In my opinion given the context and text of *the Act* the reference to, "*the proceedings*" in s83C(2) is the application contemplated by s83(1) which in turn is called the "*claim*" in the *IMC Regulations*.

82 Section 83C(2) requires the Industrial Magistrate's Court to form an opinion as to whether "*the proceedings*" were frivolously defended. This involves an evaluative judgment in accordance with the principles which were discussed in the primary reasons of the Full Bench.

83 Where the claim is about a single breach of an award, it will be a simpler exercise to determine whether the claim has been frivolously instituted or defended, than a claim where there is alleged multiple breaches of different provisions of an award. The latter is this appeal, which then raises the question as to what are "*the proceedings*" referred to in s83C in such an application/claim.

84 In my opinion "*the proceedings*" must still refer to the claim as made. The question must still be whether that claim, involving all of its components, was frivolously or vexatiously instituted or defended.

85 In the present case there were, as submitted by the parties, four components to the application/claim before the court. It was however all of these components making up the claim as a whole which in my opinion constituted "*the proceedings*" for the purposes of s83C. It was in my opinion an evaluation of the totality of all of the claims, making up the proceedings, which was required by the Industrial Magistrate.

86 In a sense, the Industrial Magistrate did engage in this exercise. His Honour determined that each of the four components of the claim was frivolously defended and therefore the proceedings as a whole were frivolously defended. There was, with respect, nothing wrong with this process of reasoning. The difficulty however is that the Full Bench has found his Honour was in error in determining that one of the components of the claim was frivolously defended.

87 I do not accept the appellant's submission that this necessarily means the proceedings have not been frivolously defended. This would run counter to the persuasiveness of the authority of *Perrott*, referred to earlier. Consistently with *Perrott*, the court may properly form the view that the proceedings as a whole were frivolously defended, when only one minor claim out of 53 had any prospect of being successfully defended.

88 The fact that one of the four components of the claim was not frivolously defended was relevant however to the assessment which the Industrial Magistrate ought to have made. The Industrial Magistrate did not take this into account. His Honour,

with respect, therefore erred on the way to forming the opinion required by s83C(2) of *the Act* and for this reason the appeal must be upheld.

89 I have considered the respondent's submission about the use of the word "*case*" in s83C. It appears once in s83C(1), in the expression "*in any case*". It also appears once in s83C(2), in the expression "*as the case requires*".

90 The word "*case*" is also one that can have different meanings depending on the text used and context involved. In s83C of *the Act* I do not think "*case*" is used to denote a legal case (a suit or cause of action or defence) which is the import of the respondent's submission as the respondent submits. Rather it means the "*situation*" or "*instance of the occurrence*". (See The Macquarie Dictionary, 2nd Edition, 1991, page 280).

91 Therefore I do not think the word "*case*" in s83C is used in contradistinction to the "*proceedings*" in the way submitted by the respondent. There is no doubt scope for confusion because the word "*case*" is defined and used in a different sense in the *IMC Regulations*.

Orders to be Made

92 The next issue is what other orders should be made by the Full Bench. The powers that may be exercised by the Full Bench on the hearing of an appeal against a decision of the industrial magistrate's court are set out in s84(4) of *the Act*. This provides:-

> "*(4) On the hearing of the appeal the Full Bench —*
>
> *(a) may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of the appeal;*
>
> *(b) may remit the matter to the industrial magistrate's court or to another industrial magistrate's court for further hearing and determination according to law; and*
>
> *(c) subject to subsection (5), may make such order as to costs as the Full Bench considers appropriate.*"

93 It can be seen that s84(4)(a) of *the Act* provides a power to "*vary*" or "*amend*" the decision the subject of the appeal. In this context "*decision*" is defined in s84(1) to include an order and any other determination of an industrial magistrate's court.

94 As in my opinion the Industrial Magistrate made a mistake in the process of exercising his discretion, in deciding that the "*in charge*" allowance component of the claim was frivolously defended, according to ordinary principles the Full Bench can exercise afresh the discretion reposed in the Industrial Magistrate's Court. The Full Bench could only do this however if there were sufficient materials before the Full Bench, supported by relevant findings by the Industrial Magistrate's Court, to allow it to properly exercise the discretion. In my opinion this is an appeal where the materials and findings allow the Full Bench to exercise the discretion.

95 As stated, the judgment which the Industrial Magistrate's Court should have made was whether the proceedings, taken as a whole, were frivolously defended. The Industrial Magistrate's finding, that three of the four components of the claim were frivolously defended, remains. The fourth component of that claim was the "*in charge*" allowance. According to the assessment of counsel for the respondent, who appeared both at first instance and on appeal, the "*in charge*" issue occupied less than 30% of the hearing of the proceedings. That component also made up 23.5% of the amount of compensation ordered.

96 The appellant submitted that by the time of the hearing there were only two matters in contention so that if costs were apportioned, this should be on the basis of one half each. In my opinion however this approach does not involve the type of evaluative judgment which the Industrial Magistrate was obliged to make, as I have earlier tried to describe.

97 From my consideration of the documents filed prior to the hearing of the claim by the Industrial Magistrate, the transcript of the hearing including the evidence and the opening and closing submissions of the advocates and the reasons for decision of the Industrial Magistrate, it is my assessment that the determination of the "*in charge*" allowance claim, as part of the proceedings as a whole comprised about one third to one half of "*the proceedings*". In those circumstances I do not find myself able to form the opinion that "*the proceedings*", as a whole, were frivolously defended. Accordingly, in my opinion, because of the terms of s83C of *the Act*, the application for costs should have been refused by the Industrial Magistrate's Court.

98 I reach this conclusion despite, with respect, the very able and helpful submissions made to the Full Bench by the respondent's counsel. I also reach it with some misgiving.

99 This is because, it seems to me, the respondent could, under s83(1) have made a separate application/claim for the enforcement of each of what became the four components of the claim at first instance. This is so despite the contents of s83(3). This subsection provides:-

> "*(3) An application for the enforcement of an instrument to which this section applies shall not be made otherwise than under subsection (1).*"

100 Despite "*provision*" being able to be read "*provisions*" because of s10 of the *Interpretation Act 1984* (WA), I do not think s83(3) obliges or requires someone, where there are multiple claims of breaches of different award provisions, to only make a single claim.

101 In my opinion s83(3) is directed instead to ensure that the industrial magistrate's court is the only jurisdiction in which enforcement applications may be made.

102 If single applications/claims had been made by the respondent for each breach they could have been heard at the same time without necessarily being consolidated (see *IMC Regulation* 7(1)(d) and (e)). If that had occurred, the Industrial Magistrate could properly have made a finding that three of the four claims/proceedings had been frivolously defended and make a costs

order in each of them. Therefore because the respondent has acted in the administratively sensible way of filing a single claim/proceeding he is, in the particular circumstances of this appeal, precluded from succeeding in obtaining a costs order. This unfortunate result has caused me to question, again, whether the construction I have set out above is correct as a matter of law.

103 In doing so I have had regard to the purpose of s83C. It enacts a primary position that ordinarily the industrial magistrate's court is a no costs jurisdiction. The exception to this is when proceedings are frivolously or vexatiously instituted or defended. The prospect of a costs order being made against a party is intended to prevent or lessen the prospect of a frivolous or vexatious defence or institution of proceedings. In those circumstances the legislature considers it appropriate that costs may be awarded in favour of the other party. It seems that there is an intended deterrent and compensatory effect intended by allowing costs in the limited circumstances that s83C does. It might be argued that this purpose would be enhanced by allowing a costs order to be made in the present appeal. This is because there should be deterrence/compensation where a component of the claim has been frivolously defended. On the other hand, it could be argued that there is no need for deterrence/compensation unless the proceedings taken as a whole have the quality that they were frivolously instituted/defended. In paragraph [57] of my reasons in *Theiss Pty Ltd*, cited earlier, which were agreed with by Harrison C and Smith C, I said:-

> "*[57] Although the focus must be on the meaning of the language used in the statute, s18 of the Interpretation Act, requires that in "the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object". As stated however by the Full Federal Court in R v L (1994) 122 ALR 464 at 468/9, the command contained in provisions like s18 of the Interpretation Act "can have meaning only where two constructions are otherwise open", and the section "is not a warrant for redrafting legislation nearer to an assumed desire of the legislature".*"

104 In the present appeal, on the submissions made and materials cited and referred to by the parties, it is not apparent what the purpose or object of the law is, where there is a claim with components like the present. It is therefore difficult to conclude that the first argument referred to in the previous paragraph better reflects the purpose or object of the "*written law*" constituted by s83C.

105 Also, to find in favour of the respondent because of the concerns set out earlier, I would need to find some principled basis on which to do this, so that s83C(2) could be given meaning. It is at this point that the argument falls away. I do not think the expression "*the proceedings*" can be construed so that an application involving four components can be deconstructed so that each component comprises "*the proceedings*" or perhaps "*the proceeding*" (see s10(c) of the *Interpretation Act 1984* (WA)) for the purpose of s83C(2). Ultimately, the respondent is bound by how the application/claim was commenced and conducted at first instance. This has the effect that, as I have earlier decided, the application for costs should have been dismissed by the Industrial Magistrate.

106 In my opinion a minute of proposed order should issue in these terms:-

1. The appeal is allowed.
2. Orders 4 and 5 of the orders made by the Industrial Magistrate's Court on 19 July 2006 are set aside.
3. The respondent's application for an order for costs in the Industrial Magistrate's Court is dismissed.
4. Leave be granted to amend page 1 of the Notice of Appeal to include the words "*Order 4 and*" before the words "*Order 5*".

SENIOR COMMISSIONER J H SMITH:

107 I have had the benefit of reading the reasons for decision of His Honour, the Acting President. I agree with those reasons and have nothing to add.

COMMISSIONER P E SCOTT:

108 I have had the benefit of reading the reasons for decision of His Honour, the Acting President. I agree with those reasons and have nothing to add.

2007 WAIRC 00101

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KENJI AUTO PARTS LTD T/AS SSS AUTO PARTS (WA)
	APPELLANT
	-and-
	ANTHONY RAYMOND FISK
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J H SMITH COMMISSIONER P E SCOTT
DATE	TUESDAY, 13 FEBRUARY 2007
FILE NO	FBA 26 OF 2006
CITATION NO.	2007 WAIRC 00101

Decision	Appeal allowed, respondent's application for an order for costs in the Industrial Magistrate's Court is dismissed
Appearances	
Appellant	Mr R Gifford, as agent
Respondent	Mr M Cox, (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 17 November 2006, and having heard Mr R Gifford, as agent, on behalf of the appellant, and Mr M Cox (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 1 December 2006, and supplementary reasons for decision having been delivered on 8 February 2007, it is this day, 13 February 2007, ordered that:-

1. The appeal is allowed.
2. Orders 4 and 5 of the orders made by the Industrial Magistrate's Court on 19 July 2006 are set aside.
3. The respondent's application for an order for costs in the Industrial Magistrate's Court is dismissed.
4. Leave be granted to amend page 1 of the Notice of Appeal to include the words "*Order 4 and*" before the words "*Order 5*".

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2007 WAIRC 00195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 00195
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J H SMITH COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 8 FEBRUARY 2007
DELIVERED	**:**	TUESDAY, 6 MARCH 2007
FILE NO.	**:**	FBM 2 OF 2006
BETWEEN	**:**	THE REGISTRAR; Applicant AND THE WEST AUSTRALIAN HAIRDRESSERS AND WIGMAKERS EMPLOYEES' UNION OF WORKERS Respondent

CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J H SMITH COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 8 FEBRUARY 2007
DELIVERED	**:**	TUESDAY, 6 MARCH 2007
FILE NO.	**:**	FBM 3 OF 2006
BETWEEN	**:**	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA Applicant

CatchWords:

Industrial Law (WA) – Application to alter rules of organisation relating to membership – Application to cancel the registration of an organisation – Difficulties arising from one application being contingent upon success of the other application – Whether "Catch 22" – Cancellation of the registration of one organisation and allowing its members to be covered by another organisation – Consideration of earlier decision of the Full Bench in a similar application – Consideration of the principal objects of the Industrial Relations Act 1979 (WA) (as amended) – Application to alter rules granted – Application to cancel registration of organisation granted.

Legislation:

Industrial Relations Act 1979 (WA) (as amended), s6, s55(2), (3), (4), (5), s56, s58(3), s62(2), (4), s73(12)

Industrial Relations Commission Regulations 2005, r69(1), (3), r76, r76(2)

Result:

Application to alter rules of an organisation in FBM 3 of 2006 granted.

Application to cancel the registration of an organisation in FBM 2 of 2006 granted on condition.

Representation: (FBM 2 of 2006):

Applicant	:	Mr J Spurling
Respondent	:	Mr T Pope

Representation: (FBM 3 of 2006):

Applicant	:	Mr T Pope

Case(s) referred to in reasons:

Amalgamated Metal Workers and Shipwrights Union of Western Australia (1992) 72 WAIG 1290.

The Registrar v RAC Patrolmen's Association of Western Australia, Union of Workers (1992) 72 WAIG 1294.

Case(s) also cited:

No additional cases cited.

Reasons for Decision

THE FULL BENCH:

The Applications

1 These are combined reasons for decision in FBM 2 of 2006 and FBM 3 of 2006.

2 FBM 3 of 2006 was filed on 31 October 2006. The applicant is an organisation of employees registered under Division 4 of Part II of the *Industrial Relations Act 1979* (WA) (*the Act*). Pursuant to s62(2) of *the Act*, the applicant seeks the authorisation of the Full Bench for the Registrar of the Commission to register an alteration to the rules of the applicant, that relates to the qualification of persons for membership. For ease of reference we will refer to the applicant as the SDA.

3 The effect of the alteration is to allow the applicant to have as members, employees who currently fall within the constitutional coverage of The West Australian Hairdressers and Wigmakers Employees' Union of Workers, WA (HWEU). This is also an organisation registered under *the Act*. The application was supported by a statutory declaration made by Mr Joseph Bullock on 31 October 2006 (the first statutory declaration). Mr Bullock is the general secretary of the SDA and secretary of the HWEU.

4 FBM 3 of 2006 is linked to application FBM 2 of 2006. It is an application by the Registrar, under s73(12) of *the Act*, for the cancellation of the registration of the HWEU. The application by the Registrar was made under s73(12)(c) of *the Act* because the HWEU requested, in "*the manner prescribed*", that its registration be cancelled. The "*manner prescribed*" is contained in regulation 76 and Form 23 of the *Industrial Relations Commission Regulations 2005* (*the Regulations*). Pursuant to regulation 76(2) the application for cancellation is to state clearly the grounds on which it is made and be accompanied by a

statutory declaration setting out the facts on which the Registrar relies. The application, dated 16 November 2006, is in accordance with *the Regulations*, supported by a statutory declaration sworn by the Registrar on the same date.

5 In a schedule to the cancellation application it states that the Registrar seeks "*an order of the Full Bench*" that the registration of the HWEU be cancelled, "*subject to A Full Bench Order to alter the rules of the Shop, Distributive and Allied Employees' Association of Western Australia, as sought by FBM 3 of 2006*". The reason for seeking the order in these terms was described in paragraph 2 of the schedule to the application for cancellation. This said that the application by the HWEU to the Registrar for cancellation was made "*subject to*" FBM 3 of 2006.

6 Thus, as stated the two applications are linked. The cancellation application is contingent upon the alteration application succeeding. The alteration application, in turn, assumes the success of the cancellation application.

The Hearing

7 Both applications were listed for hearing on the same day and sequentially. The hearing occurred on 8 February 2007. The same agent appeared for the SDA in FBM 3 of 2006 and the HWEU in FBM 2 of 2006. The Registrar also appeared in FBM 2 of 2006. There was no appearance by any other party and the Full Bench did not receive notice of any objection to either of the applications.

8 Due to some perceived difficulties with the granting of the orders in each application, both applications ended up being in effect heard together. Again, arising out of the difficulties which emerged, the hearing concluded on the basis that an order was made in each application to allow the parties to make additional written submissions within seven days. The Full Bench also ordered that the decisions on both applications would stand reserved after the receipt of the written submissions.

9 Additional written submissions were received from the Registrar on 9 February 2007. A statutory declaration of Mr Joseph Bullock, made on 15 February 2007, was filed on that date on behalf of both the SDA and the HWEU (the second statutory declaration). The second statutory declaration dealt with some of the issues which emerged at the hearing and on which the Full Bench wanted to receive additional information.

FBM 3 of 2006

10 It is appropriate to first consider application FBM 3 of 2006. This will lead to a setting out of the primary difficulty which emerged.

11 The proposed alteration is to rule 26 of the rules of the SDA. Rule 26 is headed "*Constitution*" and at present sets out that the "*Union shall consist of an unlimited number of members employed or usually employed in any of the following industries or vocations*". At present there are then listed from (a)-(j) a number of industries. At the end of this there is a list of exclusions. The amendment sought is to include within the alphabetic list of industries as industry (j) "*Hairdressers and wigmakers employed within the portion of the State of Western Australia south of the 26th parallel of south latitude*". What was previously industry (j) becomes (k) and the exclusions are not amended. Accordingly the proposed rule incorporating and showing in bold the alteration sought is as follows:-

> ***26 – CONSTITUTION***
>
> *The Union shall consist of an unlimited number of members employed or usually employed in any of the following industries or vocations:*
>
> *(a) The sale of goods or wares, or the rendering of services by or in connection with wholesale or retail trade in any place establishment or shop (other than an hotel) and cashiers in shops.*
>
> *(b) Storemen, packers, dispatch hands, canvassers, collectors and others employed in or in connection with the receipt, storing, sale or dispatch of goods or wares in any place, shop, warehouse, manufacturing establishment, or assembly plant.*
>
> *(c) In oil stores or installations (other than oil refineries) in or in connection with the cleaning, rumbling, lacquering or reconditioning of drums and containers, packing, stacking, storing, receiving, despatching, blending or preparing of oil, greases, petrols, bitumen, and all petroleum products and bitumenous products or goods or wares.*
>
> *(d) In wool, skin and hide stores, or wool scouring establishments: whether employed by exporters, importers, brokers, dealers, agents, or any manner whatsoever: in or in connection with classing, sorting, dumping, piece picking, packing, storing, receiving or despatching of goods or wares.*
>
> *(e) In Government-owned stores (other than those controlled by The West Australian Government Railways Commission or the General Manager of the Western Australian Government Tramways and Ferries): in or in connection with the receipt, storing, packing, despatching, or sale of goods or wares.*

(f) *In markets or other places of trade that buy, sell, auction, export, import or deal in fruit, vegetables, produce, flowers, poultry or fish: in or in connection with the sale, storing, packing, receiving or despatching of goods or wares.*

(g) *In cold stores: in or in connection with the sale, storing packing, receiving or despatching of goods, or wares.*

(h) *In iron or steel stores or explosives stores: in or in connection with the sale, storing, packing, receiving or despatching of goods or wares.*

(i) *In or in connection with the wine and spirit industry in wholesale warehouses where wines and/or spirits are bottled and/or broken down.*

(j) ***Hairdressers and wigmakers employed within the portion of the Sate of Western Australia south of the 26th parallel of south latitude.***

(k) *In the employ of the Union as a paid official.*

Provided that no person who is or who is eligible to be a member of the West Australian Cleaners, Caretakers, Lift Attendant, Window Cleaners, Attendants and Watchmans Industrial Union of Workers, Perth. West Australian Branch Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth. Australian Workers' Union, Westralian Branch, Industrial Union of Workers, Transport and Motor Operators, Union of Workers, Perth, State Executive and registered affiliated Branches of Australasian Society of Engineers, Industrial Association of Workers, Amalgamated Engineering Union of Workers, Collie Branch. Amalgamated Engineering Union of Workers, Kalgoorlie Branch, Amalgamated Engineering Union of Workers, Northam Branch, Electrical Trades Union of Workers of Australia (Western Australian Branch) Perth, Electrical Trades Union of Workers of Australia (Western Australian Goldfields Sub-Branch) Kalgoorlie, Federated Clerks Union of Australia, Industrial Union of Workers, W.A. Branch, Western Australian Amalgamated Society of Carpenters and Joiners, Industrial Union of Workers, The West Australian Plumbers and Sheet Metal Workers Industrial Union of Workers, The Operative Painters and Decorators Industrial Union of Workers, Perth, The Hotel, Club Caterers, Tea Room and Restaurant Employees' Industrial Union of Workers, Perth, The Waterside Workers' Federation of Australia, Union of Workers, (Fremantle Branch) The West Australian Midland Railway Employees' Industrial Union of Workers, Coastal and E.G. Government Water Sewerage & Drainage Employees' Industrial Union of Workers, West Australian Amalgamated Society of Railway Employees' Union of Workers, as registered with the Court of Arbitration at the date of the registration of this Constitution shall be eligible to become a member of this Union.

No person shall be a member of the Union (except in the capacity of an honorary member) who is not a worker within the meaning of the Industrial Arbitration Act, 1912-1975.

The Union shall comprise only those persons who are referred to in this constitution, and who are employed or are usually employed within the state of Western Australia."

Mr Bullock's First Statutory Declaration

12 Mr Bullock's first statutory declaration was relevant to both applications FBM 2 of 2006 and FBM 3 of 2006. In summary, it referred to the actions of the HWEU which had led to the making of both of the applications. A description of the applications now made is contained in Part 3 of the first statutory declaration. Part 4 of the first statutory declaration certifies that documents appended to the application are true and accurate copies of the original documents. Parts 1 and 2 of the first statutory declaration set out the relevant facts. It is appropriate to reproduce both of these parts of the first statutory declaration, as follows:-

"***PART 1***

(1) By way of letter dated 14 March 2006 a member of The Shop, Distributive and Allied Employees' Association of Western Australia, Mr M. Pritchard member number #29890, in accordance with Rule 21(1), requested The Shop, Distributive and Allied Employees' Association of Western Australia alter its rules to include within its constitutional coverage those persons who currently fall within the constitutional coverage of The West Australian Hairdressers & Wigmakers Employees' Union of Workers, W.A. Appendix 1.

(2) Pursuant to Rule 21(1) of The Shop, Distributive and Allied Employees' Association of Western Australia, a Board of Control meeting was called on 5th April 2006 in accordance with rule 18(a). See Appendix 2 for notice of meeting.

(3) Pursuant to Rule 19(a) at Board Meetings, a majority shall form a quorum. In this case the minutes show seven of the eleven members of the board attended the meeting on the 5th April 2006 thereby forming a quorum. See Appendix 3 for attendees.

(4) At the Board of Control meeting of 5th April 2006 a resolution was put and passed causing action to take place to put into effect the proposed rule change. See Appendix 3. Point 5.

(5) In accordance with the direction given by the Board of Control of The Shop, Distributive and Allied Employees' Association of Western Australia detailed at point (4) above, the General Secretary of The Shop, Distributive and Allied Employees' Association of Western Australia inserted a notice to all members in the Union Journal, Winter 2006 Edition. That notice detailed the rule changes and the reasons therefore and provided members with the right of objection specified in the union's rules and the Industrial Relations Act. See Rule 21 and Appendix 4.

(6) The journal was posted to all members on 3rd July 2006. No objections were received.

PART 2

(7) By way of Special Requisition signed by 13 financial members of the 21 members of The West Australian Hairdressers & Wigmakers Employees' Union of Workers, W.A. dated between 15 and 17 August 2006, the Management Committee of the union was requested to convene a Special General Meeting of the union to pass resolutions in the following or similar terms.

"(1) Subject to The Shop, Distributive and Allied Employees' Association of Western Australia amending its rules to allow employees and/or members who are eligible to belong to The West Australian Hairdressers & Wigmakers Employees' Union of Workers, W.A. to be eligible to join The Shop, Distributive and Allied Employees' Association of Western Australia; and

(2) Upon the meeting of the requirements of resolution (1) above, the Special General Meeting resolves to direct the Committee of Management to take whatever steps are necessary to dissolve The West Australian Hairdressers & Wigmakers Employees' Union of Workers, W.A. and instructs the Secretary to make the necessary application to the Western Australian Industrial Relations Commission to dissolve the union; and

(3) The Special General Meeting also resolves that all outstanding funds and liabilities be transferred to The Shop, Distributive and Allied Employees Association of Western Australia subject to their agreement."

See Appendix 5 and Reg 75(2) requiring the consent of the majority of members.

(8) A Committee of Management Meeting was called by the President by a telephone call to all members of the Committee of Management approximately one week before the meeting of 22nd August 2006. The Committee of Management Meeting was held on 22nd August 2006 and was attended by the Secretary and four members. A majority of Committee of Management members attended forming a quorum (four of seven members — see Appendix 5A).

(9) Point 2 of the minutes at Appendix 5A states:

"2. Members' Requisition

The Secretary tabled a letter from members requisitioning a special meeting of members to consider resolutions supportive of the SDA rule change, as already discussed, and determining to dissolve the union and to transfer funds and liabilities to the SDA should such an application by the SDA to extend its coverage be successful.

Moved D. Genovesse and seconded T Crisa that the requisition for a special meeting of members be received and that the Secretary be directed to take all the necessary steps to convene a special meeting of members to address the proposed resolutions set out in the requisition.

CARRIED"

(10) The Special General Meeting of The West Australian Hairdressers & Wigmakers Employees' Union of Workers, W.A. was convened by way of notice sent to all members on the 29 August 2006 to consider the Special Requisition. See rule 21(3) and Appendix 6. More than seven clear days notice was given as required by Rule 21(3).

(11) The Special General Meeting held on 12th September was attended by six financial members forming a quorum pursuant to Rule 21(4). See Appendix 7 for attendees.

(12) At the Special General Meeting dated 12 September 2006, the following resolution was put and passed which is shown in Appendix 7.

Moved D. Genovesse and seconded S. Russo that this Special General Meeting of the West Australian Hairdressers' and Wigmakers' Employees' Union of Workers resolves as follows:

"(1) To endorse the decision of the Union's Committee of Management to support any application by the Shop Distributive and Allied Employees' Association of Western Australia to vary its rules to extend its constitutional coverage to enable it to enroll as members employees eligible to be members of the West Australian Hairdressers' and Wigmakers' Employees' Union of Workers, and

(2) Subject to such an application by the Shop Distributive and Allied Employees' Association of Western Australia being successful, directs the Secretary to take all actions necessary to achieve the formal dissolution of the Union, and

(3) Directs the Secretary to take all actions necessary to ensure that, upon dissolution, all outstanding funds and liabilities of the Union are, subject to the agreement of that Union, transferred to the Shop Distributive and Allied Employees' Association of Western Australia."

(13) In the event of the applications referred to in Part 3 of this Statutory Declaration being successful The Shop Distributive and Allied Employees' Association of Western Australia agree to take responsibility for the debts and assets of The West Australian Hairdressers & Wigmakers Employees' Union of Workers, WA."

Alteration of Rules – Statutory Requirements

13 As stated earlier, FBM 3 of 2006 is made pursuant to s62(2) of *the Act*. By s62(4) of *the Act*, the contents of s55, s56 and s58(3) apply, with such modifications as are necessary, to and in relation to an application by an organisation for the alteration of a rule of the kind contemplated by s62(2).

14 Regulation 69(1) and (3) of *the Regulations* sets out the documents which need to be filed to support an application to alter the rules of an organisation or association with respect to the qualification of persons for membership or the area of the State within which the organisation or association operates or intends to operate. Each of the documents referred to in these regulations has been filed with the Commission.

15 Section 55(2) of *the Act* refers to publication, in this case and by reference to s62(4), of notice of the application to alter the rules. Notice of the application to alter the rules was published in the Western Australian Industrial Gazette on 27 December 2006 (see (2006) 86 WAIG 3444).

16 Section 55(3) of *the Act* provides that an application should not be listed for hearing before the Full Bench until after the expiration of 30 days from the day on which the publication of the notice referred to in s55(2) has occurred. This subsection has been complied with, as the application was not heard until, as stated, 8 February 2007; in excess of 30 days after the date of the publication of the notice in the WAIG.

17 Section 55(4) of *the Act* provides that the Full Bench shall refuse an application unless it is satisfied that:-

> "*(a) the application has been authorised in accordance with the rules of the organisation;*
>
> *(b) reasonable steps have been taken to adequately inform the members —*
>
> *(i) of the intention of the organisation to apply for registration;*
>
> *(ii) of the proposed rules of the organisation; and*
>
> *(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,*
>
> *and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;*
>
> *(c) in relation to the members of the organisation —*
>
> *(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or*
>
> *(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;*
>
> *(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and*
>
> *(e) rules of the organisation relating to elections for office —*
>
> *(i) provide that the election shall be by secret ballot; and*
>
> *(ii) conform with the requirements of section 56(1),*
>
> *and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.*"

18 The first requirement of s55(4) is that the application has been authorised in accordance with the rules of the organisation.

19 Rule 21 of the rules of the SDA is about the alteration of those rules. This provides:-

> "*(1) The Union shall have the right to make Rules for its own use and guidance. Rules may be amended, added to, varied, repealed by notice of any proposed alteration to the rules being given by any member to the Secretary in writing. The same shall be laid before the Board of Control or before a special meeting of the Union which may amend, add to, vary or repeal the Rules or any part of them in accordance with the proposal in the said notice or any reasonable amendment of same.*
>
> *(2) No amendment, addition to, variation, repeal, or substitution, of these Rules shall be made unless a notice of the proposed alteration, and the reasons therefor, are:*
>
> *(a) sent to each work place for the attention of all members; or*
>
> *(b) published in a Union magazine which shall be distributed to all members.*

> *(3) In the notice referred to in sub-rule (2) members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Industrial Registrar to reach him no later than 21 days after the date of issue of the notice in (2)(a) above or 21 days after the date of issue of the magazine as in (2) (b) above, as the case may be.*"

20 We are satisfied by the facts deposed to by Mr Bullock in the first statutory declaration that the alteration application has been authorised in accordance with this rule.

21 The facts deposed to in the first statutory declaration also satisfy us that reasonable steps have been taken to adequately inform the members of the SDA of the three matters set out in s55(4)(b) of *the Act*, as modified for the purposes of considering a rule alteration application. Accordingly, we are satisfied that members have been afforded a reasonable opportunity to make an objection.

22 With respect to s55(4)(c) of *the Act*, the facts set out in the first statutory declaration establish that less than five percent of the members of the SDA have objected to the alteration of the rules. In fact, no-one has objected to the making of the application. Accordingly, we are satisfied that the requirement contained in s55(4)(c) has been complied with.

23 We are also satisfied that s55(4)(d) of *the Act* has been complied with. This finding is made because of the contents of the rules relating to notice being provided to members, contained in rule 21 which we have earlier quoted, and the action taken by the SDA to provide notice to the members, including a reasonable opportunity to object to the proposed rule alteration.

24 Section 55(4)(e) of *the Act* does not apply, given that the rules for election of office bearers are not proposed to be altered by the present application.

25 We will refer to the contents of s55(5) of *the Act* shortly.

26 It is first convenient to state that the contents of s56 of *the Act* are not relevant to the present application which does not seek to amend the rules of the SDA with respect to elections or secret ballots.

27 Also s58(3) of *the Act*, which provides for applications for the authorisation of exclusionary membership rules, is not relevant to the present application.

Section 55(5) of *the Act*

28 This deals with all of the statutory requirements relevant to FBM 3 of 2006, except s55(5) of *the Act*. This provides that:-

> "*(5) Notwithstanding that an organisation complies with section 53(1) or 54(1), the Full Bench shall refuse an application by the organisation under this section if a registered organisation whose rules relating to membership enable it to enrol as a member some or all of the persons eligible, pursuant to the rules of the first-mentioned organisation, to be members of the first-mentioned organisation unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in section 6, to permit registration.*"

29 It is this subsection which contains the kernel of the problem which emerged at the hearing of the two applications. This is because unless and until the order for cancellation of the HWEU is made in FBM 2 of 2006, the alteration application would have the effect of enabling the SDA to enrol as members people who were eligible to be members of the HWEU.

30 Further, s55(5) is stated in terms that "*the Full Bench shall refuse …*". The exception to the refusal is that there is "*good reason, consistent with the objects prescribed in section 6, to permit registration*".

31 A consideration of those objects confirms the problem. Section 6 of *the Act* sets out the principal objects of *the Act*. There are presently listed 15 such objects from (a) to (g) with some alphabetical variations in between. Principal object (e) is:-

> "*(e) to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations;*"

32 Accordingly, a principal object of *the Act* is to discourage overlapping of eligibility for membership of organisations. If, accordingly, there is a good reason, consistent with the objects prescribed in s6 of *the Act* to permit the rule alteration sought, it must be found in other than, and in spite of, principal object 6(e).

33 Mr Pope, the agent for the SDA and the HWEU at the hearing, submitted that most of the other objects contained in s6 supported the alteration of the rules application. This argument gained most force from the following of the principal objects set out in s6:-

> "***6. Objects***
>
> *The principal objects of this Act are —*
>
> …
>
> *(ab) to promote the principles of freedom of association and the right to organise;*
>
> …

> *(ad) to promote collective bargaining and to establish the primacy of collective agreements over individual agreements;*
>
> …
>
> *(ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises;*
>
> …"

34 It was submitted in effect that, given the contents of the first statutory declaration, unless the present members of the HWEU were able to be covered by the SDA then their capacity to collectively bargain and reach agreements appropriate to the needs of enterprises with employers within the relevant industry could be frustrated or denied.

Catch-22?

35 Mr Pope also submitted that if the cancellation of the HWEU which was sought in FBM 2 of 2006 was granted, then the problem which originated in s55(5) of *the Act* would not be present. As pointed out to Mr Pope by the Full Bench, however, the difficulty with that approach was the cancellation application was specifically subject to the operation of the rules application being made.

36 Mr Pope responded that this had the potential to become a "*Catch-22*" situation. This is a well known and colloquial reference to the novel "*Catch-22*" by Joseph Heller which was first published in the early 1960's. It is a fictional account of some American air servicemen stationed overseas in World War II. In the context of the sanity of a pilot, called Orr, Catch-22 was explained on page 54 of the 1979 Corgi edition of the book: "*There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and he didn't have to; but if he didn't want to he was sane and had to*". Two of the characters in the book then describe Catch-22 as being "*some catch*" and "*the best there is*".

37 The submissions of the parties went on to consider whether the conundrum in the present applications is as irresolvable as Catch-22.

The RAC Patrolmen's Case

38 In this context, Mr Pope and the Registrar both referred, at the hearing, to an earlier decision of the Full Bench which was said to involve not dissimilar applications involving the Amalgamated Metal Workers and Shipwrights Union of Western Australia (AMWSU) and the RAC Patrolmen's Association of Western Australia, Union of Workers. As the details of the decisions made in these applications was not clear at the hearing, it was one issue upon which the Full Bench wanted additional written submissions.

39 As summarised in the subsequent written submissions of the Registrar:-

> "*In that decision, the Full Bench issued an order which cancelled the registration of the respondent union, the RAC Patrolmen's Association of Western Australia, Union of Workers. The terms of the order provided that the cancellation was effective on and from the date of the registration of the alteration to the rules of the Amalgamated Metal Workers and Shipwrights Union of Western Australia Union authorised by an order in Application 1322 of 1991 dated the 12th day of December 1991.*
>
> *In Application 1322 of 1991, the Amalgamated Metal Workers and Shipwrights Union of Western Australia Union sought to alter its rules to cover patrolmen employed by the RAC. These persons were at the time of the application, eligible to be to be (sic) members of the registered organisation, the RAC Patrolmen's Association of Western Australia, Union of Workers. The Full Bench order amended the constitution of the Amalgamated Metal Workers and Shipwrights Union to provide for coverage of these employees [72 WAIG 1290] – copy attached).*"

40 In those applications, two sets of reasons for decision were published by the Full Bench, both on 20 May 1992. The rules alteration decision is *Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1992) 72 WAIG 1290. The cancellation of registration is *The Registrar v RAC Patrolmen's Association of Western Australia, Union of Workers* (1992) 72 WAIG 1294. In the rules alteration application the Full Bench referred to the amendment to alter rule 2 to include patrolmen and vehicle inspectors employed or usually employed by the Royal Automobile Club of Western Australia Inc (the RAC). That part of the application was not objected to. The reasons of the Full Bench stated that the patrolmen employed by the RAC were at the time of the application eligible to be members of the registered organisation, the RAC Patrolmen's Association of Western Australia, Union of Workers, but that they desired to be covered by the AMWSU. The reasons also refer to the parallel application by that organisation to deregister itself. The vehicle inspectors employed by the RAC were not eligible for coverage by any other organisation. The Full Bench had no difficulty in granting the rule alteration sought with respect to the RAC patrolmen and vehicle inspectors.

41 With respect to the cancellation of registration decision, the Full Bench said that it accepted the Registrar's submission that there was a discretion whether or not to grant the cancellation application. When heard by the Full Bench, s73(12)(c) had the word "*may*" contained in it, whereas now it provides that the Full Bench "*shall cancel the registration …*". The Full Bench in the RAC Patrolmen's case referred at page 1294 to the fact that:-

> "*… since organisations exist because firstly the members wish them to exist, and secondly because they are registered under the Act upon application by the members, it must be a relevant consideration that the members, having decided that their interests are better served by another registered organisation, particularly when their own is so small, no longer see the need for it to exist.*"

42 These observations are, with respect, relevant to the two applications which are presently before the Full Bench.

43 The orders made by the Full Bench are accurately described in the written submissions from the Registrar which has been quoted earlier. The effect of the order made was that the cancellation of the RAC Patrolmen's Association of Western Australia, Union of Workers, was effective on and from the date of the registration of the alteration to the rules of the AMWSU, authorised by the order of the Full Bench in the other application.

The Appropriate Orders in the Cancellation Application

44 In our opinion it is appropriate to make an order of this type in the present cancellation application. The making of such an order would satisfy the contingency upon which the cancellation application is based. It would also provide that, in effect, in the future there will not be the potential for dual coverage of employees by registered organisations, which is what s55(5) of *the Act* is aimed at avoiding, consistent with principal object 6(e) of *the Act*.

45 The alteration of rules application also satisfies those other principal objects which have been earlier quoted.

Alteration of Rules Application – Exercise of Discretion

46 With respect to the alteration of rules application, s62(2) of *the Act* does not set out any additional criteria to guide the Full Bench in determining whether to give the authorisation referred to. In our opinion, however, it is appropriate in this case to make an order which authorises the alteration of the rules. This is mainly for the reasons described in the first statutory declaration. All of the statutory requirements have been complied with. The rules of the SDA authorise the alteration to the rule which is sought and no-one has objected to the application. The first statutory declaration sets out the facts which provide reasons for the SDA and its members to seek the alteration to the rule sought. These are considered to be good reasons by Mr Bullock and the members of the SDA and the HWEU, and there is no information before the Full Bench to indicate that these views are not genuinely or reasonably held.

Mr Bullock's Second Statutory Declaration

47 Mr Bullock's second statutory declaration referred to some other issues which emerged during the hearing. The first was an inquiry as to which state award currently covers members of the HWEU and what steps the SDA were taking or have taken to enable coverage of the award over those employees to continue. An appendix to the second statutory declaration is a copy of the Hairdressers Award 1989. The second schedule to the award lists the HWEU as a named union party. The second statutory declaration also appends a copy of application No 159 of 2006 filed at the Commission on 21 December 2006. That application seeks the joinder of the SDA as a party to the Hairdressers Award 1989. The application states that it is subject to applications FBM 2 of 2006 and FBM 3 of 2006 being successful.

48 A second issue on which the Full Bench wanted more information after the hearing was the extent of "*federal coverage*" of the employees who could be affected by the rules alteration and/or cancellation of registration applications. This had been referred to in the submissions made by Mr Pope at the hearing. The second statutory declaration appends a copy of the rules of the Shop, Distributive and Allied Employees Association, Western Australian Branch, certified under the *Workplace Relations Act 1996* (Cth). Rule 3 is headed "*Constitution*" and provides that the "*Constitution of the Branch shall be as contained in Rules 3 and 3A – Constitution and Industry Rules of the Association*". "*The Association*" is defined in rule 29 to mean "*The Shop, Distributive and Allied Employees Association*". The second statutory declaration also appends a copy of the registered rules of the Association. The constitution of the Association and the industry in or in connection with which the Association is formed are set out in clauses 3 and 3A of these rules. The members include those "*engaged in any capacity in or in connection with hairdressing, wigmaking, hairworking, beauty therapy …*". The industries include "*hairdressing, wigmaking, hairworking, beauty therapy …*". The second statutory declaration also appends a copy of the *SDA -Volona Nominees Enterprise Agreement 2005* which by clause 3(1) of the agreement covers classifications registered by the Hairdressers Registration Board of Western Australia and as to which The Shop, Distributive and Allied Employees Association is the union party.

49 The second statutory declaration also declares that there are 32 members of the SDAEA who are listed as hairdressers, wigmakers or beauticians.

50 The second statutory declaration also refers to the reasons for decision in the RAC Patrolmen's case referred to earlier.

51 A question was also raised at the hearing as to what will happen to the funds of the HWEU if cancellation occurs. This subject matter was referred to in the first statutory declaration and the Full Bench enquired as to the constitutionality of this proposal.

52 The second statutory declaration appended a copy of the balance sheet of the HWEU dated 7 February 2007, signed by the organisation's accountant, Mr Mustica. This showed that the total assets of the HWEU were $12,559.47 and the net assets were $11,924.08.

53 Rule 37 of the rules of the HWEU, which was also appended to the second statutory declaration, is in the following terms:-

"***37 - DISSOLUTION OF UNION***

(1) This Union cannot be diverted from its original purpose or be dissolved while one-third of its members present, at a meeting convened for the purpose, object.

(2) Should the members at any time be reduced to fourteen (14), the funds and other properties of the Union shall be placed in the hands of such body as is recognised as the head council in the State for the purpose of reorganising the Union at some future time."

54 The second statutory declaration declared, or in effect submitted, that rule 37(1) did not apply in this case because the decision to seek cancellation of registration was unanimous. It was also submitted that rule 37(2) does not apply because the union has 21 members which is obviously more than the 14 specified in rule 37(2). The effect of this submission seemed to be that there was no prohibition upon the funds of the HWEU being used in the way contemplated in the first statutory declaration of Mr Bullock. We accept this submission.

Conclusion

55 For all of these reasons, in our opinion the Full Bench is required to cancel the registration of the HWEU in accordance with s73(12) of *the Act*. The cancellation shall take effect in terms similar to that described above with respect to the RAC Patrolmen's case.

56 In addition, we are satisfied that the Full Bench should authorise the alteration of the rules of the SDA as sought in FBM 3 of 2006.

Orders

57 In our opinion the order which should issue in application FBM 3 of 2006 is that:-

1. The Registrar be authorised to register the alteration to the rules of the applicant to the form of the rules published in the Western Australian Industrial Gazette on 27 December 2006.

58 In our opinion in FBM 2 of 2006 the order which should be made is that:-

1. The registration of the Western Australian Hairdressers and Wigmakers Employees Union of Workers, Western Australia be cancelled and that such cancellation be effective on and from the date of the registration of the alteration to the rules of The Shop, Distributive and Allied Employees' Association of Western Australia authorised by an order of the Full Bench in application FBM 3 of 2006.

59 Minutes of proposed orders will issue in these terms.

2007 WAIRC 00214

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR
	APPLICANT
	-and-
	THE WEST AUSTRALIAN HAIRDRESSERS AND WIGMAKERS EMPLOYEES' UNION OF WORKERS
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 9 MARCH 2007
FILE NO	FBM 2 OF 2006
CITATION NO.	2007 WAIRC 00214

Decision	Application to cancel the registration of an organisation granted on condition
Appearances	
Applicant	Mr J Spurling
Respondent	Mr T Pope

Order

This matter having come on for hearing before the Full Bench on 8 February 2007, and having heard Mr J Spurling on behalf of the applicant and Mr T Pope on behalf of the respondent, it is this day, 9 March 2007, ordered that:-

1. The registration of the Western Australian Hairdressers and Wigmakers Employees Union of Workers, Western Australia be cancelled and that such cancellation be effective on and from the date of the registration of the alteration to the rules of The Shop, Distributive and Allied Employees' Association of Western Australia authorised by an order of the Full Bench in application FBM 3 of 2006.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2007 WAIRC 00215

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 9 MARCH 2007
FILE NO	FBM 3 OF 2006
CITATION NO.	2007 WAIRC 00215

Decision	Application to alter rules of an organisation granted
Appearances	
Applicant	Mr T Pope

Order

This matter having come on for hearing before the Full Bench on 8 February 2007, and having heard Mr T Pope on behalf of the applicant, it is this day, 9 March 2007, ordered that:-

1. The Registrar be authorised to register the alteration to the rules of the applicant to the form of the rules published in the Western Australian Industrial Gazette on 27 December 2006.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2007 WAIRC 00159

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-and-
	MARK JAMES LAWRENCE
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 23 FEBRUARY 2007
FILE NO	FBA 1 OF 2007
CITATION NO.	2007 WAIRC 00159

Decision	Application dismissed
Appearances	
Appellant	Mr T Caspersz (of Counsel), by leave
Respondent	Mr T Borgeest (of Counsel), by leave

Order

This application having come on for hearing before the Full Bench on 22 February 2007, and having heard Mr T Caspersz (of Counsel), by leave, on behalf of the appellant, and Mr T Borgeest (of Counsel), by leave, on behalf of the respondent, it is this day, 23 February 2007, ordered that the application to strike out the notice of appeal is dismissed.

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

2007 WAIRC 00212

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPELLANT
	-and-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE HON. MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 8 MARCH 2007
FILE NO	FBA 37 OF 2006
CITATION NO.	2007 WAIRC 00212

Decision	Orders and directions
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr D Matthews (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 8 March 2007, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the appellant, and Mr D Matthews (of Counsel), by leave, on behalf of the respondent, it is this day, 8 March 2007 ordered that:-

1. The respondent provide additional written submissions within 10 days.
2. The appellant provide additional written submissions within 20 days.
3. The decision of the Full Bench stands reserved upon the receipt of the additional written submissions.

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

2007 WAIRC 00194

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION & TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 2 MARCH 2007
FILE NO	FBA 43 OF 2006
CITATION NO.	2007 WAIRC 00194

Decision	Appeal discontinued

Order

The Full Bench orders, by consent that:-

(1) Leave be granted for the appeal to be discontinued.

(2) There be no orders as to costs.

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

PRESIDENT—Matters dealt with—

2007 WAIRC 00193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROMAN CATHOLIC ARCHBISHOP OF PERTH
	APPLICANT
	-and-
	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	FRIDAY, 2 MARCH 2007
FILE NO	PRES 1 OF 2007
CITATION NO.	2007 WAIRC 00193

Decision	Orders and directions
Appearances	
Applicant	Mr J F I Curlewis (of Counsel), by leave
Respondent	No appearance

Order

This matter having come on for hearing before me on 2 March 2007, and having heard Mr J F I Curlewis (of Counsel), by leave on behalf of the applicant, and there being no appearance on behalf of the respondent, it is this day, 2 March 2007 ordered that:

1. Orders 2, 3, 4, 5 and 6 of the Orders made by the Commission on 16 February 2007 in application CR 188 of 2005 be stayed pending the further hearing and determination of the application for a stay or until further order.
2. The parties have liberty to apply on 48 hours' notice for the purpose of seeking any amendment to or revocation of the first order made.
3. The application for a stay will be listed for further hearing on Tuesday, 13 March 2007 at 10:00am.
4. A copy of application No. PRES 1 of 2007 together with a copy of the Orders made on 2 March 2007 will be served on the respondent forthwith in accordance with the *Industrial Relations Commission Regulations 2005* (as amended) and a Declaration of Service be filed by 4:00pm on Tuesday, 6 March 2007.
5. If the respondent intends to oppose the application then before 4:00pm on Wednesday, 7 March 2007 it is to file and serve an answer.
6. Any evidence in opposition to the application is to be by way of affidavit filed and served by the respondent by 4:00pm on Thursday, 8 March 2007.
7. Any affidavit in reply to any affidavit filed by the respondent be filed and served by the applicant by 4:00pm on Friday, 9 March 2007.
8. Notice of any intention to seek leave to cross examine the deponent of any affidavit is to be filed and served by 2:00pm on Monday, 12 March 2007.
9. If the application for a stay is opposed then each party shall file and serve written submissions and a list of authorities by 2:00pm, Monday, 12 March 2007.

[L.S.]

(Sgd.) M T RITTER,
Acting President.

2007 WAIRC 00210

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN DARROW STACEY
	APPLICANT
	-and-
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	THURSDAY, 8 MARCH 2007
FILE NO	PRES 5 OF 2006
CITATION NO.	2007 WAIRC 00210

Decision	Orders and directions
Appearances	
Applicant	Mr D Howlett (of Counsel), by leave
Respondent	Mr P Fraser (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 7 March 2007, and having heard Mr D Howlett (of Counsel), by leave, on behalf of the applicant, and Mr P Fraser (of Counsel), by leave, on behalf of the respondent, it is this day, 8 March 2007, ordered and directed as follows:-

1. The applicant's application for further and better discovery is refused.
2. The application is to be listed for further hearing for two days commencing on Thursday, 26 April 2007 at 10:00am.
3. The respondent is to file and serve an additional outline of submissions by 4:00pm on Thursday, 19 April 2007 dealing with the following issues:
   (a) The principles which apply in determining questions of issue estoppel and what issue or issues the respondent contends are affected by issue estoppel, because of the proceedings, decision and reasons for decision in application 1215 of 2004.
   (b) The scope of the jurisdiction of the Acting President in the present s66 application having regard to the matters identified in pages 244 and 245 of the transcript in these proceedings.
   (c) The dates of the repeal of the *Public Service Act 1978* (WA), the commencement of the *Public Sector Management Act (1984)* (WA), the commencement and repeal of the *Workplace Agreements Act (1993)* (WA) and the legislation which effected these changes.
4. The applicant is to file and serve a written outline of submissions by 4:00pm on Monday, 23 April 2007 with respect to issues (a) and (c) of the previous order and any submissions which the applicant may wish to make about issue (b).
5. Attached to the written outline of submissions referred to in orders 3 and 4 is to be either an agreed chronology of events or if no chronology can be agreed, a chronology of relevant events as asserted by the party filing the submissions. The chronology may include the matters referred to in issue (c) in orders 3 and 4 which will be taken as satisfying the direction in relation to that part of the required outline of submissions.
6. The parties have liberty to apply for further orders or directions on 48 hours' notice.

[L.S.]

(Sgd.) M T RITTER,
Acting President.

AWARDS/AGREEMENTS—Variation of—

2007 WAIRC 00235

BAKERS' (COUNTRY) AWARD NO. 18 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ACME BAKERY AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 12 MARCH 2007
FILE NO	APPL 17 OF 2007
CITATION NO.	2007 WAIRC 00235

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondents	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Bakers' (Country) Award No. 18 of 1977 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. – Wages: Delete subclause (1)(d) and (e) of this clause and insert the following in lieu thereof:

(d) Foreperson: In addition to the total wage prescribed in this clause for a doughmaker, a foreperson shall be paid:

		$
(i)	if placed in charge of less than four other employees (per week)	15.10
(ii)	if placed in charge of four but less than ten other employees (per week)	23.90
(iii)	if placed in charge of ten and not more than 20 other employees (per week)	36.55
(iv)	if placed in charge of 20 or more other employees (per week)	49.85

(e) Disability Allowance:

In addition to the total wage prescribed in this subclause a disability allowance of $6.40 per week shall be paid to doughmakers and single hand bakers.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Baker.

2. For Work Related Allowances – the percentage increase in:

- Clause 8. – Wages

is derived from $17 divided by $545.00 equals 3.12% (2005) and $20 divided by $562.00 equals 3.56% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

The Union uses CPI Catalogue No.: 6455.0.40.001

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – BAKER

Clause		A	B	C
Clause 8. – Wages	(1)(d)(i)	$14.15	$15.12	$15.10
	(d)(ii)	$22.40	$23.92	$23.90
	(d)(iii)	$34.25	$36.56	$36.55
	(d)(iv)	$46.20	$49.86	$49.85
	(e)	$6.00	$6.42	$6.40

2007 WAIRC 00117

BAG, SACK AND TEXTILE AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

JOYCE BROS (WA) PTY LTD AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S WOOD

DATE WEDNESDAY, 14 FEBRUARY 2007

FILE NO APPL 132 OF 2006

CITATION NO. 2007 WAIRC 00117

Result Award varied

Representation

Applicant Ms E Palmer on behalf of the applicant

Respondents No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Bag, Sack and Textile Award as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. – Meal Money: Delete this clause and insert the following in lieu thereof:

12. - MEAL MONEY

(1) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by his/her employer or paid $9.30 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the employees concerned on the previous day or earlier, that such second or subsequent meal will also be required, provide such meals or pay an amount of $8.10 for each second or subsequent meal.

(3) No such payments need be made to employees living in the same locality as their workshops who can reasonably return home for such meals.

(4) If an employee in consequence of receiving such notice has provided himself/herself with a meal or meals and is not required to work overtime, or is required to work less overtime than notified, he/she shall be paid the amount prescribed in respect of the meals not then required.

2. Clause 23. – Extra Rates: Delete this clause and insert the following in lieu thereof:

23. - EXTRA RATES

Any employee required to repair canvas goods of all descriptions which are of an unusually dirty or offensive nature shall be paid 34 cents per hour in addition to the ordinary rate.

3. Clause 25. – Wages: Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:

(5) Leading Hands: Any employee placed by the employer in charge of other employees shall be paid the following rates in addition to their ordinary rate of wage:

	Per Week $
In charge of 1 - 5 employees	23.95
In charge of 6 - 10 employees	36.75
In charge of 11 or more employees	47.20

(6) Tool Allowance:

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

(i) $11.20 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $11.70 being the percentage which appears against his/her year of apprenticeship in subclause (4) of this clause.

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

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

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

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

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Canvas and Vinyl Fabricator.

2. For Work Related Allowances – the percentage increase in:

- Clause 23. – Extra Rates
- Clause 25. - Wages

is 3.15% derived from $17 divided by $539.60 (2005) and 3.59% is derived from $20 divided by $556.60 (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 12. – Meal Money has been varied for the CPI Take Away Food for the period December 2004 to June 2006 giving the percentage of 6.19%.

Calculations are therefore:

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

CPI Meals Out and Take Away Foods - Perth

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

The Union uses Catalogue No.: 6455.0.40.001

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – CANVAS AND VINYL FABRICATOR

Clause		A	B	C
Clause 23. – Extra Rates		$0.32	$0.34	
Clause 25. – Wages	(5)	$22.40 $34.40 $44.15	$23.93 $36.77 $47.19	$23.95 $36.75 $47.20
	(6)	$10.45 $10.95	$11.19 $11.71	$11.20 $11.70

EXPENSE RELATED ALLOWANCES

CPI Take Away Food - Perth

Clause	A	B	C
Clause 12. – Meal Money	$8.75 $7.65	$9.29 $8.12	$9.30 $8.10

2007 WAIRC 00158

BURSWOOD INTERNATIONAL RESORT CASINO EMPLOYEES' AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

BURSWOOD RESORT (MANAGEMENT) LIMITED

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH

DATE THURSDAY, 22 FEBRUARY 2007

FILE NO. APPL 105 OF 2006

CITATION NO. 2007 WAIRC 00158

Result Award varied

Representation

Applicant Ms E Palmer

Respondent No appearance

Order

Having heard Ms E Palmer on behalf of the Applicant and no appearance by the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the Burswood International Resort Casino Employees' Award 2002 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 February 2007.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 5. – Wages: Delete paragraphs (a) and (b) of subclause (1) of this clause and insert the following in lieu thereof:

(a) In-Charge Rates

An employee who is appointed and placed in charge of other employees shall be paid the following rates in addition to the employee's ordinary time rate of pay:

		$ Per Fortnight
(i)	if placed in charge of less than 6 employees	26.52
(ii)	if placed in charge of 6-10 employees	35.78
(iii)	if placed in charge of 11-20 employees	41.49
(iv)	if placed in charge of more than 20 employees	69.38

Provided that these additional rates shall not be payable to any employee employed in the classifications of Chef, Housekeeper, Head Waiter, Head Waitress, Head Steward, Head Stewardess, Head Bar Attendant and Casino Operations Employees.

(b) Service Payments

In addition to the wage rates prescribed in Sections A, B, C and D of this subclause, all employees (other than Apprentices) employed on a full-time or part-time basis, shall be paid Service Payments at the following rates:

	$ Per Fortnight
After 1 year of service	20.69
After 2 years of service	31.77
After 3 years and subsequent years of service	42.52

2. Clause 5. – Wages: Delete the paragraph immediately following 10. – Security Officer in Section E of subclause (1) of this clause and insert the following in lieu thereof:

Provided that an employee appointed as a Senior Security Officer shall, in addition to the appropriate Security Officers' rate receive an additional payment of $63.67 per fortnight.

3. Clause 13. – Additional Rates for Ordinary Hours: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) An employee who is rostered to work any of the employee's ordinary hours prior to 7.00am or after 7.00pm, Monday to Friday, both inclusive shall, in addition to the employee's ordinary time rate of pay, be entitled to an allowance of $1.42 per hour or part thereof for time worked during such hours.

4. Clause 13. – Additional Rates for Ordinary Hours: Delete paragraphs (c), (d) and (e) of subclause (2) of this clause and insert the following in lieu thereof:

(c) Any employee who is required to work any of the employee's ordinary hours on any day in more than one period, other than for meal breaks as prescribed in Clause 17. – Meal and Rest Breaks of this Award, shall be paid an allowance of $2.09 per day for such broken work period worked.

(d) Where a Cleaner is rostered to perform normal duties within the recognised Casino, International Room, Convention Centre or Burswood Dome restroom facilities, and such duties include work of an unusually unsavoury or unhygienic nature, such employee shall, in addition to the employee's ordinary time rate of pay be paid a flat allowance of $6.57 per shift.

(e) Where a Laundry Attendant is rostered to perform duties of an unusually unsavoury or unhygienic nature, the employee shall, in addition to the ordinary time rate of pay, be paid a flat allowance of $6.57 per shift.

5. Clause 18. – Meal Money: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) All employees shall be supplied with one meal free of charge per rostered shift, to be consumed in the employee cafeteria.

Any employee who is required to work overtime for 2 hours or more shall be supplied with a meal free of charge to be consumed in the employee cafeteria. Provided that where the Employer does not supply such a meal, the employee shall be paid $6.16 per meal.

6. Clause 25. – Bar Work: Delete this clause and insert the following in lieu thereof:

25. - BAR WORK

(1) Any employee other than a Bar Attendant who, in addition to the employee's normal duties, is required to dispense liquor from a bar shall, in addition to the employee's ordinary time rate of pay, be paid a flat allowance of 82 cents per shift for the performance of such additional duties.

(2) Any employee employed as a Bar Attendant who is required, in addition to the employee's normal duties, to be responsible for and/or the purchasing of stock, shall be paid in addition to the employee's ordinary time rate of pay an allowance of $13.59 per fortnight.

7. Clause 27. – Uniforms and Laundering: Delete this clause and insert the following in lieu thereof:

27. - UNIFORMS AND LAUNDERING

(1) Where the Employer requires an employee to wear a special uniform in the performance of their duties, such special uniform shall be provided by the Employer and shall at all times remain the Employer's property. A special uniform shall consist of such articles of clothing as monogrammed or coloured jackets, dresses, blouses, overalls, aprons, caps, collars, cuffs, or other special apparel which the Employer may require an employee to wear whilst on duty, provided that the ordinary apparel usually worn by Waiters/Waitresses and Stewards/Stewardesses shall not be deemed to be special uniforms within the meaning of this clause.

(2) Where a cook wears the ordinary apparel usually worn by cooks, such as black and white check or white trousers, white coat, white shirt, white apron and cap, such garments shall be laundered at the Employer's expense or otherwise the employee shall be paid $7.54 per fortnight as laundry allowance.

(3) Subject to sub-clause (2) of this clause, where the Employer requires any of the articles of clothing to be worn as described in sub-clause (1) of this clause, then such clothing shall be laundered at the Employer's expense or otherwise shall be paid $4.95 per fortnight as a laundry allowance.

(4) Where such special uniforms are supplied, employees shall be obliged to wear special uniforms at all times and in line with Employer standards.

8. Clause 29. – Employees' Equipment: Delete this clause and insert the following in lieu thereof:

29. - EMPLOYEES' EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements, and materials which may be required to be used by an employee for the purpose of carrying out the employee's duties shall be supplied by the Employer free of charge. Provided that where an employee is required by the Employer to use the employee's own knives they shall be paid an allowance of $10.74 per fortnight.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Qualified Cook.

2. The Work Related Allowances – the percentage increase in:

   - Clause 5. – Wages
   - Clause 13. – Additional Rates for Ordinary Hours
   - Clause 25. – Bar Work
   - Clause 29. – Employees Equipment

   is derived from $34 divided by $1097.60 equals 3.1% (2005) and $40 divided by $1114.60 equals 3.6% (2006), as prescribed by Principles 5. – Adjustment of Allowances and Service Increments of the State Wage Case:

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

   - Clause 18 – Meal Money has been varied for the CPI Meals Out and Take Away Foods for the period December 2004 to June 2006 giving the percentage of 6.19%.

     $$\text{June 2006} \atop \text{December 2004} \quad \frac{171.5}{161.5} \times \frac{100}{1} = 6.19\%$$

   Perth for the period December 2004 to June 2006 giving the percentage 7.29%.

   $$\text{June 2006} \atop \text{December 2004} \quad \frac{185.5}{172.9} \times \frac{100}{1} = 7.29\%$$

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION - QUALIFIED COOK

Clause			A	B	C
Clause 5. – Wages	(a)	(i)	$24.83	$26.52	
		(ii)	$33.50	$35.78	
		(iii)	$38.85	$41.49	
		(iv)	$64.96	$69.38	

Clause	A	B	C
(b)	$19.37	$20.69	
	$29.75	$31.77	
	$39.81	$42.52	
E(10) Senior Security Officer	$59.61	$63.67	
Clause 13. – Additional Rates for Ordinary Hours			
(1)	$1.33	$1.42	
(2)(c)	$1.96	$2.09	
(2)(d)	$6.15	$6.57	
(2)(e)	$6.15	$6.57	
Clause 25. – Bar Work (1)	$0.77	$0.82	
(2)	$12.73	$13.59	
Clause 29. – Employees' Equipment	$10.06	$10.74	

EXPENSE RELATED ALLOWANCES

CPI Meals Out & Take Away Food - Perth

Clause	A	B	C
Clause 18. – Meal Money	$5.80	$6.16	

CPI Clothing Services & Shoe Repair – Perth

Clause		A	B	C
Clause 27. – Uniforms and Laundering	(2)	$7.03	$7.54	
	(3)	$4.62	$4.95	

2007 WAIRC 00153

CATERING EMPLOYEES AND TEA ATTENDANTS (GOVERNMENT) AWARD 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

THE MINISTER FOR PRIMARY INDUSTRY AND OTHERS

RESPONDENTS

CORAM SENIOR COMMISSIONER J H SMITH

DATE THURSDAY, 22 FEBRUARY 2007

FILE NO. APPL 79 OF 2006

CITATION NO. 2007 WAIRC 00153

Result Award varied

Representation

Applicant Ms E Palmer

Respondents Mr J Lange (DOCEP)

Order

Having heard Ms E Palmer on behalf of the Applicant and Mr J Lange on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the Catering Employees and Tea Attendants (Government) Award 1982 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 February 2007.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) A full-time or part-time employee who is required to work any ordinary hours between 7.00pm and 7.00am Monday to Friday, inclusive, shall be paid, in addition to the appropriate wage set out in Clause 22. - Wages, an additional payment equivalent to 15% of the wages paid for the time so worked with a minimum payment of $3.00 per day.

(2) An employee who is required to work any of his ordinary hours on any day in more than one period of employ and other than for meal breaks as prescribed by Clause 13. - Meal Breaks of this award, shall be paid an allowance of $2.56 per day, for such broken work period worked.

2. Clause 14. – Meal Money: Delete this clause and insert the following in lieu thereof:

14. - MEAL MONEY

When an employee is required to work overtime for more than one hour on any day, he or she will either be supplied with a substantial meal by the employer or be paid $10.10 meal money.

3. Clause 22. - Wages: Delete subclauses (2) and (3) of this clause and insert the following in lieu thereof:

(2) In addition to the above wage rates service pay will be paid for each year of service at the following rates per week:

	$
Year 1	76.60
Year 2	83.60
Year 3 and thereafter	89.80

(3) Leading Hands -

An employee (other than a Chef) who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to his or her normal wage per week:-

		$
(a)	If placed in charge of less than six employees	12.80
(b)	If placed in charge of six to ten employees	17.10
(c)	If placed in charge of 11 to 20 employees	19.70
(d)	If placed in charge of more than 20 employees	33.00

4. Clause 25. – Bar Work: Delete this clause and insert the following in lieu thereof:

25. - BAR WORK

Any employee other than a Bar Attendant, who in addition to their normal duties is required to dispense liquor from a bar, shall be paid a flat rate of 99 cents per day in addition to the rate prescribed for such normal duties.

5. Clause 27. – Uniforms and Laundering: Delete this clause and insert the following in lieu thereof:

27. - UNIFORMS AND LAUNDERING

Where uniforms are required to be worn by the employer they shall be supplied and laundered by the employer and remain the property of the employer, provided that in lieu of the employer laundering same, the employee shall be paid $3.60 per week for such laundering. Provided further that any employee employed as a Cook shall be paid $5.25 per week for laundering.

6. Clause 28. – Protective Clothing: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees who are required to wash dishes, or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid an allowance of $1.63 per week in lieu.

7. Clause 29. – Employees Equipment: Delete this clause and insert the following in lieu thereof:

29. - EMPLOYEE'S EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be used by the employee for the purpose of carrying out their duties, shall be supplied by the employer free of charge.

Provided that where an employee is required by the employer to use his own knives he shall be paid an allowance of $9.30 per week.

And further, with the consent of the parties, the Commission records the following basis for variation:

1. The agreed Key Minimum Classification in this Award is Qualified Cook.

2. The Work Related Allowances – the percentage increase in:

- Clause 9. – Additional Rates for Ordinary Hours
- Clause 22. – Wages
- Clause 25. – Bar Work
- Clause 29. – Employees Equipment

is derived from $17 divided by $467.40 equals 3.64% (2005) and $20 divided by $484.40 equals 4.13% (2006), as prescribed by Principles 5. – Adjustment of Allowances and Service Increments of the State Wage Case:

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 14. – Meal Money has been varied for the CPI Meals Out and Take Away Foods for the period December 2004 to June 2006 giving the percentage of 6.19%.

$$\text{June 2006} \atop \text{December 2004} \quad \frac{171.5}{161.5} \times \frac{100}{1} = 6.19\%$$

CPI Meals Out and Take Away Foods – Perth

- Clause 27. – Uniforms and Laundering
- Clause 28. – Protective Clothing

have been varied for the CPI Clothing Services and Shoe Repair – Perth for the period December 2004 to June 2006 giving the percentage of 7.29%.

$$\text{June 2006} \atop \text{December 2004} \quad \frac{185.5}{172.9} \times \frac{100}{1} = 7.29\%$$

CPI Clothing Services and Shoe Repair – Perth

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

Catalogue No. 6455..0.40.001

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION IS QUALIFIED COOK

Clause		A	B	C
Clause 9. – Additional Rates for Ordinary Hours	(1)	$2.78	$3.00	
	(2)	$2.37	$2.56	
Clause 22. – Wages	(2)	$71.00	$76.62	$76.60
		$77.50	$83.64	$83.60
		$83.20	$89.79	$89.80
	(3)	$11.90	$12.84	$12.80
		$15.80	$17.05	$17.10
		$18.30	$19.75	$19.70
		$30.60	$33.02	$33.00
Clause 25. – Bar Work		92c	99c	
Clause 29. – Employees Equipment		$8.60	$9.28	$9.30

EXPENSE RELATED ALLOWANCES

CPI Take Away Food - All

Clause	A	B	C
Clause 14. – Meal Money	$9.50	$10.09	$10.10

CPI Clothing Services and Shoe Repair – Perth

Clause	A	B	C
Clause 28. – Protective Clothing	$1.56	$1.63	
Clause 27. – Uniforms and Laundering	$3.35	$3.59	$3.60
	$4.90	$5.26	$5.25

2007 WAIRC 00118

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD, 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

THE HON PREMIER OF WESTERN AUSTRALIA AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S WOOD

DATE WEDNESDAY, 14 FEBRUARY 2007

FILE NO APPL 109 OF 2006

CITATION NO. 2007 WAIRC 00118

Result Award varied

Representation

Applicant Ms E Palmer on behalf of the applicant

Respondents Mr A Harper on behalf of the respondents

Order

HAVING heard Ms E Palmer on behalf of the applicant and Mr A Harper on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Cleaners and Caretakers (Government) Award, 1975 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. – Overtime: Delete Subclause (4) of this clause and insert the following in lieu thereof:

(4) Any employee, who without being notified the previous day, is required to continue working for more than one hour after the usual ceasing time shall be provided with a meal by the employer, or be paid $9.75 in lieu thereof.

2. Clause 11. – Special Rates and Provisions:

(A) Delete Subclause (1)(a) of this clause and insert the following in lieu thereof:

(1) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 65 cents per closet per week.

(B) Delete Subclause (2) of this clause and insert the following in lieu thereof:

(2) Employees called upon outside the ordinary working hours to wash towels shall be paid $3.96 per dozen for ordinary towels, and $2.96 per dozen for dusters, hand towels and tea towels.

(C) Delete Subclause (5) of this clause and insert the following in lieu thereof:

(5) Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance $3.75 per day.

(D) Delete Subclause (6) of this clause and insert the following in lieu thereof:

(6) An employee who is required to open and close classrooms, halls and other school facilities for any activities authorised by the Principal, shall be paid an allowance according to the following scale:

		Per Day$
(a)	Evenings - Monday to Friday	
	Up to 40 rooms per week	6.34
	41 rooms to 100 per week	9.64
	over 100 rooms per week	12.68
(b)	Saturday and Sunday	12.02

(c) An additional allowance of $3.75 shall be paid to a caretaker on each occasion he/she is required to open or close a school facility after 11.00 pm, Monday to Friday, or for any opening or closing required on a Saturday or Sunday after the initial opening and closing. Provided that on a Saturday or Sunday the additional allowance shall not be paid if the duty is performed less than one hour after the initial or any subsequent opening or closing.

(E) Delete Subclause (9)(b) of this clause and insert the following in lieu thereof:

(b) Any employee performing in wood chopping duties shall be paid an allowance of $14.29 per tonne to a maximum of:

(i) 100% of the weight of bushwood supplied or 50% of the weight of mill-ends supplied for enclosed fire places such as Wonderheats.

(ii) 50% of the weight of bushwood supplied or 20% of the weight of mill-ends supplied for open fireplaces.

(F) Delete Subclause (10)(a) of this clause and insert the following in lieu thereof:

(10) (a) An Estate Attendant (Homeswest) who, in his/her privately owned vehicle commutes from estate to estate and is required to carry sundry cleaning and/or gardening implements and/or supplies shall be paid $7.09 per week for all purposes of this award.

3. Clause 21. – First Aid: Delete Subclause (2) of this clause and insert the following in lieu thereof:

(2) The employer shall, wherever practicable, appoint an employee holding current first aid qualifications from St. John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate:

	10 Employees or less	In excess of 10 Employees
	¢ per day	¢ per day
Qualified Attendant	$1.29	$2.22

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Cleaner – Level 1, Year 1.

2. The percentage increase relating to the work related increases in:

- Clause 11. – Special Rates and Provisions
- Clause 21. – First Aid

is derived from $17 divided by $512.10 equals 3.32% (2005) and $20 divided by $529.10 equals 3.78% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

Please note that previous rates used as the basis for variation of work related allowances in this award were incorrect.

This application does not seek to amend the mistakes in previous applications. However this application does seek to use the correct wage rates as the basis for variations from this application forward. The 2005-2006 variations should reflect accurately the wages of a Level 1, Year 1 Cleaner following the 2003-2004 wage cases respectively.

3. For Expense Related Allowances:

- Clause 8. – Overtime has been varied for the CPI for the period December 2004 to June 2006 giving the percentage of 6.19%.

Catalogue No. 6455.0.40.001

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION - CLEANER

Clause		A	B	C
Clause 11. – Special Rates and Provisions	(1)(a)	$0.61	$0.65	
	(2)	$3.69	$3.96	
		$2.76	$2.96	
	(5)	$3.50	$3.75	
	(6)(a)	$5.91	$6.34	
		$8.99	$9.64	
		$11.83	$12.68	
	(6)(b)	$11.21	$12.02	
	(6)(c)	$3.50	$3.75	
	(9)(b)	$13.33	$14.29	
	(10)(a)	$6.61	$7.09	
Clause 21. – First Aid	(2)	$1.20	$1.29	
		$2.07	$2.22	
Clause		**A**	**B**	**C**
Clause 8. – Overtime		$9.20	$9.77	$9.75

CPI Take Away Food – Perth

2007 WAIRC 00152

CLUB WORKERS' AWARD, 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

KALAMUNDA CLUB (INC) AND OTHERS

RESPONDENTS

CORAM SENIOR COMMISSIONER J H SMITH

DATE THURSDAY, 22 FEBRUARY 2007

FILE NO. APPL 88 OF 2006

CITATION NO. 2007 WAIRC 00152

Result Award varied

Representation

Applicant Ms E Palmer

Respondents Ms S Thorp (CCI)

Order

Having heard Ms E Palmer on behalf of the Applicant and Ms S Thorp as agent on behalf of Respondents for whom warrants have been filed, and there being no appearance by or on behalf of any other Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the Club Workers' Award, 1976 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 February 2007.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete this clause and insert the following in lieu thereof:

9. - ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.53 per hour for each such hour, or part thereof worked. Provided that any employee who works the majority of his/her ordinary hours between midnight and 7.00 am shall be paid $1.61 per hour extra for each such hour, or part thereof worked.

(2) All time worked during the ordinary hours of work on Saturdays and Sundays shall be paid for at the rate of time and a half.

(3) An employee who is required to work any of his/her ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of Clause 13. - Meal Breaks of this Award, shall be paid an allowance of $2.52 per day, for such broken work period worked.

(4) The provisions of subclauses (1) and (2) hereof shall not apply to any work performed on a holiday and to which the provisions of subclause (2) of Clause 17. - Holidays are applicable.

(5) The provisions of this clause shall not apply to casual employees.

2. Clause 14. – Meal Money: Delete this clause and insert the following in lieu thereof:

14. - MEAL MONEY

Any employee who is required to work overtime for two hours or more on any day, without being notified on the previous day or earlier, that he or she will be so required to work such overtime, will either be supplied with a substantial meal by the employer or be paid $10.30 meal money.

3. Clause 26. – Uniforms and Laundering: Delete subclauses (2) and (3) of this clause and insert the following in lieu thereof:

(2) Subject to subclause (3) hereof, an employer requiring any of the articles of clothing to be worn as described in subclause (1) of this clause, shall cause such clothing to be laundered at his/her own expense or otherwise shall pay to the employee concerned $6.65 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

(3) Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments shall be laundered at the employer's expense or otherwise the employee shall be paid $10.10 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

4. Clause 27. – Protective Clothing: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid, in lieu, an allowance of $3.55 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

5. Clause 28. – Employee Equipment: Delete this clause and insert the following in lieu thereof:

28. - EMPLOYEE EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be-used by the employee for the purpose of carrying out his/her duties, shall be supplied by the employer free of charge. Provided that where an employee is required by the employer to use his/her own knives he shall be paid an allowance of $13.30 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Cook Grade 3.

2. The Work Related Allowances – the percentage increase in:

- Clause 9. – Additional Rates for Ordinary Hours

is derived from $34 divided by $1122.40 equals 3.03% (2005) and $40 divided by $1156.40 equals 3.46% (2006), as prescribed by Principles 5. – Adjustment of Allowances and Service Increments of the State Wage Case:

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 14 – Meal Money has been varied for the CPI Meals Out and Take Away Foods for the period December 2004 to June 2006 giving the percentage of 6.19%.

$$\text{June 2006} \atop \text{December 2004} \quad \frac{171.5}{161.5} \times \frac{100}{1} = 6.19\%$$

CPI Meals Out and Take Away Foods – Perth

- Clause 26. – Uniform and Laundering and Clause 27 – Protective Clothing have been varied for the CPI Clothing Services and Shoe Repair – Perth for the period December 2004 to June 2006 giving the percentage 7.29%.

$$\text{June 2006} \atop \text{December 2004} \quad \frac{185.5}{172.9} \times \frac{100}{1} = 7.29\%$$

CPI Clothing Services and Shoe Repair – Perth

Catalogue: 6455.0.40.001

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – COOK GRADE 3

Clause	A	B	C
Clause 9. – Additional Rates for Ordinary Hours (1)	$1.44	$1.53	
	$1.51	$1.61	
(3)	$2.37	$2.52	
Clause 28. – Employees Equipment	$12.50	$13.35	$13.30

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 14. – Meal Money	$9.70	$10.30	$10.30

CPI Clothing Services and Shoe Repair – Perth

Clause	A	B	C
Clause 26. – Uniforms and Laundry (2)	$6.20	$6.65	$6.65
(3)	$9.40	$10.08	$10.10
Clause 27. – Protective Clothing (1)	$3.30	$3.54	$3.55

2007 WAIRC 00230

CULTURAL CENTRE AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE LIBRARY BOARD OF WESTERN AUSTRALIA & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 12 MARCH 2007
FILE NO	APPL 10 OF 2007
CITATION NO.	2007 WAIRC 00230

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Cultural Centre Award 1987 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (9)(a) of this clause and insert the following in lieu thereof:

(9) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $9.75 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each meal by the employer or be paid $5.70 for each meal so required.

2. Clause 15. – Special Rates and Provisions:

(A) Delete subclause (3)(a) of this clause and insert the following in lieu thereof:

(3) (a) All employees called upon to clean closets connected to septic tanks or sewers shall be paid an allowance of 63 cents per closet per week.

(B) Delete subclauses (5), (6), (7) and (8) of this clause and insert the following in lieu thereof:

(5) An allowance of $2.38 per day or part thereof shall be paid to an employee required to use an airlift in the course of their duties.

(6) An allowance of $9.20 per day shall be paid in addition to the ordinary rate to an attendant required to operate audio visual equipment.

(7) (a) Except as provided for in paragraph (b) of this subclause an allowance of $5.00 per day shall be paid to an employee required to carry keys and be responsible for securing the premises at the close of business.

(b) Where it is agreed between the employer and the Union in writing then an alternative arrangement may exist in respect of this subclause.

(8) (a) An employee who is required to work away from his/her usual place of work shall be paid for any fares in excess of those normally incurred in travelling from his/her home to his/her usual place of work and return, except where an allowance is paid in accordance with Clause 17. - Fares and Travelling Allowances of the Miscellaneous Government Conditions and Allowances Award No. A4 of 1992.

(b) Travelling time in excess of that normally incurred in travelling from his/her home to his/her usual place of work and return shall be paid at the rate of ordinary time.

(c) An employee who commences or completes a shift at or between the hours of 11.00pm and 5.00am, shall in addition to the ordinary rate of pay for that shift be paid an allowance of $11.20 per shift.

3. Clause 16. – Wages: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Leading Hands: In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid:

		$
(a)	if placed in charge of not less than one and more than five other employees	22.20
(b)	if placed in charge of more than six and not more than ten other employees	34.15
(c)	if placed in charge of more than 11 other employees	43.85

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Attendant (3rd year of employment and thereafter)

2. The Work Related Allowances - the percentage increase in:

- Clause 15. – Special Rates and Provisions
- Clause 16. - Wages

is derived from $17 divided by $553.10 equals 3.07% (2005) and $20 divided by $570.10 equals 3.51% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 8. – Overtime has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

Calculations are therefore:

$$\text{June 2006 } \frac{171.5}{161.5} \text{ December 2004} \times \frac{100}{1} = 6.19\%$$

CPI Meals Out and Take Away Food – Perth

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

The Union uses Catalogue No. 6455.0.40.001

KEY MINIMUM CLASSIFICATION – ATTENDANT (3RD YEAR OF EMPLOYMENT AND THEREAFTER)

EXPENSE RELATED ALLOWANCES

Clause		A	B	C
Clause 8. – Overtime	(9)(a)	$9.20	$9.77	$9.75
		$5.35	$5.68	$5.70

WORK RELATED ALLOWANCES

Clause		A	B	C
Clause 16. - Wages	(2)(a)	$20.80	$22.19	$22.20
	(b)	$32.00	$34.14	$34.15
	(c)	$41.10	$43.85	$43.85
Clause 15. – Special Rates and Provisions				
	(3)(a)	$0.59	$0.63	
	(5)	$2.23	$2.38	
	(6)	$8.62	$9.20	
	(7)(a)	$4.70	$5.01	$5.00
	(8)(c)	$10.50	$11.20	

2007 WAIRC 00162

DAIRY FACTORY WORKERS' AWARD 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BROWNES DAIRY PTY LTD T/A P B FOODS, MASTERS DAIRY LTD. T/A NATIONAL FOODS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 23 FEBRUARY 2007
FILE NO/S	APPL 99 OF 2006
CITATION NO.	2007 WAIRC 00162

Result	Award Varied
Representation	
Applicant	Ms E Palmer
Respondents	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the Dairy Factory Workers' Award 1982 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date of this order.

Furthermore, the Commission records the following basis for the variations:

1. The agreed Key Minimum Classification in this Award is Dairy Production Worker Grade vii.
2. The Work Related Allowances – the percentage increase in:
   - Clause 6. – Special Rates
   - Clause 8. – Leading Hands

   is derived from $17 divided by $561.20 (2005) equals 3.03% and $20 divided by $578.20 (2006) equals 3.46%, as prescribed by Principle 5. – Adjustment of Allowances and Service Increments of the State Wage Case:

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:
   - Clause 11. – Meal Money has been varied for the CPI for the period December 2004 to June 2006 giving the percentage of 6.19%.

     June 2006 171.5 / December 2004 161.5 x 100/1 = 6.19%

     CPI Meals out and Take Away Foods – Perth
   - Clause 19. – Vehicle Allowance

   Fares and Travelling Allowances:

   June 2006 157.0 / December 2004 144.7 x 100/1 = 8.50%

   CPI Private Motoring – Motor Vehicles – Perth

   The Union uses Catalogue No. 6455.0.40.001

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

KEY MINIMUM CLASSIFICATION – DAIRY PRODUCTION WORKER GRADE VII

WORK RELATED ALLOWANCES

Clause		A	B	C
Clause 6. – Special Rates	1	$0.48	$0.51	
	2	$1.27	$1.35	
	3	$0.60	$0.64	
	4	$0.20	$0.22	
Clause 8. – Leading Hands	1	$22.45	$23.90	$23.90
	2	$34.50	$36.73	$36.70
	3	$44.15	$47.07	$47.10

EXPENSE RELATED ALLOWANCES

Clause		A	B	C
Clause 11. – Meal Money	1	$8.35	$8.87	$8.85
	2	$7.25	$7.70	$7.70

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

SCHEDULE

1. Clause 6. – Special Rates: Delete this clause and insert the following in lieu thereof:

(1) An employee required to enter and clean any enclosed vat or tank shall be paid 51 cents per clean.

(2) An employee required to clean out a "powder box" or "spray drier" shall be paid $1.35 per clean.

(3) An employee shall receive 64 cents for every hour of which he/she spends 20 minutes or more in a cold chamber in which the temperature is less than 0C.

(4) An employee shall receive 22 cents for every hour he/she spends in a cold chamber in which the temperature is between 4C and 0C inclusive.

2. Clause 8. – Leading Hands: Delete this clause and insert the following in lieu thereof:

In addition to the rates prescribed in Clause 29. - Wages, of this award a leading hand shall be paid -

		Per Week$
(1)	if placed in charge of not less than three and not more than ten other employees	23.90
(2)	if placed in charge of more than ten and not more than 20 other employees	36.70
(3)	if placed in charge of more than 20 other employees	47.10

3. Clause 11. – Meal Money:

A. Delete subclause (1)(a) of this clause and insert the following in lieu thereof:

(1) (a) Subject to the provisions of this clause an employee who is required to continue working after his usual ceasing time for more than two hours shall be supplied with a meal by his employer or be paid $8.85 for a meal.

B. Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Where the amount of overtime worked is at least four hours from the time the employee became entitled to a meal, the employer shall supply an additional meal or pay to the employee $7.70 for each such additional meal.

4. Clause 28. – Vehicle Allowance: Delete subclause (2)(c) of this clause and insert the following in lieu thereof:

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	OVER 1600CC - & 2600CC	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	81.7	70.9	62.8
South West Land Division	84.0	72.9	64.8
North of 23.5° South Latitude	92.1	80.4	71.6
Rest of the State	86.7	75.3	66.8

Schedule 2 - Motor Cycle Allowances

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	28.2

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2007 WAIRC 00116

DRUM RECLAIMING AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

DRUM SERVICES PTY LTD

RESPONDENT

CORAM COMMISSIONER S WOOD

DATE WEDNESDAY, 14 FEBRUARY 2007

FILE NO APPL 133 OF 2006

CITATION NO. 2007 WAIRC 00116

Result Award varied

Representation

Applicant Ms E Palmer on behalf of the applicant

Respondent No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Drum Reclaiming Award as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. – Meal Money: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $7.80 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.30 for each meal so required.

2. Clause 20. – Shift Work: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) The loading on the ordinary rates of pay for shift work shall be $8.35 for afternoon shift and for night shift.

3. Clause 23. – Leading Hands: Delete this clause and insert the following in lieu thereof:

23. - LEADING HANDS

In addition to the appropriate rates prescribed in Clause 25. - Rates of Pay of this award, a leading hand shall be paid:

		Per Week $
(1)	If placed in charge of not less than three and not more than ten other employees	25.80
(2)	If placed in charge of more than ten and not more than 20 other employees	39.35
(3)	If placed in charge of more than 20 other employees	50.85

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Painting and Incidental Duties.

2. The Work Related Allowances - the percentage increase in:

   - Clause 20. – Shift Work
   - Clause 23. – Leading Hands

   Is derived from $17 divided by $490.30 (2005) equals 3.47% and $20 divided by $507.30 (2006) equals 3.94% as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

   - Clause 12. – Meal Money has been varied for the CPI Take Away Foods – Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

     June 2006 171.5 / December 2004 161.5 X 100 / 1 = 6.19%

     CPI Meals out and Take Away Foods – Perth

     Catalogue 6455.0.40.001

   For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

Clause	A	B	C
Clause 20. – Shift Work	$7.80	$8.37	$8.35
Clause 23. – Leading Hands	$23.95	$25.78	$25.80
	$36.60	$39.34	$39.35
	$47.25	$50.83	$50.85
Clause	**A**	**B**	**C**
Clause 12. – Meal Money	$7.35	$7.80	$7.80
	$5.00	$5.31	$5.30

2007 WAIRC 00225

ENROLLED NURSES AND NURSING ASSISTANTS (GOVERNMENT) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE BOARD OF MANAGEMENT ALBANY REGIONAL HOSPITAL, THE MINISTER FOR HEALTH, HEALTH DEPARTMENT OF WA , AVON HEALTH SERVICE
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 12 MARCH 2007
FILE NO	APPL 4 OF 2007
CITATION NO.	2007 WAIRC 00225

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	Ms M Muccilli on behalf of the Department of Health

Order

HAVING heard Ms E Palmer on behalf of the applicant and Ms M Muccilli on behalf of the Department of Health, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Enrolled Nurses and Nursing Assistants (Government) Award as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Where an employee has not been notified the previous day or earlier that he/she is required to work overtime the employer shall ensure that employees working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $10.10 each meal.

2. Clause 11. – Public Holidays: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) An employee who works on any public holiday named herein shall be paid a loading of $8.70 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage for the time worked in ordinary hours on that day.

3. Clause 17. - Transfer: Delete subclause (2)(a) of this clause and insert the following in lieu thereof:

(2) (a) In addition, he/she shall be allowed travelling allowance of $8.45 for any meal purchased, or the actual cost of any meal purchased, if such cost exceeds $8.45. Meal times shall be 8.00 a.m., 1.00 p.m. and 6.00 p.m. $3.20 for each morning and afternoon tea shall be allowed when travelling at 11.00 a.m. and 4.00 p.m. Reasonable porterage shall also be allowed. Claims for taxi fares must be supported by receipts.

4. Clause 19. – Laundry and Uniforms:

(A) Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) All washable clothing forming part of the uniform supplied by the employer shall be laundered free of cost to the employees. Provided that in lieu of such free laundering the employer may pay the employee $1.53 per week.

(B) Delete subclause (10)(c) of this clause and insert the following in lieu thereof:

(c) Provided further that in lieu of providing uniforms the employer may pay an allowance of $6.50 per week, and the nurse shall wear uniforms which conform to the uniform stipulated by the employer with respect to material, colour, pattern and conditions.

(C) Delete subclause (10)(e) of this clause and insert the following in lieu thereof:

(e) Each nurse shall be entitled to all reasonable laundry work at the expense of the employer, but where the employer elects not to launder the uniforms, the nurse shall be paid an allowance of $2.15 per week.

5. Clause 24. – Shift Work:

(A) Delete subclause (1)(a) of this clause and insert the following in lieu thereof:

(1) (a) Subject to subclause (2) of this clause where on any day an employee commences his/her ordinary hours of work before 4.00 a.m. or after 12 noon, he/she shall be paid a loading of $2.15 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage.

(B) Delete subclause (2)(a) of this clause and insert the following in lieu thereof:

(2) (a) A loading of $3.30 per hour or pro rata for part thereof shall be paid to an employee in addition to his/her ordinary rate of wage for time worked on permanent afternoon or night shift.

(C) Delete subclause (3)(a) and (b) of this clause and insert the following in lieu thereof:

(a) Saturday - $8.70 per hour or pro rata for part thereof;

(b) Sunday - $17.50 per hour or pro rata for part thereof.

6. Clause 26. – Wages:

(A) Delete subclause (7)(c) of this clause and insert the following in lieu thereof:

(c) The ordinary rate of wage prescribed for an Enrolled Nurse in this clause shall be increased by $12.50 per week when a Registered Enrolled Nurse has obtained a second post basic certificate approved by the Nurses' Board of W.A., and he/she is required to use the knowledge gained in that certificate as part of his/her employment.

(B) Delete subclause (11) of this clause and insert the following in lieu thereof:

(11) Leading hands shall be paid the ordinary wage prescribed for the classification in which they are employed increased by:

(a) $20.05 per week when in charge of not less than three and not more than ten other employees;

(b) $30.20 per week when in charge of more than 10 and not more than 20 other employees; and

(c) $40.25 per week when in charge of more than 20 employees.

The provisions of this subclause shall not apply to enrolled community nurses or enrolled community school nurses.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Enrolled Nurse Level 1 – Third Year.

2. The Work Related Allowances - the percentage increase in:

- Clause 17. - Transfer
- Clause 11. – Public Holidays
- Clause 24. – Shift Work
- Clause 26. - Wages

is derived from $17 divided by $578.70 equals 2.94% (2005) and $20 divided by $595.70 equals 3.36% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances (other than Travel):

- Clause 7**. –** has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

Calculations are therefore:

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

CPI Meals out and Take Away Foods – Perth

- Clause 19. – Uniforms and Laundering has been varied for the CPI Clothing Services and Shoe Repair - Perth for the period December 2004 to June 2006 giving the percentage of 7.29%.

June 2006	185.5	X	100	=	7.29%
December 2004	172.9		1		

CPI Clothing Services and Shoe Repair– Perth

Catalogue 6455.0.40.001

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – TRADEPERSON COOK

Clause		A	B	C
Clause 17. – Transfer	(2)(a)	$7.95	$8.46	$8.45
		$7.95	$8.46	$8.45
		$3.00	$3.20	
Clause 11. – Public Holidays	(1)	$8.20	$8.72	$8.70
Clause 24. – Shift Work	(1)(a)	$2.00	$2.13	$2.15
	(2)(a)	$3.10	$3.31	$3.30
	(3)(a)	$8.20	$8.72	$8.70
	(3)(b)	$16.45	$17.52	$17.50
Clause 26. – Wages	(7)(c)	$11.75	$12.51	$12.50
	(11)(a)	$18.85	$20.05	
	(b)	$28.40	$30.21	$30.20
	(c)	$37.85	$40.26	$40.25

EXPENSE RELATED ALLOWANCES

CPI Meals Out and Take Away Food – Perth

CPI Clothing Services and Shoe Repair - Perth

Clause		A	B	C
Clause 8. – Overtime		$9.50	$10.09	$10.10
Clause 19. – Laundry and Uniforms	(7)	$1.43	$1.53	
	(10)(c)	$6.05	$6.49	$6.50
	(10)(e)	$2.00	$2.15	

2006 WAIRC 05521

GAOL OFFICERS' AWARD 1998 NO 12 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN PRISON OFFICERS UNION OF WORKERS

APPLICANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

HEARD MONDAY, 17 MARCH 2003, THURSDAY, 30 MARCH 2006, THURSDAY, 31 AUGUST 2006

DELIVERED THURSDAY, 28 SEPTEMBER 2006

FILE NO. APPL 87 OF 2003

CITATION NO. 2006 WAIRC 05521

CatchWords	Award – Award modernisation – Current wages and conditions of employment – Provisions incorporated from orders, unregistered agreements and EBA - Removal of obsolete provisions to give effect to s.40B considerations – Award varied and consolidated – Industrial Relations Act 1979 (WA) s 40; s 40A
Result	Award varied and consolidated
Representation	
Applicant	Mr J Welch
Respondent	Mr N Cinquina

Reasons for Decision

1 This is an application of long standing to vary the Gaol Officers' Award 1998. In 2000 an Order issued in settlement of a dispute between the parties regarding the operation of the Award ((2000) 80 WAIG 4347). In their Enterprise Bargaining Agreement ("EBA") of that year, the parties agreed to vary the Award in the terms of the Order and also to ensure that the Award is updated where necessary to reflect current best practice. In the 2003 and 2005 EBAs, the agreement of the parties has been to vary the Award to reflect the 2000 Order and also to consolidate into the Award by way of appendices all informal agreements ("adjunct agreements") between the parties which relate to terms and conditions of employment for Prison Officers and which sit outside the Award and the EBA.

2 Further, the Commission has requested the parties to examine the Award for the purposes of section 40B of the *Industrial Relations Act, 1979* ("the Act"). An agreement has now been reached between the parties to vary the Award in accordance with these commitments, understandings, and requests.

3 The variations are conveniently broken down into five categories of change.

4 The first category is to clarify meanings and modify language or terminology in the Award.

5 The second category is to give effect to Order C 121 of 2000 (Ibid.). This reflected the parties' agreement to delete the package conditions in relation to pre-paid hours and reinstate penalty rates for out-of-hours work. It requires the deletion of a number of Award clauses and individual subclauses and their replacement where necessary by other clauses and subclauses.

6 The third category is to give effect to the Order of the Commission in C 437 of 1991 ((1991) 71 WAIG 2401) which settled the dispute between the parties in relation to the introduction of 12-hour shifts and which has been followed by the parties since it was issued.

7 The fourth category is to include matters which have been informally agreed between the parties over the years. It also includes matters in the EBA which the parties now wish to incorporate into the Award under section 40A of the Act, including the replacement of the Award wage rates by the wage rates from the EBA. This necessarily follows given that the wage rates in the Award contain the pre-paid hours component which does not reflect the wage rates currently paid.

8 The fifth category of change reflects the parties' wish to put into the Award the various allowances from the Public Service Award 1992 which already apply to Prison Officers and which are either referred to in the Award or paid administratively. It is the parties' preference to have in the Award all of the information regarding employment conditions for Prison Officers rather than having to refer to other Awards. The parties have also, sensibly in my view, included a clause which provides that the allowances move automatically when the parent Award is varied.

9 The parties also seek to change the name of the Award from the Gaol Officers' Award 1998 to the Prison Officers' Award 2006 and to correctly identify the employer, the identity of which changes with rather unsatisfying frequency as the Government makes changes to its administration and Ministerial portfolio allocations over time. Similarly the names of some of the senior positions identified within the Award have been changed to reflect their current notation.

10 None of the above changes will result in any wage increases to Prison Officers and the changes do not offend the State Wage Principles nor the Act.

11 The parties have presented an agreed Schedule to the Commission which is a consolidation of the Award incorporating all of the above changes; there is no separate schedule of amendments as such. Given that the only parties to the Award are the parties who prepared the Schedule, and those parties themselves have prepared the Schedule in close cooperation, I consider it appropriate to vary the Award by both varying the Award and consolidating it in the one document and not by publishing a separate schedule of variations and then separately consolidating the Award.

12 I congratulate the parties on the work undertaken by them to produce this result. The Prison Service necessarily has significant and detailed Regulations governing its operation. It should come as no surprise that the Award governing the employment of Prison Officers is similarly significant and detailed. Thus, although there is much to be said for simplifying Awards, this is a more desirable objective in a common rule award applicable across many industries and many workplaces. In this case, where the Award affects only the Prison Service and where the parties by agreement prefer to have incorporated into it as many of the administrative arrangements applicable to Prison Officers as are able to be identified, it is entirely appropriate that the Commission permit the parties to do so.

13 I am satisfied on that basis that the Award has been modernised consistent with section 40B of the Act, although this application is necessarily an application pursuant to sections 40 and 40A.

14 The Minute of an Order in the terms of the parties' Schedule, together with variations which have been suggested by the Commission to ensure internal consistency and that the Schedule truly reflects the parties' intentions, now issues. The Order will cancel the two Orders that are now incorporated in current terms in the Award. The Order will take effect on a date agreed by the parties and notified to the Commission.

2007 WAIRC 00187

GAOL OFFICERS' AWARD 1998 NO 12 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 2 MARCH 2007
FILE NO.	APPL 87 OF 2003
CITATION NO.	2007 WAIRC 00187

Catchwords	Award - Award modernisation - Current wages and conditions of employment - Provisions incorporated from orders, unregistered agreements and Enterprise Bargaining Agreement - Removal of obsolete provisions to give effect to s.40B considerations - Award varied and consolidated - Industrial Relations Act 1979 (WA) s 40; s 40A
Result	Award varied and consolidated
Representation	
Applicant	Mr J Welch, and later Mr T Clark
Respondent	Mr N Cinquina

Supplementary Reasons for Decision

1 Further to the Reasons for Decision and Minute of Proposed Order issued on 28 September 2006, the parties met at the Commission on 23 November 2006 to discuss the schedule attached to the Minute of Proposed Order. Since then there have been numerous exchanges of draft schedules amongst the parties and the Commission. There is now agreement on the schedule. The Commission on its own motion called on the matter for hearing for 28 February 2007.

2 The respondent notified the Commission on 28 February 2007 that the parties had agreed that Clause 59 – Civilian Clothing Allowance and Clause 60 – Special Provisions are to be maintained as in the Award at the moment, however the parties will further discuss the rates reflected in those clauses with the intent to submit at a later date a separate application to vary the Award once agreement is reached. The Special Provisions form part of the agenda for the current Enterprise Bargaining Agreement negotiations.

3 The respondent also notified the Commission that the parties had agreed to delete reference to right of reversion (previously subclause 41.11(5)) under Clause 41 – Parental Leave, with the undertaking that this would also be discussed as part of the Enterprise Bargaining Agreement negotiations.

4 The wage rates in the schedule are the current Enterprise Bargaining Agreement rates. A concern was raised by the respondent that those wage rates in the Award will be increased by the 2007 State Wage Case, thereby making them higher than those in the current Enterprise Bargaining Agreement, which is not the intention of the parties.

5 After a brief adjournment into conference, the parties agreed on the record that the Award should contain a provision stating that the rates of pay in the Award shall not be adjusted in accordance with the 2007 State Wage Order made by this Commission. This provision is clause (4) in Schedule A – Rates of Pay.

6 The parties agreed to the operative date being the issue date of the Minute of Proposed Order, that date being the first pay period on or after 28 September 2006.

7 Order issued accordingly.

2007 WAIRC 00186

GAOL OFFICERS' AWARD 1998 NO 12 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS UNION OF WORKERS
	APPLICANT
	-v-
	MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 2 MARCH 2007
FILE NO/S	APPL 87 OF 2003
CITATION NO.	2007 WAIRC 00186

Result	Award varied and consolidated
Representation	
Applicant	Mr J Welch, and later Mr T Clark
Respondent	Mr N Cinquina

Order

HAVING HEARD Mr J Welch, and later Mr T Clark on behalf of the applicant and Mr N Cinquina on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders –

1. THAT the Gaol Officers' Award 1998 be varied and consolidated in accordance with the following schedule.
2. THAT Orders C 437 of 1991 and C 121 of 2000 be cancelled.
3. THAT this Order come into effect from the beginning of the first pay period on or after the 28th day of September 2006.

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

SCHEDULE

PART I – AWARD DETAILS AND APPLICATION

1. - TITLE

This Award shall be known as the Prison Officers' Award.

2A. - STATEMENT OF PRINCIPLES

It is a condition of this Award that any variation to its terms shall not be made except in compliance with the Statement of Principles made by the Commission from time to time.

2B. - MINIMUM ADULT AWARD WAGE

2B.1 No adult Officer shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

2B.2 The Minimum Adult Award Wage for full time adult employees is $504.40 from 7 July 2006.

2B.3 The Minimum Adult Award Wage of $504.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

2B.4 Unless otherwise provided in this clause adults employed as casuals, part-time or sessional employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

2B.5 Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of $504.40 per week.

2B.6 (1) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

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

2B.7 Subject to this clause the Minimum Adult Award Wage shall -

(1) Apply to all work in ordinary hours.

(2) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this Award.

2B.8 Minimum Adult Award Wage

The rates of pay in this Award include the minimum weekly wage for adult employees payable under the 2006 General Order Wage Case Decision. Any increase arising from the insertion of the Minimum Adult Award Wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such above award payments include wages payable pursuant to Enterprise Agreements, Consent Awards or award variations to give effect to Enterprise Agreements and over award arrangements. Absorption which is contrary to the terms of an Agreement is not required. Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from Enterprise Agreements, are not to be used to offset the Minimum Adult Award Wage.

2B.9 Adult Apprentices

(1) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $421.70 per week.

(2) The rate paid in subclause 2B.9(1) above is payable on superannuation and during any period of paid leave prescribed by this Award.

(3) Where in an Award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of apprenticeship.

(4) Nothing in this clause shall operate to reduce the rate of pay fixed by the Award for an adult apprentice in force immediately prior to 5 June 2003.

3. - ARRANGEMENT

PART I – AWARD DETAILS AND APPLICATION

1. Title
2A. Statement of Principles
2B. Minimum Adult Award Wage
3. Arrangement
4. Term
5. Scope
6. Definitions

PART II – CONDITIONS OF EMPLOYMENT AND RELATED MATTERS

7. Contract of Service
8. Re-Engagement in Employment
9. Part-Time and Sessional Employment
10. Public Holidays
11. Duty Roster
12. Hours of Duty
13. Out of Hours Work
14. Effect of 38 Hour Week
15. Management of Musters
16. Secondments and Vacancies
17. Transfers
18. Probationary Officers in Training
19. Prison Officers (Vocational and Support) Training
20. Board of Reference
21. Introduction of Change
22. Establishment of Consultative Mechanisms

23. Award Modernisation
24. Dispute Settlement Procedure

PART III – RATES OF PAY AND RELATED MATTERS

25. Payment of Wages
26. Annualised Salaries
27. Salary Packaging
28. Payroll Errors
29. Higher Duties

PART IV – LEAVE TYPES/SPECIFICATIONS

30. Annual Leave
31. Travel Concessions Annual Leave Broome and Roebourne Prisons
32. Long Service Leave
33. Carer's Leave
34. Sick Leave
35. Bereavement Leave
36. Cultural/Ceremonial Leave
37. Emergency Service Leave
38. Trade Union Training Leave
39. Union Facilities for Union Representation
40. Leave to Attend Union Business
41. Parental Leave
42. Study Leave
43. Leave Without Pay
44. Blood/Plasma Donors Leave
45. Training With Defence Force Reserves Leave
46. International Sporting Events Leave
47. Purchased Leave Deferred Salary Scheme
48. Purchased Leave – 50/52 or 49/52 Salary Arrangement

PART V – ALLOWANCE TYPES/SPECIFICATIONS

49. Dog Handlers Allowance
50. District Allowance
51. Disturbance Allowance
52. Motor Vehicle Allowance
53. Relieving Allowance
54. Removal Allowance
55. Transfer Allowance
56. Travelling Allowance
57. Property Allowance
58. Uniforms
59. Civilian Clothing Allowance
60. Special Provisions
61. Movement of Allowances

Schedule A – Rates of Pay

Schedule B – Memorandum of Agreement

Schedule C – Memorandum of Agreement For Prison Officers (Vocational And Support) Training

Schedule D – District Allowance

Schedule E – District Allowance Map

Schedule F – Motor Vehicle Allowance

Schedule G – Motor Vehicle Allowance

Schedule H – Motor Cycle Allowance

Schedule I – Travelling, Transfer and Relieving Allowance

4. - TERM

This Award shall remain in force until cancelled.

5. - SCOPE

5.1 This Award shall apply to the employees enumerated in Schedule A - Rates of Pay of this Award.

5.2 The parties to the Award shall be the Minister for Corrective Services and the Western Australian Prison Officers' Union of Workers (the Union).

6. - DEFINITIONS

6.1 The definitions referred to hereunder shall apply only for the purpose of this Award and shall not be taken to conflict in any manner whatsoever with the General Orders and Regulations dealing with the control and management of the Prison Service of Western Australia.

6.2 For the purposes of this Award the definitions are:

(1) "Minister for Corrective Services" means the Government Minister responsible for the administration of the *Prisons Act, 1981*, *Prisons Regulations, 1982* and the *Court Security and Custodial Services Act, 1999*.

(2) "Department" means the Department of Corrective Services of the Government principally assisting the Minister for Corrective Services with the administration of the *Prisons Act, 1981* and the *Court Security and Custodial Services Act, 1999* as amended from time to time or as may be replaced by a new Act.

(3) "Commissioner" means the Commissioner, Department of Corrective Services.

(4) "Employer" means the Minister.

(5) "Local branch of the Union" means a branch of the Union formally approved under the rules of the Union.

(6) "Minister" means Minister for Corrective Services.

(7) "Prison Services" means the management, control and security of a Prison and the welfare of the prisoners at the Prison.

(8) "Superintendent" means the Superintendent who is at the relevant time appointed under the *Prisons Act, 1981* to be in charge of a Prison.

(9) "Officers" shall mean all employees classified in Schedule A – Rates of Pay of this Award hereof and shall include probationary and temporary employees.

(10) "Probationary Prison Officer (Training)" shall mean an Officer not permanently appointed but undergoing instruction prior to posting to a Prison.

(11) "Probationary Officer" shall mean an Officer not permanently appointed but undergoing instruction and proving his or her suitability for permanent employment.

(l2) "Permanent Officer" shall mean an Officer appointed to the permanent staff as provided by the *Prisons Act, 1981* and *Prisons Regulations, 1982*.

(13) "Practicable" shall mean practicable in the fair and reasonable opinion of the Commissioner provided that if any dispute arises as to whether in any case such opinion is fair and reasonable that matter may be referred to the Western Australian Industrial Relations Commission (WAIRC)**.**

(14) "Prison" means a Prison proclaimed under the *Prisons Act, 1981*.

(15) "Prisons Act" means the *Prisons Act, 1981*.

(16) "Prisons Regulations" means the *Prisons Regulations, 1982*.

(17) "CS & CS Act" means the *Court Security and Custodial Services Act, 1999*.

(18) "Union" means the Western Australian Prison Officers' Union of Workers (WAPOU).

(19) "Temporary employee" shall mean an Officer appointed for an emergency and whose service does not exceed a period of three months at any one time.

(20) "Accrued Days Off" shall mean the paid days off which accrued to an Officer pursuant to the provisions of the 38 hour week arrangement prior to 1 July 1994 and remain a residual entitlement until cleared.

PART II – CONDITIONS OF EMPLOYMENT AND RELATED MATTERS

7. - CONTRACT OF SERVICE

7.1 An employee on probation shall give two weeks' notice of his or her intention to leave the Prison Service, or shall forfeit two weeks' pay.

7.2 If an employee on probation is discharged for reasons other than misconduct, he or she shall be given two weeks' notice or two weeks' pay in lieu of notice.

7.3 An employee shall give the Employer written notice of termination of not less than -

(1) Four weeks, or

(2) Such other period as specified in the employee's contract of service where applicable.

7.4 An employee who fails to give the required written notice forfeits the sum of four weeks' pay, unless agreement is reached between an employee and the Employer for a shorter period of notice than that specified.

7.5 Where an employee's services are terminated for any reason other than dismissal, that employee shall be given written notice of –

(1) Four weeks, or

(2) Such other period as specified in a contract of service, where applicable, or

(3) Payment of salary for the appropriate period in lieu of notice.

7.6 An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer, shall be entitled to one week's notice in addition to the notice prescribed in subclause 7.5.1 of this clause.

7.7 If any employee fails to give the appropriate notice, in accordance with sub-clause 7.3(1) of this clause, the Employer has the right to withhold monies due to the employee to a maximum amount equal to four weeks' pay for the period of notice.

7.8 Nothing in this clause will affect the operation of the Prisons Act and the *Public Sector Management Act, 1994* as it applies to employees covered by this Award.

8. - RE-ENGAGEMENT IN EMPLOYMENT

8.1 Where an Officer is reengaged in employment the Department has the discretion to

(1) Exempt the Officer from all or part of the trainee program.

(2) Appoint the Officer to a point within the range for the rank of Prison Officers above the minimum that accounts for the Officer's previous relevant Prison Service.

9. - PART-TIME AND SESSIONAL EMPLOYMENT

9.1 Sessional Prison Officers

(1) Sessional Prison Officers shall be engaged to perform hospital guard duty within the metropolitan area only.

(2) Subject to subclauses (a) and (b) hereof, Sessional Prison Officers shall be required to escort a prisoner to the Prison upon discharge from hospital where a Prison Officer is not available and:

(a) there shall be a written agreement between the Superintendent of the Prison and the local branch of the Union as to what circumstances give rise to the non availability of a Prison Officer.

(b) the Prison shall be responsible for the return of the Sessional Prison Officer to the hospital.

(3) Sessional Prison Officers shall be engaged by the hour, with a minimum engagement of not less than three hours.

(4) Sessional Prison Officers shall be paid the hourly rate of a Prison Officer General (Shifts) 1st year plus 20%. This will increase in line with the hourly rate of the Prison Officer General (Shifts) 1st year.

(5) The following clauses contained in this Award shall not apply to Sessional Prison Officers:

Clause 10. - Public Holidays, Clause 11. - Duty Roster, Clause 12. - Hours of Duty, Clause 13. - Out of Hours Work, Clause 30. - Annual Leave, Clause 32. - Long Service Leave, Clause 33. - Carer's Leave, Clause 34. - Sick Leave, Clause 38. - Trade Union Training Leave, Clause 40. - Leave to Attend Union Business, Clause 47 – Purchased Leave Deferred Salary Scheme, Clause 48 – Purchased Leave 50/52 or 49/52 Salary Arrangement, Clause 59. - Civilian Clothing Allowance and Schedule A - Rates of Pay.

(6) Sessional Prison Officers shall be entitled to unpaid parental leave in accordance with Part 4, Division 6 – Parental Leave of the *Minimum Conditions of Employment Act, 1993* provided the Officer is an "eligible" employee as defined under section 32 of the *Minimum Conditions of Employment Act, 1993.*

An "eligible" employee is an employee who has been engaged on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and but for an expected birth of a child to the employee or the employee's spouse or de facto partner or an expected placement of a child with the employee with a view to the adoption of the child by the employee, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

9.2 Sessional Prison Officers and Employees Job Sharing

(1) The Department is committed to providing employees with opportunities to access part-time and job share arrangements.

(2) Part-time and sessional employees may be employed to work less than forty hours per week.

(3) An employee's regular part time hours may be varied by the Commissioner with the consent of the employee.

(4) Part-time and sessional employees shall not be required to work for less than three hours in any week or on any occasion of attendance at work.

(5) Part-time employees and those in job sharing arrangements shall be entitled to the salary and other conditions of employment as provided in this Award on a pro rata basis of their regular working hours to normal weekly working hours.

(6) Notwithstanding subclause 9.1(5), where provided in this Award, Sessional Prison Officers shall be entitled to the salary and other conditions of employment on a pro-rata basis of their regular working hours to normal working hours.

10. - PUBLIC HOLIDAYS

10.1 The following days, or the days observed in lieu shall, subject as hereinafter provided, be recognised as public holidays, namely: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day.

10.2 Where -

(1) a day is proclaimed as a whole holiday or as a half holiday under section 7 of the *Public and Bank Holidays Act, 1972*; and

(2) that proclamation does not apply throughout the State or to the metropolitan area of the State,

that day shall be recognised as a holiday or, as the case may be, a half holiday for the purposes of this Award within the district or locality specified in the proclamation.

10.3 Except where specifically provided for remuneration for work performed on all public holidays is included in an Officer's annualised salary as prescribed in Schedule A - Rates of Pay of this Award.

10.4 Prison Officers (Vocational and Support) who work Monday to Friday and are not required to work public holidays will not receive the public holiday portion in their annualised salary. However, if a public holiday falls during such an Officer's annual leave, the Officer will receive a paid day in lieu which will be taken immediately following the annual leave or at a time mutually acceptable to the Employer and employee. Such a day in lieu shall be clearly shown on the duty board.

10.5 Accrued days off may be taken at a time mutually acceptable between the Employer and the employee.

11. - DUTY ROSTER

11.1 (1) (a) A six weekly duty board shall be posted up by 11.00 am each payday to cover shifts for the following three pay periods and shall only be changed in unforeseen circumstances.

(b) An Officer's rostered hours of duty may be changed providing 36 hours' notice of change is given. No Officer shall be compelled to work different ordinary hours to those shown on the roster within the 36 hour notification period.

(2) Officers shall be allowed to exchange shifts or days off or to perform duty for other employees provided the approval of the Minister or his or her delegate is first had and obtained.

11.2 Rosters shall provide for at least eight hours between the ceasing of one shift and the commencement of the next shift except in the case of Officers working 12-hour shifts where the break shall be 12 hours.

11.3 Where practicable Shift Officers shall be rostered in such a manner that afternoon, night and weekend shifts are divided equally between such Officers.

11.4 Accrued days off shall be clearly shown on the duty board.

11.5 The Superintendent at the Broome Regional Prison and Roebourne Regional Prison, which have two specified rosters lines operating independently of the normal roster, and the local branch of the Union may agree a time in lieu arrangement based on time for time for Officers performing escorts where such duty involves working time outside normal rostered shifts.

12. - HOURS OF DUTY

12.1 The ordinary hours of duty shall be 40 per week, 80 per fortnight, or 120 per three weeks to be worked in accordance with Clause 11. - Duty Roster, of this Award unless otherwise agreed by the Union and the Department for the purpose of alternative shift arrangement.

12.2 The foregoing hours shall be worked in continuous shifts of eight hours, ten hours, twelve hours or such other period as agreed between the Union and the Minister.

12.3 Each Officer shall be allowed a meal break of 30 minutes during which time Officers other than those on duty shall be on call. Officers on guard duty shall remain on duty at their posts during such meal breaks.

The meal break shall be allowed and taken no earlier than three hours or later than 5.5 hours from the Officer commencing work. Where an Officer is required for duty during his or her meal break and his or her meal break is delayed beyond 5.5 hours from commencement of work, he or she shall be permitted by the Officer in Charge to cease duty 30 minutes before the conclusion of his or her rostered shift providing the operational requirements of the Prison are maintained. If this is not possible the Officer may take the 30 minutes as time in lieu at a mutually agreed time between the Officer and the Employer.

Officers who are designated to supervise prisoners or remain at their work area during their paid meal break shall at that time, if they desire, consume an ordered meal without charge.

12.4 Officers working twelve hour shifts shall be allowed two 30 minute meal breaks during the twelve hour shift. These meal breaks will be taken in accordance with the provisions of subclause 12.3.

12.5 Accrued days off shall be taken in the agreed non-leave periods or at a time mutually agreed between the Officer and the Employer.

13. – OUT OF HOURS WORK

13.1 For the purposes of this Clause, the following terms shall have the following meanings:

"Out of hours work" means all work performed at the direction of the Superintendent or a duly authorised Officer outside the Officer's rostered hours of duty.

"Major Emergency Duty" shall be duty outside the Officer's rostered hours of duty on a major emergency as determined by the Minister or the Commissioner or Deputy Commissioner Adult Custodial.

13.2 All Officers are required to be available to work reasonable out of hours work in addition to their rostered hours of duty. Arrangements in respect of such availability will be agreed to ensure that the routine operations of each Prison are maintained.

(1) Where it is necessary to maintain routine Prison functions, and only when sufficient Officers are not available on a voluntary basis, the Superintendent may roster Officers for out of hours work.

(2) Officers rostered for out of hours work in accordance with subclause 13.2(1) above may arrange to swap with other Officers, subject to the approval of their Superintendent.

(3) If an Officer agrees to take over another Officer's rostered out of hours work, that Officer is then responsible for attending for duty for that rostered work.

13.3 An Officer, having been directed in accordance with this clause, will on each occasion that he or she undertakes out of hours work for a period of 15 minutes or more in excess of his or her rostered hours of duty, be entitled to payment in accordance with subclause 13.4 of this clause.

13.4 Payment for Excess Hours

(1) Payment for all out of hours work, other than that set out in subclause 13.4(2) of this subclause, will be calculated at the rate of time and a half the Officer's annualised rate of pay for all excess time worked.

(2) Any Officer who is called in for Major Emergency Duty shall be paid at the rate of doubletime the Officer's annualised rate of pay for all hours worked outside the Officer's rostered hours of duty on that major emergency.

13.5 Minimum Periods for Return to Duty

(1) An Officer who is required to return to duty for out of hours work shall be entitled to payment at the rate in accordance with subclause 13.4 of this clause for a minimum period of three hours.

(2) Where an Officer is required to return to duty more than once, each duty period will stand alone in respect to the application of minimum period payment except where the second or subsequent return to duty is within any such minimum period.

13.6 Excess Hours at a Place other than Usual Headquarters

(1) When an Officer is directed to work excess hours at a place other than usual headquarters and the time spent in travelling to and from that place is in excess of the time which a Prison Officer would ordinarily spend in travelling to and from usual headquarters, and provided such travel is undertaken on the same day as the overtime is worked, then such excess time will be deemed to form part of the time worked.

(2) When an Officer has volunteered to work excess hours at a place other than usual headquarters, the time spent in travelling to and from that place will not form part of the time worked.

13.7 The handover time existing as at September 1, 1985 between Officers for the purpose of effecting the customary rotation of shifts shall be conducted in an Officer's own time without any payment in addition to the Officer's base pay.

13.8 (1) An Officer who is required to report for, return to, or remain on duty for out of hours work shall be entitled to have at least 10 hours off duty between the hours of successive rostered shifts.

(2) An Officer who works so much out of hours work between the termination of his or her ordinary shift and the commencement of his or her next ordinary shift so that he or she has not had at least ten consecutive hours off duty between such shifts, shall subject to this subclause, be released after completion of such out of hours work until he or she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring such absences. If on the instructions of his or her Superintendent, such Officer resumes or continues work without having had ten consecutive hours off duty he or she shall be granted time off in lieu for the hours worked until he or she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absences.

(3) No Officer shall, or shall be required to, work more than two full consecutive shifts, including out of hours work, except in the case of a major emergency as defined in subclause 13.1.

13.9 If the Superintendent determines that the number of staff on duty or available for duty has fallen below a staffing level which will ensure the maintenance of routine Prison functions including the security and welfare of prisoners and the safety of staff at the Prison, he or she shall:

(1) determine the number of Officers required to return to duty; and/or

(2) what changes are required to be made to routine Prison functions.

13.10 If the local Branch of the Union of the Prison believes that the number of staff available for duty has fallen below a staffing level which will ensure the maintenance of routine Prison functions including the security and welfare of prisoners and the safety of staff at the Prison, it shall advise the Superintendent, who may then take action in accordance with subclause 13.9.

(1) If the Superintendent does not agree that any action is necessary in accordance with subclause 13.9, he or she shall advise the Union Branch of his or her decision and the reasons for that decision.

(2) If the local Branch of the Union at the Prison does not agree with the Superintendent's decision, any dispute that arises shall be resolved in accordance with Clause 24. - Dispute Settlement Procedure.

13.11 Subject to the provisions of this clause, Officers may be given advance or immediate notice to report for, return to, or remain on duty to perform out of hours work.

13.12 Where possible, Officers will be called out to cover positions at the same level as their own, however if no such Officers are available, any available Officer will be called out.

13.13 An Officer must not unreasonably fail to attend duty for out of hours work.

13.14 The Union or an Officer or Officers covered by this Award, shall not in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the working of out of hours duties, in accordance with requirements of this clause.

14. - EFFECT OF 38 HOUR WEEK

14.1 An Officer who terminates his or her employment and has accumulated accrued day(s) off and has not taken those days off, shall be paid the total accumulated hours on termination.

14.2 An Officer who terminates his or her employment and has taken accrued day(s) off for which no entitlement has accrued shall have his or her wages reduced on termination by the total hours for which payment has been made out but for which the Officer had no entitlement toward those accrued day(s) off.

15. - MANAGEMENT OF MUSTERS

If prisoner numbers are such that additional resources are necessary above the Prison's approved staffing level the Minister undertakes to use his or her best efforts to obtain those resources.

16. - SECONDMENTS AND VACANCIES

16.1 All secondments will be centrally controlled by the Commissioner.

16.2 The Department undertakes to fill all vacancies as quickly as possible to ensure efficient management and avoid unnecessary secondments.

16.3 A pool of full time equivalent staff will be maintained by the Commissioner to assist in filling vacancies and secondments.

16.4 If there is unnecessary or undue delay by the Minister, or his/her delegated authority, in filling vacancies and a dispute arises as a consequence it shall be dealt with in accordance with Clause 24. - Dispute Settlement Procedure of this Award.

17. - TRANSFERS

The following principles and objectives are the basis for transfer arrangements:

Principles

Transfers are to be effected through an agreed process and applied in a manner able to withstand open scrutiny with fair and equitable treatment of all Officers subject to transfer.

Objectives

To facilitate the identification and filling of vacancies in a timely manner.

To ensure that agreed establishment levels are maintained at all Prisons.

To ensure that agreed staffing numbers of male and female Officers are maintained in all Prisons.

To provide stability in Prison staffing.

To provide a degree of predictability and certainty so that Officers can plan for the future.

To provide a system that is easy to work and easy to understand.

To provide Officers with an opportunity to gain broad based experience.

To provide consistency in the decision making process.

17.1 Definitions

For the purposes of this clause the following expressions shall have the following meanings:

"Agreed Establishment Levels" means the number of Officers required to fill all the permanent substantive positions within a Prison.

"Compassionate Transfer" means a transfer effected outside the normal Transfer Lists in response to personal circumstances that warrant relocation of an Officer.

"Gender Numbers" means the agreed number of female and male Officers required to operate the Prison.

"Mutual Swap" is a voluntary exchange of positions between Officers of the same rank at different locations.

"Local Recruit" means an Officer who is specifically recruited for a position in an identified Prison or region and who resides in that location or region.

"Permanent Posting" means the placement of an Officer to a permanent position at a Prison, on the completion of the Trainee Prison Officers course.

"Prison" means any gazetted Prison, work camp or other work location where the Department requires Prison Officers to be posted.

"Redeployed Prison Officer" means an Officer who, as a result of a Prison closure or abolition of his/her substantive position as a result of a restructure, does not have a permanent substantive position at any Prison.

"Temporary Posting" means the agreed temporary placement of an Officer to a Prison on the completion of the Trainee Prison Officer course, pending a permanent posting.

"Transfer" is the movement of an employee from one location to another location at the same, or lesser rank. There are three main categories of transfer, these being:

(1) Voluntary: A transfer initiated by an Officer and effected through the transfer lists, mutual swap or a compassionate transfer.

(2) Management Initiated: A Department directive to an Officer to relocate from one location to another to meet its operational needs.

(3) Disciplinary: A Departmental directive to an Officer to relocate from one Prison to another in accordance with the disciplinary procedures of the Prisons Act and Regulations or this Award.

"Transfer List" is the list of Officers who have expressed an interest for a transfer to another Prison or branch.

17.2 Transfer Committee

(1) All proposals and requests for transfer between Prisons shall be forwarded to the Transfer Committee for consideration.

(2) The Transfer Committee shall be compromised of:

- One or more of either the General Manager Adult Custodial, the Director Regional and Rural Prisons and the Director Women's Custodial Services;
- A representative from the Human Resources (Prisons) Branch; and

- At least one representative of the Western Australian Prison Officers' Union.

(3) The Director Health Services may participate in the deliberations of the Transfer Committee where it is necessary to make an assessment of medical information provided by an Officer.

17.3 Special Conditions

(1) A transfer that is to be implemented in accordance with the Department's obligations under the Regional Incentives arrangements negotiated between the parties shall take precedence over all proposals and requests for transfers and filling of positions.

(2) The determination of the Transfer Committee in considering a Departmental proposal or an Officer's request for transfer out of the Emergency Support Group shall be made in accordance with arrangements that may be agreed between the parties.

(3) As close as possible to half of all Senior Officer and First Class Prison Officer positions that become vacant within each Prison each year may be advertised by the Department for promotion before being offered on a transfer basis. All other positions will be filled on a transfer basis and will only be offered for promotion if no person is registered on the transfer list as wishing to transfer into the position.

(4) Officers wishing to obtain an employee-initiated transfer will be required to serve a minimum of twelve months at their initial posting from the Trainee Prison Officer course.

(5) Officers having received a promotion will be required to serve a minimum of twelve months in the promoted position before being eligible for employee-initiated transfer.

(6) An Officer who receives a transfer, whether it be through the transfer lists, mutual swap or a compassionate transfer, will be ineligible to be considered for a transfer within two years of his or her last transfer, unless he or she is granted a further compassionate transfer.

(7) Probationary Prison Officers (Training) will take up vacancies after transfers based on the Transfer List have been effected except where the position is filled by a local recruit.

(8) Officers who accept a transfer to another Prison to fill a vacancy at a lower rank than their current rank will revert substantively to the rank of the position they are to fill.

(9) Where a vacancy is unable to be filled through the normal transfer process the time limits specified in subclauses (4), (5) and (6) of this subclause may be waived by the Department after consultation with the Union.

(10) Where an Officer has a documented substandard performance issue that Officer cannot be transferred to another Prison via an employee-initiated transfer, irrespective of his or her position on the Transfer List, while that substandard performance issue remains unresolved.

(11) Where certain skill sets are required at a Prison and the Department and Union have agreed to pre-requisite training, such training must be successfully completed before a person can transfer to that Prison.

(12) Prison Officers (Vocational and Support) who have completed the Department's Industry Standard Prison Officer Training Course or deemed equivalent shall be entitled to register on the Prison Officer (General) Transfer List.

(13) Prison Officers (Vocational and Support) shall be entitled to register on the Prison Officer (Vocational and Support) Transfer List to transfer into vacant positions within their scope of vocational skills and knowledge that may arise at other Prisons.

17.4 Voluntary Transfers

(1) Transfer Lists

To enable a transfer from a Transfer List to be effective there must be an identified vacancy at a Prison that resulted or will result in the staffing level being below the approved establishment level.

The Transfer List process will work as follows:

(a) Officers can apply to be placed on a Transfer List at any time. If there is nobody on the Transfer List an Officer may submit an expression of interest for transfer to a like for like position at the time a position becomes vacant.

(b) Officers are entitled to seek to transfer to another Prison through application to be placed on a Transfer List. Separate Transfer Lists will be maintained for:

Prison Officers (General);

First Class Prison Officers;

Senior Officers;

Hospital Officers;

Prison Officers (Vocational and Support);

Work Camp Officers; and

Canine Handlers.

(c) Prison Officers (General), First Class Prison Officers, and Senior Officers can express an interest for transfer to a maximum of three Prisons.

(d) Officers accepting a transfer will be removed from all other Transfer Lists and will be ineligible to be placed on any transfer list for two years from the time of transferring to the new Prison.

(e) To ensure compliance with the provisions of the *Equal Opportunity Act, 1984* relating to discrimination on the basis of marital status, where two Officers are married or are in a defacto or other relationship they will be treated as independent Officers unless both Officers advise that they want to be both transferred to the same locality. An Officer, who wishes to transfer with a partner, will take a position on the Transfer List equivalent to the position of the partner placed lower on the Transfer List.

(f) In deciding whether to offer a transfer to an Officer on a Transfer List, the Department will take into account the following factors:

- The obligations set down in subclause 17.3 - Special Conditions of this Clause
- Whether there are Officers subject to redeployment who have nominated that Prison;
- The availability of accommodation at Broome, Eastern Goldfields and Roebourne.
- Gender numbers that may be agreed between the parties.

(2) Applications for placement on the Transfer Lists can be lodged at any time in writing to the Human Resources (Prisons) Branch.

(3) Officers will be placed on the Transfer List in the order they are received at the Human Resources (Prisons) Branch.

(4) Transfer Lists will be published by the Department on a regular basis of at least once annually.

17.5 Compassionate Transfers

(1) An Officer may seek a transfer outside the normal Transfer List process on compassionate grounds based on personal circumstances which warrant the relocation of an Officer.

(2) Applications from Officers seeking compassionate transfers shall be considered on a case by case basis.

(3) The Officer will meet costs associated with a compassionate transfer and is not eligible for property, removal or transfer allowances provided by this Award unless otherwise approved.

(4) The Department, for the purpose of effecting a compassionate transfer, is not obligated to consider the effects on the approved establishment levels of the particular Prison.

(5) Compassionate transfers will be considered by the Department. The grounds, without being limited, will include:

- Medical reasons,
- Personal/Family reasons, or
- Work related conflict.

(6) Officers seeking a compassionate transfer on one of the above grounds should make application to the General Manager Adult Custodial stating the reason and where possible provide supporting evidence, for example, supporting evidence from a doctor if the transfer is sought for medical reasons.

17.6 Mutual Swap Transfers

(1) Officers may obtain a transfer outside the normal Transfer List process through a voluntary exchange of positions with an Officer of the same rank at a different location.

(2) Applications from Officers seeking mutual swap transfers shall be considered on a case by case basis.

(3) A mutual swap transfer will not impact on the approved establishment level of any Prison.

(4) In instances where a mutual swap transfer is approved the Officers concerned will be responsible for all costs associated with the transfer and they are not eligible for property, removal or transfer allowances provided by this Award.

(5) The following process shall be followed by Officers seeking a mutual swap employee initiated transfer:

- Find someone on the Transfer List who is prepared to undertake a mutual swap.
- If no one is available on the Transfer List, contact the Prison to which he or she wants to transfer and arrange advertising.

- Once an Officer to swap with has been identified each Officer submits an application through his or her Superintendent to the Workforce Planner, Human Resources (Prisons) Branch, who joins the applications and submits the joint submission to the Transfer Committee.

(6) Officers will be required to return to their original substantive positions held prior to the swap in the event of one of the parties involved in the swap not fulfilling their obligations of the mutual swap transfer.

17.7 Management Initiated Transfers

(1) Where the Department is contemplating the transfer of an Officer from one Prison to another the Department will advise the Officer in writing and request that the Officer submit in writing by a specified date any personal issues he or she wants considered by the Department in deciding whether the Officer is to be transferred.

(2) The Department will genuinely consider all issues raised by the Officer prior to making a final decision about the transfer.

(3) If the Department decides the Officer is to be transferred the Officer will be advised in writing of the date he or she will commence duty at the new Prison.

(4) Transfer of one or more Officers because of the need to adjust staffing levels within Prisons will occur in accordance with the following:

(a) Where there is a need to transfer one or more Officers from one Prison to another to meet operational needs the Department will first check the transfer list to see if there are Officers registered as seeking a transfer from their current Prison.

(b) If there are insufficient Officers seeking transfer the Department will advertise for volunteers to transfer.

(c) If insufficient volunteers are received the Department will write to all Officers of the appropriate rank in the Prison and advise that they are being considered for transfer, what the potential transfer locations are, and requesting that each Officer submit in writing by a specified date any personal issues he or she wants considered by the Department in deciding who shall be transferred.

(d) The Transfer Committee will undertake a comparative assessment of all Officers and the required number of Officers will be chosen for transfer.

(e) Officers selected for transfer will be advised in writing of the date they will commence duty at the new Prison.

(5) For the purpose of these procedures Casuarina, Hakea, Boronia and Bandyup Prisons, the Training and Development Branch and the Specialist Services Branch are all deemed to be located in the metropolitan area and are in the same locality.

(6) Officers subject to compulsory transfer will be given at least six (6) weeks' notice of the date they are required to commence duty at the Prison to which they are transferring unless otherwise agreed between the parties.

(7) Officers subjected to a compulsory transfer from a Prison to adjust staffing levels shall be given the first right of return to the Prison when a vacancy arises or staffing levels are increased; that is they will be placed at the top of the Transfer List. Where more than one Officer has been so transferred, the Officers will be given right of return in the order in which they are transferred out of the Prison.

(8) The Department will pay the costs and allowances provided by this Award associated with compulsory transfers.

(9) On application from the Officer concerned, an Officer may be excluded from being chosen for a compulsory transfer to another Prison. Each application will be considered on its merits. Grounds upon which an exemption may be granted include but are not limited to:

- the transfer is to a regional Prison and the Officer has previously served in a regional Prison for a period of two years or more;
- the transfer is from one locality to another and the Officer has dependant children living with him/her who are attending years 11 or 12 at high school;
- the Officer is working in a Prison to which he or she was recruited locally and there are Officers not recruited locally who can be transferred.

17.8 Transfer of Redeployees

(1) Redeployed Officers who have been substantively placed through this means will not be subject to the two-year rule.

(2) Officers subjected to a transfer by way of redeployment from a Prison shall be given the first right of return to the Prison after those wishing to invoke their right under subclause 17.7(7) when a vacancy arises or staffing levels are increased, that is they will be placed at the top of the Transfer List. Where more than one Officer has been so transferred, the Officers will be given right of return in the order in which they were redeployed out of the Prison.

(3) The Department will pay the costs and allowances associated with transfer of redeployees.

(4) Officers who have been identified for redeployment will be given the opportunity to nominate one or more Prisons where they wish to gain a permanent position.

(5) At the first opportunity the Officer will be placed at the preferred Prison in a substantive position.

(6) Should a substantive position not be available the Officer may be placed at the preferred Prison or another Prison as agreed pending the availability of a substantive position.

17.9 Allowances

Subject to the provisions of subclauses 17.5 and 17.6 of this clause Officers who are transferred are entitled to District, Property, Removal and Transfer Allowances as provided in this Award.

18. - PROBATIONARY OFFICERS IN TRAINING

18.1 Probationary Prison Officers (Training) will be required to work a 38 hour week based on 7.6 hours per day and will not be required to work additional hours.

18.2 Probationary Prison Officers (Training) shall receive a loading for shifts worked at the following rates:

- 15% for afternoon and night shift;
- 50% for Saturday; and
- 75% for Sunday.

18.3 The following clauses contained in this Award shall not apply to Probationary Prison Officers (Training):

- Clause 13. - Out of Hours Work

18.4 Probationary Prison Officers (Training) shall be entitled to the leave as provided in this Award on a pro rata basis of their regular working hours of thirty eight hours to the award weekly working hours of forty hours.

19. - PRISON OFFICERS (VOCATIONAL AND SUPPORT) TRAINING

19.1 The parties to this Award recognise and accept the area of training of Prison Officers (Vocational and Support) is the responsibility of the Employer and the Employer is committed to the design, provision and implementation of training programs to extend the knowledge and skills of its employees.

(1) The overriding objective is to enable each Prison Officer (Vocational and Support) to gain the competence to perform, consistent with operational needs, all of the tasks and activities associated with the job.

(2) Training will be designed in consultation with the Union, and made available to Prison Officers (Vocational and Support) by the Employer. Prison Officers (Vocational and Support) have an obligation to participate in the training programs that develop the skills and knowledge in respect of the competencies necessary to fulfil the role of Prison Officer (Vocational and Support).

19.2 All new Prison Officers (Vocational and Support) will be provided one week's Induction Training and three weeks' full time essential training similar to the training undertaken by Prison Officers (General).

(1) All current Prison Officers (Vocational and Support) will be provided three weeks' full time essential training similar to the training undertaken by Prison Officers (General).

(2) The parties to this Award agree that current Prison Officers (Vocational and Support) will be required to undertake the essential training mentioned in subclause 19.2(1) above.

(3) All current Prison Officers (Vocational and Support) who have previously qualified as Prison Officers (General) may elect in writing to undertake the essential training mentioned in subclause 19.2(1) above.

19.3 (1) Prison Officers (Vocational and Support) will have the opportunity to complete the training similar to the training undertaken by Prison Officers (General) by combination of skills recognition, attendance at formal training programs during normal working hours, and or interactive online training.

(2) Prison Officers (Vocational and Support) shall have access to training towards Certificate IV in Correctional Practice (Custodial) or Diploma of Correctional Administration on the same basis as other Prison Officers (General) whose employment is governed by this Award.

19.4 The Employer shall maintain an individual record of the training received by each Prison Officer (Vocational and Support).

19.5 Prison Officers (Vocational and Support) may be directed to carry out duties within other areas of the Prison where the Officer has obtained the knowledge and skill for the safe and competent performance of that function through training provided by the Employer.

19.6 Any dispute arising in relation to this clause shall be processed through the dispute resolution procedure contained in Clause 24. - Dispute Settlement Procedure of this Award.

20. - BOARD OF REFERENCE

20.1 The Commission hereby appoints, for the purpose of this Award, a Board of Reference consisting of a Chairman and two other members who shall be appointed pursuant to section 48 of the *Industrial Relations Act, 1979*.

20.2 The Board of Reference is hereby assigned the function of determining any dispute between the parties in relation to any matter which, under this Award, may be allowed, approved, fixed, determined or dealt with by a Board of Reference.

21. - INTRODUCTION OF CHANGE

21.1 Employer's Duty to Notify

(1) Where the Employer has made a decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have significant effects on officers, the Employer shall notify the Officers who may be affected by the proposed changes and their Union.

(2) "Significant effects" include major changes in the composition, operation or size of the Employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs. Provided that where the Award makes provision for alteration of any of the matters referred to in subclause 21.1(1) hereof an alteration shall be deemed not to have significant effect.

21.2 Employer's Duty to Discuss Change

(1) The Employer shall discuss with the Officers affected and their Union, the effects the changes are likely to have on Officers, measures to avert or mitigate the adverse effects of such changes on Officers and shall give prompt consideration to matters raised by the Officers and/or their Union in relation to the changes.

(2) The discussion shall commence as early as practicable after a decision has been made by the Employer to make the changes referred to in subclause 21.1(1) hereof.

(3) For the purposes of such discussion, the Employer shall provide to the Officers concerned and their Union, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on Officers and any other matters likely to affect Officers provided that the Employer shall not be required to disclose confidential information the disclosure of which would be inimical to its interests.

22. - ESTABLISHMENT OF CONSULTATIVE MECHANISMS

The parties to this Award are to establish a consultative mechanism(s) and procedures appropriate to their size, structure and needs, for consultation and negotiation on matters affecting the efficiency and productivity of the Department and its institutions.

23. - AWARD MODERNISATION

23.1 The parties are committed to modernising the terms of this Award so that it provides for more flexible and efficient working arrangements, enhances productivity, improves the quality of working life, skills and job satisfaction and assists positively in the restructuring process.

23.2 In conjunction with testing the current Award structure the parties are prepared to discuss all matters raised by the parties for increased flexibility and efficiency. As such, any discussions between the parties must be premised on the understanding that:

(1) The majority of employees employed under this Award and who work in the section, branch or division, must genuinely agree;

(2) No Officer will suffer a reduction in ordinary earnings as a result of the change;

(3) The Union must be party to the agreement, in particular, where the employees at any section, branch or division are holding discussions which would require any award variation. The Union shall be invited to participate;

(4) The Union shall not unreasonably oppose any agreement;

(5) Subject to the provision of this Award, any agreement reached may require ratification by the Western Australian Industrial Relations Commission.

23.3 Should an agreement be reached pursuant to subclause 23.2 hereof and that agreement requires an award variation, no party will oppose the award variation.

24. - DISPUTE SETTLEMENT PROCEDURE

24.1 Preamble

Subject to the provisions of the *Industrial Relations Act, 1979*, any grievance, complaint or dispute, or any matter raised by the Union or the Department and its Officers, shall be settled in accordance with the procedures set out in subclause 24.2 of this clause.

The parties agree that no precipitate action will be taken prior to, or during the time this procedure is being followed.

24.2 Procedure

Where a matter is raised by any party, or individual, or group of individuals, the following stages shall be observed:

Stage 1: Local discussion between the Prison administration and the Prison branch of the Union. If not resolved;

Stage 2: The matter is referred for discussion between the Department's and the Union's respective executives. If not resolved;

Stage 3: Prompt application for a section 44 conference at the Western Australian Industrial Relations Commission.

24.3 Access to the Western Australian Industrial Relations Commission

The settlement procedure provided by this clause shall be applied to all manner of disputes referred to in subclause 24.1, and no party, or individual, or group of individuals, shall commence any further action, of this kind, which may frustrate a settlement in accordance with its procedures. Observance of these procedures shall in no way prejudice the right of any party in dispute to refer the matter for resolution in the Western Australian Industrial Relations Commission, at any time.

The status quo will remain until the issue is resolved in accordance with the procedure outlined above.

PART III – RATES OF PAY AND RELATED MATTERS

25. - PAYMENT OF WAGES

25.1 Wages shall be paid fortnightly into an approved Bank, Building Society Account or other approved Savings Organisation, or by cheque if so agreed between the Employer and the employee. Deductions from wages will continue to be made by procuration to other financial institutions.

25.2 An Officer who regularly performs shifts or weekend work shall be paid for accrued day(s) off, including shift and weekend penalties, when those days are taken as leave and at the rate which applied when they were accumulated.

26. - ANNUALISED SALARIES

26.1 All Officers will be paid an annualised salary which will include a component in lieu of shift penalty payments, accrued days off, public holidays and overtime.

26.2 Any application for a variation in the annualised salary in the Award may be pursued under the Award in accordance with the State Wage Fixing Principles.

27. - SALARY PACKAGING

27.1 An Officer may, by agreement with the Employer, enter into a salary packaging arrangement in accordance with the provisions of this clause or any similar salary packaging arrangements offered by the Employer.

27.2 Salary packaging is an arrangement whereby the entitlements under the Award contributing toward the Total Employment Cost (as defined in subclause 27.3 hereof) of an employee, can be reduced by and substituted with another, or other benefits.

27.3 For the purpose of this clause, Total Employment Cost (TEC) is defined as the cost of salary and other benefits aggregated to a total figure or TEC, less the cost of Compulsory Employer Superannuation Guarantee contributions.

27.4 The TEC for the purposes of salary packaging, is calculated by adding:

(1) The base salary;

(2) Other cash allowances, e.g. annual leave loading;

(3) Non cash benefits e.g. superannuation, motor vehicles etc;

(4) Any Fringe Benefit Tax liabilities currently paid; and

(5) Any variable components, e.g. performance based incentives (where they exist).

27.5 Where an Officer enters into a salary packaging arrangement, he or she will be required to enter into a separate written agreement with the Employer that sets out the terms and conditions of the arrangement.

27.6 The salary packaging arrangement must be cost neutral in relation to the total cost to the Employer.

27.7 The salary packaging arrangement must comply with relevant taxation laws and the Employer will not be liable for additional tax, penalties or other costs payable or which may become payable by the Officer.

27.8 In the event of any increase or additional payments of tax or penalties associated with the employment of the Officer or the provisions of Employer benefits under the salary packaging agreement, such tax, penalties and any other costs shall be borne by the Officer.

27.9 In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to arrangements under this clause, the Officer may vary or cancel a salary packaging arrangement.

27.10 An Employer shall not unreasonably withhold agreement to salary packaging on request from an Officer.

27.11 The dispute settlement procedures contained in this Award shall be used to resolve any dispute arising from the operations of this clause. Where such a dispute is not resolved, the matter may be referred by either party to the Western Australian Industrial Relations Commission.

28. - PAYROLL ERRORS

28.1 The Employer shall pay an Officer his or her full normal fortnightly pay no later than the close of business on each payday and for all overtime worked no later than the pay period following that within which the overtime is worked.

28.2 Where an Officer, after consulting his or her on-line payslip, advises the Human Resources Directorate by the close of business on the Monday prior to the payday that any proportion of his or her normal base wage is not going to be paid on the payday to which that payslip relates the underpayment will be corrected so as to reach the Officer's bank account via the next available ad-hoc payment.

28.3 Ad-hoc payments will not be used to back pay payments such as higher duties or other allowances or salary increments; these will be paid in the next available pay.

28.4 Where an Officer is paid for work not subsequently performed or is overpaid in any other manner, the Employer is entitled to make adjustment to the subsequent wages of the Officer in accordance with the formulas below. The Employer will notify the Officer of its intention to recoup the overpayment and consult with the Officer as to the appropriate recovery rate.

28.5 One-off overpayments may be recovered by the Employer in the pay period immediately following the pay period in which the overpayment was made, or in the period immediately following the pay period in which it was discovered that overpayment had occurred.

28.6 Cumulative overpayments may be recovered by the Employer at a rate agreed in writing between the Employer and Officer, provided that the rate at which the overpayment is recovered is not less than the rate at which it was overpaid or $50.00 per week, whichever is the lesser amount per pay period.

28.7 Officers who have overpayments outstanding or who are required to repay monies owing to the Department shall repay any outstanding amounts prior to cessation of employment. Failing this the Department may deduct all monies owing from the final termination payment to the Officer.

28.8 In exceptional circumstances, other arrangements regarding underpayments and overpayments may be agreed between the Employer and the Officer.

28.9 The Employer shall pay an Officer all allowances provided in this Award except property, transfer and removal allowances no later than the pay period after the claim for the allowance made by the Officer is received at the Prison administration.

28.10 The Employer shall pay an Officer all property, transfer and removal allowances provided in this Award within one month of the claim for the allowance lodged by the Officer being received at the Prison administration.

29. - HIGHER DUTIES

29.1 An Officer required to carry out the duties of a classification carrying a higher rate than his or her ordinary rate of pay shall be paid such higher rate of pay but only if he or she is required to carry out such duties for a period of two hours or more.

29.2 Officers who receive a qualifications allowance in accordance with subclause 60.4 of Clause 60. - Special Provisions of this Award shall not be paid the allowance when acting in a position for which the qualification is required.

PART IV – LEAVE TYPES/SPECIFICATIONS

30. - ANNUAL LEAVE

30.1 (1) Except as hereinafter provided, a period of five consecutive weeks' leave with payment of ordinary wages as prescribed shall be allowed annually to an Officer by the Department after a period of twelve months' continuous service with the Department.

(2) Officers employed in the area north of 26 degree south latitude shall receive one week's leave after a period of twelve months' continuous service in such area in addition to the leave prescribed in subclause 30.1(1) hereof.

(3) An Officer who is rostered to work regularly on Sundays and holidays shall be allowed one week's leave in addition to the leave to which he or she is otherwise entitled under this clause.

30.2 After one month's continuous service in any qualifying twelve monthly period, an Officer whose employment terminates through no fault of the Officer shall be paid in respect of each completed week of service in that qualifying period:

(1) Payment at his or her ordinary rate of pay, accrued at the rate of 0.47923 (5 d.p.) days per week if he or she is employed in the area south of the 26 degree south latitude, or

(2) In addition to the entitlement at subclause 30.2(1), payment at his or her ordinary rate of pay, accrued at the rate of 0.09585 (5 d.p.) days per week if he or she is employed in the area north of the 26 degree south latitude.

30.3 (1) Leave Roster:

	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**
JULY	C	D	G	H	F	E	B	A	C
	D	C	H	G	E	F	A	B	D
	A	G	D	F	H	B	E	C	A
	B	H	C	E	G	A	F	D	B
XMAS	G	A	F	D	B	H	C	E	G
	H	B	E	C	A	G	D	F	H
	E	F	A	B	D	C	H	G	E
JUNE	F	E	B	A	C	D	G	H	F

(2) The roster shall apply to all Officers who shall be divided into groups A-H. The actual leave dates may vary from Prison to Prison.

(3) (a) The roster shall commence on a pay Friday at a date each year agreed between the parties to this Award and shall continue in the order shown for the year with each group commencing at six weekly intervals.

(b) Provided that where an Officer for special reasons wishes to have his or her annual leave at a time other than of his or her particular group he or she shall make written application to the Superintendent or Officer in Charge for permission to be allocated a different date, but if his or her application is approved he or she shall be considered as having taken his or her leave in accordance with the roster.

(4) Officers who commence employment subsequent to the introduction of this roster shall be allocated to a group on posting to a Prison and shall have the option of taking actual accrued leave due or their annual entitlement.

(5) An Officer who has been permitted to proceed on annual leave and who ceases duty before completing the required continuous service to accrue the leave, must refund the value of the unearned pro rata portion, calculated at the rate of salary as at the date the leave was taken, but no refund is required in the event of the death of an Officer.

(6) Officers who are transferred or promoted to another Prison shall be allocated a new annual leave letter, where there is irresolvable conflict with that Prison's established leave roster. The allocation of a new leave letter will only be at the conclusion of the procedure for negotiations as provided hereafter.

30.4 Annual Leave Letter Procedures for Transfers and Promotions

(1) An Officer is to be notified prior to transfer or promotion if the leave letter is unavailable at the new Prison.

(2) Discussions are to take place between the Superintendent and the Officer concerned prior to an allocation of a new leave letter.

(3) Consideration is to be given to situations prior to transfer or promotion where an Officer has made travel bookings and paid a deposit, or in any other situations which make it imperative for Officers to take their annual leave at the time prescribed by the original letter for the leave period in question.

(4) The allocation of a new leave letter that places an Officer with an immediate second annual leave period is to be avoided.

30.5 (1) An Officer who, at the commencement of, or during his or her annual leave, has an entitlement to payment for non-attendance on the ground of illness for not less than one week under the provisions of Clause 34. - Sick Leave of this Award and who produces to the Minister, or his/her delegated authority, a certificate from a qualified registered medical practitioner that during his or her annual leave he or she was confined to his or her home or to a hospital for a period of at least seven consecutive days shall be deemed to be absent from work through sickness for so much of that period as he or she would otherwise have been entitled to payment under Clause 34. - Sick Leave of this Award.

(2) An Officer to whom subclause (1) applies shall take the period deemed to be absence through sickness as annual leave at a time mutually convenient to the Minister, or his/her delegated authority, and the Officer.

30.6 Annual leave shall be accrued on the basis that the Officer works a 40 hour week.

30.7 An Officer shall be entitled to take up to 5 days of annual leave as single days of leave subject to the approval of the Superintendent or Officer in Charge. Approval for single days of leave shall not be unreasonably withheld.

31. - TRAVEL CONCESSIONS ANNUAL LEAVE BROOME AND ROEBOURNE PRISONS

31.1 Annual leave travel concessions for Officers stationed at the Broome and Roebourne Prisons when proceeding on annual leave to a destination outside the geographical region of their headquarters shall be entitled to the concessions contained in the following provided that such concessions are limited to the lesser value of the return economy airfare from their headquarters to the destination or Perth.

31.2 Officers are required to serve a year in these areas before qualifying for travel concessions. However, Officers who have less than a year's service in these areas and who are required to proceed on annual leave to suit departmental convenience will be allowed the concessions. The concession may also be given to an Officer who proceeds on annual leave before completing the year's service provided that the Officer returns to the area to complete the year's service at the expiration of the period of leave.

31.3 The mode of travel is to be at the discretion of the Commissioner.

31.4 Travel concessions not utilised within 12 months of becoming due will lapse.

	Approved Mode of Travel	Travel Concession	Travelling Time
(a)	Air	Air fare for the Officer, dependant spouse and dependant children.	One day each way
(b)	Road	Full motor vehicle allowance rates, but reimbursement not to exceed the cost of the return air fare for dependant spouse and dependant children travelling in the return air fare motor vehicle.	Broome - Two and one half days each way Roebourne - Two days each way
(c)	Air and Road	Full motor vehicle allowance rates for car trip, but reimbursement not to exceed the cost of the return air fare for the Officer. Air fares for the dependant spouse and dependant children.	Broome - Two and one half days each way Roebourne - Two days each way

32. - LONG SERVICE LEAVE

32.1 Each Officer who has completed a period of 7 years of continuous service in a permanent and/or fixed term contract capacity shall be entitled to 13 weeks of long service leave on full pay.

32.2 Each Officer is entitled to an additional 13 weeks of long service leave on full pay for each subsequent period of 7 years of continuous service.

32.3 A part-time or job share Officer shall have the same entitlement to long service leave as full time Officers however payment made during such periods of long service leave shall be adjusted according to the hours worked by the Officer during that accrual period.

32.4 For the purpose of determining an Officer's long service leave entitlement, the expression "continuous service" includes any period during which the Officer is absent on full pay or part pay from duties in the Prison service but does not include:

(1) any period exceeding two weeks during which the Officer is absent on leave without pay or unpaid parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Public Sector of Western Australia;

(2) any period during which an Officer is taking long service leave entitlement or any portion thereof except in the case of subclause 32.9 when the period excised will equate to a full entitlement of 13 weeks;

(3) any service by an Officer who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when that prior service has actually entitled the Officer to the long service leave under this clause;

(4) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave;

32.5 A long service leave entitlement which fell due prior to March 16, 1988 amounted to three months. A long service leave entitlement which falls due on or after that date shall amount to thirteen weeks.

32.6 Any public holiday or Public Service holiday occurring during an Officer's absence on long service leave shall be deemed to be a portion of the long service leave and extra days in lieu thereof shall not be granted.

32.7 The Commissioner may direct an Officer to take accrued long service leave and may determine the date on which such leave shall commence. Should the Officer not comply with the direction, disciplinary action may be taken against the Officer.

32.8 An Officer who has elected to retire at or over the age of 55 years and who will complete not less than 12 months' continuous service before the date of retirement may make application to the Commissioner to take pro rata long service leave before the date of retirement, based on continuous service of a lesser period than that prescribed by this clause for a long service entitlement.

32.9 Compaction of leave

(1) An Officer who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the Officer's ordinary working hours at the time of commencement of long service leave, may elect to take a lesser period of long service leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of long service leave.

(2) Notwithstanding subclause 32.5 of this clause, an Officer who has elected to compact an accrued entitlement to long service leave in accordance with subclause 32.9(1) of this clause, shall only take such leave in any period on full pay, and the period excised as "continuous service" shall be 13 weeks.

32.10 Portability

(1) Where an Officer was, immediately prior to being employed in the Prison Service, employed in the service of:

- The Commonwealth of Australia, or
- Any other State Government of Australia, or
- Any Western Australian State body or statutory authority prescribed in Administrative Instruction 611,

and the period between the date when the Officer ceased previous employment and the date of commencing employment in the Prison Service does not exceed one week, that Officer shall be entitled to long service leave determined in the following manner:

(a) the pro rata portion of long service leave to which the Officer would have been entitled up to the date of appointment under the Prisons Act, shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the Officer may become entitled under this clause; and

(b) the balance of the long service leave entitlement of the Officer shall be calculated upon appointment to the Prison Service in accordance with the provisions of this clause.

(2) Nothing in this clause confers or shall be deemed to confer on any Officer previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the Officer's favour prior to the date on which the Officer commenced employment in the Prison Service.

32.11 Any Officer who has served at least twelve months continuously and who is retired through ill-health shall be paid for long service leave pro rata to the date of leaving the Prison Service.

32.12 Where practicable three months' notice of the commencing date of long service leave shall be given to Officers.

32.13 If a deceased Officer who had served continuously for at least twelve months before his or her death leaves a widow or children, dependant mother or father or dependant invalid sister or brother, payment pro rata of long service leave up to the date of such Officer's death shall be granted to such widow or dependants.

32.14 Long service leave accumulated to an Officer as at September 1, 1985 shall be adjusted in hours in the ratio of 38 to 40. Long service leave accumulated as at July 1, 1994 shall be adjusted in the ratio of 40 to 38.

32.15 Long service leave shall be adjusted in the ratio of 40 to 38.

32.16 Officers may with the agreement of the Employer clear any accrued entitlement of long service leave in multiples of one week. The Officer has the right to determine the length of any leave taken.

33. - CARER'S LEAVE

33.1 Officers covered by this Award may with the consent of the Department use sick leave up to a maximum of 10 days per annum in accordance with this clause to provide care for another person subject to:

(1) The Officer being responsible for the care of the person concerned.

(2) The person concerned being either:

a member of the Officer's family; or

a member of the Officer's household.

(3) The definition of family shall be the definition contained in clause 27(4) of the *Public Service Award 1992*.

(4) Production of evidence that would satisfy a reasonable person of the illness of the other person.

33.2 The Officer shall, wherever practicable, give the Employer notice prior to the absence of the intention to take leave, the name of the person requiring care and his or her relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the Officer to give prior notice of absence, the Officer shall notify the Employer by telephone of such absence.

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

34. - SICK LEAVE

34.1 All Officers shall be entitled to sick leave in accordance with the following:

(1) An Officer who is unable to attend or remain at their place of employment during ordinary hours of work by reason of personal ill health or injury, shall be entitled to payment of 120 hours' full pay in the first and successive years of service.

(2) Entitlement to payment shall accrue at the rate of 2.30 hours for each completed week of service.

(3) The unused portions of the entitlement to paid sick leave shall accumulate from year to year and be available to the Officer for absence by reason of personal ill health or injury.

(4) All Officers employed after 28 June 1990 shall at the end of their fourth year of employment have an additional entitlement to 528 hours on full pay which shall reduce (if appropriate) in accordance with the following formula:

$$AL = \frac{528 \times (480 - SD)}{480}$$

AL: Additional Leave entitlement

SD: Number of Sick Leave hours taken in the first four years

34.2 Sick leave will not be granted when the illness is due to the Officer's own neglect or serious misconduct.

34.3 To be entitled to payment in accordance with this clause, the Officer or the Officer's agent shall advise the Employer of his or her inability to attend for work, provided that such advice in ordinary circumstances be given to the Employer prior to the commencement of the Officer's rostered shift. Where possible, an Officer shall also advise the Employer of his or her understanding of the nature of the illness and the estimated duration of the absence.

34.4 An Officer who is absent from work for a half day shall have the absence recorded by the Prison Administration and debited from the Officer's entitlement as prescribed in subclause 34.1 of this clause.

34.5 The provisions of this clause do not apply to an Officer who fails to provide to the Employer evidence to satisfy a reasonable person, within 14 days from the commencement of his or her absence, provided that the Officer shall not be required to produce evidence to satisfy a reasonable person for absences of less than three consecutive working days unless the total of such absences exceeds five days in any one accruing year.

34.6 An Officer proceeding on sick leave shall have the accrued entitlement to paid sick leave reduced by the time the Officer is absent from work on account of sick leave.

34.7 Where a Superintendent has received a complaint or has reason to believe that an Officer has taken sick leave without genuine cause the Superintendent may:

(1) inquire into the matter, and/or

(2) require an explanation in writing from the Officer concerned, and/or

(3) conduct an interview with the Officer either at the Officer's home or place of work, and/or

(4) direct the Officer to attend a medical practitioner nominated by the Department of Corrective Services for a medical examination to determine the Officer's fitness for duty; and/or

(5) refer the Officer to the Employee Welfare Unit for counselling.

34.8 (1) The parties to the Award have agreed that an Officer who takes sick leave without genuine cause is guilty of serious misconduct.

(2) If a Superintendent is satisfied that an Officer who has taken sick leave without genuine cause or acted in breach of this clause, the Superintendent shall:

(a) direct that the Officer be counselled by an Officer senior in rank, and/or

(b) direct that the misconduct be noted on the Officer's Performance Appraisal Report, and/or

(c) recommend to the Deputy Commissioner Adult Custodial that the Officer be given a compulsory transfer to another Prison, and/or

(d) recommend to the Deputy Commissioner Adult Custodial that the Officer be examined in accordance with regulation 5 of the Prisons Regulations or

(e) initiate disciplinary proceedings under Part X of the Prisons Act, (which may result in the following penalties: a caution, a reprimand, a fine not exceeding $250.00, suspension from duty without pay or other entitlements for a period not exceeding 10 working days, reduction to a lower rank, requirement to resign under threat of dismissal or dismissal).

34.9 Any dispute arising under subclauses 34.7, 34.8, and 34.9 shall be dealt with in accordance with Clause 24. - Dispute Settlement Procedure of this Award or Part X of the Prisons Act.

35. - BEREAVEMENT LEAVE

35.1 Officers, including Sessional Prison Officers, shall on the death of:

(1) the spouse or de-facto partner of the Officer;

(2) the child or step-child of the Officer;

(3) the parent or step-parent of the Officer;

(4) the brother, sister, step brother or step sister; or

(5) any other person who, immediately before that person’s death, lived with the Officer as a member of the Officer’s family;

be eligible for up to two days paid bereavement leave, provided that at the request of an Officer the Employer may exercise discretion to grant bereavement leave to an Officer in respect of some other person with whom the Officer has a special relationship.

35.2 The two days need not be consecutive.

35.3 Bereavement leave is not to be taken during any other period of leave.

35.4 Payment of such leave may be subject to the Officer providing evidence, if so requested by the Employer, of the death or relationship to the deceased that would satisfy a reasonable person.

35.5 An Officer requiring more than two days bereavement leave in order to travel overseas in the event of the death overseas of a member of the Officer’s immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the Officer is eligible, have immediate access to annual leave and/or accrued long service leave or leave without pay provided all accrued leave is exhausted.

36. - CULTURAL/CEREMONIAL LEAVE

36.1 Cultural/ceremonial leave shall be available to all Officers.

36.2 Such leave shall include leave to meet the Officer's customs, traditional law and to participate in cultural and ceremonial activities.

36.3 Officers are entitled to time off without loss of pay for cultural/ceremonial purposes, subject to agreement between the Employer and Officer and sufficient leave credits being available.

36.4 The Employer will assess each application for cultural/ceremonial leave on its merits and give consideration to the personal circumstances of the Officer seeking the leave.

36.5 The Employer may request reasonable evidence of the legitimate need for the Officer to be allowed time off.

36.6 Cultural/ceremonial leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from:

(1) the Officer's annual leave entitlements; or

(2) accrued days off or time in lieu.

36.7 Time off without pay may be granted by arrangement between the Employer and the Officer for cultural/ceremonial purposes.

37. - EMERGENCY SERVICE LEAVE

37.1 Subject to operational requirements, paid leave of absence shall be granted by the Employer to an Officer who is an active volunteer member of State Emergency Service Units, St John Ambulance Brigade, Volunteer Fire and Rescue Service Brigades, Bush Fire Brigades, Volunteer Marine Rescue Services Groups or FESA Units, in order to allow for attendance at emergencies as declared by the recognised authority.

37.2 The Employer shall be advised as soon as possible by the Officer, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.

37.3 The Officer must complete a leave of absence form immediately upon return to work.

37.4 The application form must be accompanied by a certificate from the emergency organisation certifying that the Officer was required for the specified period.

37.5 An Officer, who during the course of an emergency, volunteers his or her services to an emergency organisation, shall comply with subclauses 37.2, 37.3 and 37.4 of this clause.

38. - TRADE UNION TRAINING LEAVE

38.1 Subject to the provisions of this clause:

(1) The Employer shall grant paid leave of absence to employees who are nominated by their Union to attend short courses conducted by the Union or a body nominated by the Union.

(2) Paid leave of absence shall also be granted to attend similar courses or seminars as from time to time approved by agreement between the parties.

38.2 An employee shall be granted up to a maximum of five days' paid leave per calendar year for Trade Union training or similar courses or seminars as approved. However, leave of absence in excess of five days and up to ten days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten days.

38.3 (1) Leave of absence will be granted at the annualised rate of pay.

(2) Where a public holiday or rostered day off falls during the duration of a course, a day off in lieu of that day will not be granted.

38.4 Subject to subclause 38.3 of this clause shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course.

38.5 The granting of leave pursuant to the provisions of subclause 38.1 of this clause is subject to the operation of the organisation not being unduly affected and to the convenience of the Employer.

38.6 (1) Any application by an employee shall be submitted to the Employer for approval at least four weeks before the commencement of the course, provided that the Employer may agree to a lesser period of notice.

(2) All applications for leave shall be accompanied by a statement from the relevant Union indicating that the employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the Authority which is conducting the course.

38.7 A qualifying period of 12 months in Government employment shall be served before an employee is eligible to attend courses or seminars of more than one-half day duration. An Employer may, where special circumstances exist, approve an application to attend a course or seminar where an employee has less than 12 months' Government service.

38.8 (1) The Employer shall not be liable for any expenses associated with an employee's attendance at Trade Union training courses.

(2) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.

39. - UNION FACILITIES FOR UNION REPRESENTATIVES

39.1 The Employer recognises the rights of the Union to organise and represent its members. Union representatives in the agency have a legitimate role and function in assisting the Union in the tasks of recruitment, organising, communication and representing members' interests in the workplace, Department and Union electorate.

39.2 The Employer recognises that under the Union's rules Elected Representatives represent members within a Union.

39.3 The Union will advise the Employer in writing of the names of the elected Union representatives in the Department.

39.4 The Employer shall recognise the authorisation of each elected Union representative in the Department and shall provide them with the following assistance to undertake their duties as elected representatives:

39.5 (1) To attend State Council and Executive Council meetings, the Superintendent of the Prison will, upon receiving at least one week's notice of the meeting, effect administrative shift swaps so that elected representatives can have day(s) off.

(2) Reasonable paid time off from normal duties to perform his or her functions as a Union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the electorate delegates committee and to attend Union business in accordance with Clause 40. - Leave to Attend Union Business of the Award.

(3) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, Internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the Prison Service and shall be in accordance with normal agency protocols.

(4) A noticeboard for the display of Union materials including broadcast email facilities.

(5) Paid access to periods of leave for the purpose of attending Union training courses in accordance with Clause 38. - Trade Union Training Leave of this Award. Country representatives will be provided with appropriate travel time.

(6) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of Union membership with them.

(7) Access to Awards, Agreements, policies and procedures.

(8) Access to information on matters affecting employees in accordance with Clause 22 - Establishment of Consultative Mechanisms of this Award.

(9) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.

(10) Alternative arrangements may be agreed between the parties.

(11) Where the Employer allows a person to take paid leave to attend Union duties or meetings there will be an obligation on the Employer to backfill that position. Where there is a maximum number of positions agreed to be backfilled by the parties at a Prison, covering Union leave will constitute one of those positions.

39.6 The Employer recognises that Union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a Union representative.

40. - LEAVE TO ATTEND UNION BUSINESS

40.1 The Employer shall grant paid leave at the ordinary rate of pay during normal working hours to an Officer:

(1) who is required to attend or give evidence before any Industrial Tribunal;

(2) who as a Union-nominated representative is required to attend any negotiations and/or proceedings before an Industrial Tribunal and/or meetings with Ministers of the Crown, their staff or any other representative of Government;

(3) when prior arrangement has been made between the Union and the Employer for the Officer to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings; and

(4) who as a Union-nominated representative is required to attend joint Union/management consultative committees or working parties.

40.2 The granting of leave is subject to convenience and shall only be approved:

(1) where reasonable notice is given for the application for leave;

(2) for the minimum period necessary to enable the Union business to be conducted or evidence to be given; and

(3) for those Officers whose attendance is essential.

40.3 The Employer shall not be liable for any expenses associated with an Officer attending to Union business.

40.4 Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.

40.5 An Officer shall not be entitled to paid leave to attend to Union business other than as prescribed by this clause.

40.6 The provisions of the clause shall not apply to:

(1) special arrangements made with the Union which provide for unpaid leave for Officers to conduct Union business;

(2) when an Officer is absent from work without the approval of the Employer; and

(3) Sessional Prison Officers.

41. - PARENTAL LEAVE

41.1 Definition

"Officer" includes full time, part-time, permanent and fixed term contract Officers.

"Partner" means a person who is a spouse or de facto partner.

"Primary Care Giver" is the Officer who will assume the principal role for the care and attention of a child or children. The Employer may require confirmation of primary care giver status.

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

"Public Sector" means an employing authority as defined in Section 5 of the *Public Sector Management Act 1994*.

41.2 Entitlement to Parental and Partner Leave

(1) An Officer is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:

(a) birth of a child to the Officer or the Officer's partner; or

(b) adoption of a child who is not the child or the stepchild of the Officer or the Officer's partner; is under the age of five (5); and has not lived continuously with the Officer for six (6) months or longer.

(2) An Officer identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian Public Sector shall be entitled to the following amounts of paid parental leave which will form part of the 52 week entitlement provided in subclause 41.2(1) of this clause:

(a) ten (10) weeks paid parental leave from 1 July 2006

(b) twelve (12) weeks paid parental leave from 1 July 2007; and

(c) fourteen (14) weeks paid parental leave from 1 July 2008.

(3) An Officer may take the paid parental leave specified in subclause 41.2(2) at half pay for a period equal to twice the period to which the Officer would otherwise be entitled.

(4) A pregnant Officer can commence the period of paid parental leave any time up to six weeks before the expected date of birth and no later than four weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.

(5) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the periods specified in subclause 41.2(2) above.

(6) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.

(7) Parental leave may only be taken concurrently by an Officer and his or her partner as provided for in subclause 41.3 or under special circumstances with the approval of the Employer.

(8) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.

(9) An Officer may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.

(10) An Officer is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.

41.3 Partner Leave

(1) An Officer who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.

(2) The Officer may request to extend the period of unpaid partner leave up to a maximum of eight (8) weeks.

41.4 Birth of a Child

(1) An Officer shall provide the Employer with a medical certificate from a qualified registered medical practitioner naming the Officer, or the Officer's partner confirming the pregnancy and the estimated date of birth.

(2) If the pregnancy results in other than a live child or the child dies in the six (6) weeks immediately after the birth, the entitlement to paid parental leave remains intact.

41.5 Adoption of a Child

(1) An Officer seeking to adopt a child shall be entitled to two (2) days' unpaid leave to attend interviews or examinations required for the adoption procedure. Officers working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The Officer may take any paid leave entitlement in lieu of this leave.

(2) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Officers may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.

41.6 Other Leave Entitlements

(1) An Officer proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.

(2) Subject to all other leave entitlements being exhausted an Officer shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years. The Employer's approval is required for such an extension.

(3) The Employer shall only refuse such a request on reasonable grounds related to the effect on the workplace or the Employer's business. Such grounds might include:

(a) cost;

(b) lack of adequate replacement staff;

(c) loss of efficiency;

(d) the impact on customer service.

(4) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the Employer the total combined period of leave without pay following parental leave will not exceed two (2) years.

(5) An Officer on parental leave is not entitled to paid sick leave and other paid absences other than as specified in subclause 41.6(1) and 41.6(6).

(6) Should the birth or adoption result in other than the arrival of a living child, the Officer shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a qualified registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.

(7) Where a pregnant Officer not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the Officer may take any paid sick leave to which the Officer is entitled or unpaid leave for a period as certified necessary by a qualified registered medical practitioner.

41.7 Notice and Variation

(1) The Officer shall give not less than four (4) weeks notice in writing to the Employer of the date the Officer proposes to commence paid or unpaid parental leave stating the period of leave to be taken.

(2) An Officer seeking to adopt a child shall not be in breach of subclause 41.7(1) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(3) An Officer proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.

41.8 Transfer to a Safe Job

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

41.9 Communication during Parental Leave

(1) Where an Officer is on parental leave and a definite decision has been made to introduce significant change at the workplace, the Employer shall take reasonable steps to:

(a) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the Officer held before commencing parental leave; and

(b) provide an opportunity for the Officer to discuss any significant effect the change will have on the status or responsibility level of the position the Officer held before commencing parental leave.

(2) The Officer shall take reasonable steps to inform the Employer about any significant matter that will affect the Officer's decision regarding the duration of parental leave to be taken, whether the Officer intends to return to work and whether the Officer intends to return to work on a part-time basis.

(3) The Officer shall also notify the Employer of the changes of address or other contact details which might affect the Employer's capacity to comply with subclause 41.9(1).

41.10 Replacement Officer

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

41.11 Return to Work

(1) An Officer shall confirm the intention to return to work by notice in writing to the Employer not less than four (4) weeks prior to the expiration of parental leave.

(2) Where an Employer has made a definite decision to introduce major changes that are likely to have a significant effect on the Officer's position the Employer shall notify the Officer while they are on parental leave.

(3) An Officer on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the Officer's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the Officer was transferred to a safe job the Officer is entitled to return to the position occupied immediately prior to transfer.

(4) An Officer may return on a part-time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with the part time provisions of the Award and Agreement.

41.12 Effect of Parental Leave on the Contract of Employment

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

(2) Paid parental leave will count as qualifying service for all purposes of this Award and the Agreement. During paid parental leave at half pay all entitlements will accrue as if the Officer had taken the entitlement to paid parental leave at full pay.

(3) Absence on unpaid parental leave shall not break the continuity of service of Officers but shall not be taken into account in calculating the period of service for any purpose of this Award.

(4) An Officer on parental leave may terminate employment at any time during the period of leave by written notice in accordance with subclause 7.3 of Clause 7 – Contract of Service of this Award.

(5) An Employer shall not terminate the employment of an Officer on the grounds of the Officer's application for parental leave or absence on parental leave but otherwise the rights of the Employer in respect of termination of employment are not affected.

42. - STUDY LEAVE

Conditions for Granting Time Off

42.1 An Officer may be granted time off with pay for study purposes at the discretion of the Employer.

42.2 Part-time Officers are entitled to study leave on the same basis as full time Officers.

42.3 Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken.

42.4 Officers who are obliged to attend educational institutions for compulsory block sessions, may be granted time off with pay including travelling time up to the maximum annual amount allowed in subclause 42.3 of this clause.

42.5 Officers shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.

42.6 In every case the approval of time off to attend lectures and tutorials will be subject to:

(1) Department convenience;

(2) The course being undertaken on a part-time basis;

(3) Officers undertaking an acceptable formal study load in their own time;

(4) Officers making satisfactory progress with their studies;

(5) The course being of value to the agency; and

(6) The Employer's discretion when the course is only relevant to the Officer's career in the Service and being of value to the State.

42.7 A service agreement or bond will not be required.

42.8 Payment of Fees and Other Costs

(1) Agencies are to meet the payment of higher education administrative charges for Officers who, as a condition of their employment, are required to undertake studies at a University or College of Advanced Education. Officers who of their own volition attend such institutions to gain higher qualifications will be responsible for the payment of fees.

(2) This assistance does not include the cost of textbooks or Guild and Society fees.

(3) An Officer who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.

42.9 Approved Courses

(1) (a) First-degree or Associate Diploma courses at a University within the state of Western Australia.

(b) First degree or Associate Diploma courses at a College of Advanced Education.

(c) Diploma courses at Technical and Further Education (TAFE).

(d) Two-year full time Certificate courses at TAFE.

(e) Courses recognised by the National Authority for the Accreditation of Translators and Interpreters (NAATI) in a language relevant to the needs of the Public Sector.

(2) Except as outlined in subclause 42.9(4) of this clause, Officers are not eligible for study assistance if they already possess one of the qualifications specified in subclause 42.9(1)(a) and 42.9(1)(b) of this clause.

(3) An Officer who has completed a Diploma through TAFE is eligible for study assistance to undertake a degree course at a University within the state of Western Australia or a College of Advanced Education. An Officer who has completed a two year full time Certificate through TAFE is eligible for study assistance to undertake a Diploma course specified in subclause 42.9(1)(c) or a degree or Associate Diploma course specified in subclause 42.9(1)(a) or 42.9(1)(b) of this clause.

(4) Assistance towards additional qualifications including second or higher degrees may be granted in special cases, at the discretion of the Employer.

42.10 (1) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition with at least half of the total formal study commitment being undertaken in the Officer's own time, except in special cases such as where the Officer is in the final year of study and requires less time to complete the course, or the Officer is undertaking the recommended part-time year or stage and this does not entail five hours formal study.

(2) A first degree or Associate Diploma course does not include the continuation of a degree or Associate Diploma towards a higher postgraduate qualification.

(3) In cases where Officers are studying subjects which require fortnightly classes the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.

(4) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes, compared with the time usually taken to travel home from the Officer's normal place of work.

(5) An Officer shall not be granted more than 5 hours time off with pay per week except in exceptional circumstances where the Employer may decide otherwise.

(6) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.

42.11 Subject to the provisions of subclause 42.12 of this clause, the Employer may grant an Officer full time study leave with pay to undertake:

(1) Post graduate degree studies at Australian or overseas tertiary education institutions; or

(2) Study tours involving observations and/or investigations; or

(3) A combination of postgraduate studies and study tour.

42.12 Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:

(1) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of subclause 42.1 to 42.11 of this clause and the Leave Without Pay provisions of this Award (Clause 43).

(2) It must be a highly specialised course with direct relevance to the Officer's profession.

(3) It must be highly relevant to the agency's corporate strategies and goals.

(4) The expertise or specialisation offered by the course of study should not already be available through other Officers employed within the agency.

(5) If the applicant was previously granted study leave, studies must have been successfully completed at that time.

(6) A fixed term contract Officer may not be granted study leave with pay for any period beyond that Officer's approved period of engagement.

42.13 Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.

42.14 Where an outside award is granted and the studies to be undertaken are considered highly desirable by an Employer, financial assistance to the extent of the difference between the Officer's normal salary and the value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria then part or full payment of salary may be approved at the discretion of the Employer.

42.15 The Employer supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, and allowance for books, accommodation or a contribution towards accommodation.

42.16 Where recipients are in receipt of a living allowance, this amount should be deducted from the Officer's salary for that period.

42.17 Where the Employer approves full time study leave with pay the actual salary contribution forms part of the agency's approved average staffing level funding allocation. Employers should bear this in mind if considering temporary relief.

42.18 Where study leave with pay is approved and the Employer also supports the payment of transit costs and/or an accommodation allowance, the Employer will gain approval for the transit and accommodation costs as required.

42.19 Where Officers travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the Employer together with some local transit and accommodation expenses providing it meets the requirements of subclause 42.12 of this clause. Each case is to be considered on its merits.

42.20 The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for Officers under this Award.

43. - LEAVE WITHOUT PAY

43.1 Subject to the provisions of subclause 43.2 of this clause, the Employer may grant an Officer leave without pay for any period and is responsible for that Officer on his or her return.

43.2 Every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:

(1) The work of the Department is not inconvenienced; and

(2) All other leave credits of the Officer are exhausted.

43.3 An Officer on a fixed term contract may not be granted leave without pay for any period beyond that Officer's approved period of engagement.

44. - BLOOD/PLASMA DONORS LEAVE

44.1 Subject to operational requirements, Officers shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:

(1) Prior arrangements with the supervisor has been made and at least two days' notice has been provided; or

(2) The Officer is called upon by the Red Cross Blood Centre.

44.2 The notification period shall be waived or reduced where the Superintendent is satisfied that operations would not be unduly affected by the Officer's absence.

44.3 The Officer shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.

44.4 Officers shall be entitled to two hours of paid leave per donation for the purpose of donating blood to the Red Cross Blood Centre.

45. - TRAINING WITH DEFENCE FORCE RESERVES LEAVE

45.1 The Employer must grant leave of absence for the purpose of defence service to an Officer who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.

45.2 Leave of absence may be paid or unpaid in accordance with the provisions of this clause.

45.3 Application for leave of absence for defence service shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the Officer shall provide a certificate of attendance to the Employer.

45.4 Paid Leave

(1) An Officer who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for the purpose of attending a training camp, school, class or course of instruction, subject to the conditions set out hereunder.

(2) Part-time Officers shall receive the same paid leave entitlement as full time Officers but payment shall only be made for those hours that would normally have been worked but for the leave.

(3) On written application, an Officer shall be paid salary in advance when proceeding on such leave.

(4) Sessional Prison Officers are not entitled to paid leave for the purpose of defence service.

45.5 Attendance at a Camp for Annual Continuous Obligatory Training

(1) An Officer is entitled to paid leave for a period not exceeding 80 hours on full pay in any period of twelve months commencing on 1 July in each year.

(2) If the Officer-in-Charge of a military unit certifies that it is essential for an Officer to be at the camp in an advance or rear party, a maximum of 30 extra hours leave on full pay shall be granted in the twelve-month period.

45.6 Attendance at One Special School, Class or Course of Instruction

(1) In addition to the paid leave granted under subclause 45.5 of this clause, an Officer is entitled to a period not exceeding 16 calendar days in any period of twelve months commencing on July 1 in each year, provided the Employer is satisfied that the leave required is for a special purpose and not for a further routine camp.

(2) In this circumstance, an Officer may elect to utilise annual leave credits. However, if the leave is not taken from annual leave, salary during the period shall be at the rate of the difference between the normal remuneration of the Officer and the defence force payments to which the Officer is entitled if such payments do not exceed normal salary. In calculating the pay differential, pay for Saturdays, Sundays, public holidays and special rostered days off is to be excluded and no account is to be taken of the value of any board or lodging provided for the Officer.

45.7 Unpaid Leave

(1) Any leave for the purpose of defence service that exceeds the paid entitlement prescribed in subclauses 45.5 and 45.6 of this clause shall be unpaid.

(2) Sessional Prison Officers are entitled to unpaid leave for the purpose of defence service.

45.8 Use of Other Leave

(1) An Officer may elect to use annual or long service leave credits for some or all of his or her absence on defence service, in which case he or she will be treated in all respects as if on normal paid leave.

(2) An Employer cannot compel an Officer to use annual leave or long service leave for the purpose of defence service.

46. - INTERNATIONAL SPORTING EVENTS LEAVE

46.1 Special leave with pay may be granted by the Employer to an Officer chosen to represent Australia as a competitor or official, at a sporting event, which meets the following criteria:

(1) It is a recognised international amateur sport of national significance; or

(2) It is a world or international regional competition; and

(3) No contribution is made by the sporting organisation towards the normal salary of the Officer.

46.2 The Employer shall make enquiries with the Department of Sport and Recreation:

(1) Whether the application meets the above criteria;

(2) The period of leave to be granted.

47. - PURCHASED LEAVE DEFERRED SALARY SCHEME

47.1 With the written agreement of the Employer, an Officer may elect to receive, over a four-year period, 80% of the salary he or she would otherwise be entitled to receive in accordance with the Award.

47.2 The Employer will assess each application for deferred salary on its merits and give consideration to the personal circumstances of the Officer seeking the leave.

47.3 On completion of the fourth year, an Officer will be entitled to 12 months' leave and will receive an amount equal to 80% of the salary he or she would otherwise be entitled to in the fourth year of deferment.

47.4 Where an Officer completes four years of deferred salary service and is not required to attend duty in the following year, the period of non-attendance shall not constitute a break in service and shall count as service on a pro-rata basis for all purposes.

47.5 An Officer may withdraw from this arrangement prior to completing a four-year period by written notice. The Officer will receive a lump sum payment of salary forgone to that time but will not be entitled to equivalent absence from duty.

47.6 The Employer will ensure that superannuation arrangements and taxation effects are fully explained to the Officer by the relevant Authority. The Employer will put any necessary arrangements into place.

48. - PURCHASED LEAVE -50/52 OR 49/52 SALARY ARRANGEMENT

48.1 The Officer may elect to enter into an arrangement whereby the Officer can purchase a block of two or three weeks' additional leave. These arrangements have been developed to encourage Officers working a three week roster cycle to apply for the three week leave block.

48.2 The Employer will give priority access to those employees with carer responsibilities.

48.3 The Employee can agree to take a reduced salary spread over the 52 weeks of the year and receive two (2) or three (3) weeks' purchased leave.

48.4 The purchased leave will not be able to be accrued. The Officer is to be entitled to pay in lieu of the purchased leave not taken. In the event that the Officer is unable to take such purchased leave, his or her salary will be adjusted on the last pay period in July to take account of the fact that time worked during the year was not included in the salary.

48.5 In the event that a part-time Officer's ordinary working hours are varied during the year, the salary paid for such leave taken will be adjusted on the last pay in July to take into account any variations to the Officer's ordinary working hours during the previous year.

48.6 Applications by Officers wishing to receive the additional weeks' leave must be received by 31 March prior to the financial year in which the leave will be taken.

48.7 Overtime will continue to be paid as if the Officer was in receipt of his or her normal substantiative salary and not the amended salary rate.

48.8 Each Prison, prior to the start of the financial year, will determine the number of Officers who have elected for the additional two or three weeks' additional leave and develop a roster. The roster is to be designed to spread allocation of this leave evenly throughout the year. Officers will be given the opportunity to nominate periods within the roster. Where more Officers than can be accommodated nominate for a particular block the Superintendent will decide in consulting with those Officers directly affected who is to be allocated the period. Subject to subclause 48.2, Officers will receive priority where that leave adjoins their existing leave roster.

PART V – ALLOWANCE TYPES/SPECIFICATIONS

49. - DOG HANDLERS ALLOWANCE

49.1 Where the Department directs that an Officer is to be responsible for maintaining an animal attached to the Dog Handlers Unit and that such responsibility includes feeding, home kennelling, transportation, safety and security of the animal, the Officer shall be paid a fortnightly allowance calculated at ten and one half percent of the Officer's fortnightly annualised salary.

49.2 The Department shall be responsible to provide alternative kennel facilities for the animal during an Officer's leave.

49.3 The Department shall cover the cost of approved veterinary treatment provided to the animal.

50. – DISTRICT ALLOWANCE

50.1 For the purposes of this clause the following terms shall have the following meanings:

(1) "Dependant" in relation to an Officer means:

(a) a spouse; or

(b) where there is no spouse, a child or any other relative resident within the State who relies on the Officer for his or her main support;

who does not receive a district or location allowance of any kind.

(2) "Partial dependant" in relation to an Officer (for the purpose of district allowance) means:

(a) a spouse; or

(b) where there is no spouse, a child or any other relative resident within the State who relies on the Officer for his or her main support;

who receives a district or location allowance of any kind less than that applicable to an Officer without dependants under any Award, Agreement or other provision regulating the employment of the partial dependant.

(3) "Spouse" means an Officer's spouse including defacto spouse.

50.2 (1) Boundaries

For the purpose of Schedule D - District Allowance of this Award, the boundaries of the various districts shall be as described hereunder and as delineated on the plan in Schedule E - District Allowance Map to this Award.

(2) District

(a) The area within a line commencing on the coast; thence east along lat 28 to a point north of Tallering Peak, thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of lat 32 and long 119; thence south along long 119 to coast.

(b) That area within a line commencing on the south coast at long 119 then east along the coast to long 123; then north along long 123 to a point on lat 30; thence west along lat 30 to the boundary of No. 1 District.

(c) The area within a line commencing on the coast at lat 26; thence along lat 26 to long 123; thence south along long 123 to the boundary of No. 2 District.

(d) The area within a line commencing on the coast at lat 24; thence east to the South Australian border; thence south to the coast; thence along the coast to long 123 thence north to the intersection of lat 26; thence west along lat 26 to the coast.

(e) That area of the State situated between the lat 24 and a line running east from Carnot Bay to the Northern Territory Border.

(f) That area of the State north of a line running east from Carnot Bay to the Northern Territory Border.

50.3 (1) An Officer shall be paid a district allowance at the standard rate prescribed in Column II of Schedule D. - District Allowance of this Award, for the district in which the Officer's headquarters is located. Provided that where the Officer's headquarters is situated in a town or place specified in Column III of Schedule D- District Allowance of this Award, the Officer shall be paid a district allowance at the rate appropriate to that town or place as prescribed in Column IV of the said schedule.

(2) An Officer who has a dependant shall be paid double the district allowance prescribed by subclause 50.3(1) of this clause for the district, town, or place in which the Officer's headquarters is located.

(3) Where an Officer has a partial dependant the total district allowance payable to the Officer shall be the district allowance prescribed by subclause 50.3(1) of this clause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if he or she was employed in a full time capacity under the Award, Agreement or other provision regulating the employment of the partial dependant.

(4) When an Officer is on approved annual leave, the Officer shall for the period of such leave, be paid the district allowance to which he or she would ordinarily be entitled.

(5) When an Officer is on long service leave or other approved leave with pay (other than annual leave), the Officer shall only be paid district allowance for the period of such leave if the Officer, dependant/s or partial dependant/s remain in the district in which the Officer's headquarters are situated.

(6) When an Officer leaves his or her district on duty, payment of any district allowance to which the Officer would ordinarily be entitled shall cease after the expiration of two weeks unless the Officer's dependant/s or partial dependant/s remain in the district or as otherwise approved by the Commissioner.

(7) Except as provided in subclause 51.3(6) of this clause, a district allowance shall be paid to any Officer ordinarily entitled thereto in addition to reimbursement of any travelling, transfer or relieving expenses or camping allowance.

(8) Where an Officer whose headquarters is located in a district in respect of which no allowance is prescribed in Schedule D. - District Allowance of this Award, is required to travel or temporarily reside for any period in excess of one month in any district or districts in respect of which such allowance is so payable, then notwithstanding the Officer's entitlement to any such allowance provided by Clause 53. - Relieving Allowance and Clause 56. - Travelling Allowance of this Award the Officer shall be paid for the whole of such a period a district allowance at the appropriate rate prescribed by subclauses 51.3(1), 51.3(2) or 51.3(3) of this clause, for the district in which the Officer spends the greater period of time.

(9) When an Officer is provided with free board and lodging by the Employer the allowance shall be reduced to two-thirds of the allowance the Officer would ordinarily be entitled to under this clause.

50.4 Part-Time Officers

An Officer who is employed on a part-time basis shall be paid a proportion of the appropriate district allowance payable in accordance with the following formula:

$$\frac{\text{Hours worked per fortnight}}{80} \times \frac{\text{Appropriate District Allowance}}{1}$$

50.5 Adjustment of Rates

The rates expressed in Schedule D. - District Allowance of this Award shall be adjusted administratively every twelve (12) months, effective from the first pay period to commence on or after the first day of July in each year, in accordance with the official Consumer Price Index (CPI) for Perth, as published for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

51. - DISTURBANCE ALLOWANCE

51.1 Where an Officer is transferred and incurs expenses in the areas referred to in subclause 51.2 of this clause as a result of that transfer then the Officer shall be granted a disturbance allowance and shall be reimbursed by the Employer the actual expenditure incurred upon production of receipts or such other evidence as may be required.

51.2 The disturbance allowance shall include:

(1) Costs incurred for telephone installation at the Officer's new residence provided that the cost of telephone installation shall be reimbursed only where a telephone was installed at the Officer's former residence including Employer accommodation.

(2) Costs incurred with the connection or reconnection of services to the Officer's household including Employer accommodation for water, gas or electricity.

(3) Costs incurred with the redirection of mail to the Officer's new residence for a period of no more than three months.

52. - MOTOR VEHICLE ALLOWANCE

For the purposes of this clause the following expressions shall have the following meanings:

52.1 (1) "A year" means 12 months commencing on the 1st day of July and ending on the 30th day of June next following.

(2) "Metropolitan area" means that area within a radius of 50 kilometres from the Perth City Railway Station.

(3) "South West land division" means the South West land division as defined by to Section 6 Schedule 1 *Land Administration Act, 1997* excluding the area contained within the metropolitan area.

(4) "Rest of the State" means that area south of 23.5 degrees south latitude, excluding the metropolitan area and the South West land division.

(5) "Term of Employment" means a requirement made known to the Officer at the time of applying for the position by way of publication in the advertisement for the position, written advice to the Officer contained in the offer for the position or oral communication at interview by an interviewing Officer and such requirement is accepted by the Officer either in writing or orally.

(6) "Qualifying Service" shall include all service in positions where there is a requirement as a term of employment to supply and maintain a motor vehicle for use on official business but shall exclude all absences, which effect entitlements as provided by the schedule attached to Administrative Instruction 610.

52.2 Allowance for Officers required to supply and maintain a vehicle as a term of employment

(1) An Officer who is required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment shall be reimbursed in accordance with the appropriate rates set out in Schedule F - Motor Vehicle Allowance of this Award for journeys travelled on official business and approved by the Commissioner.

(2) An Officer who is reimbursed under the provisions of subclause 52.2(1) will also be subject to the following conditions:

(a) For the purposes of subclause 52.2 an Officer shall be reimbursed with the appropriate rates set out in Schedule F - Motor Vehicle Allowance of this Award for the distance travelled from the Officer's residence to the place of duty and for the return distance travelled from place of duty to residence except on a day where the Officer travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.

(b) Where an Officer in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Schedule F - Motor Vehicle Allowance of this Award.

(c) Where an Officer does not travel in excess of 4,000 kilometres in a year an allowance calculated by multiplying the appropriate rate per kilometre by the difference between the actual distance travelled and 4,000 kilometres shall be paid to the Officer provided that where the Officer has less than 12 months qualifying service in the year then the 4,000 kilometre distance will be reduced on a pro rata basis and the allowance calculated accordingly.

(d) Where a part-time Officer is eligible for the payment of an allowance under subclause (2)(c) of this subclause such allowance shall be calculated on the proportion of total hours worked in that year by the Officer to the annual standard hours had the Officer been employed on a full time basis for the year.

(e) An Officer who is required to supply and maintain a motor vehicle for use on official business is excused from this obligation in the event of his or her vehicle being stolen, consumed by fire, or suffering a major and unforeseen mechanical breakdown or accident, in which case all entitlement to reimbursement ceases while the Officer is unable to provide the motor vehicle or a replacement.

(f) The Commissioner may elect to waive the requirement that an Officer supply and maintain a motor vehicle for use on official business, but three months written notice of the intention so to do shall be given to the Officer concerned.

52.3 Allowance for Officers relieving Officers subject to subclause 52.2 of this clause

(1) An Officer not required to supply and maintain a motor vehicle as a term of employment who is required to relieve an Officer required to supply and maintain a motor vehicle as a term of employment shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Schedule F - Motor Vehicle Allowance of this Award for all journeys travelled on official business and approved by the Commissioner where the Officer is required to use his or her vehicle on official business whilst carrying out the relief duties.

(2) For the purposes of subclause 52.3(1) of this clause an Officer shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Schedule F - Motor Vehicle Allowance of this Award for the distance travelled from the Officer's residence to place of duty and the return distance travelled from place of duty to residence except on a day where the Officer travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.

(3) Where an Officer in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Schedule F - Motor Vehicle Allowance of this Award.

(4) For the purpose of this subclause the allowance provided in subclauses 52.2(2)(c) and (d) of this clause shall not apply.

52.4 Allowance for other Officers using vehicle on official business

(1) An Officer who is not required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment, but when requested by the Commissioner voluntarily consents to use the vehicle shall for journeys travelled on official business approved by the Commissioner be reimbursed all expenses incurred in accordance with the appropriate rates set out in Schedule G - Motor Vehicle Allowance and Schedule H - Motor Cycle Allowance of this Award.

(2) For the purpose of subclause 52.4(1) of this clause an Officer shall not be entitled to reimbursement for any expenses incurred in respect to the distance between the Officer's residence and headquarters and the return distance from headquarters to residence.

(3) Where an Officer in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate if applicable to each of the areas traversed as set out in Schedule G - Motor Vehicle Allowance.

(4) For the purposes of this subclause the allowances provided in subclauses 52.2(2)(c) and 52.2(2)(d) of this clause shall not apply.

52.5 Allowance for towing Departmental caravan or trailer

In cases where Officers are required to tow Departmental caravans on official business, the additional rate shall be 6.5 cents per kilometre. When Departmental trailers are towed on official business the additional rate shall be 3.5 cents per kilometre.

52.6 Special conditions

Where the cost of vehicles and petrol increase or decrease such that a corresponding increase or decrease in the allowance provided for a vehicle over 1600cc in the metropolitan area would amount to 0.1 of a cent or greater then the parties agree that the allowance shall be increased or decreased accordingly.

53. - RELIEVING ALLOWANCE

An Officer who is required to take up duty away from headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from the Officer's usual place of residence shall be reimbursed reasonable expenses on the following basis:

53.1 Where the Officer:

(1) is supplied with accommodation and meals free of charge, or

(2) is accommodated at a Government institution, hostel or similar establishment and supplied with meals,

reimbursement shall be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award.

53.2 Where Officers are fully responsible for their own accommodation, meals and incidental expenses and hotel or motel accommodation is utilised:

(1) For the first forty-two (42) days after arrival at the new locality reimbursement shall be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award

(2) For periods in excess of forty-two (42) days after arrival in the new locality reimbursement shall be in accordance with the rates prescribed in Column B, Items (4) to (8) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award for Officers with dependants or Column C, Items (4) to (8) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award for other Officers; period of reimbursement under this subclause shall not exceed forty-nine days without the approval of the Commissioner.

53.3 Where Officers are fully responsible for their own accommodation, meal and incidental expenses and other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award.

53.4 If an Officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the Officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $157.00 to cover incidental personal expenses; provided that an Officer shall receive no more than one lump sum of $157.00 in any one period of three (3) years.

53.5 Reimbursement of expenses shall not be suspended should an Officer become ill whilst on relief duty, provided leave for the period of such illness is approved in accordance with the provisions of this Award and the Officer continues to incur accommodation, meal and incidental expenses.

53.6 When an Officer who is required to relieve or perform special duties in accordance with the preamble of this clause is authorised by the Commissioner to travel to the new locality in the Officer's own motor vehicle, reimbursement for the return journey shall be as follows:

(1) Where the Officer will be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement shall be in accordance with the appropriate rate prescribed by subclause 52.2 of Clause 52. - Motor Vehicle Allowance of this Award.

(2) Where the Officer will not be required to maintain a motor vehicle for the performance of the relieving or special duties reimbursement shall be on the basis of one half (½) of the appropriate rate prescribed by subclause 52.2 of Clause 52. - Motor Vehicle Allowance of this Award; provided that the maximum amount of reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would be utilised for such return journey.

53.7 Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred, an appropriate rate of reimbursement shall be determined by the Commissioner.

53.8 The provisions of Clause 56. - Travelling Allowance of this Award shall not operate concurrently with the provisions of this clause to permit an Officer to be paid allowances in respect of both travelling and relieving expenses for the same period; provided that where an Officer is required to travel on official business which involves an overnight stay away from the Officer's temporary headquarters the Commissioner may extend the periods specified in subclause 53.2 of this clause by the time spent in travelling.

53.9 An Officer who is directed to relieve another Officer or to perform special duty away from the Officer's usual headquarters and is not required to reside temporarily away from his or her usual place of residence shall, if the Officer is not in receipt of a higher duties or special allowance for such work, be reimbursed the amount of additional fares paid by the Officer travelling by public transport to and from the place of temporary duty.

54. - REMOVAL ALLOWANCE

54.1 When an Officer is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the Officer has no control, the Officer shall be reimbursed:

(1) The actual reasonable cost of conveyance of the Officer and dependants.

(2) The actual cost (including insurance) of the conveyance of an Officer's household furniture effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the Commissioner in special cases.

(3) An allowance of $525.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an Officer is required to transport his or her furniture, effects and appliances provided that the Commissioner is satisfied that the value of household furniture, effects and appliances moved by the Officer is at least $3,143.00.

(4) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $167.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the Officer or the Officer’s dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

54.2 An Officer who is transferred solely at his or her own request or on account of misconduct must bear the whole cost of removal unless otherwise determined by the Employer prior to removal.

54.3 An Officer shall be reimbursed the full freight charges necessarily incurred in respect of the removal of the Officer's motor vehicle. If authorised by the Commissioner to travel to a new locality in the Officer's own motor vehicle, reimbursement shall be as follows:

(1) Where the Officer will be required to maintain a motor vehicle for use on official business at the new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause 52.2 of Clause 52. - Motor Vehicle Allowance of this Award.

(2) Where the Officer will not be required to maintain a motor vehicle for use on official business at the new headquarters reimbursement for the distance necessarily travelled shall be on the basis of one half (½) of the appropriate rate prescribed by subclause 52.3 of Clause 52. - Motor Vehicle Allowance of this Award.

54.4 The Officer shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the Commissioner, who may authorise the acceptance of the more suitable; provided that payment for a volume amount beyond 35 cubic metres by a Department is not to occur without the prior written approval of the Commissioner.

54.5 The Commissioner may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an Officer, with prior approval of the Commissioner, disposes of his or her household furniture effects and appliances instead of removing them to the new headquarters; provided that such payments shall not exceed the sum which would have been paid if the Officer's household furniture effects and appliances had been removed by the cheapest method of transport available and the volume was 35 cubic metres.

54.6 Where an Officer is transferred to Government owned or private rental accommodation, where furniture is provided, and as a consequence the Officer is obliged to store furniture, the Officer shall be reimbursed the actual cost of such storage up to a maximum allowance of $975.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the Employer.

54.7 Receipts must be produced for all sums claimed.

54.8 New appointees to the Prison Service shall be entitled to receive the benefits of this clause if they are required by the Employer to participate in any training course prior to being posted to their respective positions in the service. This entitlement shall only be available to Officers who have completed their training and who incur costs when moving to their first posting.

55. - TRANSFER ALLOWANCE

55.1 Subject to subclauses 55.2 and 55.5 of this clause an Officer who is transferred to a new locality in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the Officer has no control, shall be paid at the rates prescribed in Column A, Item (4), (5) or (6) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award for a period of 14 days after arrival at new headquarters within Western Australia or Column A, Items (7) and (8) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award for a period of 21 days after arrival at a new headquarters in another State of Australia; provided that if an Officer is required to travel on official business during the said periods, such period will be extended by the time spent in travelling. Under no circumstances, however, shall the provisions of this subclause operate concurrently with those of Clause 56. - Travelling Allowance of this Award to permit an Officer to be paid allowances in respect of both travelling and transfer expenses for the same period.

55.2 Prior to the payment of an allowance specified in subclause 55.1 of this clause, the Commissioner shall:

(1) Require the Officer to certify that permanent accommodation has not been arranged or is not available from the date of transfer. In the event that permanent accommodation is to be immediately available, no allowance is payable; and

(2) Require the Officer to advise the Employer that should permanent accommodation be arranged or become available within the prescribed allowance periods, the Officer shall refund the pro rata amount of the allowance for that period the occupancy in permanent accommodation takes place prior to the completion of the prescribed allowance periods.

Provided also that should an occupancy date which falls within the specified allowance periods be notified to the Department prior to the Officer's transfer, the payment of a pro rata amount of the allowance should be made in lieu of the full amount.

55.3 If an Officer is unable to obtain reasonable accommodation for the transfer of his or her home within the prescribed period referred to in subclause 55.1 of this clause and the Commissioner is satisfied that the Officer has taken all possible steps to secure reasonable accommodation, such Officer shall, after the expiration of the prescribed period to be paid in accordance with the rates prescribed by Column B, Items (4), (5), (6), (7) or (8) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award as the case may require, until such time as the Officer has secured reasonable accommodation; provided that the period of reimbursement under this subclause shall not exceed 77 days without the approval of the Commissioner.

55.4 When it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred by an Officer on transfer, an appropriate rate of reimbursement shall be determined by the Commissioner.

55.5 An Officer who is transferred to Employer accommodation shall not be entitled to reimbursement under this clause, provided that:

(1) where entry into Employer accommodation is delayed through circumstances beyond the Officer's control an Officer may, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the Officer and dependants less a deduction for normal living expenses prescribed in Column A, Items (15) and (16) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award.

and provided that:

(2) if any costs are incurred under subclause 51.2 of Clause 51. - Disturbance Allowance of this Award they shall be reimbursed by the Employer.

56. - TRAVELLING ALLOWANCE

An Officer who travels on official business shall be reimbursed reasonable expenses on the following basis:

56.1 When a trip necessitates an overnight stay away from headquarters and the Officer:

(1) is supplied with accommodation and meals free of charge; or

(2) attends a course, conference, etc., where the fee paid includes accommodation and meals; or

(3) travels by rail and is provided with a sleeping berth and meals; or

(4) is accommodated at a Government institution, hostel or similar establishment and supplied with meals;

reimbursement shall be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award.

56.2 When a trip necessitates an overnight stay away from headquarters and the Officer is fully responsible for his or her own accommodation, meals and incidental expenses:

(1) where hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award; and

(2) where other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award.

56.3 When a trip necessitates an overnight stay away from headquarters and accommodation only is provided at no charge to the Officer, reimbursement shall be made in accordance with the rates prescribed in Column A, Items 1, 2 or 3 and Items 12, 13 or 14 of Schedule I - Travelling, Transfer and Relieving Allowance of this Award subject to the Officer's certification that each meal claimed was actually purchased.

56.4 To calculate reimbursement under subclauses 56.1 and 56.2 of this clause for a part of a day, the following formula shall apply:

(1) If departure from headquarters is:

before 8.00am - 100% of the daily rate.

8.00am or later but prior to 1.00pm - 90% of the daily rate.

1.00pm or later but prior to 6.00pm - 75% of the daily rate.

6.00pm or later - 50% of the daily rate.

(2) If arrival back at headquarters is:

8.00am or later but prior to 1.00pm - 10% of the daily rate.

1.00pm or later but prior to 6.00pm - 25% of the daily rate.

6.00pm or later but prior to 11.00pm - 50% of the daily rate.

11.00pm or later - 100% of the daily rate.

56.5 When an Officer travels to a place outside a radius of 50 kilometres measured from the Officer's headquarters, and the trip does not involve an overnight stay away from headquarters, reimbursement for all meals claimed shall be at the rates set out in Column A, Items (12) or (13) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award subject to the Officer's certification that each meal claimed was actually purchased; provided that when an Officer departs from headquarters before 8.00am and does not arrive back at headquarters until after 11.00pm on the same day the Officer shall be paid at the appropriate rate prescribed in Column A, Items (4) to (8) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award.

56.6 When it can be shown to the satisfaction of the Commissioner by the production of receipts that reimbursement in accordance with Schedule I - Travelling, Transfer and Relieving Allowance of this Award does not cover an Officer's reasonable expenses for a whole trip the Officer shall be reimbursed the excess expenditure.

56.7 In addition to the rates contained in Schedule I - Travelling, Transfer and Relieving Allowance of this Award an Officer shall be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses, on production of receipts.

56.8 If on account of lack of suitable transport facilities an Officer necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the Officer shall be reimbursed the actual cost of such accommodation.

56.9 Reimbursement of expenses shall not be suspended should an Officer become ill whilst travelling, provided leave for the period of such illness is approved in accordance with provisions of Clause 34. - Sick Leave of this Award, and the Officer continues to incur accommodation, meal and incidental expenses.

56.10 Reimbursement claims for travelling in excess of 14 days in one month shall not be passed for payment by a certifying officer unless the Commissioner has endorsed the account.

56.11 An Officer who is relieving at or temporarily transferred to any place within a radius of 50 kilometres measured from the Officer's headquarters shall not be reimbursed the cost of midday meals purchased, but an Officer travelling on duty within that area which requires absence from the Officer's headquarters over the usual midday meal period shall be paid at the rate prescribed by Item (17) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award for each meal necessarily purchased, provided that:

(1) such travelling is not a normal feature in the performance of the Officer's duties; and

(2) such travelling is not within the suburb in which the Officer resides; and

(3) the Officer's total reimbursement under this subclause for any one pay period shall not exceed the amount prescribed by Item (18) of Schedule I - Travelling, Transfer and Relieving Allowance of this Award.

57. - PROPERTY ALLOWANCE

57.1 For the purposes of this clause the following expressions shall have the following meanings:

(1) "Agent" means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.

(2) "Dependant" in relation to an Officer means:

(a) spouse including defacto spouse;

(b) child/children; or

(c) other dependant family;

who resides with the Officer and who relies on the Officer for support.

(3) "Expenses" in relation to an Officer means all costs incurred by the Officer in the following areas:

(a) Legal fees in accordance with the *Solicitor's Remuneration Order, 1976* as amended and varied, duly paid to a solicitor or in lieu thereof fees charged by a settlement agent for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out under item 8 of the above order.

(b) Disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence.

(c) Real Estate Agent's Commission in accordance with that fixed by the Real Estate and Business Agents Supervisory Board, acting under Section 61 of the *Real Estate and Business Agents Act, 1978*, duly paid to an agent for services rendered in the course of and incidental to the sale of the property, the maximum fee to be claimed shall be fifty percent (50%) as set out under Items 1 or 2 - Sales by Private Treaty or Items 1 or 2 - Sales by Auction of the Maximum Remuneration Notice.

(d) Stamp Duty.

(e) Fees paid to the Registrar of Titles or to the Officer performing duties of a like nature and for the same purpose in another State or Territory of the Commonwealth.

(f) Expenses relating to the execution or discharge of a first mortgage.

(g) The amount of expenses reasonably incurred by the Officer in advertising the residence for sale.

(4) "Locality" in relation to an Officer means:

(a) Within the metropolitan area, that area within a radius of 50 kilometres from the Perth City Railway Station, and

(b) Outside the metropolitan area, that area within a radius of 50 kilometres from an Officer's headquarters when he or she is situated outside of the metropolitan area.

(5) "Property" shall mean a residence as defined in this clause including a block of land purchased for the purpose of erecting a residence thereon to the extent that it represents a normal urban block of land for the particular locality.

(6) "Residence" includes any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement including dwelling house, and the surrounding land, exclusive of any other commercial property, as would represent a normal urban block of land for the particular locality.

(7) "Settlement Agent" means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under the law.

57.2 When an Officer is transferred from one locality to another in the public interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the Officer has no control, the Officer shall be entitled to be paid a property allowance for reimbursement of expenses incurred by the Officer:

(1) In the sale of residence in the Officer's former locality, which, at the date on which the Officer received notice of transfer to a new locality:

(a) the Officer owned and occupied; or

(b) the Officer was purchasing under a contract of sale providing for vacant possession; or

(c) the Officer was constructing for the Officer's own permanent occupation, on completion of construction; and

(2) In the purchase of a residence or land for the purpose of erecting a residence thereon for the Officer's own permanent occupation in the new locality.

57.3 An Officer shall be reimbursed such following expenses as are incurred in relation to the sale of a residence:

(1) If the Officer engaged an agent to sell the residence on the Officer's behalf - 50 percent of the amount of the commission paid to the agent in respect of the sale of the residence;

(2) if a solicitor was engaged to act for the Officer in connection with the sale of the residence - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect of the sale of the residence;

(3) if the land on which the residence is created was subject to a first mortgage and that mortgage was discharged on the sale, then an Officer shall, if, in a case where a solicitor acted for the mortgagee in respect of the discharge of the mortgage and the Officer is required to pay the amount of professional costs and disbursements necessarily incurred by the mortgagee in respect of the discharge of the mortgage - the amount so paid by the Officer;

(4) if the Officer did not engage an agent to sell the residence on his or her behalf - the amount of the expenses reasonably incurred by the Officer in advertising the residence for sale.

57.4 An Officer shall be reimbursed such following expenses as are incurred in relation to the purchase of a residence:

(1) if a solicitor or settlement agent was engaged to act for the Officer in connection with the purchase of the residence - the amount of the professional costs and disbursements necessarily incurred are paid to the solicitor or settlement agent in respect of the purchase of the residence;

(2) if the Officer mortgaged the land on which the residence was erected in conjunction with the purchase of the residence, then an officer shall, if, in a case where a solicitor acted for the mortgagee and the Officer is required to pay and has paid the amount of the professional costs and disbursements (including valuation fees but not a procuration fee payable in connection with the mortgage) necessarily incurred by the mortgagee in respect of the mortgage - the amount so paid by the Officer;

(3) if the Officer did not engage a solicitor or settlement agent to act for the Officer in connection with the purchase or such a mortgage - the amount of the expenses reasonably incurred by the Officer in connection with the purchase or the mortgage, as the case may be, other than a procuration fee paid by the Officer in connection with the mortgage.

57.5 An Officer is not entitled to be paid a property allowance under subclause 57.2(2) of this clause unless the Officer is entitled to be paid a property allowance under subclause 57.2(1) of this clause, provided that the Commissioner may approve the payment of a property allowance under subclause 57.2(2) of this clause to an Officer who is not entitled to be paid a property allowance under subclause 57.2(1) of this clause if the Commissioner is satisfied that it was necessary for the Officer to purchase a residence or land for the purpose of erecting a residence thereon in the Officer's new locality because of the Officer's transfer from the former locality.

57.6 For the purpose of this Award it is immaterial that the ownership, sale or purchase is carried out on behalf of an Officer who owns solely, jointly or in common with:-

(1) the Officer's spouse, or

(2) a dependant relative, or

(3) the Officer's spouse and a dependant relative.

57.7 Where an Officer sells or purchases a residence jointly or in common with another person - not being a person referred to in subclause 57.6 of this clause the Officer shall be paid only the proportion of the expenses for which the Officer is responsible.

57.8 An application by an Officer for a property allowance shall be accompanied by evidence of the payment by the Officer of the expenses, being evidence that is satisfactory to the Commissioner.

57.9 Notwithstanding the foregoing provisions, an Officer is not entitled to the payment of a property allowance:

(1) In respect of a sale or purchase prescribed in subclause 57.2 of this clause which is effected -

(a) more than twelve months after the date on which the Officer took up duty in the new locality; or

(b) after the date on which the Officer received notification of being transferred back to the former locality;

Provided that the Commissioner may, in exceptional circumstances, grant an extension of time for such period as is deemed reasonable.

(2) Where the Officer is transferred from one locality to another solely at the Officer's own request or on account of misconduct.

58. - UNIFORMS

Uniforms shall be provided by the Department and shall be replaced on a reasonable wear and tear basis.

59. - CIVILIAN CLOTHING ALLOWANCE

59.1 An allowance, as provided in subclause 59.3 hereof, may be paid to an Officer covered by this Award, where he or she has received a prior direction from the Department to wear civilian clothes.

59.2 The standard of civilian clothes required to qualify for this allowance shall be at the sole discretion of the Department.

59.3 The allowance, as provided in subclause 59.1 hereof, shall be paid where the officer is directed to wear civilian clothes on any shift in any rostered week. The entitlement under this subclause, shall be on the following scale:

No. of Shifts	Amount ($)
1 shift per week	3.80
2 shifts per week	4.45
3 shifts per week	6.90
4 shifts per week	9.20
5 or more shifts per week	11.40

59.4 The Minister may, at his or her option, allocate all or any duty, the nature of which qualifies for the allowance contained in this clause, to a particular Officer in any rostered period.

60. - SPECIAL PROVISIONS

60.1 Where an Officer occupies quarters provided by the Minister, the Minister shall pay the water rates for such quarters. Where the quarters are in an area served by the *Country Areas Water Supply Act, 1947* the Minister shall pay for a reasonable quantity of water. Officers stationed and residing in their own accommodation north of the 26 degree south parallel, shall have paid by the Minister a reasonable quantity of water.

60.2 An Officer who prior to 28 June 1990 was qualified as prescribed in the Prisons Regulations for promotion to the classification of Senior Prison Officer or Chief Officer and who has not been appointed to such position, shall be paid $7.50 per week and $11.00 per week respectively. Officers who qualify after 28 June 1990 shall not be entitled to these allowances.

60.3 Officers other than Prison Officers (Vocational and Support) whose duties may include driving vehicles, engaged in driving duties for more than two hours per shift, shall be paid an allowance of $2.70 for each shift so worked.

60.4 An Officer who is delegated to be Officer in Charge of a shift shall receive $7.50 for each shift so worked. This subclause shall also apply to Officers in Charge of a shift at the Special Operations Unit.

60.5 (1) Officers employed at Pardelup Prison Farm and Karnet Prison who do not live in quarters, shall be paid a travelling allowance of $3.56 and $2.99 respectively for each shift worked.

(2) Officers employed at Wooroloo Prison who do not live in quarters and reside 16 kilometres or more away from the Institution, shall be paid a travelling allowance of $2.99 per shift.

(3) Officers who were stationed at Geraldton Regional Prison on 3 May 1984 and who by reason of the relocation of the facilities thereat to the Greenough Regional Prison and who do not live in quarters, shall be paid $2.99 per shift.

60.7 An Officer who is in charge of and required to use explosives, shall be paid $2.60 for each shift so worked.

60.8 Officers appointed to a Prison Officer (Vocational and Support) position who have completed 12 months or more service since the end of their probationary period shall be paid the Prison Officer (Vocational and Support) rate which is equal to, if no comparative rate exists, the next higher rate from the date of appointment to that Prison Officer (Vocational and Support) position. Where the Officer's rate exceeds the "thereafter rate" for the Prison Officer (Vocational and Support) position the Officer shall be paid the "thereafter rate" from the date of taking up duty in that Prison Officer (Vocational and Support) position.

61. - MOVEMENT OF ALLOWANCES

61.1 The following allowances shall be varied in accordance with movements in the same allowances or schedules in the *Public Service Award 1992* or its successor Award:

(1) District Allowance

(2) Disturbance Allowance

(3) Motor Vehicle allowance

(4) Relieving Allowance

(5) Removal Allowance

(6) Transfer Allowance

(7) Travelling Allowance

SCHEDULE A - RATES OF PAY

RATES OF PAY

The rates of pay in this Award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an Industrial Agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from Enterprise Agreements, are not to be used to offset arbitrated safety net adjustments.

	Annual Rate
	$ P.A.
Probationary Prison Officer (Training School)	33,364
Prison Officer (General)	
Officer	
Mon-Fri	
1st Year	38,202
2nd Year	39,699
3rd-5th Year	41,586
6th-7th year	42,693
Thereafter	43,547
Regional Increment	45,347
Shifts	
1st Year	47,113
2nd Year	49,087
3rd-5th Year	51,486
6th-7th year	52,904
Thereafter	53,962
Regional Increment	55,762
First Class Officer	
Monday to Friday	43,829
3 years and thereafter	44,705
Regional Increment	46,505
Shifts	54,244
3 years and thereafter	55,329
Regional Increment	57,129
Senior Officer	
Mon-Fri	
1st Year	45,325
2nd Year	46,434
3rd Year	47,543
4th-5th Year	48,680
Thereafter	49,653
Regional Increment	51,453
Shifts	
1st Year	55,944
2nd Year	57,469
3rd Year	58,874
4th-5th Year	60,281
Thereafter	61,486
Regional Increment	63,286

	Annual Rate
	$ P.A.
Senior Officer Security Albany and Hakea	
1st Year	53,180
2nd Year	54,509
3rd Year	55,838
4th-5th Year	57,168
Thereafter	58,311
Senior Officer Reception Hakea	
1st Year	50,849
2nd Year	52,117
3rd Year	53,419
4th-5th Year	54,653
Thereafter	55,746
Senior Officer Training	
1st Year	55,952
2nd Year	57,475
3rd Year	58,877
4th-5th Year	60,283
Thereafter	61,488
Prison Officers (Vocational and Support)	
Group 1	
Monday to Friday	43,829
3 years and thereafter	44,705
Regional Increment	46,505
Monday to Friday plus Public Holidays	45,055
3 years and thereafter	45,956
Regional Increment	47,756
Alternate Weekends (8 hours)	50,326
3 years and thereafter	51,333
Regional Increment	53,133
Casuarina Canteen	49,139
3 years and thereafter	50,122
Hakea Canteen	47,504
3 years and thereafter	48,455
Bunbury Canteen	49,139
3 years and thereafter	50,122
Wooroloo Canteen	46,278
3 years and thereafter	47,204
Bandyup Activities	52,370
3 years and thereafter	53,418
Bunbury Activities	51,180
3 years and thereafter	52,204

	Annual Rate
	$ P.A.
Eastern Goldfields Regional Prison Activities	53,017
3 years and thereafter	54,077
Albany Activities	48,117
3 years and thereafter	49,080
Wooroloo Activities	52,423
3 years and thereafter	53,472
Hakea Reception	48,340
3 years and thereafter	49,307
Hakea Reception	50,180
3 years and thereafter	51,183
Karnet Activities	53,422
3 years and thereafter	54,491
Greenough Activities	53,805
3 years and thereafter	54,881
Canine Handler	53,314
3 years and thereafter	54,380
Regional Increment	56,180
Group 2	
Monday to Friday	
1st Year	45,325
2nd Year	46,434
3rd Year	47,543
4th-5th Year	48,680
Thereafter	49,653
Regional Increment	51,453
Monday to Friday plus Public Holidays	
1st Year	46,595
2nd Year	47,750
3rd Year	48,906
4th-5th Year	50,061
Thereafter	51,062
Regional Increment	52,862
Alternate Weekends	
1st Year	52,326
2nd Year	53,582
3rd Year	54,872
4th-5th Year	56,203
Thereafter	57,327
Regional Increment	59,127

	Annual Rate
	$ P.A.
Monday to Friday plus Public Holidays—*continued*	
East Perth Lock Up	
1st Year	48,730
2nd Year	49,943
3rd Year	51,154
4th-5th Year	52,366
Thereafter	53,414
Dog Squad	
1st Year	55,156
2nd Year	56,537
3rd Year	57,919
4th-5th Year	59,301
Thereafter	60,487
Regional Increment	62,287
Bunbury Cook Instructors	
1st Year	54,557
2nd Year	55,920
3rd Year	57,287
4th-5th Year	58,653
Thereafter	59,826
Kitchen Hakea	
1st Year	49,260
2nd Year	50,486
3rd Year	51,711
4th-5th Year	52,938
Thereafter	53,997
Level 1	
Drivers	
Hakea & Casuarina	
1st Year	45,760
2nd Year	47,575
3rd-5th Year	49,844
6th-7th Year	51,204
Thereafter	52,228
Refer to rate above	
Alternate Weekend (8 hours)	
1st Year	44,005
2nd Year	45,920
3rd-5th Year	47,975
6th-7th Year	49,229
Thereafter	50,214
Level 2	
Monday to Friday	43,829
3rd Year	44,705
Regional Increment	46,505

	Annual Rate
	$ P.A.
Monday to Friday plus Public Holidays	45,055
3rd Year	45,956
Regional Increment	47,756
Alternate Weekends	50,326
3rd Year	51,333
Regional Increment	53,133
Level 3	
Monday to Friday	
1st Year	45,325
2nd Year	46,434
3rd Year	47,543
4th-5th Year	48,680
Thereafter	49,653
Regional Increment	51,453
Monday to Friday plus Public Holidays	
1st Year	46,595
2nd Year	47,750
3rd Year	48,906
4th-5th Year	50,061
Thereafter	51,062
Regional Increment	52,862
Alternate Weekends (8 hours)	
1st Year	52,326
2nd Year	53,582
3rd Year	54,872
4th-5th Year	56,203
Thereafter	57,327
Regional Increment	59,127
Level 4	
Monday to Friday	
1st Year	46,573
2nd Year	47,681
3rd Year	48,789
4th-5th Year	49,925
Thereafter	50,924
Regional Increment	52,724
Monday to Friday plus Public Holidays	
1st Year	47,922
2nd Year	49,062
3rd Year	50,202
4th-5th Year	51,370
Thereafter	52,397
Regional Increment	54,197

	Annual Rate
	$ P.A.
Monday to Friday plus Public Holidays—*continued*	
Level 5	
Monday to Friday	
1st Year	47,822
2nd Year	48,929
3rd Year	50,037
4th -5th Year	51,172
Thereafter	52,196
Regional Increment	53,996
Monday to Friday plus Public Holidays	
1st Year	49,309
2nd Year	50,347
3rd Year	51,485
4th-5th Year	52,654
Thereafter	53,707
Regional Increment	55,507
Senior Officer Wyndham Work Camp	
1st Year	55,944
2nd Year	57,469
3rd Year	58,874
4th -5th Year	60,281
Thereafter	61,486
Regional Increment	63,286
Prison Officer Work Camp (7 Day)	
1st Year	49,862
2nd Year	51,190
3rd Year	52,551
Thereafter	53,602
Regional Increment	55,538

In addition to the rates prescribed above, any Officer or Industrial Officer attaining First Class status prior to 12 November, 1987 shall be paid an additional $8.00 per week.

SCHEDULE B - MEMORANDUM OF AGREEMENT

The Minister for Corrective Services ("the Employer") for Western Australia and the Western Australian Prison Officers' Union of Workers ("the Union") agree that the following provisions shall apply to all Officers covered by the *Prison Officers' Award*.

The provisions of this Memorandum shall be read and interpreted wholly in conjunction with the Award. Where there is any inconsistency between this Memorandum and the Award, the provisions of this Memorandum shall prevail to the extent of any inconsistency.

Where an informal or unregistered agreement comes to the notice of either party after the registration of this Schedule B - Memorandum of Agreement that party shall bring that agreement to the notice of the other party in writing within one month of becoming aware of the agreement. Where the parties agree to that agreement being added into this Schedule it shall be so added.

(1) Section 1 – SALARY

Incremental Placement – Promotion or Transfer of Prison Officers (Vocational and Support)

(a) A Prison Officer (Vocational and Support) who is transferred or promoted to a Prison Officer (General) position shall be paid at the relevant year of service for the range of the Monday to Friday or Shift Work Officer depending upon the position to which the Officer is transferred or promoted. There will be no salary maintenance should the transfer or promotion result in a lesser salary than that which the Officer received as a Prison Officer (Vocational and Support).

(b) A Prison Officer (Vocational and Support) who is transferred or promoted to a Prison Officer (General) position will not automatically progress to First Class or Senior Officer due to the equivalent remuneration per years of service the Officer acquired as a Prison Officer (Vocational and Support).

Increments – Higher Duties

Where an Officer is directed to act in a higher position(s) that has an incremental range of salaries such Officer shall be entitled to receive an increase in the higher duties allowance equivalent to the increment the Officer would have received had the Officer been appointed to such position(s); provided that acting service with allowances for acting in positions of the same or higher classification than the position during the eighteen (18) months preceding the commencement of acting shall aggregate as qualifying service towards such an increase in the allowance.

Higher Duties – Salary on Annual Leave

Where a Prison Officer acting in a Senior Officer position proceeds on a period of normal annual leave the Officer shall be paid the salary of the higher position for the period of the leave if the Officer has been in receipt of a higher duties allowance for the greater proportion of the calendar month prior to taking the leave.

Salary – Appointment and Acting

The following arrangements apply in respect of substantive and acting appointments to Level 4 and 5 Prison Officer (Vocational and Support) positions.

(a) Appointment to Level 4 or 5 from outside the Service is to be at the minimum point of the range.

(b) Salary on promotion from Level 3 to Level 4 of an Officer in the service will be at the same point in the range and the Officer shall retain the Level 3 anniversary date.

(c) Salary on promotion from Level 4 to Level 5 of an Officer in the service would be at the same point in the range and of the Officer shall retain the Level 4 anniversary date.

(d) When acting in a Level 4 position a Level 3 Officer in the service will be paid at the same point in the Level 4 range as enjoyed within the Level 3 range with retention of the Level 3 anniversary date.

(e) When acting in a Level 5 position a Level 3 Officer in the service will be paid at the same point in the Level 5 range as enjoyed within the Level 3 range with retention of the Level 3 anniversary date.

(f) When acting in a Level 5 position a Level 4 officer in the service will be paid at the same point in the Level 5 range as enjoyed within the Level 4 range with retention of the Level 4 anniversary date.

Section 2 – HOURS OF DUTY

Filling of Rosters

The following process shall be followed in the development of rosters.

(a) All positions required at both Senior Officer and Prison Officer classification to fulfil the operational requirements of the Prison on a daily basis shall be identified.

(b) An agreed roster shall be prepared to cover all these positions.

(c) The first priority in preparing the roster shall be to fill all lines or part thereof.

(d) The second priority will be to cover all absences due to long-term sickness and worker's compensation.

(e) All Officers attached to the Prison whether on duty or absent due to sickness, workers compensation, or secondment should be listed on the roster.

(f) In the preparation of the roster the only time there will not be an Officer's name against a roster line will be where there is an actual vacant position at that Prison.

(g) When preparing the roster and prior to posting any excess staff on a particular day should be allocated to offset any shortfalls.

Agreed Rosters

Prison rosters will only be posted following agreement between the local branch of the Union and the administration of the Prison.

Roster Cycles

(a) Each roster period will run for six weeks and will be made up of two or three week roster cycles.

(b) A roster will initially be posted with another roster in advance providing rosters to cover a total of twelve weeks containing six or four roster cycles.

(c) A roster will be posted at the completion of a roster and at all times on the completion of one roster period another roster shall be posted. At any one point in time there will be posted a maximum of two rosters covering twelve weeks and a minimum of one roster covering six weeks.

(d) Roster cycles will run independently of each other.

(e) The non-leave period will be made up of three weeks, three weeks, and six weeks in any order over a three year period.

(f) Shift swaps shall not be approved between roster periods.

(g) Shift swaps can occur between roster cycles that make up the same roster period.

Shift Swaps

(a) An Officer must have at least one full day break after any period of seven (7) consecutive twelve-hour shifts including approved employee or management initiated shift swaps and out of hours work.

(b) Shift swaps must be approved prior to the first of the shifts swapped being worked. Shift swaps will not be approved retrospectively except where an urgent, pressing need was notified prior to the scheduled commencement of the first of the shifts being swapped.

(c) Any proposed shift swap must adhere to the requirements of the 12-hour shift arrangements regarding the break between finishing time of a day shift and commencement of a following night shift.

(d) Shift swaps will not be approved where it will result in an Officer working more than two consecutive night shifts. When working day shifts on the posted roster no more than two (2) night shifts can be swapped into in any seven (7) consecutive days.

(e) Shift swaps will not be approved where it will result in an Officer working more than an additional two consecutive nights following or before night shifts on the posted roster. When working night shifts on the posted roster no more than two (2) additional night shifts can be swapped in any consecutive days.

(f) Shift swaps must be completed within the same roster period.

(g) Where possible shift swaps should be with an Officer of the same unit to ensure continuity for case management purposes.

(h) Shift swaps will not be approved where it appears, from a trend of previous shift swaps, that Officers are avoiding certain duties that will result in an atrophying of skills in any area of Prison Officer work (e.g. Officers changing shifts and not having prisoner contact).

Commencement of Duty

(a) A Prison Officer's hours of duty commence and cease when the Officer reports to the front gate at his or her Prison.

(b) The handover time existing as at September 1, 1985 between Officers for the purpose of effecting the customary rotation of shifts shall be conducted in an Officer's own time without payment in addition to the Officer's annualised salary**.**

12 Hour Shift Guidelines

(a) Maximum of 2 consecutive twelve hour night shifts to be worked.

(b) Rosters should be made up, as a preferred option, in groups of 2 or 3 groups of shifts followed by days off – short rotation.

(c) Maximum limit of shift groups being 4 at any time.

(d) Day shifts should precede night shifts, i.e. D.N.N. or D.D.N. or D.N. etc.

(e) Minimum of 12 hours between shifts to be worked subject to G below.

(f) No start earlier than 6.00am and flexibility on shift changes.

(g) No overtime to be worked after a 12 hour shift except in an extreme emergency, 2 hours may be worked.

(h) Two free weekends each month on average.

(i) Nutritional food and drinks to be available during shifts.

(j) Training for supervisors to increase awareness of special requirements of 12 hour rosters.

(k) Where a total rate is used, individual component parts of penalties, allowances, base rates, etc. should be identified.

(l) Information to staff regarding effect of medication, drugs, rest and fatigue in appropriate language.

(h) Shift rosters must be developed and agreed upon through consultation with Officers and the Union with provision for ongoing consultation and resolution of disputes about rosters.

(n) Roster must be compatible with Unit Management and continuity needs as well as security and operational requirements.

(o) The options for staff who do not wish to work a twelve hour roster are:

inclusion on an eight hour roster (if it is possible to run such a roster at the Prison) or agreed transfer to another Prison.

(p) Provision of staff facilities at all Prisons.

Section 3 – LEAVE

Single Days Annual Leave

The following conditions provide clarification of the entitlement to take up to five single days of Annual Leave as provided by Clause 30.7 of the Award.

(a) Prison Officers shall be entitled to take up to five days of the normal annual leave as single days leave subject to the approval of the Superintendent or Officer in Charge.

(b) Any shortfall on the roster created by approval of single days of annual leave shall be covered by:

(i) An Officer utilised from the normal roster staffing levels identified by local agreement between the Prison administration and branch of the Union; or

(ii) An Officer surplus or additional to that day's normal roster staffing level requirement; or

(iii) Payment of overtime.

If the Superintendent is unable to obtain an Officer to undertake the overtime required to redeploy staff as provided in (i) and (ii) above, then approval of the application for a single day's annual leave may be withheld. Once staff are redeployed in accordance with (i) and (ii) above to cover an absence caused by granting a single day's annual leave, they cannot be reassigned.

(c) The Officer shall complete shifts equivalent to single annual leave days taken before commencement of his or her normal annual leave.

(d) The Officer's leave will be delayed for one working shift for each single day's leave taken. The Officer will be required to work on each of these days. In cases where an Officer has taken 4 or 5 days single days leave the first three days shall be cleared by attending work on the first three days of the nominated leave period with one day break before attending work to clear the remaining work obligation. If the Officer is on days off immediately prior to the nominated day for the commencement of leave then the four or five days work obligation may be satisfied by working those shifts on consecutive days.

(e) The Officer and the Superintendent may agree an administrative swap that provides for the time to be worked at a time other than outlined in the previous subclause (d) but no later than the date upon which the Officer's annual leave is scheduled.

Sick Leave Credits

(a) All Officers who, prior to 1 July 1994, received a total sick leave entitlement of three months with payment of ordinary wages and three months with payment of half ordinary wages in each period in three years will receive a credit of 528 hours in addition to their entitlements under Clause 34.1(1).

(b) All Officers with more than 10 years' continuous service as at 1 July 1994 who had accrued more than 528 hours' sick leave will be entitled to receive those days in addition to their entitlements under Clause 34.1(1).

Sick Leave - Anniversary Date

The anniversary date for the determination of a Prison Officer's sick leave entitlements shall be as follows:

(a) 19 July for Officers who chose to transfer from the triennial scheme to new arrangements introduced as from 28 July 1990;

(b) 1 July with the introduction of the "Package" for Officers employed on 1 July 1994 and still on the triennial system who were transferred to the present sick leave entitlements of the Award; and

(c) Officers employed since 1 July 1994 who have an anniversary date linked to commencement date.

Reconciliation of Sick Leave

(a) The following subclause shall complement the provisions of Clause 34.1(2) of the Award.

(b) Payment for sick leave may be adjusted at the end of each accruing year or at the time the Officer leaves the service of the Employer in the event of the Officer being entitled by service subsequent to sickness in that year to a greater entitlement than that existing at the time the sickness occurred.

Sick Leave on Annual Leave

(a) Where an Officer is ill during a period of annual leave for a period of at least seven consecutive days and produces at the time or as soon as possible thereafter medical evidence that the Officer is or was as a result of the illness confined to the Officer's place of residence or hospital the Officer who claims reinstatement of annual leave will have sick leave credits debited on the basis of eight hours a day (forty hours a week) and annual leave credited on the basis of eight hours a day (forty hours a week).

(b) Officers who are sick for a period of seven consecutive days or more while on annual leave and who claim reinstatement of annual leave will have sick leave debited on basis of 8 hours per day (40 hours per week) and annual leave credited on the basis of 8 hours per day.

Sick Leave Hours

Sick Leave will be paid on the basis of payment for rostered hours that the Officer would have worked. Where the Officer claims sick leave on an 8 hour day, 8 hours will be debited against the Officer's accumulated sick leave entitlements. Where an Officer claims sick leave on a 12 hour day, 12 hours will be debited against the Officer's accumulated sick leave.

Annual Leave Loading

(a) Subject to the provisions of subclauses (b), (c), (d) and (h) of this clause, a loading equivalent to 17.5% of annualised salary is payable to Officers proceeding on annual leave, including accumulated annual leave.

(b) Officers whose annualised salary includes a component for shift penalties that exceeds 17.5% of the Monday to Friday plus public holidays rate for their classification and are granted an additional week's pay shall not be entitled to annual leave loading.

(c) Officers whose annualised salary includes a component for shift penalties that is less than 17.5% of the Monday to Friday plus public holidays rate for their classification and are granted an additional week's pay shall be paid an allowance equal to the difference between a loading equivalent to 17.5% of normal salary and the shift work component for five weeks' leave.

(d) Subject to the provisions of subclause (f) of this clause the loading is paid on a maximum of four weeks' annual leave, or five weeks in the case of shift workers who are granted an additional week's penalty leave. Payment of the loading is not made on additional leave granted for any other purpose (e.g. to Officers whose headquarters are located North of the 26° South Latitude). The maximum payment shall not exceed the Average Weekly Total Earnings of all Males in Western Australia, as published by the Australian Bureau of Statistics, for the September quarter of the year immediately preceding that in which the leave commences. The maximum payment of the loading including the shift work component of the annualised salary to Officers granted in accordance with subclause (c) shall not exceed 5/4th of the Average Weekly Total Earnings of all Males in Western Australia, as published by the Australian Bureau of Statistics, for the September quarter of the year immediately preceding that in which the leave commences.

(e) Annual leave commencing in any year and extending without a break into the following year attracts the loading calculated on the salary applicable on the day the leave commenced.

(f) The loading payable on approved accumulated annual leave shall be at the rate applicable at the date the leave is commenced. Under these circumstances an Officer can receive up to the maximum loading for the approved accumulated annual leave in addition to the loading for the current year's entitlement.

(g) A pro rata loading is payable on periods of approved annual leave less than four weeks.

(h) The loading is calculated on the rate of the normal fortnightly salary including any allowances that are paid as a regular fortnightly or annual amount but excluding any shift allowances. Any allowance paid to an officer for undertaking additional or higher-level duties is only included if the allowance is payable during that period of normal annual leave.

(i) Where payment in lieu of accrued or pro rata annual leave is made on the death or retirement of an Officer, a loading calculated in accordance with the terms of this clause is to be paid on accrued and pro rata annual leave.

(j) When an Officer resigns, or ceases employment, or where an officer is dismissed under Part X of the Prisons Act, an annual leave loading shall be paid as follows:

(i) Accrued entitlements to annual leave - a loading calculated in accordance with the terms of this clause for accrued annual leave is to be paid.

(ii) Pro rata annual leave - no loading is to be paid.

(k) Part-time Officers shall be paid a proportion of the annual leave loading at the salary rate applicable, provided that the maximum loading payable shall be calculated in accordance with the following:

$$\frac{\text{Hours of work per fortnight}}{80} \times \frac{\text{Maximum loading in accordance with subclause (d) of this clause}}{1}$$

(l) An Officer who has been permitted to proceed on annual leave and who ceases duty other than by resignation or dismissal under Part X of the Prisons Act before completing the required continuous service to accrue the leave must refund the value of the unearned pro rata portion of leave loading but no refund is required in the event of the death of an Officer.

(m) An Officer who has been permitted to proceed on annual leave and who resigns or is dismissed under Part X of the Prisons Act must refund the value of the loading paid for leave other than accrued leave.

Recall to Duty During Leave:

Officers who are recalled to duty from annual or long service leave other than for training or to give evidence in an official capacity as provided under provisions for witness service shall be paid as follows:

(a) For a period less than one day payment at overtime rates for all time worked with a minimum payment for three hours. No adjustment will be made to the Officer's pay or leave credits.

(b) An Officer's leave shall be reinstated for periods in excess of one day with payment at overtime rates for all hours worked in excess of eight hours on any one day.

Long Service Leave – Pro Rata Entitlements

On application to the Department a lump sum payment for the money equivalent of any:

(a) Long service leave entitlement for seven years' continuous service shall be made to any Prison Officer who resigns, retires, is retired, is dismissed, or in respect of a Prison Officer who dies;

(b) Pro rata long service leave entitlement based on continuous service of less than seven years shall be made to any Prison Officer who:

(i) retires at or over the age of 55 years or who is retired on grounds of ill health if the Prison Officer has completed not less than twelve months' continuous service before retirement;

(ii) not having resigned is retired by the Department for any other cause if the Prison Officer has completed not less than three years' continuous service before the date of retirement;

(iii) in respect of a Prison Officer who dies, if the Officer has completed not less than twelve months' continuous service before the date of death.

(c) In the case of a deceased Prison Officer, payment shall be made to the estate of the Prison Officer unless the Officer is survived by a legal dependant approved by the Department, in which case the payment shall be made to the legal dependant.

Long Service Leave – Portability

Prison Officers are entitled to portability in respect of Long Service Leave entitlements for prior service with State bodies and statutory authorities set down in Administrative Instruction 611 of 13 December 1989 under the same conditions as officers of the Public Service.

Witness Service

(a) A Prison Officer subpoenaed or called as a witness to give evidence in any proceeding will as soon as practicable notify his or her Superintendent.

(b) Where a Prison Officer is subpoenaed or called as a witness to give evidence in an official capacity including occasions where the Officer is to give evidence at a Coronial Inquiry or other court proceedings relating to the conduct of a prisoner in Prison, that Officer will be granted by the Employer leave of absence with pay, but only for such period as required to enable the Officer to carry out duties related to being a witness. If the Officer is on any form of paid leave, the leave involved will be reinstated.

(c) A Prison Officer subpoenaed or called as a witness to give evidence in an official capacity is not entitled to any witness fee and will pay any fees received including travel expenses into the Consolidated Revenue Fund and forward the receipt for such payment to the Employer.

(d) A Prison Officer subpoenaed or called as a witness to give evidence on behalf of the Crown but not in an official capacity will be granted leave with full pay entitlements. If the Officer is on any form of paid leave, this leave will be not be reinstated as such witness service is deemed to be part of the Officer's civic duty.

(e) A Prison Officer subpoenaed or called as a witness to give evidence on behalf of the Crown but not in an official capacity granted paid leave is not entitled to retain any witness fee and will pay any fees received including travel expenses into the Consolidated Revenue Fund and forward the receipt for such payment to the Employer.

(f) A Prison Officer subpoenaed or called as a witness under circumstances other than those specified in subclauses (b) and (d) will be granted leave of absence without pay except where the Officer makes an application to clear accrued leave in accordance with the Award.

Additional Leave Entitlement – Definition of Regular

(a) An Officer's eligibility for an additional week's leave is calculated using the period between the date of the Officer's appointment and its anniversary irrespective of when the Officer takes the leave.

(b) An Officer satisfies the definition of regular for the purposes of Clause 30.1(3) of the Award if the Officer has worked on the approved roster eleven (11) Sundays or public holidays, not including overtime, in the period established under subclause (a) to calculate entitlement.

Section 4 – ALLOWANCES

Pager Allowance

(a) A Prison Officer instructed in writing to carry a pager and be available to be called to attend work outside of normal rostered hours of duty shall be paid an allowance of $39.24 per week.

(b) Officers required to carry a pager for a period of less than a week, that is seven calendar days, shall be paid a pro-rata allowance based on the number of days required.

(c) Officers will not be required to carry a pager during periods of annual or long service leave and will not be entitled to receive the allowance for that period of leave.

(d) A Prison Officer who is unavailable to respond to after hour calls as a result of illness is not eligible to claim the allowance for the period of that incapacity.

(e) From 18 October 1996 the allowance provided in subclause (a) shall be varied annually with effect from 18 October each year to reflect movements in the Consumer Price Index over the previous twelve months.

Travel Allowances

(a) The headquarters for Officers allocated to the Special Services Branch is the Hakea Complex.

(b) The headquarters for each Officer attached to the Gatehouse project will be established as either Casuarina or Hakea Prison prior to the Officer commencing duty on the project.

(c) Officers directed to report for duty at a location other than their nominated headquarters will be entitled to kilometreage as provided for in Schedule F of the *Public Service Award, 1992* where the distance travelled to and from that location is greater than the Officer's normal travelling distance to his or her nominated headquarters.

Overtime Meal Allowances

(a) A Prison Officer required to work overtime of not less than two hours and who actually purchases a meal shall be reimbursed in accordance with Part 2 of Schedule H - Overtime Allowance of the *Public Service Award, 1992*, in addition to any payment for overtime to which that Officer is entitled.

(b) A Prison Officer working a continuous period of overtime who has already purchased one meal during a meal break, shall not be entitled to reimbursement for the purchase of any subsequent meal in accordance with Part 2 of Schedule H – Overtime Allowance of the *Public Service Award, 1992* until that Officer has worked a further five hours' overtime from the time of the last meal break.

(c) If an Officer, having received prior notification of a requirement to work overtime, is no longer required to work overtime, then the Officer shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased.

Shift Penalty Rates

(a) The following formula is the basis upon which the shift component of the Officer's annualised salary will be calculated.

(b) Fifteen percent (15%) for any shift commencing before 6.01am Monday to Friday inclusive.

(c) Fifteen percent (15%) for any shift commencing on or after midday Monday to Friday inclusive.

(d) Time and a half for the length of any shift worked on a Saturday.

(e) Time and three quarters for the length of any shift worked on a Sunday.

Driving Allowance and Explosive Allowances

These allowances are to be paid pro-rata for the period of the shift - i.e. daily rate plus 50% where 12 hour shift is worked.

Civilian Clothing Allowance

The allowance will be paid at a rate pro-rata to the amount expressed in the Award - i.e. divide award rate by eight and multiply by twelve.

Section 5 – STAFFING

Officer in Charge

(a) The appointment of the Officer in Charge of the Prison shall be determined in accordance with the procedure outlined in the Department's correspondence to the Union dated 19 October 1988 and 21 November 1988.

(b) Acting Senior Officer appointments shall be determined in accordance with the procedure outlined in the Department's correspondence to the Union dated 15 September 1988.

Work Beyond Age 65

The provisions of Attachment 3 Extension of and Employment Beyond Age 65 contained in Circular to Departments and Authorities No 22 of 1988 shall apply to Prison Officers covered by the Award.

Vacancy management and relief pools

The Department shall maintain a pool of Prison Officers equal in size to the full time equivalent of the annual absence of staff due to worker's compensation. Prison Officers from that pool shall be used to cover staffing shortfalls caused by absence of Officers on worker's compensation.

Dog Handlers

(a) An Officer seeking to leave or required to leave the Canine Squad shall be entitled to return to his or her previous Prison or posting. The Officer may apply to the Transfer Committee for an alternative placement.

(b) The Officer prior to returning to his or her previous posting/Prison or taking up a requested alternative placement may be required to take a temporary posting within the Metropolitan Area pending a vacancy occurring at his or her previous or requested posting.

(c) Officers will not be required to use their vehicle to travel to and from work unless a Departmental vehicle is not available. Where no Departmental vehicle is available and the Officer agrees to transport the dog in their own private vehicle, the Officer shall be paid the motor vehicle rate provided by Schedule G – Motor Vehicle Allowance of this Award.

Section 6 – TRAINING

Residential and Full Time Training

(a) These terms and conditions will apply to Officers attending training where the course requires their attendance for a full day or more away from their normal work location.

(b) Criteria for selection of Officers to attend a course will be developed before the selection process is commenced. Officers shall attend courses where directed. Training programs developed out of performance reviews or disciplinary proceedings are excluded from the scope of these arrangements. The conditions governing such programs would be developed to meet the needs of the specific program.

(c) Courses will generally be based around a nine-hour structured training day (including the paid meal break provided by the Award). Officers will be rostered for duty for the duration of the structured training day. Where a course is to be something other than a nine-hour day the Training and Development Branch will advise the Prison when initially advising the Prison of the course.

(d) Where a course is to be conducted the following process should be followed:

(i) Training Branch will advise the Prison of the upcoming course.

(ii) The Prison Superintendent or delegate will determine whether staff can be released to attend the training, and identify Officer/s to attend.

(iii) The Prison Superintendent or delegate will negotiate with the local WAPOU branch for agreement on a training roster as an addendum to the existing agreed roster or modification to the agreed roster to release Officer/s for training. No roster modification will be required if the vacancies created by the Officer's/Officers' attendance at training are to be backfilled using overtime.

(iv) The roster/s for the Officer/s attending training must be adjusted to ensure that they work a total of 120 hours for each three-week period.

(v) In adjusting the hours, Prisons must ensure that Officers attending training have at least six rostered days off in each three-week period.

(vi) When the addendum training or modified roster is agreed it must be posted as in the normal course of events, thereby giving Officers formal notification of their attendance at training in accordance with industrial requirements.

(vii) Where a roster has already been posted and a Superintendent wishes an Officer to vary his or her roster to attend training then the Superintendent must seek agreement with the Officer prior to committing that Officer to the training. Superintendents should ensure Officers are given as much notice as possible in these circumstances.

(e) Where there is a need to cover the attendance of an Officer at training the agreed protocols applying at the Prison for covering ad-hoc absences shall apply.

(f) Where a course is non-residential Officers will be entitled to kilometreage as provided for in Schedule G-Motor Vehicle Allowance of this Award where the distance travelled to and from the training venue is greater than the Officer's normal travelling distance to work.

(g) Where courses are residential and the accommodation site is located away from the training venue, Officers will be provided with transport to and from the training venue.

(h) Other than when there is a requirement for Officers attending a course who are not utilising the Departmental supplied accommodation to report to the accommodation site to travel to the course venue, the time spent travelling from the accommodation site to the training venue each morning and from the training venue to the accommodation site each afternoon will not form part of the nine-hour structured training day. This travel will be in the Officers' own time, being analogous to that time normally spent travelling to and from work. Where Officers are required to report to the accommodation the travel time from and to the accommodation site shall be rostered time worked in addition to the structured training day.

(i) Residential courses shall have no formal structured training scheduled outside of the structured training day. In accordance with common training and professional development program practices, attendees can be expected to undertake in their own time after-hours study and other activities that do not form part of the structured training schedule.

(j) Where structured extracurricular voluntary activities (such as team building activities, wellness programs) are programmed into a training period during times outside of the structured training day they are to be clearly marked as voluntary on the course outline. Officers taking part in such activities are not entitled to payment of overtime for the time spent participating in the activities. Where structured training sessions are programmed into a course during times outside of the structured training day, officers are required to attend the sessions and overtime will be paid.

(k) Travel to and from courses shall be in accordance with the Travel Plan included in the Course Joining Instruction. The Travel Plan will detail the mode of transport. Where an Officer wishes to use his or her private vehicle in lieu:

- Permission may be obtained from the Officer's Superintendent or the Manager, Training and Development Branch.
- Officers may claim kilometreage as provided for at Schedule F - Motor Vehicle Allowance of the *Public Service Award 1992* of an amount up to that which it would have cost the Department to purchase the fare for the public transport; and
- Officers will be paid the normal salary rate for:
    - the actual period of the journey; or
    - the period equal to the time it would have taken for the officer to travel by mode nominated in the Travel Plan,

  whichever is lesser.

(l) Where Officers are involved in team building or other activities that require them to wear special protective clothing and footwear other than their issue of uniform, footwear and accoutrements then that special protective clothing and footwear will be provided. Any special protective clothing and footwear provided must be returned on the completion of the course. Where the course facilitators deem it prudent to wear civilian clothing or footwear Officers will be advised of that in the joining instructions and will have the option of wearing civilian clothing or their uniform.

(m) Where an Officer is required to attend a residential course of more than one week and is necessarily absent from his or her residence and separated from dependants, the Officer shall be granted an additional day's leave for every group of three (3) consecutive weekends so absent, provided that each weekend shall be counted as a member of only one group, provided that:

- An additional day's leave shall not be allowed if the General Manager Adult Custodial or its representative has approved the Officer's dependants accompanying the Officer to the locality of the course;
- The additional leave is commenced within one (1) month of the conclusion of the training course unless the General Manager Adult Custodial or its representative approves otherwise;
- Annual leave loading, if payable, shall not apply to this additional leave entitlement.

(n) Where Officers attend a residential course the Department will not be responsible for the provision or reimbursement of cost, of transport for private purposes.

(o) Where Officers attend a residential course the travelling allowances provisions contained in Clause 53 – Relieving Allowance, Clause 55 – Transfer Allowance and Clause 56 – Travelling Allowance of this Award shall apply.

Accredited Training

(a) The standard of training provided to Prison Officers shall meet the national accreditation set for Certificate III in Correctional Practice (Custodial), Certificate IV in Correctional Practice (Custodial), and the Diploma of Correctional Administration.

(b) The Department of Corrective Services Prison Officers Training Course for Probationary Prison Officers shall be at the standard set for national accreditation for Certificate III in Correctional Practice (Custodial).

(c) The Department deems that all Prison Officers who have completed the Department of Corrective Services Probationary Prison Officers training course hold qualification required for appointment to positions requiring the Certificate III in Correctional Practice (Custodial).

Section 7 – GENERAL

1. Performance Management

The parties agree to the implementation of a performance management system for the assessment of Prison Officer work performance at all ranks.

2. Reclassification Procedures

Prison Officer (Vocational and Support)

Position History Files

(a) The Department will maintain a Position History file on all Prison Officer (Vocational and Support) positions. This file will keep track of the history of the position and contain a copy of the current Job Description Form (JDF) and documentation of all variations in duties and responsibilities that have occurred.

(b) The Union will be provided with an electronic copy of the JDF for all new Prison Officer (Vocational and Support) positions created after 7 July 2000.

(c) The Union will be provided with a copy of the new JDF where the original JDF is varied to take into account a change in duties and responsibilities.

(d) The Position History file shall contain the details of the approved working hours for the position where the hours are outside the parameters of five eight-hour days 8.00am to 4.00pm Monday to Friday

Creation of New Positions

(a) All new Prison Officer (Vocational and Support) positions shall be approved by the Commissioner before implemented in the workplace.

(b) Where a Prison Officer (Vocational and Support) is created the Superintendent is required to ensure that a JDF for the position is prepared.

(c) The Department in approving the JDF will conduct a review to determine the work value of the position.

(d) The assessment of work value of the position shall include but not be limited to the following criteria:

- Comparison to like positions already in existence within the Prisons.
- Qualifications required for the performance of the duties.
- Training required for the performance of the duties as required.
- Skills and/or knowledge now required for the performance of the duties.
- Responsibilities in respect of the outcome of the work area and/or safety of other employees or prisoners.
- Conditions under which the duties are performed.
- Quality of the work required.
- Multiplicity and diversity of the functions attached to the position.
- Level of supervision received.
- Responsibility for supervision of other employees or changes in requirements of supervision of other employees.
- Level of importance of the position in the overall operations of the Prison Service or Prison.

(e) When the classification of the position has been assessed the Department shall inform the Union of the new position and the proposed classification and provide it with a copy of the approved JDF.

(f) If the Union considers that the proposed classification is not commensurate with the duties and responsibilities of the position, the Department's position shall become made the subject matter of a meeting with representatives of the Department and the Union. The Department's representatives at this meeting shall have the capacity to act independently of the Department's response and make a recommendation to the Commissioner for reclassification based on the merit of information discussed thereby allowing for a possible joint recommendation on the matter on the day of the meeting.

(g) If this meeting does not satisfactorily resolve the claim then the Union can refer the matter to the Western Australian Industrial Relations Commission for resolution.

(h) If the all up salary for the position is outside the parameters provided in the pay schedule to the Award the Department will act expeditiously to have the appropriate amendment registered with Western Australian Industrial Relations Commission.

Changes in Working Hours

(a) Any change to the working hours of a Prison Officer (Vocational and Support) shall be approved by the Commissioner before implemented in the workplace.

(b) If a change in working hours impacts upon the all up salary in a manner that requires an amendment to the pay schedule in the Award the Department and the Union will act expeditiously to have the appropriate amendment registered with Western Australian Industrial Relations Commission.

Changes in Duties and Responsibilities

(a) Any change to the duties and/or responsibilities of a Prison Officer (Vocational and Support) shall be approved by the Commissioner before implemented in the workplace.

(b) Where a Prison Officer (Vocational and Support) is required to take on additional duties and/or responsibilities this will be immediately reflected in the JDF. It will be the responsibility of the Superintendent to ensure that the JDF is changed.

(c) The Department in amending the JDF to reflect these changes will conduct a review to determine if the changes bring about a net increase in the work value of the position. If a net increase in work value has occurred the Department will make the appropriate change to the classification of the position and notify the Officer.

The assessment of work value change shall include but not be limited to the following criteria:

- Additional qualifications that have been required for the performance of the duties.
- Additional training required for the performance of the duties as required.
- Additional skills and/or knowledge now required for the performance of the duties.
- Additional responsibilities in respect of the outcome of the work area and/or safety of other employees or prisoners.
- Changes in the conditions under which the duties are performed.
- Changes in the quality of the work required.
- Changes in the multiplicity and diversity of the functions attached to the position.
- Changes in the level of supervision received.
- The introduction of the responsibility for supervision of other employees or changes in requirements of supervision of other employees.
- Changes in the level of importance of the position in the overall operations of the Prison Service or Prison.

(d) If a change in classification requires an amendment to the all up salary listed in the pay schedule to the Award the Department will act expeditiously to have the appropriate amendment registered with Western Australian Industrial Relations Commission.

(e) Where an Officer considers that the classification allocated to his or her position does not reflect its true work value he or she can make written application for a review.

(f) The application is to be submitted to the Superintendent and contain detail as to the reasons the officer considers that JDF does not reflect duties allocated and/or the classification of the position does not reflect the value of the duties and responsibilities to the position.

(g) The Superintendent is required to deal with the request expeditiously and where necessary seek advice from the appropriate sections of the Department before providing the Officer with a written response addressing each of the reasons listed in the Officer's application.

(h) If the Officer considers that the response to his or her application is not satisfactory he or she has the right to have the claim and the Department's response made the subject matter of a meeting with representatives of the Department and the Union. The Department's representatives at this meeting shall have the capacity to act independently of the Department's response and make a recommendation for reclassification to the General Manager Adult Custodial based on the merit of information discussed thereby allowing for possible resolution of the matter on the day of the meeting.

(i) If this meeting does not satisfactorily resolve the claim then the matter can be referred to the Western Australian Industrial Relations Commission for resolution in accordance in accordance with the Commission's correspondence to the parties pursuant to Application No 1303 of 1988. The procedure for hearing of such matter is outlined in Annexure B.

(j) Where a position is reclassified by the Department or by way of appeal the Western Australian Industrial Relations Commission the incumbent of the position shall retain the position and receive the benefit of that reclassification.

(k) The effective date of a reclassification granted by the Department or the Western Australian Industrial Relations Commission shall be the date the officer formally requested the Department in writing for a reclassification of the position.

(l) Where the position has been reviewed through this process at the request of the Officer a further application cannot be made by that Officer within the next twelve months unless the Officer is required by the Superintendent to take on additional duties and/or responsibilities.

3. These procedures are subject to ongoing review by the parties. The parties may apply to vary these procedures. If there is any dispute the matter will be referred to the Western Australian Industrial Relations Commission.

Annexure A

The classification of a position is assessed in accordance with the principles outlined in the document Reclassification Procedures Prison Officer (Vocational and Support) February 2006.

The introduction of these new procedures means that the previous criteria used in the assessment of Industrial Officers with the introduction from 7 July 2000 of the five tiered classification scale for Vocational and Support Officers, that is Levels 1 to 5, is no longer valid.

The following principles underpin the assessment of work value of Prison Officer (Vocational and Support) positions:

- Qualifications required for the performance of the duties.
- Training required for the performance of the duties as required.
- Skills and/or knowledge required for the performance of the duties.
- Responsibilities in respect of the outcome of the work area and/or safety of other employees or prisoners.
- Conditions under which the duties are performed.
- Quality of the work required.
- Multiplicity and diversity of the functions attached to the position.
- Level of supervision received.
- Supervision of other employees
- Level of importance of the position in the overall operations of the Prison Service or Prison.

The determination of the work value of a Prison Officer (Vocational and Support) positions shall the include but not be limited to the assessment of the following criteria:

- Technical skills;
- Academic/theoretical qualifications;
- Licensing obligations;
- Accredited and non accredited on the job training;
- Staff supervision;
- Level of supervision received and independence of action;
- Prisoner supervision – large or small group;
- Accredited training provided to prisoners;
- Non accredited training provided to prisoners;
- Internal negotiations;
- External negotiations;
- Business unit management;
- Financial responsibility;
- Resource management;
- Record keeping;
- Report writing;
- Legal responsibilities;
- Compliance obligations;
- Responsibilities external to home/base Prison;
- Diversity of scope of responsibilities, i.e. involves more that one stream of activity;
- Focus of operations – production, skill development and/or remedial training;
- Other criteria agreed between the parties.

	Benchmark	**Responsibilities**	**Other**
1	Driver Casuarina	Level restricted to positions where primary function and responsibility involves only in driving duties	Driving duties would involve transport of prisoners or courier work
2		Co-ordination of prisoner activities or Provision of resources to prisoners or Control of Departmental resources or Prisoner records or Duties involving prisoner discipline only in workshops and other or areas	Primary duties are those other than driving and of lesser value than benchmark for Level 3
2A		Level restricted to positions in charge in work areas where more than one Level 2 operates	Officer holds end of line responsibility or supervisory role in the work area staffed by Level 2 Officers
3	Catering Instructor - Hakea	Includes but is not restricted to: Prisoner supervision in production or workshop activities Provision of accredited training or Provision within a Prison of maintenance services not requiring a license or other specialist duties	The duties and responsibilities justify a classification beyond Level 2
4	Laundry Manager - Greenough	Includes but is not restricted to: Staff supervision Prisoner supervision Provision of accredited training Day to day responsibility for operations in a work area or Performance of duties requiring external license or Coordinates or is responsible for a function that extends beyond one Prison	Supervisory position where two or more Officers at Level 3 are engaged or License to be *other* than a driving license or The position holds responsibilities for a function across prisons. or The duties and responsibilities justify a classification beyond Level 3 but less than Level 5

	Benchmark—*continued*	**Responsibilities**	**Other**
5	Abattoir Manager Karnet	Includes but is not restricted to: Staff supervision Prisoner supervision Provision of accredited training Day to day responsibility for operations in a work area Obligations to external organisations e.g. Primary Industry or Public Health	Supervisory position or The duties and responsibilities justify a classification beyond Level 4

Notes

The Benchmark for Level 3 is the work value and responsibilities attached to the position of Cook Instructor Hakea Prison as of January 2006. The work value of this position has been chosen as the benchmark due to the influence upon the day-to-day operations within the Hakea Prison of the Catering Manager and consequential impact upon the Cook Instructor's responsibilities. The position will cease to be a Benchmark with immediate effect should the position be allocated any additional duties or responsibilities after January 2006. The parties will then enter discussions to establish a new benchmark.

These procedures are subject to ongoing review by the parties. The parties may apply to vary these procedures. If there is any dispute the matter will be referred to the Western Australian Industrial Relations Commission.

During the negotiations the Union proposed that the Level 4 classification should also apply where a position based within one Prison has responsibilities across prisons. At proceedings before the Western Australian Industrial Relations Commission in June 2003 the Union indicated it was prepared to allow this issue to be subject to further discussion after the outcome of proceedings of the review and appeal process in respect of the Library position at Casuarina.

Annexure B

The processing of appeals by Prison Officers Vocational and Support Officers is based on the Practice Directions issued by the Western Australian Industrial Relations Commission in respect of reclassification appeals.

1. At least seven clear days before the hearing of the appeal the officer shall provide the Commission and the Department with a written statement of the facts upon which the appellant relies to support the appeal together with any witness statements.
2. At least seven clear days before the hearing of the appeal the Department shall provide the Commission and the officer with a written statement of the basis upon which it relies to resist or otherwise question the appeal.
3. The information and evidence contained in statements by both parties is to be restricted to matters canvassed in the documented outcome of discussions that took place in the meetings between the parties.
4. An Officer may address or respond to any issue canvassed in a witness statement provided by the Department by way of a written statement to the Commission and the Department at least three clear days before the hearing of the appeal.
5. The Department may address or respond to any issue canvassed in a witness statement provided by the Officer by way of a written statement to the Commission and the officer least three clear days before the hearing of the appeal.
6. The hearing of the appeal will proceed on the following basis:
   (a) The appellant and/or Union if desired may make a brief opening statement outlining the basis of the appeal;
   (b) The appellant may then give evidence to support the appeal that will be restricted to matters canvassed in the discussions that took place in the meetings between the parties;
   (c) The Department may then question the appellant;
   (d) The appellant and Union will then have the right to clarify matters arising out of the Department's questions to the appellant;

(e) The appellant may then call any witnesses whose evidence shall be restricted to matters raised in his or her statement;

(f) At the conclusion of the evidence of the witness the case for the appellant is closed;

(g) The Department if desired may make a brief opening statement outlining the basis of its opposition to the officer's claim;

(h) The Department will then give evidence to support its position that will be restricted to matters canvassed in the documented outcome of discussions that took place in the meetings between the parties;

(i) The appellant or the Union may then question the Department;

(j) The Department will then have the right to clarify matters arising out of the appellant or Union's questions to the Department;

(k) The Department may then call any witnesses whose evidence shall be restricted to matters raised in his or her statement;

(l) At the conclusion of the evidence of the witness the case for the Department is closed;

(m) The **a**ppellant, or Union, may make a brief closing statement.

SCHEDULE C – MEMORANDUM OF AGREEMENT

FOR PRISON OFFICERS (VOCATIONAL AND SUPPORT) TRAINING

This memorandum of agreement identifies the detail of the training programs and entitlements available to Prison Officers (Vocational and Support) through Clause 19 of this Award.

1. INDUCTION PROGRAM

(1) The induction program shall commence on the Officer's first day of employment prior to the Officer taking up duties at the workplace and be completed within the first week of service.

(2) The induction program shall include, but not limited to, the Department's general induction program together with areas such as facilities/amenities, Prison security including locks and keys, roster arrangements, health and safety, swearing of the oath, and a tour of the Prison.

(3) The Employer will consult with the Union from time to time as to the content of the induction program.

2. THREE-WEEK FULL-TIME ESSENTIAL TRAINING PROGRAM

(1) The Essential Training Program shall be completed within the first six months of service for all new Prison Officers (Vocational and Support) appointments.

(2) Where special circumstances exist which prevent an employee from attending the scheduled training, as mentioned in subclause (1) of this clause, the employee and the Employer shall consult to arrange a suitable alternative attendance date.

(3) The Essential Training Program for current Prison Officers (Vocational and Support) will commence in April 2004 and all Officers will have been provided that training within twenty-four months of the commencement of the program.

(4) The Essential Training Program will cover but not be limited to such modules as:

Fire Awareness, Blood Borne Viruses, Air/Oxy Viva, Prison Officer Roles and Responsibilities, WAPOL, Searches, Sampling Procedures, Dynamic Security, Radio Voice Procedures, Use of Force, Self Defence, Aerosol Subject Restraint, Instruments of Restraint, Emergency Procedures/First Responding Officer, Hostage Situations, Hostage Survival, Incident Report and Minutes Writing, Crimes Scenes and Police Prisons Unit, Continuity of Evidence, Occurrence Books, Accounting for Prisoners, Prisoner Employment and Gratuities, Prisoner Discipline Procedures, Introduction to TOMS, Scenario Training, Practical Placement, Administration/Performance Counselling, and Assessment Competencies.

(5) The contents of the Essential Training Program will be designed by the Employer, in consultation with the Union.

(6) Prison Officers (Vocational and Support) undertaking the essential training during working time will not suffer any loss of pay.

3. INDUSTRY SPECIFIC TRAINING

(1) Industry Specific Training is presently the Certificate III in Correctional Practice (Custodial).

(2) All new Prison Officers (Vocational and Support) appointments will exercise their option to enrol in the Certificate III training within 12 months of the completion of their three-week essential training program.

(3) All current Prison Officers (Vocational and Support) appointments will exercise their option to enrol to complete Certificate III within two months of the completion of their three-week essential training program.

(4) Prison Officers (Vocational and Support) who enrol in this training will have the opportunity to complete this training by combination of skills recognition, attendance at formal training programs during normal working hours, and or interactive online training.

(5) Each employee who exercises the option to enrol to complete Certificate III has a responsibility to positively co-operate and participate in his or her own learning.

(6) Certificate III training to be completed within three years of commencement of the three-week essential training program.

4. INTERPERSONAL SKILLS TRAINING PROGRAM

Prison Officers (Vocational and Support) will participate in the State-wide Interpersonal Skills Training Program on the same basis as Prison Officers (General) whose employment is governed by this Award.

5. FULL DISCIPLINARY OFFICER TRAINING

(1) Prison Officers (Vocational and Support) who wish to undergo full disciplinary officer training to undertake the full duties of a Prison Officer (General) must satisfy entry requirements similar to those of a probationary Prison Officers (General).

(2) Prison Officers (Vocational and Support) will undertake the same training program as probationary Prison Officer (General).

(3) On the successful completion of the training program a Prison Officer (Vocational and Support) will remain in his or her position until a replacement has been found. The Officer will follow the normal transfer procedures.

(4) Prison Officers (Vocational and Support) will not receive the Prison Officer's (General) salary until he or she undertakes the full duties of a Prison Officer (General).

(5) Prison Officers (Vocational and Support) who do not successfully complete the training program will return to their former position.

6. OTHER TRAINING

The Employer as part of its commitment to training may require Prison Officers (Vocational and Support) to undertake various forms of training to meet its operational needs. This may include training towards the qualification of Workplace Assessor and Trainer.

7. USE OF PRISON OFFICER (VOCATIONAL AND SUPPORT)

(1) A Prison Officer (Vocational and Support) may be directed to carry out such duties as are within the limits of his or her skill, competence and training.

(2) Prison Officers (Vocational and Support) upon completion of the three-week essential training program or any additional training can be called upon to provide ad-hoc short-term assistance in fulfilling the functions within other areas of the Prison for which they have been trained for the safe and competent performance of that function.

(3) The parties will establish broad parameters for the functions that can be performed by Officers who have completed the three-week essential training program.

SCHEDULE D - DISTRICT ALLOWANCE

(a) Officers without dependants (subclause 50.1(1) of this Award):

COLUMN 1 DISTRICT NO.	COLUMN II STANDARD RATE $ P.A.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV RATE $ P.A.
6	3,569	Nil	Nil
5	2,920	Fitzroy Crossing	3,933
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	3,655
		Marble Bar	
		Wittenoom	
		Karratha	3,438
		Port Hedland	3,199
4	1,471	Warburton Mission	3,952
		Carnarvon	1,385
3	927	Meekatharra	1,471
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	

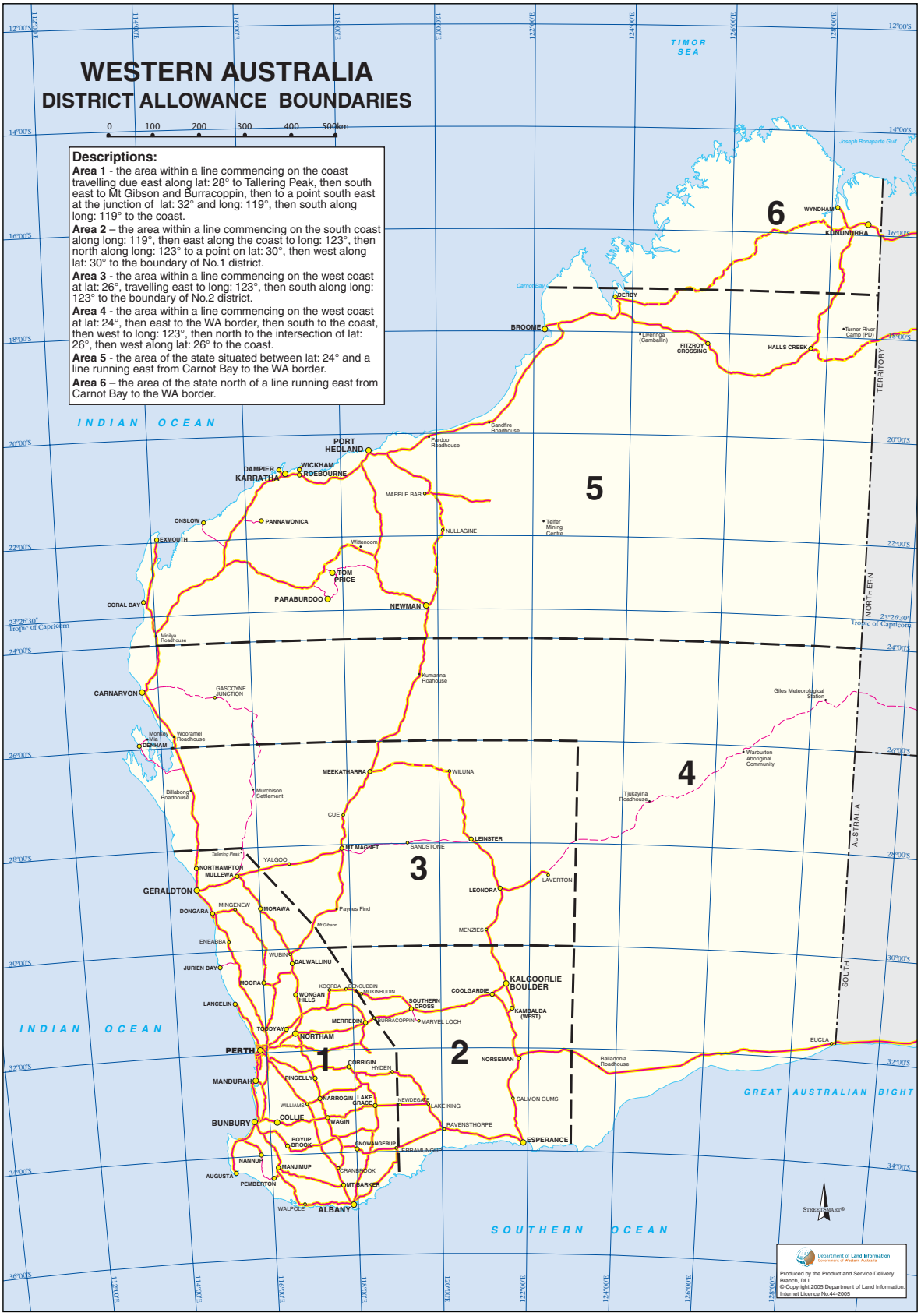
COLUMN 1 DISTRICT NO.	COLUMN II STANDARD RATE $ P.A.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV RATE $ P.A.
2	665	Kalgoorlie	222
		Boulder	
		Ravensthorpe	878
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(b) Officers with dependants (subclause 50.1(1) of this Award)

Double the appropriate rate as prescribed in (a) above for Officers without dependants.

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after July 1, 2005.

SCHEDULE E - DISTRICT ALLOWANCE MAP



SCHEDULE F - MOTOR VEHICLE ALLOWANCE

NOTE: This applies to Officers required to supply and maintain a motor vehicle for use when travelling on approved official business. (Clause 52.2 of this Award).

AS FROM 18 SEPTEMBER 2003

Area Details	Rate (cents) per kilometre Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
Metropolitan Area			
First 4000 kilometres	149.7	126.6	102.2
Over 4000 up to 8000 kms	61.7	52.7	44.0
Over 8000 up to 16000 kms	32.4	28.1	24.6
Over 16000 kms	34.0	28.8	24.7
South West Land Division			
First 4000 kilometres	154.3	130.9	106.4
Over 4000 up to 8000 kms	64.0	54.8	46.0
Over 8000 up to 16000 kms	33.9	29.4	25.8
Over 16000 kms	35.2	29.7	25.5
North of 23.5° South Latitude			
First 4000 kilometres	170.9	145.4	118.9
Over 4000 up to 8000 kms	70.3	60.2	50.7
Over 8000 up to 16000 kms	36.7	31.9	28.0
Over 16000 kilometres	36.3	30.6	26.3
Rest of State			
First 4000 kilometres	159.2	134.8	109.2
Over 4000 up to 8000 kms	66.0	56.4	47.2
Over 8000 up to 16000 kms	34.9	30.2	26.5
Over 16000 kilometres	35.7	30.1	25.9

SCHEDULE G - MOTOR VEHICLE ALLOWANCE

NOTE: This applies to Officers who agree to use their own motor vehicle for travel on approved official business. (Clause 52.4 of this Award).

AS FROM 18 SEPTEMBER 2003

Area Details	Rate (cents) per kilometre Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
Metropolitan Area	69.0	58.9	48.9
South West Land Division	71.5	61.1	51.0
North of 23.5o South Latitude	78.7	67.3	56.4
Rest of the State	73.7	62.9	52.4

SCHEDULE H - MOTOR CYCLE ALLOWANCE

NOTE: This applies to Officers who agree to use their own motor cycle for travel on approved official business. (Clause 52.4 of this Award).

AS FROM JULY 1 2003

Distance travelled during a year on Official Business	Rate Cents per Kilometre
Rate per kilometre	23.9

SCHEDULE I - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) OF THE *PUBLIC SERVICE AWARD 1992* TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3) OF THE *PUBLIC SERVICE AWARD 1992*)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) OF THE *PUBLIC SERVICE AWARD 1992*)
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	11.75		
(2)	WA - North of 26° South Latitude	15.40		
(3)	Interstate	15.40		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA- Metropolitan Hotel or Motel	210.05	105.00	70.00
(5)	Locality South of 26° South Latitude	168.60	84.30	56.20
(6)	Locality North of 26° South Latitude			
	Broome	284.40	142.20	94.80
	Carnarvon	222.30	111.15	74.10
	Dampier	209.15	104.55	69.70
	Derby	188.40	94.20	62.80
	Exmouth	215.90	107.95	71.95
	Fitzroy Crossing	314.90	157.45	104.95
	Gascoyne Junction	128.90	64.45	42.95
	Halls Creek	265.40	132.70	88.45
	Karratha	364.65	182.30	121.55
	Kununurra	266.80	133.40	88.95
	Marble Bar	179.40	89.70	59.80
	Newman	254.65	127.35	84.90
	Nullagine	189.75	94.90	63.25
	Onslow	207.20	103.60	69.05
	Pannawonica	177.15	88.60	59.05
	Paraburdoo	238.40	119.20	79.45
	Port Hedland	239.70	119.85	79.90
	Roebourne	132.90	66.45	44.30
	Sandfire	160.40	80.20	53.45
	Shark Bay	175.90	87.95	58.65
	Tom Price	219.40	109.70	73.15

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) OF THE *PUBLIC SERVICE AWARD 1992* TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3) OF THE *PUBLIC SERVICE AWARD 1992*)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) OF THE *PUBLIC SERVICE AWARD 1992*)
(6)	Locality North of 26° South Latitude— *continued*			
		$	$	$
	Turkey Creek	175.90	87.95	58.65
	Wickham	323.90	161.95	107.95
	Wyndham	158.90	79.45	52.95
(7)	Interstate - Capital City			
	Sydney	255.65	127.85	85.20
	Melbourne	245.65	122.85	81.90
	Other Capitals	213.15	106.60	71.00
(8)	Interstate - Other than Capital City	168.60	84.30	56.20

ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL

(9)	WA - South of 26° South Latitude	79.40
(10)	WA - North of 26° South Latitude	97.7085.25
(11)	Interstate	97.7085.25

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMODATION ONLY IS PROVIDED.

(12) WA - South of 26° South Latitude:

Breakfast	14.1513.30
Lunch	14.1513.30
Dinner	39.40

(13) WA - North of 26° South Latitude

Breakfast	15.75
Lunch	27.7023.75
Dinner	38.9033.40

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) OF THE *PUBLIC SERVICE AWARD 1992* TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3) OF THE *PUBLIC SERVICE AWARD 1992*)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) OF THE *PUBLIC SERVICE AWARD 1992*)
		$	$	$
(14)	Interstate			
	Breakfast	15.7514.50		
	Lunch	27.70		
	Dinner	38.9033.40		
DEDUCTION FOR NORMAL LIVING EXPENSES (Clause 53(5)(a) of the *Public Service Award 1992*)				
(15)	Each Adult	22.75		
(16)	Each Child	3.90		
MIDDAY MEAL (Clause 54(11) of the *Public Service Award 1992*)				
(17)	Rate per meal	5.50		
(18)	Maximum reimbursement per pay period	27.50		

2007 WAIRC 00121

GARDENERS (GOVERNMENT) 1986 AWARD NO. 16 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

THE HON PREMIER OF WA AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S WOOD
DATE WEDNESDAY, 14 FEBRUARY 2007
FILE NO APPL 104 OF 2006
CITATION NO. 2007 WAIRC 00121

Result Award varied
Representation
Applicant Ms E Palmer on behalf of the applicant
Respondent Mr A Harper on behalf of the respondents

Order

HAVING heard Ms E Palmer on behalf of the applicant and Mr A Harper on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Gardeners (Government) 1986 Award No. 16 of 1983 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. – Overtime: Delete Subclause (2) of this clause and insert the following in lieu thereof:

(2) When an employee without being notified on the previous day or earlier is required to continue working after his usual knock off time for more than two hours, the employee shall be provided with a meal or be paid $9.75 in lieu thereof.

2. Clause 16. – First Aid – Kits and Attendants: Delete Subclause (2) of this clause and insert the following in lieu thereof:

(2) The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate per day:

Qualified Attendant	$ Per Day
10 employees or less	1.28
In excess of 10 employees	2.17

3. Clause 25. – Wages – Part C – All Employees:

(A) Delete Subclause (3) of this clause and insert the following in lieu thereof:

(3) A Senior Gardener/Ground Attendant who is required to maintain turf wickets, bowling greens or tennis courts shall be paid in addition to the rates prescribed an amount of $6.15 per week. Occasional off-season attention shall not qualify an employee for payment under this subclause.

(B) Delete Subclause (5) of this clause and insert the following in lieu thereof:

(5) Leading Hands

Leading Hands and Senior Gardener/Ground Attendants if placed in charge of:

(a) five and not more than ten other employees shall be paid $21.50 per week extra;

(b) more than ten but not more than 20 other employees shall be paid $31.50 per week extra;

(c) more than 20 other employees shall be paid $41.75 per week extra.

(C) Delete Subclause (10)(a) of this clause and insert the following in lieu thereof:

(a) Employees of the Zoological Gardens Board covered by this award who are required to clean public toilets shall be paid 66 cents per closet, per week.

4. Clause 28. – Travel Allowance: Delete Subclause (1) of this clause and insert the following in lieu thereof:

(1) (a) An employee required on any day to report directly to the job as distinct from the permanent depot to which such employee is attached (or where a permanent depot does not exist the head office of the employer shall be regarded as the permanent depot) shall be paid $10.95 per day to compensate for the excess fare and travelling time from the employee's home to his place of work and return.

(b) An employee who is usually employed at his employer's principal place of business shall not be entitled to the foregoing allowance when required to start work at some other place unless he thereby incurred in travelling to and from his usual place of employment.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Tradesperson Gardener.

2. For Work Related Allowances – the percentage increase in:

- Clause 16. – First Aid – Kits and Attendants
- Clause 25. – Wages – Part C – All Employees

is derived from $17 divided by $561.20 equals 3.03% (2005) and $20 divided by $578.80 equals $3.46% (2006), as prescribed by Principle 5.- Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 12. - Overtime has been varied for the CPI Meals Out and Take Away Food – Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

- Clause 28. – Travel Allowance has been varied for the CPI Private Motor – Perth for the period December 2001 to June 2006 giving the percentage of 17.78%.

June 2006	157.0	X	100	=	17.78%
December 2001	133.3		1		

Catalogue: 6455.0.40.001

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – TRADESPERSON GARDENER

Clause		A	B	C
Clause 16. – First Aid – Kits and Attendants		$1.20 $2.04	$1.28 $2.17	
Clause 25 – Wages – Part C – All Employees				
	(3)	$5.75	$6.15	
	5(a)	$20.15	$21.48	$21.50
	5(b)	$29.55	$31.50	
	5(c)	$39.15	$41.75	
	10(a)	$0.62	$0.66	

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 12. – Overtime	$9.20	$9.77	$9.75

CPI Private Motor – Perth

Clause	A	B	C
Clause 28. – Travel Allowance	$9.30	$10.95	

2007 WAIRC 00122

GOVERNMENT WATER SUPPLY, SEWERAGE AND DRAINAGE EMPLOYEES AWARD 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

THE WATER CORPORATION AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S WOOD

DATE WEDNESDAY, 14 FEBRUARY 2007

FILE NO APPL 107 OF 2006

CITATION NO. 2007 WAIRC 00122

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant and the Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch
Respondents	Mr S Rooke on behalf of the Water Corporation
	Ms K Bowe on behalf of the Construction, Forestry, Mining and Energy Union of Workers

Order

HAVING heard Ms E Palmer on behalf of the applicant and the AFMEPKIU and Mr S Rooke on behalf of the Water Corporation and Ms K Bowe on behalf of the CFMEU, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Water Supply, Sewerage and Drainage Employees Award 1981 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 10. – Special Rates and Provisions: Delete this clause and insert the following in lieu thereof:

10. - SPECIAL RATES AND PROVISIONS

(1) Meter Fitters' Vehicle Allowance

A Meter Fitter who in the course of his/her duties has to ride a motor cycle or drive a motor vehicle shall receive $9.13 per week extra.

(2) An employee who regulates and controls vehicular traffic in thoroughfares shall receive an allowance of $1.84 per shift above his/her usual rate.

(3) Offensive Allowance

(a) An allowance of $3.86 per day shall be paid to each employee who comes into contact with filth during the operation of cleaning out septic tanks, sand pits, ripple chambers, suction chambers of sewerage pumping stations or in de-ragging of sewerage pumps.

(b) An employee (other than a sewerage maintenance employee) employed on offensive work in connection with working in or about old sewers or working in ground where fumes arise from decomposed material or from any other cause shall be paid an allowance of 26 per cent of his/her ordinary time rate.

(4) Dirt Money

42 cents per hour extra shall be paid to an employee when engaged on work which is agreed to be of an unusually dirty nature.

(5) Confined Spaces

An employee working in a compartment, space or place the dimensions of which necessitate working in a unusually stooped or otherwise cramped position, or without proper ventilation, shall be paid an allowance of 52 cents per hour whilst so engaged.

(6) Underground Allowance

An employee required to work underground on tunnelling or shaft sinking shall be paid an amount of $1.84 per day or shift, in addition to any other amount prescribed for such employee elsewhere in this Award. Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface. The allowance shall not be payable to employees engaged upon "cut and cover" work at a depth of 3.5 metres or less or to employees in trenches or excavations.

"Shaft" means an excavation over 1.8 metres deep with a cross sectional area of less than 13.4 square metres.

"Tunnelling" shall include all work performed in a tunnel until it is commissioned.

(7) Well Work

An employee required to enter a well nine metres or more in depth for the purpose, in the first instance, of examining the pump, or any other work connected therewith, shall receive an amount of $2.38 for such examination and 90 cents per hour extra thereafter for fixing, renewing or repairing such work.

(8) Hot Work

An employee who works in a place where the temperature has been raised by artificial means to between 46 °C and 54 °C shall be paid 42 cents per hour or part thereof, and to more than 54 °C - 50 cents per hour or part thereof, in addition to any other amount prescribed for such employee elsewhere in this Award. Where such work continues for more than two

hours the employee shall be entitled to 20 minutes' rest after every two hours' work without loss of pay, not including the special rate provided by this subclause.

(9) Height Money

An employee shall be paid an allowance of 38 cents per hour, in addition to the ordinary rate, on which the employee works at a height of nine metres or more above the nearest horizontal plane.

(10) Drivers' Licences

Initial issue or additional classifications of drivers' licences required by the employer shall be paid for by the employer. In addition the employer shall allow the employee sufficient time off with pay to take the requisite test.

(11) Explosive Powered Tools Allowance

An employee qualified in accordance with the laws and regulations of the State to operate explosive powered tools shall be paid an allowance of 96 cents per day on which such tools are used.

(12) Any employee actually working a pneumatic tool of the percussion type shall be paid 35 cents per hour extra whilst so engaged.

(13) Fumes

An employee required to work in a place where fumes of sulphur or acid or other offensive fumes are present shall be paid an allowance of 38 cents for each hour worked.

(14) An employee using a steam or water cleaning unit shall be paid an allowance of 42 cents per hour whilst so engaged.

(15) Wet Places

(a) An employee required to work in a wet place or during wet weather shall be provided with rubber boots and adequate waterproof clothing, including waterproof head covering so as to protect the employee from getting wet.

Such waterproof clothing and rubber boots shall be replaced as required, subject to fair wear and tear in the service of the employer.

(b) Any employee working in a wet place shall be paid an allowance of $1.96 per day in addition to the ordinary rate, irrespective of the time worked unless his/her classification expressly includes an allowance for wet pay.

(c) A place shall be deemed to be wet when it is agreed that water (other than rain) is continually dropping from overhead to such an extent that it would saturate the clothing of an employee if waterproof clothing was not provided or when the water in the place where the employee is standing is over 2.5 centimetres deep.

(d) Where the employer directs work to continue during rain, the employer may, if adequate protective clothing is supplied the employee, require the employee to continue working. For such work the employee shall be paid an allowance of 25% of the ordinary rate.

(16) Handling Lime Cement or Flyash

Any employees involved in the handling of dry cement, lime or flyash shall be paid $2.21 per day.

(17) Hot Bitumen

An employee handling hot bitumen or asphalt or dipping materials in creosote, shall be paid 52 cents per hour extra.

An employee shall be provided with gloves and overalls and with oil or other solvents suitable for the removal of the above materials.

(18) Pesticides and Toxic Substances

(a) An employer who requires an employee to use a pesticide or toxic substance shall -

(i) inform the employee of any known health hazards involved; and

(ii) pursuant to the relevant Acts and Regulations, ascertain whether and, if so, what protective clothing and/or equipment should be worn during its use.

(b) Pending advice obtained pursuant to the relevant Acts and Regulations, the employer may require the pesticide or toxic substance to be used, if the employee is informed of any safety precautions specified by the manufacturer of the pesticide and instructs the employee to follow those precautions.

(c) The employer shall supply the employee with any protective clothing or equipment required pursuant to paragraph (a) or (b) hereof and, where necessary, instruct him/her in its use.

(d) An employee required to wear protective clothing or equipment for the purposes of this subclause shall be paid 52 cents per hour or part thereof while doing so unless the union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it, or in the event of disagreement, the Board of Reference so determines.

(e) An allowance is not payable under this subclause if the advice obtained pursuant to subparagraph (a)(ii) hereof in writing indicates that protective clothing or equipment is not necessary.

(19) Asbestos

An employee using materials containing asbestos or working in close proximity to any employee using such material shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority.

Where such safeguards include the mandatory wearing of protective equipment, i.e. combination overalls and breathing equipment or similar apparatus, any such employee shall be paid 53 cents per hour extra whilst so engaged.

(20) Shotfirers Allowance

An employee being a permit holder, responsible for the proper handling of explosives and the conducting of firing shall be paid an allowance of $4.58 per shift.

(21) The work of an electrical fitter shall not be tested by an employee of a lower grade.

(22) An Electronic Tradesperson, an Electrician - Special Class, an Electrical Fitter and/or an Armature Winder or an Electrical Installer who holds and in the course of employment may be required to use a current 'A' grade or 'B' grade licence issued pursuant to the relevant Regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $16.80 per week. Provided that an employee appointed to the DC classification structure as contained in Clause 38. - Wages, of this Award shall not receive this allowance as the wage rate contained in the DC classification structure includes a component for licence allowance.

(23) Special Rates Not Cumulative

Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely the highest for the disabilities so prevailing. Provided further that this subclause shall not apply to confined space, dirt money, height money, hot work or wet work the rates for which are cumulative.

(24) Special Disability Not Otherwise Provided For in This Award

Where a union representing a particular group of employees claims the existence of special disability not otherwise provided for in this Award, representatives of the employer and the union shall confer with a view to agreeing upon an appropriate special rate. In the event of agreement not being reached, the matter may be referred to the Western Australian Industrial Relations Commission.

(25) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 51 cents per closet per week.

(b) For the purposes of this subclause, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(c) All such employees shall be supplied with rubber gloves on request.

(26) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this clause, be paid an allowance of $1.69 per hour whilst so engaged.

(27) Spray Application Painters

A painter engaged on any spray applications carried out in other than a properly constructed booth approved by the Department of Occupational Health, Safety and Welfare shall be paid 42 cents per hour or part thereof in addition to the rates otherwise prescribed in this Award.

(28) Fuel, Kerosene and Water

Electric pump attendants and pumping station assistants shall be supplied with free water and in lieu of fuel and kerosene be paid $5.43 per week or such other amount as may be agreed between the parties or determined by the Board of Reference.

(29) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 30 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces and noise.

(b) The foundry allowance herein prescribed shall also apply to apprentices and unapprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to him/her shall be decreased proportionately.

(c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit any employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(d) For the purpose of this subclause foundry work shall mean -

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials or by shell moulding, centrifugal casting or continuous casting; and

(ii) where carried on as an incidental process in connection with and in the course of production to which subparagraph (i) of this definition applies, the preparation of moulds and cores (but not in the making

of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -

(aa) non-ferrous die casting (including gravity and pressure);

(bb) casting of billets and/or ingots in metal moulds;

(cc) continuous casting for metal into billets;

(dd) melting of metal for use in printing;

(ee) refining of metal.

(30) Fluoride Allowance

An employee who is required to handle fluoride shall be paid an allowance of $3.99 per week. This allowance shall only be payable to an employee who was formerly covered by the Government Water Supply (Kalgoorlie Pipeline) Award No. 15 of 1981.

2. Clause 12. – First Aid Attendant: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) An employee who is a qualified first aid attendant and is appointed by the employer to carry out first aid duties in addition to normal duties, shall be paid an additional rate of $1.63 per day.

3. Clause 14. – Travelling Time and Allowances: Delete subclause (3)(a) of this clause and insert the following in lieu thereof:

(a) For travelling daily to and from the job within a radius of 50 kilometres of the G.P.O. Perth - an allowance of $15.85 per day.

4. Clause 17. – Tea Breaks, Meal Hours, Refreshments: Delete subclause (6)(a) of this clause and insert the following in lieu thereof:

(6) (a) An employee required to work overtime for more than 1.5 hours without being notified on the previous day or earlier that he/she will be so required to work shall either be supplied with a meal by the employer or paid $10.85 but payment need not be made to employees residing in the locality of the work who can reasonably return home for meals.

5. Clause 26. – Distant Work - Construction: Delete subclauses (6) and (7) of this clause and insert the following in lieu thereof:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $32.10 and for any weekend he/she returns home from the job but only if -

(a) the employer or his/her agent is advised of the intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) he/she is not required for work during that weekend;

(c) the employee returns to the job on the first working day following the weekend; and

(d) the employer does not provide or offer to provide suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, he/she shall be provided with suitable transport to and from that job or be paid an allowance of $14.05 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

6. Clause 38. – Wages: Delete subclauses (6), (7) and (8) of this clause and insert the following in lieu thereof:

(6) Tool Allowance

(a) Engineering Trades

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

(aa) $11.70 per week to such tradesperson; or

(bb) in the case of an apprentice a percentage of $11.70 being the percentage which appears against the year of apprenticeship in subclause (5) of this clause.

(ii) Any tool allowance paid pursuant to paragraph (i) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in subclause (2) of this clause.

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

(iv) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through the negligence of the employee.

(b) Building Trades

In addition to the rate of pay prescribed in this clause for a Painter or a Signwriter, such employee shall be paid a tool allowance of $4.10 per week in accordance with the provisions of the Building Trades (Government) Award.

(7) Leading Hands

An employee placed in charge of -

(a) Metal Trades

(i) Three and not more than 10 other employees shall be paid $21.20 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $32.40 per week extra.

(iii) More than 20 other employees shall be paid $41.75 per week extra.

(iv) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees shall be deemed a Leading Hand and shall be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than 10 other employees.

(b) Building Trades

(i) Three and not more than 10 other employees shall be paid $32.60 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $43.45 per week extra.

(iii) More than 20 other employees shall be paid $54.35 per week extra.

(8) Construction Work Allowance

(a) Subject to the provisions of this clause, an employee specified in this clause shall be paid an allowance at the rate of $19.85 per week to compensate for disabilities when actually engaged on construction work on site (as defined).

(b) "Construction Work" for the purpose of paragraph (a) hereof, shall mean and include all work performed on site on the construction, alteration, repair or maintenance of roads, reservoirs and drainage works, pipelines, water and sewerage mains and services. It shall not include the following classes of work -

(i) work in, around and/or adjacent to any workshop, depot, yard, treatment works, nursery or other similar establishments;

(ii) work in, around and/or adjacent to pumping stations for less than two hours;

(iii) gardening operations; or

(iv) driving vehicles, floats or fork lifts when that driving is not directly associated with construction work (as defined) for less than four hours on the day.

(c) An employee referred to in paragraph (a) of this subclause who is employed on construction work (as defined) for less than one week shall be paid for each day so employed, 1/5th of the said allowance.

(d) Provided that an employee under this clause who is engaged in the construction, or alteration of any building, structure or other civil engineering project which is carried out in areas excluded in paragraph (b) of this subclause shall be paid a construction allowance at the rate of $9.90 per week.

7. Schedule A – Parties to the Award: Delete this schedule and insert the following in lieu thereof:

SCHEDULE A - PARTIES TO THE AWARD

Unions Party to the Award

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

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

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch

Construction, Forestry, Mining and Energy Union of Workers

Employers Party to the Award

Water Authority of Western Australia

8. Clause 5. – Classification Structure and Definitions: Delete the reference to the Western Australian Builders' Labourers, Painters and Plasterers Union of Workers and insert the following in lieu thereof:

Construction, Forestry, Mining and Energy Union of Workers

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is C10.

2. The Work Related Allowances – the percentage increase in:

- Clause 10 – Special Rates and Provisions
- Clause 12 – First Aid Attendant
- Clause 38 - Wages

is 2.93% derived from $17 divided by $580.00 and 3.35% derived from $20 divided by $597.00 as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

- Clause 26 – Distant Work has been varied in line with clause 20(6) of the Engineering Trades (Government) Award, as per Application 1019 of 1992.

3. For Expense Related Allowances:

- Clause 14 – Travelling Time and Allowances has been varied for the CPI Private Motoring – Motor Vehicles – Perth, for the period December 2004 to June 2006.

June 2006	157.0	X	100	=	8.50%
December 2004	144.7		1		

- Clause 17 – Tea Breaks, Meal Hours and Refreshments has been varied for the CPI Meals and Take Away Food – Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

Previous rates are identified in Column A of the table below. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

		COLUMN A	**COLUMN B**	**COLUMN C**
		$	$	$
Clause 10	(1)	8.58	9.13	
	(2)	1.73	1.84	
	(3)	3.62	3.86	
	(4)	0.40	0.42	
	(5)	0.49	0.52	
	(6)	1.73	1.84	
	(7)	2.24	2.38	
		0.85	0.90	
	(8)	0.40	0.42	
		0.47	0.50	
	(9)	0.36	0.38	
	(11)	0.90	0.96	
	(12)	0.33	0.35	
	(13)	0.36	0.38	
	(14)	0.40	0.42	
	(15)(b)	1.85	1.96	
	(16)	2.08	2.21	
	(17)	0.49	0.52	
	18(d)	0.49	0.52	
	(19)	0.50	0.53	
	(20)	4.30	4.58	
	(22)	15.80	16.80	
	(25)	0.48	0.51	
	(26)	1.59	1.69	
	(27)	0.40	0.42	
	(28)	5.10	5.43	
	(29)(a)	0.28	0.30	
	(30)	3.75	3.99	

CLAUSE		COLUMN A	COLUMN B	COLUMN C
		$	$	$
Clause 12 – First Aid Attendant		1.53	1.63	
Clause 14 - Travelling Time and Allowances		14.60	15.84	15.85
Clause 17 - Tea Breaks, Meal Hours and Refreshments		10.20	10.83	10.85
Clause 26 - Distant Work		29.55	32.10	
		12.85	14.05	
Clause 38 - Wages	(6)(aa)	11.00	11.70	
	(6)(bb)	11.00	11.70	
	(6)(b)	3.85	4.10	
	(7)(a)(i)	19.90	21.19	21.20
	(7)(a(ii)	30.45	32.40	
	(7)(a)(iii)	39.25	41.75	
	(7)(b)(I)	30.65	32.60	
	(7)(b)(ii)	40.85	43.46	43.45
	(7)(b)(iii)	51.10	54.36	54.35
	(8)(a)	18.65	19.84	19.85
	(8)(d)	9.35	9.92	9.90

2007 WAIRC 00119

GOVERNMENT WATER SUPPLY, SEWERAGE AND DRAINAGE FOREMEN'S AWARD 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE WATER CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 14 FEBRUARY 2007
FILE NO	APPL 108 OF 2006
CITATION NO.	2007 WAIRC 00119

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	Mr S Rooke on behalf of the respondent

Order

HAVING heard Ms E Palmer on behalf of the applicant and Mr S Rooke on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Water Supply, Sewerage and Drainage Foremen's Award 1984 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Schedule F. – District Allowance: Delete Subclause (6) of this clause and insert the following in lieu thereof:

(6) The weekly rate of district allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO RATE STANDARD RATE	COLUMN IV RATE
	$ per week	Town or Place	$ per week
6	72.92	Nil	Nil
5	59.61	Fitzroy Crossing	80.15
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	74.66
		Marble Bar	
		Wittenoom	
		Karratha	70.31
		Port Hedland	65.25
4	29.95	Warburton Mission	80.88
		Carnarvon	28.21
3	18.95	Meekatharra	29.96
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	13.46	Kalgoorlie	4.49
		Boulder	
		Ravensthorpe	17.94
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

And further, with the consent of the parties, the Commission records the following basis for variations:

Schedule F – District Allowance has been varied for the CPI for the period December 2004 to June 2006 giving the percentage of 6.91%.

EXPLANATION

June 2006	153.2	X	100	=	6.91%
December 2004	143.3		1		

(CPI – All Groups, Index Numbers (a) – Perth)

2007 WAIRC 00229

HEALTH WORKERS - COMMUNITY AND CHILD HEALTH SERVICES AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

HONOURABLE MINISTER FOR HEALTH

RESPONDENT

CORAM COMMISSIONER S WOOD

DATE MONDAY, 12 MARCH 2007

FILE NO APPL 9 OF 2007

CITATION NO. 2007 WAIRC 00229

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	Ms M Muccilli on behalf of the Department of Health

Order

HAVING heard Ms E Palmer on behalf of the applicant and Ms M Muccilli on behalf of the Department of Health, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Health Workers - Community and Child Health Services Award, 1980 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

Clause 16. – Uniforms: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) The employer shall pay an allowance of $1.38 cents per week for the laundering of uniforms.

And further, with the consent of the parties, the Commission records the following basis for variations:

For Expense Related Allowances:

- Clause 16. – Uniforms has been varied for the CPI Clothing Services and Shoe Repair – Perth for the period December 2004 to June 2006 giving the percentage of 7.29%.

June 2006	185.5	X	100	=	7.29%
December 2004	172.9		1		

CPI Clothing Services and Shoe repair - Perth

Catalogue No.: 6455.0.40.001

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

CPI Clothing Services and Shoe Repair

Clause	A	B	C
Clause 16. – Uniforms	$1.29	$1.38	

2007 WAIRC 00224

HOSPITAL EMPLOYEES' (BRIGHTWATER) CONSOLIDATED AWARD 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BRIGHTWATER
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 12 MARCH 2007
FILE NO	APPL 3 OF 2007
CITATION NO.	2007 WAIRC 00224

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Employees' (Brightwater) Consolidated Award 1981 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 9. – Overtime: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost or shall be paid the sum of $8.39 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2. Clause 28. – Wages: Delete subclause (2)(a) of this clause and insert the following in lieu thereof:

(2) General Conditions

(a) The ordinary wages of any employee, placed in charge of three or more employees, shall be increased by $19.90 per week.

3. Clause 29. – Fares and Motor Vehicle Allowances: Delete subclause (2)(c) of this clause and insert the following in lieu thereof:

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc 2600cc	1600cc & Under
	Rate per kilometre (Cents)		
Metropolitan Area	81.7	70.9	62.8
South West Land Division	84.0	72.9	64.8
North of 23.5° South Latitude	92.1	80.3	71.5
Rest of the State	86.7	75.3	66.8

Schedule 2 - Motor Cycle Allowances

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	28.2

Motor Vehicles with rotary engines are to be included in the 1600 – 2600cc.

And further with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Tradesperson Cook.

2. For Work Related Allowances – the percentage increase in:

- Clause 28. - Wages

is derived from $17 divided by $598.80 equals 2.84% (2005) and $20 divided by $615.80 equals 3.25% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 9. – Overtime has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

CPI Meals Out and Take Away Food – Perth

- Clause 29 – Fares and Motor Vehicle Allowance has been varied for the CPI Private Motoring - Perth from December 2004 to June 2006 giving the percentage of 8.50%.

June 2006	157	X	100	=	8.50%
December 2004	144.7		1		

CPI Private Motoring – Motor Vehicles – Perth

The Union uses Catalogue No. 6455.0.40.001

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – TRADESPERSON COOK

Clause	A	B	C
Clause 28. - Wages	$18.70	$19.85	$19.90

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 9. – Overtime	$7.90	$8.39	

N.B. For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

2007 WAIRC 00232

HOSPITAL WORKERS (CLEANING CONTRACTORS - PRIVATE HOSPITALS) AWARD 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	POWERCLEAN
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 12 MARCH 2007
FILE NO	APPL 13 OF 2007
CITATION NO.	2007 WAIRC 00232

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the *Hospital Workers (Cleaning Contractors - Private Hospitals) Award 1978* as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 10. – Overtime: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost, or shall be paid the sum of $8.80 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2. Clause 13. – Special Rates and Conditions: Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:

(5) Toilets: Workers engaged in any week for the major portion of their time cleaning lavatories shall be paid an extra $1.37 per week.

(6) Broken Shift: Where a worker is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than four hours an allowance of $1.02 per day shall be paid.

3. Clause 18. – Laundry: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Where the uniform of any worker cannot be laundered at the hospital an allowance of $1.58 per week shall be paid to the worker.

4. Clause 19. – Height Money: Delete subclauses (2) and (3) of this clause and insert the following in lieu thereof:

(2) Where it is necessary to go wholly outside a building to clean windows an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $2.06 per day.

(3) Where an employee is required to clean windows from a swinging scaffold or similar device, he/she shall be paid 34 cents per hour extra for every hour or part thereof so worked.

5. Clause 23. – Fares, Travelling Time and Transport: Delete subclauses (2)(c) and (2)(d) of this clause and insert the following in lieu thereof:

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc & 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	81.7	70.9	62.8
South West Land Division	84.0	72.9	64.8
North of 23.5° South Latitude	92.1	80.3	71.5
Rest of the State	86.8	75.3	66.8

Schedule 2 - Motor Cycle Allowance

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	28.3

Motor vehicles with rotary engines are to be included in the 1600 – 2600cc.

(d) The rates are calculated by applying the percentage movement in the Consumer Price Index (Private Motoring Perth) between December 2004 and June 2006. This is calculated as:

June 2006 157 x 100 = 8.50%
December 2004 144.7

6. Clause 32. – Wages: Delete subclause (2)(a) of this clause and insert the following in lieu thereof:

(2) General Conditions:

(a) Leading Hands: In addition to the rates herein prescribed a leading hand shall be paid per week –

		$
(i)	If placed in charge of not less than three and not more than 10 other workers	20.95
(ii)	If placed in charge of more than 10 and not more than 20 other workers	31.50
(iii)	If placed in charge of more than 20 other workers	42.05

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Cleaner Third Year of Employment.

2. For Work Related Allowances – the percentage increase in:

   - Clause 13. – Special Rates and Conditions
   - Clause 19. – Height Money
   - Clause 32. - Wages

   is derived from $17 divided by $520.30 equals 3.27% (2005) and $20 divided by $537.30 equals 3.72% (2006) as prescribed by Principle 5. - Adjustment of Allowances and Service Increments of the State Wage Case:

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

   - Clause 10. –Overtime has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

     June 2006 $\frac{171.5}{161.5} \times \frac{100}{1} = 6.19\%$
     December 2004

   CPI Meals out and Take Away Foods – Perth

   - Clause 18. – Laundry has been varied for the CPI Clothing Services and Shoe Repair – Perth for the period December 2004 to June 2006 giving the percentage 7.29%.

     June 2006 $\frac{185.5}{172.9} \times \frac{100}{1} = 7.29\%$
     December 2004

   CPI Clothing Services and Shoe repair – Perth

4. Clause 23. – Fares, Travelling Time and Transport have been varied for the CPI Private Motoring - Perth for the period December 2004 to June 2006 giving the percentage 8.50%

   June 2006 $\frac{157}{144.7} \times \frac{100}{1} = 8.50\%$
   December 2004

   CPI Private Motoring – Motor Vehicles – Perth

   Catalogue No. 6455.0.40.001

   For all allowances (except Fares and Travelling) previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – CLEANER THIRD YEAR OF EMPLOYMENT

Clause		A	B	C
Clause 13. – Special Rates and Conditions	(5)	$1.28	$1.37	
	(6)	$0.95	$1.02	
Clause 19. – Height Money	(2)	$1.93	$2.06	
	(3)	$0.32	$0.34	
Clause 32. – Wages	(2)(a)(i)	$19.55	$20.95	
	(ii)	$29.40	$31.48	$31.50
	(iii)	$39.25	$42.05	

EXPENSE RELATED ALLOWANCES

CPI Meals Out and Take Away Food – Perth

Clause	A	B	C
Clause 10. – Overtime	$8.30	$8.81	$8.80

CPI Clothing Services and Shoe Repair – Perth

Clause	A	B	C
Clause 18. – Laundry	$1.47	$1.58	

2007 WAIRC 00236

HOSPITAL WORKERS' (N'GALA) AWARD NO. 6A OF 1958

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BOARD OF MANAGEMENT NGALA INC
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 12 MARCH 2007
FILE NO	APPL 19 OF 2007
CITATION NO.	2007 WAIRC 00236

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Workers' (N'Gala) Award No 6A of 1958 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 14. – Overtime: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost or shall be paid the sum of $8.35 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2. Clause 17. – Allowances and Special Provisions: Delete this clause and insert the following in lieu thereof:

17. - ALLOWANCES AND SPECIAL PROVISIONS

(1) Any employee handling foul linen in laundry procedures shall be paid an allowance of $1.84 per week.

(2) An employee engaged as a casual shall be paid 25% over the rates specified in this award.

3. Clause 26. – Fares and Motor Vehicle Allowances: Delete subclause (2)(c) of this clause and insert the following in lieu thereof:

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc & 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	81.7	71.1	62.8
South West Land Division	84.0	72.9	64.8
North of 23.5° South Latitude	92.1	80.3	71.5
Rest of the State	86.7	75.3	66.8

Schedule 2 - Motor Cycle Allowance

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	28.2

Motor vehicles with rotary engines are to be included in the 1600 – 2600cc.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Hospital Worker Level 4.

2. For Work Related Allowances – the percentage increase in:

- Clause 17 – Allowances and Special Provisions

is derived from $17 divided by $540.80 equals 3.14% (2005) and $20 divided by $557.80 equals 3.59% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 14. – Overtime has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

CPI Meals Out and Take Away Foods - Perth

- Clause 26. – Fares and Motor Vehicle Allowances has been varied for the CPI Private Motoring – Perth for the period September 2002 to December 2004 giving the percentage of 5.16%.

June 2006	157.0	X	100	=	8.50%
December 2004	144.7		1		

CPI Private Motoring – Motor Vehicles - Perth

Catalogue: 6455.0.40.001

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – HOSPITAL WORKER LEVEL 4

Clause	A	B	C
Clause 17. Allowances and Special Provisions	$1.73	1.84	

EXPENSE RELATED ALLOWANCES

CPI Meals Out and Take Away Food – Perth

Clause	A	B	C
Clause 14. – Overtime	$7.85	$8.34	$8.35

N.B. For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

2007 WAIRC 00154

HOTEL AND TAVERN WORKERS' AWARD, 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

SHERATON HOTEL AND OTHERS

RESPONDENTS

CORAM SENIOR COMMISSIONER J H SMITH
DATE THURSDAY, 22 FEBRUARY 2007
FILE NO. APPL 89 OF 2006
CITATION NO. 2007 WAIRC 00154

Result	Award varied
Representation	
Applicant	Ms E Palmer
Respondents	Ms S Thorp (CCI)

Order

Having heard Ms E Palmer on behalf of the Applicant and Ms S Thorp as agent on behalf of Respondents for whom warrants have been filed, and there being no appearance by or on behalf of any other Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the Hotel and Tavern Workers' Award, 1987 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 February 2007.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete this clause and insert the following in lieu thereof:

9. - ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.53 per hour for each such hour, or part thereof worked. Provided that any employee who works the majority of his/her ordinary hours between midnight and 7.00 am shall be paid $1.61 per hour extra for each such hour, or part thereof worked.

(2) All time worked during the ordinary hours of work on Saturdays and Sundays shall be paid for at the rate of time and a half.

(3) An employee who is required to work any of his/her ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of Clause 13. - Meal Breaks of this Award, shall be paid an allowance of $2.52 per day, for such broken work period worked.

(4) The provisions of subclauses (1) and (2) hereof shall not apply to any work performed on a holiday and to which the provisions of subclause (2) of Clause 17. - Holidays are applicable.

(5) The provisions of this clause shall not apply to casual employees.

2. Clause 14. – Meal Money: Delete this clause and insert the following in lieu thereof:

14. - MEAL MONEY

Any employee who is required to work overtime for two hours or more on any day, without being notified on the previous day or earlier, that he or she will be so required to work such overtime, will either be supplied with a substantial meal by the employer or be paid $10.30 meal money.

3. Clause 26. – Uniforms and Laundering: Delete subclauses (2) and (3) of this clause and insert the following in lieu thereof:

(2) Subject to subclause (3) hereof, an employer requiring any of the articles of clothing to be worn as described in subclause (1) of this clause, shall cause such clothing to be laundered at his/her own expense or otherwise shall pay to the employee concerned $6.65 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

(3) Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments shall be laundered at the employer's expense or otherwise the employee shall be paid $10.10 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

4. Clause 27. – Protective Clothing: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid, in lieu, an allowance of $3.55 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

5. Clause 28. – Employee Equipment: Delete this clause and insert the following in lieu thereof:

28. - EMPLOYEE EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be-used by the employee for the purpose of carrying out his/her duties, shall be supplied by the employer free Of charge. Provided that where an

employee is required by the employer to use his/her own knives he shall be paid an allowance of $13.30 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Cook Grade 3.

2. For Work Related Allowances – the percentage increase in:

   - Clause 9. – Additional Rates for Ordinary Hours
   - Clause 28. – Employee Equipment

   is derived from $34 divided by $1122.40 equals 3.03% (2005) and $40 divided by $1156.40 equals 3.46% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

   - Clause 14. – Meal Money has been varied for the CPI Meals Out and Take Away Foods – Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

   $$\frac{\text{June 2006}}{\text{December 2004}} = \frac{171.5}{161.5} \times \frac{100}{1} = 6.19\%$$

   CPI Meals Out and Take Away Foods - Perth

   - Clause 26. – Uniform and Laundering and Clause 27. – Protective Clothing has been varied for the CPI Clothing Services and Shoe Repair – Perth for the period December 2004 to June 2006 giving the percentage of 7.29%.

   $$\frac{\text{June 2006}}{\text{December 2004}} = \frac{185.5}{172.9} \times \frac{100}{1} = 7.29\%$$

   Catalogue: 6455.0.40.001

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – COOK GRADE 3

Clause	A	B	C
Clause 9. – Additional Rates for Ordinary Hours (1)	$1.44	$1.53	
	$1.51	$1.61	
(3)	$2.37	$2.52	
Clause 28. – Employees Equipment	$12.50	$13.35	$13.30

EXPENSE RELATED ALLOWANCES

CPI Take Away Food - Perth

Clause	A	B	C
Clause 14. – Meal Money	$9.70	$10.30	$10.30

CPI – Clothing Services and Shoe Repair – Perth

Clause	A	B	C
Clause 26. – Uniforms and Laundry (2)	$6.20	$6.65	$6.65
(3)	$9.40	$10.08	$10.10
Clause 27. – Protective Clothing (1)	$3.30	$3.54	$3.55

2007 WAIRC 00171

MASTERS DAIRY AWARD 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	MASTERS DAIRY T/A NATIONAL FOODS, TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 26 FEBRUARY 2007
FILE NO/S	APPL 100 OF 2006
CITATION NO.	2007 WAIRC 00171

Result	Award Varied
Representation	
Applicant	Ms E Palmer
Respondents	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the Masters Dairy Award 1994 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date of this order.

Furthermore, the Commission records the following basis for the variations:

1. The agreed Key Minimum Classification in this Award is Dairy/Production Worker Grade 7.

2. The Work Related Allowances – the percentage increase in:

   - Schedule 4 – Other Allowances

   is derived from $17 divided by $569.66 = 2.98% (2005) and $20 divided by $586.66 = 3.41% (2006), as prescribed by Principle 5. – Adjustment of Allowances and Service Increments of the State Wage Case:

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

   - Schedule 3 – Vehicle Allowance has been varied for the CPI Private Motoring (Perth) for the period December 2004 to June 2006 giving the percentage 8.50%.

   $$\text{June 2006} \quad \frac{157.0}{\text{December 2004} \quad 144.7} \times \frac{100}{1} = 8.50\%$$

   CPI Private Motoring – Motor Vehicles – Perth

4. The application seeks to correct the adjustment of Schedule 4, clause 7 – Meal Money, which has historically been adjusted as wage-related instead of in accordance with the CPI – Meals Out and Take Away Foods – Perth. This is in accordance with Principle 5 of the Statement of Principles:

   > "Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses."

   The clause was adjusted on 12 November 1996 (via Application 1340 of 1996) to $6.70 in accordance with the appropriate movement in the CPI. Since then it appears that the clause has been varied using an incorrect method of the State Wage increase.

This application seeks to revert to the November 1996 amount of $6.70 and apply an appropriate CPI adjustment from that point. The CPI adjustment is as follows:

June 2006	171.5	x	100	=	48.61%
March 1996	115.4		1		

An increase of 48.61 per cent applied to the original allowance of $6.70 gives a new allowance of $9.95.

CPI – Meals Out & Take Away Foods – Perth

Catalogue: 6455.0.40.001

For all allowances (except Fares and Travelling) previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – Dairy/Production Worker Grade 7

Clause		A	B	C
Schedule 4 – Other Allowances	(1)(a)	$1.89	$2.01	
	(2)(b)	$0.92	$0.98	
	(2)	$0.68	$0.72	
	(3)	$4.14	$4.39	$4.40
	(4)	$1.28	$1.36	
	(5)	$0.45	$0.47	
	(6)	$0.52	$0.56	
	(7)		$9.95	
	(8)	$1.07	$1.14	
	(9)	$9.39	$10.00	
	(10)(a)	$24.21	$25.74	$25.70
	(10)(b)	$36.31	$38.68	$38.70
	(10)(c)	$45.26	$48.19	$48.20

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

SCHEDULE

1. Schedule 3 – Vehicle Allowances: Delete this schedule and insert the following in lieu thereof:

(1) Motor Car Allowances

	Engine Displacement (In cubic centimetres)		
	2600cc	2600cc	& Under
Area and Details			
Rate per Kilometre:	c/km	c/km	c/km
Metropolitan Area	81.7	71.1	62.8
South West Land Division	84.	72.9	64.8
North of 23.5 ° South Latitude	92.1	80.3	71.5
Rest of State	86.7	75.3	66.8

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

(2) Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate c/km
Rate per Kilometre	28.2

2. Schedule 4 – Other Allowances: Delete this schedule and insert the following in lieu thereof:

(1)	Freezer Allowances:	
(a)	Van Salesperson	$2.01per day
(b)	Storeperson	$0.98 per hour
(2)	Train Allowance	$0.72 per hour when driving B. Train
(3)	BPU Drivers	$4.40 per day for milk testing
(4)	Dryer Cleaning	$1.36 for every dryer cleaned
(5)	Dirt Money	$0.47 per hour
(6)	Confined Space	$0.56 per hour
(7)	Meal Money	$9.95
(8)	Driver (General) - over 43 tonnes all purposes of the award allowance	$1.14 for each additional tonne over 43 tonnes to be paid for all purposes of the award as part of the weekly wage.
(9)	Van Driver - Salesperson allowance per week for all purposes of the Award	$10.00 per week extra
(10)	Leading Hand allowance for all purposes of the Award	
(a)	Not less then 3 and not more than 10 other employees	$25.70 per week
(b)	More than 10 and not more than 20 other employees	$38.70 per week
(c)	More than 20 other employees	$48.20 per week

2007 WAIRC 00231

MINERAL EARTHS EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

COMMERCIAL MINERALS LTD

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE MONDAY, 12 MARCH 2007
FILE NO APPL 12 OF 2007
CITATION NO. 2007 WAIRC 00231

Result Award varied
Representation
Applicant Ms E Palmer on behalf of the applicant
Respondent No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Mineral Earths Employees' Award as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 7 – Overtime: Delete paragraph (a) of subclause (5) of this clause and insert the following in lieu thereof:

(a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $7.85 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.35 for each meal so required.

2. Clause 8 – Wages: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Leading Hands: In addition to the wage prescribed in subclause (2) hereof a leading hand shall be paid:-

		$
(a)	If placed in charge of not less than 3 and not more than 10 other employees	25.45
(b)	If placed in charge of more than 10 and not more than 20 other employees	39.25
(c)	If placed in charge of more than 20 other employees	50.50

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Mill Attendant.

2. For Work Related Allowances – the percentage increase in:

- Clause 8. – Wages

is derived from $17 divided by $494.10 equals 3.44% (2005) and $20 divided by $511.10 equals 3.91% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 7. - Overtime has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

$$\text{June 2006} \ \frac{171.5}{\text{December 2004} \ 161.5} \times \frac{100}{1} = 6.19\%$$

CPI Meals Out and Take Away Food – Perth

Catalogue: 6455.0.40.001

For all allowances (except Fares and Travelling) previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

KEY CLASSIFICATION – MILL ATTENDANT

Clause	A	B	C
Clause 8. – Wages	$23.70 $36.50 $47.00	$25.46 $39.23 $50.50	$25.45 $39.25
Clause	A	B	C
Clause 7. – Overtime	$7.40 $5.05	$7.86 $5.36	$7.85 $5.35

CPI Meals Out and Take Away Food - Perth

2007 WAIRC 00156

MOTEL, HOSTEL, SERVICE FLATS AND BOARDING HOUSE WORKERS' AWARD, 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

BELMONT PARK MOTEL AND OTHERS

RESPONDENTS

CORAM SENIOR COMMISSIONER J H SMITH
DATE THURSDAY, 22 FEBRUARY 2007
FILE NO. APPL 148 OF 2006
CITATION NO. 2007 WAIRC 00156

Result	Award varied
Representation	
Applicant	Ms E Palmer
Respondents	Ms S Thorp (CCI)

Order

Having heard Ms E Palmer on behalf of the Applicant and Ms S Thorp as agent on behalf of Respondents for whom warrants have been filed, and there being no appearance by or on behalf of any other Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 February 2007.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete this clause and insert the following in lieu thereof:

9. – ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.53 per hour for each such hour, or part thereof worked. Provided that any employee who works the majority of his/her ordinary hours between midnight and 7.00 am shall be paid $1.61 per hour extra for each such hour, or part thereof worked.

(2) All time worked during the ordinary hours of work on Saturdays and Sundays shall be paid for at the rate of time and a half.

(3) An employee who is required to work any of his/her ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of Clause 13. - Meal Breaks of this Award, shall be paid an allowance of $2.52 per day, for such broken work period worked.

(4) The provisions of subclauses (1) and (2) hereof shall not apply to any work performed on a holiday and to which the provisions of subclause (2) of Clause 17. - Holidays are applicable.

(5) The provisions of this clause shall not apply to casual employees.

2. Clause 14. – Meal Money: Delete this clause and insert the following in lieu thereof:

14. – MEAL MONEY

Any employee who is required to work overtime for two hours or more on any day, without being notified on the previous day or earlier, that he or she will be so required to work such overtime, will either be supplied with a substantial meal by the employer or be paid $10.30 meal money.

3. Clause 26. – Uniforms and Laundering: Delete subclauses (2) and (3) of this clause and insert the following in lieu thereof:

(2) Subject to subclause (3) hereof, an employer requiring any of the articles of clothing to be worn as described in subclause (1) of this clause, shall cause such clothing to be laundered at his/her own expense or otherwise shall pay to the employee concerned $6.65 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

(3) Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments shall be laundered at the employer's expense or otherwise the employee shall be paid $10.10 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

4. Clause 27. – Protective Clothing: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid, in lieu, an allowance of $3.55 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

5. Clause 28. – Employee Equipment: Delete this clause and insert the following in lieu thereof:

28. - EMPLOYEE EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be-used by the employee for the purpose of carrying out his/her duties, shall be supplied by the employer free Of charge. Provided that where an

employee is required by the employer to use his/her own knives he shall be paid an allowance of $13.30 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Cook Grade 3.

2. For Work Related Allowances – the percentage increase in:

   - Clause 9. – Additional Rates for Ordinary Hours
   - Clause 28. – Employee Equipment

   is derived from $34 divided by $1122.40 equals 3.03% (2005) and $40 divided by $1156.40 equals 3.46% (2006) as prescribed by Principle 5. – Adjustment of Allowances and Service Increments of the State Wage Case:

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances

   - Clause 14. – Meal Money has been varied for the CPI Meals Out and Take Away Foods for the period December 2004 to June 2006 giving the percentage of 6.19%:

     $$\text{June 2006} \atop \text{December 2004} \quad \frac{171.5}{161.5} \times \frac{100}{1} = 6.19\%$$

   CPI Meals Out and Take Away Foods – Perth

   - Clause 26. – Uniform and Laundering and Clause 27. – Protective Clothing has been varied for the CPI Clothing Services and Shoe Repair - Perth for the period December 2004 to June 2006 giving the percentage of 7.29%:

     $$\text{June 2006} \atop \text{December 2004} \quad \frac{185.5}{172.9} \times \frac{100}{1} = 7.29\%$$

   CPI Clothing Services and Shoe repair – Perth

   Catalogue No. 6455.0.40.001

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION –COOK GRADE 3

Clause	A	B	C
Clause 9. – Additional Rates for Ordinary Hours (1)	$1.44	$1.53	
	$1.51	$1.61	
(3)	$2.37	$2.52	
Clause 28. – Employees Equipment	$12.50	$13.35	$13.30

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 14. – Meal Money	$9.70	$10.30	

CPI Clothing Services and Shoe Repair – Perth

Clause	A	B	C
Clause 26. – Uniforms and Laundry (2)	$6.20	$6.65	
(3)	$9.40	$10.08	$10.10
Clause 27. – Protective Clothing (1)	$3.30	$3.54	$3.55

2007 WAIRC 00233

OPTICAL MECHANICS' AWARD, 1971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	LAUBMAN & PANK OPTOMETRISTS (WA) PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 12 MARCH 2007
FILE NO	APPL 14 OF 2007
CITATION NO.	2007 WAIRC 00233

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondents	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Optical Mechanics' Award, 1971 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12 – Meal Money: Delete subclause (1) of this clause and insert the following in lieu thereof:

12. - MEAL MONEY

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $8.25 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.65 for each meal so required.

2. Clause 24 – Wages: Delete subclause (4) of this clause and insert of the following in lieu thereof:

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

		Per Week $
(a)	If placed in charge of not less than 3 and not more than 10 other employees	24.55
(b)	If placed in charge of more than 10 and not more than 20 other employees	37.00
(c)	If placed in charge of more than 20 other employees	48.70

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Optical Mechanic.

2. For Work Related Allowances – the percentage increase in:

- Clause 24. - Wages

  is derived from $17 divided by $539.60 equals 3.15% (2005) and $20 divided by $556.60 equals 3.59% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case:

  "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary

safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 12. – Meal Money has been varied using the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

CPI Meals Out and Take Away Food – Perth

Catalogue: 6455.0.40.001

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – OPTICAL MECHANIC

Clause		A	B	C
Clause 24. – Wages	(a)	$23.00	$24.55	
	(b)	$34.60	$36.98	$37.00
	(c)	$45.55	$48.69	$48.70
Clause		**A**	**B**	**C**
Clause 12. – Meal Money		$7.75 $5.30	$8.23 $5.63	$8.25 $5.65

CPI Meals Out and Take Away Food – Perth

2007 WAIRC 00228

PHOTOGRAPHIC INDUSTRY AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

ILLUSTRATIONS PTY LTD

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE MONDAY, 12 MARCH 2007
FILE NO APPL 8 OF 2007
CITATION NO. 2007 WAIRC 00228

Result Award varied
Representation
Applicant Ms E Palmer on behalf of the applicant
Respondent No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Photographic Industry Award, 1980 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 12 – Wages: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) LEADING HANDS:

In addition to the rates prescribed herein, any employee appointed by the employer as a leading hand and placed in charge of not less than 3 and not more than 10 other employees, shall be paid $24.60 per week.

In addition to the rates prescribed herein, a leading hand placed in charge of more than 10 and not more than 20 other employees shall be paid $37.60 per week.

2. Clause 13 – Meal Allowance:

(A) Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $8.25 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.65 for each meal so required.

(B) Delete subclause (4) of this clause and insert of the following in lieu thereof:

(4) Late Night Trading Meal Allowance:

An employee who commences work prior to 4.30 p.m. on the day of late night trading and is required to work beyond 7.00 p.m. on that day, shall be paid a meal allowance of $8.25.

3. Clause 21. – Vehicle Allowance: Delete paragraph (c) of subclause (2) of this clause and insert in the following in lieu thereof:

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	81.7	70.9	62.8
South West Land Division	84.0	72.9	64.8
North of 23.5° South Latitude	92.1	80.3	71.5
Rest of the State	86.7	75.3	66.8

Schedule 2 - Motor Cycle Allowance

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	28.2

Motor vehicles with rotary engines are to be included in the 1600-2600cc

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Colour Filter Determinator.

2. For Work Related Allowances – the percentage increase in:

- Clause 12. – Wages

is derived from $17 divided by $498.50 equals 3.41% (2005) and $20 divided by $515.50 equals 3.88% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 13. – Meal Allowance has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

Calculations are therefore:

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

CPI Meals Out and Take Away Foods – Perth

- Clause 21 – Vehicle Allowance has been varied for the CPI Private Motoring – Motor Vehicles for the period December 2004 to June 2006 giving the percentage of 8.50%

  Calculations are therefore:

June 2006	157.0	X	100	=	8.50%
December 2004	144.7		1		

CPI Private Motoring – Motor Vehicles – Perth

Catalogue 6455.0.40.01

For all allowances previous rates (except Fares and Travelling) are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – COLOUR FILTER DETERMINATOR

Clause		A	B	C
Clause 12. – Wages	(3)	$22.90 $35.00	$24.62 $37.60	$24.60 $37.60

CPI Meals Out and Take Away Food – Perth

Clause		A	B	C
Clause 13. – Meal Allowance	(1)	$7.75	$8.23	$8.25
		$5.30	$5.63	$5.65
	(4)	$7.75	$8.23	$8.25

2007 WAIRC 00169

PLASTIC MANUFACTURING AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

GAY-DOR PLASTICS LTD, PLASTICS LTD, JAYLON INDUSTRIES PTY LTD

RESPONDENTS

CORAM COMMISSIONER S J KENNER

DATE MONDAY, 26 FEBRUARY 2007

FILE NO/S APPL 151 OF 2006

CITATION NO. 2007 WAIRC 00169

Result Award Varied

Representation

Applicant Ms E Palmer

Respondents No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the Plastic Manufacturing Award 1977 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date of this order.

Furthermore, the Commission records the following basis for the variations:

1. The agreed Key Minimum Classification in this Award is Controller Tradesperson.

2. The Work Related Allowances – the percentage increase in:

   - Clause 22. – Leading Hands
   - Clause 23. – Extra Rates and Conditions

   is derived from $17 divided by $561.20 = 3.03% (2005) and $20 divided by $578.20 = 3.46% (2006), as prescribed by Principle 5. – Adjustment of Allowances and Service Increments of the State Wage Case.

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

   - Clause 12. – Meal Money has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage 6.19%.

   Calculations are therefore:

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

   CPI – Meals Out & Take Away Foods – Perth

   Catalogue: 6455.0.40.001

   For all allowances (except Fares and Travelling) previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – CONTROLLER TRADESPERSON

Clause		A	B	C
Clause 33. – Leading Hands	(5)	$22.35	$23.79	$23.80
		$34.10	$36.31	$36.30
		$43.55	$46.45	$46.50
Clause 23. – Extra Rates and Conditions	(1)	$0.44	$0.47	
	(2)	$0.44	$0.47	
	(3)	$20.10	$21.42	$21.40

EXPENSE RELATED ALLOWANCES

Clause		A	B	C
Clause 12. – Meal Money	(1)	$8.35	$8.87	$8.85
	(2)	$5.70	$6.05	$6.05

CPI – Meals Out and Take Away Food – Perth

(Sgd.) S J KENNER,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. – Meal Money: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) A worker required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid $8.85 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the workers concerned on the previous day or earlier that such a second or subsequent meal will also be required, provide such meals or pay an amount of $6.05 for each second or subsequent meal.

2. Clause 22. – Classification Structure and Rates of Pay: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Leading Hands

In addition to the rates prescribed in subclause (2) of this clause a leading hand shall be paid:

		Per Week $
(a)	If placed in charge of not less than three and not more than ten other employees	23.80
(b)	If placed in charge of more than ten and not more than 20 other employees	36.30
(c)	If placed in charge of more than 20 other employees	46.50

3. Clause 23. – Extra Rates and Conditions: Delete this clause and insert the following in lieu thereof:

(1) Workers handling carbon black before processing, and workers engaged in processing free carbon black, shall be paid the sum of 47 cents per hour in addition to the rate herein fixed for the class of work performed.

(2) Workers engaged on weighing, packing and mixing in the powder room shall be paid the sum of 47 cents per hour in addition to the rate herein fixed for the class of work performed.

(3) Workers engaged in work on a construction site other than the normal place of work shall be paid an allowance at the rate of $21.40 per week for each hour or part thereof worked.

2007 WAIRC 00234

POULTRY BREEDING FARM & HATCHERY WORKERS' AWARD 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	DIAMOND POULTRY SERVICES AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 12 MARCH 2007
FILE NO	APPL 15 OF 2007
CITATION NO.	2007 WAIRC 00234

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondents	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Poultry Breeding Farm & Hatchery Workers' Award 1976 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8 – Overtime: Delete subparagraphs (i) and (ii) of paragraph (c) of subclause (3) of this clause and insert the following in lieu thereof:

(c) (i) An employee required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid $9.90 for a meal.

(ii) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the employees concerned on the previous day or earlier, that such a second or subsequent meal will also be required, provide such meals or pay an amount of $8.85 for each second or subsequent meal.

2. Clause 9 – Wages: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4)	Leading Hands	$
	In addition to the ordinary rate of pay, an employee placed in charge of more than 3 other employees shall receive	25.05

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is General Hand Maintenance.

2. For Work Related Allowances – the percentage increase in:

- Clause 9. – Wages

  is derived from $17 divided by $460.90 equals 3.69% (2005) and $20 divided by $477.90 equals 4.18% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

  > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 8. – Overtime has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 (161.5) to June 2006 (171.5) giving the percentage of 6.19%.

  June 2006 171.5 X 100 = 6.19%

  December 2004 161.5 1

  CPI Meals Out and Take Away Food – Perth

  Catalogue: 6455.0.40.001

For all allowances (except Fares and Travelling) previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – GENERAL HAND MAINTENANCE

Clause		A	B	C
Clause 9. – Wages	(4)	$23.20	$25.06	$25.05
Clause		**A**	**B**	**C**
Clause 8 – Overtime	(3)(c)(i)	$9.30	$9.88	$9.90
	(ii)	$8.35	$8.87	$8.85

CPI Take Away Food – Perth

2007 WAIRC 00227

QUADRIPLEGIC CENTRE AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

THE BOARD OF MANAGEMENT QUADRIPLEGIC CENTRE

RESPONDENT

CORAM COMMISSIONER S WOOD

DATE MONDAY, 12 MARCH 2007

FILE NO APPL 7 OF 2007

CITATION NO. 2007 WAIRC 00227

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	Ms S Meacham as agent

Order

HAVING heard Ms E Palmer on behalf of the applicant and Ms S Meacham on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Quadriplegic Centre Award as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

SCHEDULE

1. Clause 14. – Overtime – Part A: Delete subclause (5) and insert the following in lieu thereof:

(5) Where an employee has not been notified the previous day or earlier that he/she is required to work overtime the employer shall ensure that employees working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $8.10 each meal.

2. Clause 14. – Overtime – Part B: Delete subclause (4) and insert the following in lieu thereof:

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work, the employee shall be provided with a meal free of cost, or shall be paid the sum of $8.10 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day.

3. Clause 15. – Shift Work:

(A) Delete subclause (1)(a) of this clause and insert the following in lieu thereof:

(1) (a) Subject to subclause (2) of this clause where on any day an employee commences his/her ordinary hours of work before 4.00 am or after 12 noon, he/she shall be paid a loading of $2.04 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage.

(B) Delete subclause (2)(a) of this clause and insert the following in lieu thereof:

(2) (a) A loading of $3.06 per hour or pro rata for part thereof shall be paid to an employee in addition to his/her ordinary rate of wage for time worked on permanent afternoon or night shift.

(C) Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Subject to the provisions of subclause (5) of this clause work performed during ordinary hours on the weekend shall in addition to the ordinary rate of wage attract a loading as follows:

(a) Saturday - $8.12 per hour or pro rata for part thereof;

(b) Sunday - $16.24 per hour or pro rata for part thereof.

(c) The rates prescribed in this subclause shall be in substitution for and not cumulative on the rates prescribed in subclauses (1) and (2) of this clause.

4. Clause 17. – Public Holidays: Delete subclause (4)(a) and (b) and insert the following in lieu thereof:

(4) (a) An Enrolled Nurse or Nursing Assistant who works on any public holiday named herein shall be paid a loading of $8.12 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage for the time worked in ordinary hours on that day.

(b) Any other employee who is required to work on a day observed as a public holiday shall be paid a loading of $24.36 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage or if the employee agrees be paid a loading of $8.12 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage and be entitled to observe the holiday on a day mutually acceptable to the employer and employee.

5. Clause 27. – Wages – Part A: Delete subclause (4)(c) and insert the following in lieu thereof:

4. (c) The ordinary rate of wage prescribed for an Enrolled Nurse in this clause shall be increased by $11.60 per week when a Registered Enrolled Nurse has obtained a second post basic certificate approved by the Nurses' Board of WA, and he/she is required to use the knowledge gained in that certificate as part of his/her employment.

6. Clause 27. – Wages – Part C: Delete subclause (1)(b)(i),(ii) and (iii) and insert the following in lieu thereof:

(1) (b) Except where this clause specifies classifications which require the employee to be in charge of other employees, any employee who is placed in charge of:

(i) not less than three and not more than 10 other employees shall be paid $19.65 per week in addition to the ordinary wage prescribed by this clause;

(ii) more than 10 and not more than 20 other employees shall be paid $29.35 per week in addition to the ordinary wage prescribed by this clause;

(iii) more than 20 other employees shall be paid $39.05 per week in addition to the ordinary wage prescribed by this clause.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this award for Enrolled Nurses is Enrolled Nurse – 1st year of employment.

2. For Work Related Allowances – the percentage increase in:

- Clause 15. – Shift Work
- Clause 17 – Public Holidays
- Clause 27 – Wages Part A

is derived from $17 divided by $562.80 equals 3.02% (2005) $20 divided by $579.80 equals 3.45% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. The agreed Key Minimum Classification in this award for all employees other than Enrolled Nurses and Nursing Assistants is Tradesperson Cook.

4. For Work Related Allowances for Others – the percentage increase in:

- Clause 27. Wages, Part C

is derived from $17 divided by $589.10 equals 2.89% (2005) and $20 divided by $606.10 equals 3.3% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

5. For Expense Related Allowances:

- Clause 14. – Overtime has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

CPI Meals Out and Take Away Food – Perth

Catalogue: 6455.0.40.001

For all allowances (except Fares and Travelling) previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION FOR ENROLLED NURSES IS ENROLLED NURSE – 1ST YEAR OF EMPLOYMENT

Clause		A	B	C
Clause 15. – Shift Work	(1)	$1.91	$2.04	
	(2)	$2.87	$3.06	
	(3)(a)	$7.62	$8.12	
	(3)(b)	$15.24	$16.24	

Clause		A	B	C
Clause 17. – Public Holidays	(4)(a)	$7.62	$8.12	
	(4)(b)	$22.86	$24.36	
		$7.62	$8.12	
Clause 27 – Wages Part A	(4)(c)	$10.85	$11.60	

KEY MINIMUM CLASSIFICATION FOR OTHERS IS TRADESPERSON COOK

Clause		A	B	C
Clause 27. – Wages Part C				
	(1)(b)(i)	$18.45	$19.63	$19.65
	(ii)	$27.60	$29.34	$29.35
	(iii)	$36.75	$39.05	

EXPENSE RELATED ALLOWANCES

CPI Meals Out and Take Away Food – Perth

Clause		A	B	C
Clause 14 – Overtime	Part A	$7.65	$8.12	$8.10
	Part B	$7.65	$8.12	$8.10

2007 WAIRC 00114

RANGERS (NATIONAL PARKS) AWARD NO. 17 OF 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

DEPARTMENT OF CONSERVATION & LAND MANAGEMENT

RESPONDENT

CORAM COMMISSIONER S WOOD

DATE WEDNESDAY, 14 FEBRUARY 2007

FILE NO APPL 150 OF 2006

CITATION NO. 2007 WAIRC 00114

Result Award varied

Representation

Applicant Ms E Palmer on behalf of the applicant

Respondent Mr A Harper on behalf of the respondent

Order

HAVING heard Ms E Palmer on behalf of the applicant and Mr A Harper on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Rangers (National Parks) Award no.17 of 1981 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 9. – Overtime:

(A) Delete subclause (7)(a) of this clause and insert the following in lieu thereof:

(7) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $9.70 for a meal, and if owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each such meal by the employer or be paid $5.70 each meal so required.

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

(d) An employee required to work continuously from midnight to 6.30am and ordered back to work at 8.00am the same day shall be paid $5.00 breakfast.

2. Clause 14. – Conditions and Allowances:

(A) Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Mobile Rangers shall, in addition to their normal rate of pay, be paid an allowance of $105.10 per week to offset the costs associated with living in and maintaining a caravan.

This allowance is to be moved year to year to reflect the change in CPI for Perth.

(B) Delete subclause (4)(c) of this clause and insert the following in lieu thereof:

(c) The employee using toxic substances or materials of a like nature shall be paid 56 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 46 cents per hour extra.

(C) Delete subclause (5)(d) of this clause and insert the following in lieu thereof:

(d) An employee required to wear protective clothing or equipment for the purpose of this subclause shall be paid 56 cents per hour or part thereof while doing so unless the Union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it or, in the event of disagreement, the Western Australian Industrial Relations Commission so determines.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Ranger Grade 1, Year 1

2. For Work Related Allowances – the percentage increase in:

- Clause 14 – 4(c) and 5 (d)– Conditions and Allowances

The 2005 increase is derived from $17.00 divided by $583.60 multiplied by 100 equals 2.91% and 2006 from $20.00 divided by $600.60 multiplied by 100 equals 3.33%; as prescribed by Principle 5, Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 9. – Overtime has been varied for the CPI Take Away Food - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%

June 2006	171.5	X	100	=	6.19%
December 2004	161.5	X	1		

- Clause 14(3) - Mobile Rangers has been varied for the CPI All Groups - Perth for the period December 2004 to June 2006 giving the percentage of 6.91%.

June 2006	153.2	X	100	=	6.91%
December 2004	143.3		1		

For all allowances previous rates are identified in Column A of the below table. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

Key Minimum Classification – Ranger Grade 1 Year 1

Clause		A	B*	C	D
Clause 14. – Conditions and Allowances					
	(4)(c)	$0.53	$0.56		
		$0.43	$0.46		
	(5(d)	$0.53	$0.56		

EXPENSE RELATED ALLOWANCES

CPI Take Away Food 6455.0.40.001– Perth

Clause		A	B	C
Clause 9. – Overtime	(7)(a)	$9.15	$9.72	$9.70
		$5.35	$5.68	$5.70
	(d)	$4.70	$4.99	$5.00
Clause 14(3) – Allowances Mobile Rangers		$98.30	$105.08	$105.10

2007 WAIRC 00151

RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD, 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

KINGS PARK GARDEN RESTAURANT AND ANOTHER

RESPONDENTS

CORAM SENIOR COMMISSIONER J H SMITH

DATE THURSDAY, 22 FEBRUARY 2007

FILE NO. APPL 78 OF 2006

CITATION NO. 2007 WAIRC 00151

Result Award varied

Representation

Applicant Ms E Palmer

Respondents Ms S Thorp (CCI)

Order

Having heard Ms E Palmer on behalf of the Applicant and Ms S Thorp as agent on behalf of Respondents for whom warrants have been filed, and there being no appearance by or on behalf of any other Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the Restaurant, Tearoom and Catering Workers' Award, 1979 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 February 2007.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete this clause and insert the following in lieu thereof:

9. – ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.53 per hour for each such hour, or part thereof worked. Provided that any employee who works the majority of his/her ordinary hours between midnight and 7.00 am shall be paid $1.61 per hour extra for each such hour, or part thereof worked.

(2) All time worked during the ordinary hours of work on Saturdays and Sundays shall be paid for at the rate of time and a half.

(3) An employee who is required to work any of his/her ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of Clause 13. - Meal Breaks of this Award, shall be paid an allowance of $2.52 per day, for such broken work period worked.

(4) The provisions of subclauses (1) and (2) hereof shall not apply to any work performed on a holiday and to which the provisions of subclause (2) of Clause 17. - Holidays are applicable.

(5) The provisions of this clause shall not apply to casual employees

2. Clause 14. – Meal Money: Delete this clause and insert the following in lieu thereof:

14. – MEAL MONEY

Any employee who is required to work overtime for two hours or more on any day, without being notified on the previous day or earlier, that he or she will be so required to work such overtime, will either be supplied with a substantial meal by the employer or be paid $10.30 meal money.

3. Clause 26. – Uniforms and Laundering: Delete subclauses (2) and (3) of this clause and insert the following in lieu thereof:

(2) Subject to subclause (3) hereof, an employer requiring any of the articles of clothing to be worn as described in subclause (1) of this clause, shall cause such clothing to be laundered at his/her own expense or otherwise shall pay to the employee concerned $6.65 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

(3) Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments shall be laundered at the employer's expense or otherwise the employee shall be paid $10.10 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

4. Clause 27. – Protective Clothing: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid, in lieu, an allowance of $3.55 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

5. Clause 28. – Workers' Equipment: Delete this clause and insert the following in lieu thereof:

28. – WORKERS' EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be-used by the employee for the purpose of carrying out his/her duties, shall be supplied by the employer free Of charge. Provided that where an employee is required by the employer to use his/her own knives he shall be paid an allowance of $13.30 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

And further, with the consent of the parties, the Commission records the following basis for variation:

1. The agreed Key Minimum Classification in this Award is Cook Grade 3.

2. For Work Related Allowances – the percentage increase in:

   - Clause 9. – Additional Rates for Ordinary Hours
   - Clause 28. – Workers' Equipment

   is derived from $34 divided by $1122.40 equals 3.03% (2005) and $40 divided by $1156.40 equals 3.46% (2006), as prescribed by Principle 5. – Adjustment of Allowances and Service Increments of the State Wage Case:

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances

   - Clause 14. – Meal Money has been varied for the CPI Meals Out and Take Away Foods for the period December 2004 to June 2006 giving the percentage of 6.19%

$$\text{June 2006} \atop \text{December 2004} \quad \frac{171.5}{161.5} \times \frac{100}{1} = 6.19\%$$

   CPI Meals Out and Take Away Foods – Perth

- Clause 26. – Uniform and Laundering and Clause 27. – Protective Clothing has been varied for the CPI Clothing Services and Shoe Repair - Perth for the period of December 2004 to June 2006 giving the percentage of 7.25%

June 2006	185.5	X	100	=	7.29%
December 2004	172.9		1		

CPI Clothing Services and Shoe repair – Perth

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

The Union uses Catalogue No. 6455.0.40.001

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION –COOK GRADE 3

Clause	A	B	C
Clause 9. – Additional Rates for Ordinary Hours (1)	$1.44	$1.53	
	$1.51	$1.61	
(3)	$2.37	$2.52	
Clause 28. – Employees Equipment	$12.50	$13.35	$13.30

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 14. – Meal Money	$9.70	$10.30	$10.30

CPI Clothing Services and Shoe Repair – Perth

Clause	A	B	C
Clause 26. – Uniforms and Laundry (2)	$6.20	$6.65	$6.65
(3)	$9.40	$10.08	$10.10
Clause 27. – Protective Clothing (1)	$3.30	$3.54	$3.55

2007 WAIRC 00115

SADDLERS AND LEATHERWORKERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

MALLABONES

RESPONDENT

CORAM COMMISSIONER S WOOD

DATE WEDNESDAY, 14 FEBRUARY 2007

FILE NO APPL 135 OF 2006

CITATION NO. 2007 WAIRC 00115

Result Award varied

Representation

Applicant Ms E Palmer on behalf of the applicant

Respondent No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Saddlers and Leatherworkers' Award as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. – Meal Money: Delete this clause and insert the following in lieu thereof:

8. - MEAL MONEY

(1) A worker required to work overtime for more than two hours without being notified on the previous day or earlier, that he/she will be so required to work, shall be supplied with any meal required by the employer or paid $9.30 for such meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the workers concerned on the previous day or earlier, that such a second or subsequent meal will also be required, provide such meals or pay an amount of $7.75 for each second or subsequent meal.

(3) No such payments need be made to workers living in the same locality as their workshops who can reasonably return home for such meals.

(4) If a worker in consequence of receiving such notice has provided him/herself with a meal or meals and is not required to work overtime, or is required to work less overtime than notified, he/she shall be paid the amount above prescribed in respect of the meals not then required.

2. Clause 23. – Leading Hands: Delete this clause and insert the following in lieu thereof:

23. – LEADING HANDS

Any worker placed by the employer in charge of other workers shall be paid the following rates in addition to their ordinary rates of wages:

	$
In charge of 1 - 5 employees	23.35
In charge of 6 - 10 employees	29.25
In charge of 11 or more employees	40.10

3. Clause 24. – Special Rates: Delete this clause and insert the following in lieu thereof:

24. – SPECIAL RATES

Any worker required to repair goods which are of an unusually dirty or offensive nature shall be paid 40 cents per hour in addition to the ordinary rate.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Saddlers Employee Manufacturing.

2. For Work Related Allowances – the percentage increase in:

- Clause 23. – Leading Hands
- Clause 24. – Special Rates

is derived from $17 divided by $508.70 equals 3.34% (2005) and $20 divided by $525.70 equals 3.80% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 8. – Meal Money has been varied for the CPI Take Away Food – Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

Calculations are therefore:

$$\text{June 2006} \quad \frac{171.5}{161.5} \quad \text{December 2004} \quad \times \quad \frac{100}{1} \quad = \quad 6.19\%$$

CPI Meals Out and Take Away Foods - Perth

Catalogue: *6455.0.40.001*

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – SADDLERS EMPLOYEE MANUFACTURING

Clause	A	B	C
Clause 23. – Leading Hands	$21.75 $27.30 $37.40	$23.36 $29.27 $40.12	$23.35 $29.25 $40.10
Clause 24. – Special Rates	$0.38	$0.40	

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 8. – Meal Money	$8.75 $7.30	$9.29 $7.75	$9.30 $7.75

2007 WAIRC 00113

SOAP AND ALLIED PRODUCTS MANUFACTURING AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

CANDLE LIGHT CO

RESPONDENT

CORAM COMMISSIONER S WOOD

DATE WEDNESDAY, 14 FEBRUARY 2007

FILE NO APPL 153 OF 2006

CITATION NO. 2007 WAIRC 00113

Result Award varied

Representation

Applicant Ms E Palmer on behalf of the applicant

Respondent No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Soap and Allied Products Manufacturing Award as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 13. – Meal Money: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) A worker required to work overtime for more than two hours without being notified on the previous day or earlier, that he will be so required to work shall be supplied with a meal by the employer or paid $9.30 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he has notified the workers concerned on the previous day or earlier that such a second or subsequent meal will also be required, provide such meals or pay an amount of $7.70 for each second or subsequent meal.

2. Clause 26. – Leading Hands: Delete this clause and insert the following in lieu thereof:

26. - LEADING HANDS

In addition to the appropriate total weekly wage prescribed in Clause 25. - Wages of this award a leading hand shall be paid:

(1)	If placed in charge of not less than three and not more than ten other employees	$24.95
(2)	If placed in charge of more than ten and not more than 20 other employees	$38.55
(3)	If placed in charge of more than 20 other employees	$49.60

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Product Maker.

2. For Work Related Allowances – the percentage increase in:

- Clause 26. – Leading Hands

is derived from $17 divided by $485.60 equals 3.50% (2005) and $20 divided by $502.60 equals 3.98% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 13. – Meal Money has been varied for the CPI Take Away Food – Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

June 2006	171.5	X	100	=	6.19%
September 2004	161.5		1		

CPI Meals Out and Take Away Foods – Perth

Catalogue: 6455.0.40.001

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – PRODUCT MAKER

Clause	A	B	C
Clause 26. – Leading Hands	$23.20 $35.85 $46.10	$24.95 $38.57 $49.60	$24.95 $38.55 $49.60

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 13. – Meal Money	$8.75 $7.25	$9.29 $7.70	$9.30 $7.70

2007 WAIRC 00131

SOAP AND ALLIED PRODUCTS MANUFACTURING AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	CANDLE LIGHT CO
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 16 FEBRUARY 2007
FILE NO.	APPL 153 OF 2006
CITATION NO.	2007 WAIRC 00131

Result Correction Order

Correction Order

WHEREAS an error occurred in the Order dated 14 February 2007 issued in application 153 of 2006 Citation Number [2007] WAIRC 00113, the Commission, in order to correct the error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Soap and Allied Products Manufacturing Award as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 13. – Meal Money: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) A worker required to work overtime for more than two hours without being notified on the previous day or earlier, that he will be so required to work shall be supplied with a meal by the employer or paid $9.30 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he has notified the workers concerned on the previous day or earlier that such a second or subsequent meal will also be required, provide such meals or pay an amount of $7.70 for each second or subsequent meal.

2. Clause 26. – Leading Hands: Delete this clause and insert the following in lieu thereof:

26. - LEADING HANDS

In addition to the appropriate total weekly wage prescribed in Clause 25. - Wages of this award a leading hand shall be paid:

(1)	If placed in charge of not less than three and not more than ten other employees	$24.95
(2)	If placed in charge of more than ten and not more than 20 other employees	$38.60
(3)	If placed in charge of more than 20 other employees	$49.60

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Product Maker.

2. For Work Related Allowances – the percentage increase in:

- Clause 26. – Leading Hands

is derived from $17 divided by $485.60 equals 3.50% (2005) and $20 divided by $502.60 equals 3.98% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 13. – Meal Money has been varied for the CPI Take Away Food – Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

June 2006	171.5	X	100	=	6.19%
September 2004	161.5		1		

CPI Meals Out and Take Away Foods – Perth

Catalogue: 6455.0.40.001

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – PRODUCT MAKER

Clause	A	B	C
Clause 26. – Leading Hands	$23.20 $35.85 $46.10	$24.96 $38.58 $49.60	$24.95 $38.60 $49.60

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 13. – Meal Money	$8.75 $7.25	$9.29 $7.70	$9.30 $7.70

2007 WAIRC 00223

UNIVERSITY, COLLEGES AND SWANLEIGH AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

CURRIE HALL, ST THOMAS MORE COLLEGE, KINGSWOOD COLLEGE

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE MONDAY, 12 MARCH 2007

FILE NO/S APPL 16 OF 2007

CITATION NO. 2007 WAIRC 00223

Result Award varied

Representation

Applicant Ms E Palmer

Respondent Ms S Meacham as agent on behalf of Currie Hall

Order

HAVING heard Ms E Palmer on behalf of the applicant and Ms S Meacham as agent on behalf of Currie Hall and there being no appearance for the other respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the University, Colleges and Swanleigh Award, 1980 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after today's date.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 11. – Meal Money: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $9.30 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $6.30 for each meal so required.

2. Clause 31. – Wages:

A. Delete subclause (3)(b) of this clause and insert the following in lieu thereof:

(b) Senior employees other than the Head Groundsperson and leading hands appointed as such by the employer to be in charge of three or more other employees shall be paid $23.60 per week in addition to the rates prescribed herein.

B. Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) For all work done on any day after a break referred to in subclause (3) of Clause 7. - Hours of this award, the employee shall be paid an allowance of $1.47 per hour for each such hour worked.

3. Clause 32. – Fares and Travelling Time: Delete subclause (2)(c) of this clause and insert the following in lieu thereof:

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement(in cubic centimetres) Over 2600cc	Over 1600cc -2600cc	l600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	81.7	71.1	62.8
South West Land Division	84.0	72.9	64.8
North of 23.5 ° South Latitude	92.1	80.3	71.5
Rest of the State	86.7	75.3	66.8

SCHEDULE 2 - MOTOR CYCLE ALLOWANCES

Distance Travelled During a Year on Official Business	Rate per kilometre (cents) ¢/km
Rate per kilometre	28.2

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

2007 WAIRC 00226

WATCHMAKERS' AND JEWELLERS' AWARD 1970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

MAZZUCHELLI'S JEWELLERS PTY LTD & OTHERS

RESPONDENTS

CORAM COMMISSIONER S WOOD

DATE MONDAY, 12 MARCH 2007

FILE NO APPL 5 OF 2007

CITATION NO. 2007 WAIRC 00226

Result	Award varied
Representation	
Applicant	Ms E Palmer on behalf of the applicant
Respondent	No appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Watchmakers' and Jewellers' Award, 1970 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. - Wages: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Leading Hands:

Any jeweller or watchmaker placed in charge of not more than ten (10) jewellers or watchmakers shall be paid $23.55 per week in addition to the rates of pay prescribed by this award.

2. Clause 8. - Wages: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Tool Allowance:

Watchmakers and apprentices to watchmaking shall be paid a tool allowance of $10.50 per week extra.

3. Clause 11. – Meal Money:

(A) Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $8.10 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.65 for each meal so required.

(B) Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Late Night Trading Meal Allowance:

An employee who commences work prior to 4.30 p.m. on the day of late night trading and is required to work beyond 7.00 p.m. on that day, shall be paid a meal allowance of $8.10.

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Jewellers Tradesperson.

2. For Work Related Allowances – the percentage increase in:

- Clause 8. - Wages

is derived from $17 divided by $561.20 equals 3.03% (2005) and $20 divided by $578.20 equals 3.46% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 8(5). – Tool Allowance has been varied for the CPI Tools - Perth for the period June 1996 (112.6) to June 2006 (121.8) giving the percentage of 8.17%.

Calculations are therefore:

$$\text{June 2006} \quad \frac{121.8}{112.6} \quad \text{X} \quad \frac{100}{1} \quad = \quad 8.17\%$$

$$\text{June 1996}$$

- Clause 11. – Meal Money has been varied for the CPI Meals Out and Take Away Food - Perth for the period December 2004 (161.5) to June 2006 (171.5) giving the percentage of 6.19%.

Calculations are therefore:

June 2006	171.5	X	100	=	6.19%
December 2004	161.5		1		

CPI Meals Out and Take Away Foods - Perth

Catalogue: 6455.0.40.001

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – JEWELLERS TRADESPERSON

Clause	A	B	C
Clause 8. – Wages	$22.10	$23.54	$23.55

EXPENSE RELATED ALLOWANCES

CPI Tools - Perth

CPI Meals Out and Take Away Food – Perth

Clause		A	B	C
Clause 8. – Wages	(5)	$9.70	$10.49	$10.50
Clause		**A**	**B**	**C**
Clause 11. – Meal Money	(1)	$7.65 $5.30	$8.12 $5.63	$8.10 $5.65
	(4)	$7.65	$8.12	$8.10

2007 WAIRC 00220

WOOL SCOURING AND FELLMONGERY INDUSTRY AWARD NO. 32 OF 1959

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

SWAN WOOL SCOURING CO PTY LTD, JANDAKOT WOOL SCOURING CO PTY LTD, HULME WOOL SCOURING CO PTY LTD

RESPONDENTS

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 12 MARCH 2007
FILE NO/S APPL 18 OF 2007
CITATION NO. 2007 WAIRC 00220

Result Award varied
Representation
Applicant Ms E Palmer
Respondent No Appearance

Order

HAVING heard Ms E Palmer on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the Wool Scouring and Fellmongery Industry Award No. 32 of 1959 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date of this order.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

SCHEDULE

1. Clause 16. – Meal Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $8.10 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.40 for each meal so required.

2. Clause 21. – Special Rates and Provisions: Delete this clause and insert the following in lieu thereof:

(1) All employees handling greasy dead wool from bales for treatment shall be paid in addition to their ordinary rate of pay $1.97 per bale so handled.

(2) All employees engaged in handling dag wool shall be paid 75 cents per hour extra whilst so engaged.

(3) Ankle rubber boots shall be provided for centre men on scouring machines and workers on greasy auto feed boxes.

(4) Goggles shall be supplied to drying machine hands.

(5) A set of goggles and aprons shall be supplied for each treatment.

(6) All workers in the fellmongery section except those classing and handling dry sheep-skins, shall be supplied with gloves, waterproof aprons, knee high rubber boots, thigh boots (for pit workers if necessary).

(7) All employees handling pied wool (from the tanks before washing) shall be paid 75 cents per hour whilst so engaged.

(8) Pullers classing to quality and pickles pelt classers shall be paid $1.22 per hour extra whilst so engaged.

2007 WAIRC 00222

ZOOLOGICAL GARDENS EMPLOYEES AWARD 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ZOOLOGICAL GARDENS BOARD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 12 MARCH 2007
FILE NO/S	APPL 11 OF 2007
CITATION NO.	2007 WAIRC 00222

Result	Award varied
Representation	
Applicant	Ms E Palmer
Respondent	Ms M Raymond

Order

Having heard Ms Palmer on behalf of the Applicant and Ms Raymond on behalf of the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the "Zoological Gardens Employees" award 1969 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 12 March 2007.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 8. – Overtime: Delete paragraph (a) of subclause (5) of this clause and insert the following in lieu thereof:

(5) (a) An employee required to work continuous overtime for more than one and a half hours shall be supplied with a meal by the employer or be paid $9.75 for a meal, and if, owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $5.70 for each meal so required.

1. For Expense Related Allowances

- Clause 8. – Overtime has been varied for the CPI Meals Out and Take Away Food for the period December 2004 to June 2006 giving the percentage of 6.19%:

$$\text{June 2006} \atop \text{December 2004} \quad \frac{171.5}{161.5} \times \frac{100}{1} = 6.19\%$$

CPI Meals Out and Take Away Foods – Perth

Catalogue No. 6455.0.40.001

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

CPI Meals Out and Take Away Food – Perth

Clause		A	B	C
Clause 8. – Overtime	(5)(a)	$9.20 $5.35	$9.77 $5.68	$9.75 $5.70

AGREEMENTS—Industrial—Retirement from—

2007 WAIRC 00257

PATHCENTRE AGENCY SPECIFIC AGREEMENT 2003

No. PSA AG 39 of 2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 21 of 2007

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Western Australian Centre for Pathology and Medical Research will cease to be a party to the PathCentre Agency Specific Agreement 2003, No. PSA AG 39 of 2003 on and from 17 March 2007.

DATED at Perth this 19 day of February 2007.

(Sgd.) J.A. SPURLING,
Registrar.

2007 WAIRC 00273

NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 408 of 2004

APPLICATION FOR VARIATION OF AN AWARD TITLED

"CLEANERS AND CARETAKERS (GOVERNMENT) AWARD, 1975"

NOTICE is given that an amended application for a variation of the above Award was filed on 5 February 2007 by the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch under the Industrial Relations Act 1979.

As far as relevant, those parts of the amended application that relate to area of operation or scope are published hereunder: -

Amended application:

1.3 AREA AND SCOPE

1.3.1 Subject to 1.3.2, this award shall apply throughout the State of Western Australia to persons employed under the classifications specified in Clause 4 – Wages and who are employed by:

(a) an employing authority in the public sector as defined by the *Public Sector Management Act 1994* (WA); or

(b) the entities listed in Schedule 1 of the *Public Sector Management Act 1994* (WA).

1.3.2 This award shall not apply to:

(a) any person employed by:

(i) any university;

(ii) the R&I Bank of Western Australia;

(iii) SGIO Insurance Limited; or

(iv) any local government or regional local government or the council of a local government or regional local government; or

(b) any person employed pursuant to any of the following awards or industrial or other agreements:

(i) Country High School Hostels Award 1969;

(ii) Community Welfare Department Hostels Award 1983;

(iii) Corruption and Crime Commission Agreement 2005 and/or any replacement agreement;

(iv) Cultural Centre Award 1987;

(v) Health and Disability Services – Support Workers – Western Australian Government Award 2001 (AW808168);

(vi) Hospital Workers (Government) Award 1966;

(vii) Midland Sales Yard Agreement 2004 and/or any replacement agreement;

(viii) Parliamentary Employees Award 1989;

(ix) Port Hedland Port Authority Staff Agreement 2004 (AG838222) and/or any replacement agreement;

(x) Railway Employees' Award 1969;

(xi) State Research Stations, Agricultural Schools and College Workers Award 1971;

(xii) Theatrical Employees, Entertainment, Sporting and Amusement Facilities (Western Australian Government) Award 1987; or

(xiii) Western Australian Mint Security Officers Award 1988.

1.5 DEFINITIONS

For the purposes of this award, the following terms shall have the following meaning:

1.5.1 …

1.5.2 "caretaker" means an employee required to reside on or in the vicinity of the premises of their employer and who is responsible to their employer for the supervision and/or the general cleaning of such premises and who is responsible for the safety of the employer's grounds and buildings.

1.5.3 "cleaner" means an employee mainly employed in cleaning work of any description (including glass partitions and windows) on premises, or in bringing into or maintaining premises in a clean condition.

1.5.4 …

1.5.5 …

1.5.6 …

1.5.7 …

1.5.8 …

1.5.9 …

1.5.11 …

1.5.12 …

1.5.13 …

1.5.14 …

1.5.15 "security officer" means a person employed to watch and/or guard, patrol and/or protect premises and/or property including opening and closing doors and windows as required; and/or protect goods, cash or valuables in transit.

1.5.16 …

1.5.17 …

1.5.18 …

1.5.19 …

1.5.20 …

1.5.21 "window cleaner" means an employee employed exclusively in window cleaning.

4.2 RATES OF PAY

PART A – WAGES ADJUSTED BY ARBRITRATED SAFETY NET ADJUSTMENTS

Classifications mentioned hereunder:

4.2.4

Attendant

Cleaner

Home Economics Assistant

Car Park Attendant

Window Cleaner

Caretaker

Estate Attendant (Homeswest) Grade 1

Estate Attendant (Homeswest) Grade 2

Janitor

Security Officer

Office Attendant (Homeswest)

Court Usher

Estate Attendant (Homeswest) Grade 3

Foreperson

Classifications of employees who are employed by the Department of Education and Training mentioned hereunder:

4.2.6

Cleaner

Cleaner in Charge

Home Economics Assistant

Caretaker of Schools

Cleaner in Charge of TAFE Campuses

Foreperson (Cleaning)

PART B – EXPIRED INDUSTRIAL AGREEMENT WAGES

Classifications of employees who are employed by the Department of Education and Training, and not referred to in Part A above, are mentioned hereunder:

4.2.10

Cleaner working alone

Assistant Cleaner in Charge

Classifications of employees who are employed by TAFE Colleges, and not referred to in Part A above, are mentioned hereunder:

4.2.11

Home Economic Assistant

10.2 NAMED EMPLOYERS

Commissioner
Main Roads Western Australia

Director General
Department of Housing and Works

Executive Director
Department of Conservation and Land Management

The Board
Insurance Commission of WA

The Hon Premier

The Hon Attorney General

The Hon Minister for Agriculture and Food
The Hon Minister for Employment Protection
The Hon Minister for Education and Training
The Hon Minister for Housing and Works
The Hon Minister for Land Information
The Hon Minister for Planning and Infrastructure
The Hon Minister for Police and Emergency Services
The Hon Minister for State Development

A copy of the proposed variation may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd) J.A. SPURLING,
Registrar.

20 March 2007

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2007 WAIRC 00237

A DISPUTE REGARDING ALLEGED BREACH OF PROCESS IN DISCIPLINARY MATTERS CONCERNING A UNION EMPLOYEE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	FIRE AND EMERGENCY SERVICES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 13 MARCH 2007
FILE NO/S	PSACR 53 OF 2005
CITATION NO.	2007 WAIRC 00237

Result Discontinued

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s44 of the Industrial Relations Act 1979; and

WHEREAS the Commission listed the matter for hearing and determination on 21 and 22 February 2007; and

WHEREAS on 19 February 2007 the applicant advised the Commission that the matter had settled and the hearing was vacated; and

WHEREAS on 21 February 2007 the applicant lodged a Notice of Discontinuance;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2007 WAIRC 00209

CONTRACTUAL ENTITLEMENT OF EMPLOYEES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WA (INC)
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	THURSDAY, 8 MARCH 2007
FILE NO	P 60 OF 2002
CITATION NO.	2007 WAIRC 00209

Result	Application Dismissed

Order

WHEREAS this is an application to the Public Service Arbitrator ("the Arbitrator") pursuant to section 80E of the Industrial Relations Act 1979 filed on the 2nd day of December 2002; and

WHEREAS the Applicant sought no action in respect of the matter until Wednesday the 16th day of July 2003; and

WHEREAS on Friday the 8th day of August 2003, Tuesday the 29th day of June 2004, Wednesday the 24th day of August 2005, Tuesday the 21st day of March and Wednesday the 20th day of December 2006 the Arbitrator convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the latter conference the parties advised that they were close to reaching an in principle agreement however it was yet to be finalised; and

WHEREAS the Arbitrator issued directions that the parties meet for the purpose of finalising the resolution of the matter and a further conference was listed for Thursday the 1st day of March 2007; and

WHEREAS on Wednesday the 28th day of February 2007, the Applicant advised the Arbitrator that the parties had reached agreement in principle in respect of the application and requested that the conference date be vacated; and

WHEREAS by letter received on the 6th day of March 2007 the Applicant advised the Arbitrator that the matter has been settled and sought leave to discontinue the application;

NOW THEREFORE, the Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

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

2007 WAIRC 00181

DISPUTE REGARDING DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER OF POLICE, WESTERN AUSTRALIAN POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 2 MARCH 2007
FILE NO	PSACR 1 OF 2007
CITATION NO.	2007 WAIRC 00181

Result Direction Issued

Direction

WHEREAS this is a matter referred for hearing and determination under section 44 of the Industrial Relations Act 1979; and

WHEREAS on Thursday, the 15th day of February 2007 the Applicant filed and served a Notice to Admit which required the Respondent to admit or deny the facts set out therein within 7 days; and

WHEREAS on Thursday, the 1st day of March 2007 a conference was convened by the Public Service Arbitrator to resolve interlocutory matters,

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby directs:

THAT the Respondent is not required to respond to the Notice to Admit until further notice.

THAT this application be, and is hereby dismissed.

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

INDUSTRIAL MAGISTRATE—Claims before—

2007 WAIRC 00175

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	DANNY MICHAEL PAGODA
	CLAIMANT
	-v-
	WESLEY COLLEGE
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR
HEARD	FRIDAY, 20 OCTOBER 2006, WEDNESDAY, 24 JANUARY 2007, WEDNESDAY, 20 DECEMBER 2006, THURSDAY, 25 JANUARY 2007, WEDNESDAY, 21 FEBRUARY 2007
DELIVERED	WEDNESDAY, 28 FEBRUARY 2007
CLAIM NO.	M 89 OF 2006
CITATION NO.	2007 WAIRC 00175

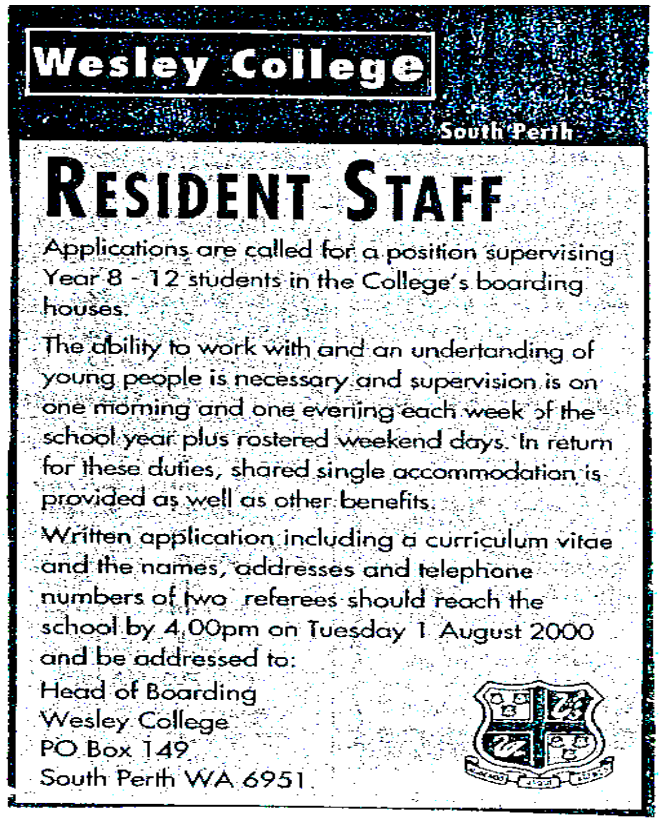
CatchWords	Breach of award; scope of award; Resident Master; whether an employee or volunteer; section 114 of the Industrial Relations Act, 1979.
Legislation	*Industrial Relations Act 1979.*
	Independent Schools (Boarding House) Supervisory Staff Award No. A9 of 1990.
Result	The Claimant is an employee and the Respondent is in breach of the Award.
Representation	
Claimant	Mr M Holler, instructed by *WL & KJ Everett, Barristers & Solicitors*, appeared for the Claimant.
Respondent	Mr M Jenson, instructed by *Lavan Legal, Lawyers* appeared for the Respondent.

REASONS FOR DECISION

1 The Claimant in these proceedings has brought an action against the Respondent as provided for by section 83(1) of the *Industrial Relations Act 1979* ("the Act"). The allegation is that the Respondent has contravened the provisions of the *Independent Schools (Boarding House) Supervisory Staff Award No A9 of 1990* ("the Award") by not paying the Claimant remuneration.

2 The Respondent is a private independent school which at all material times carried on the business of providing educational services to children of both primary and high school age as either day students or boarders. The boarding students resided in the boarding house at the Respondent's school.

3 It is the Claimant's evidence that he applied for a position with the Respondent which had been advertised in the West Australian newspaper. A copy of the advertisement (exhibit A) is set out hereunder:



Wesley College

South Perth

RESIDENT STAFF

Applications are called for a position supervising Year 8 - 12 students in the College's boarding houses.

The ability to work with and an understanding of young people is necessary and supervision is on one morning and one evening each week of the school year plus rostered weekend days. In return for these duties, shared single accommodation is provided as well as other benefits.

Written application including a curriculum vitae and the names, addresses and telephone numbers of two referees should reach the school by 4.00pm on Tuesday 1 August 2000 and be addressed to:

Head of Boarding
Wesley College
PO Box 149
South Perth WA 6951

4 Although the Claimant was not successful with his application he was later offered another position of the same nature and commenced as a Resident Master on 25th January 2001. From that day he resided in accommodation provided in the boarding house and performed the duties required of him until ceasing his employment with the Respondent on 8 December 2005, after a period of almost 5 years. The Claimant accepted that he would not receive remuneration but would be provided with his accommodation, meals and laundry services.

5 Soon after commencing with the Respondent the Claimant was provided with a Staff Procedures Handbook (exhibit E), a 25 page document setting out guidelines, policies, protocols, procedures and other information required of a Master on Duty (MOD), as the Resident Master was referred when on duty. He was also provided with a "*MOD Duty Statement, Formal Duty Requirements*" (exhibit F1) and a document headed Specific Duty Requirements (exhibit F2). Both set out, in detail, what was required of an MOD and confirmed or added to the requirements in the handbook.

6 In its response to the claim the Respondent's reason for opposing the claim is that "*the Claimant's employment does not come within the scope and classification of"* the Award. The Respondent argues that the Claimant was a volunteer not an employee and that an amendment to the Award in 2003 specifically provided that the Award *"shall not apply to volunteer tutors and volunteer residential assistants whose role it is to provide management support and to oversee students whilst under supervision, in return for which free board and lodging is provided."*

7 The Scope clauses in the 1991 and 2003 awards are otherwise identical and are as follows:

> *4. – Scope*
>
> *This award applies to Independent Schools with boarding houses and their employees who directly supervise or who are responsible for the supervision of, the educational, recreational and personal general welfare of students in or about a boarding house and shall include those supervisory duties outside a boarding house that are from time to time directed by the employer, but shall not include those persons employed as cleaners, caretakers, kitchen and canteen staff, laundry staff, nursing staff, grounds staff, and those employees primarily employed as teachers or to a member of a religious order unless it is so stated in a written contract of employment between that person and the employer.*

8 In my view there is no doubt, on the evidence, that the Claimant was employed by the Respondent to directly supervise the educational, recreational and personal general welfare of its students in or about its boarding house and that he performed those duties when directed and required. He provided a service for reward.

9 The evidence before me is that he generally complied with the Staff Procedures Handbook and carried out the duties in the MOD Duty Statement Formal Duty Requirements and the Specific Duty Requirements.

10 The Respondent in these proceedings is a named Respondent in the Award and an Independent School with a Boarding House. It is bound by the Award.

11 The Claimant was an employee who carried out the duties of a supervisor as described in the scope clause of the Award and as such is entitled to the benefits and conditions set out in the Award.

12 Section 114 of the Act prohibits the contracting out of any obligations of any award however from the evidence before me there is no suggestion that the parties turned their minds to any contracting out, nor is there evidence before me that the Claimant's status was changed after the amendment to the scope clause in the 2003 Award, or that he was formally reclassified to the status of volunteer.

13 Although I always have some difficulty with actions of this type where a party accepts the arrangements of their employment for a long time, in this case 5 years, then at the end of the relationship makes a claim for a breach of an award, in this case I must find that the Claimant herein was an employee and the Respondent is in breach of the Award.

14 While I have expressed some concerns in this case the Respondent, as a responsible employer, has an obligation to look after its own interests and ensure that relationships with employees are quite clear and if an award has application it should ensure compliance.

15 I will now hear from the parties on the orders I should make.

W G TARR
Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2007 WAIRC 00239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY EDWARD FRIEND
	APPLICANT
	-v-
	RAINER OFFERMANN AND WARREN ROWSON DIRECTORS, ROAD SAFETY SHOP
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	TUESDAY, 24 OCTOBER 2006, WEDNESDAY, 14 FEBRUARY 2007
DELIVERED	WEDNESDAY, 14 MARCH 2007
FILE NO.	U 501 OF 2006, B 501 OF 2006
CITATION NO.	2007 WAIRC 00239

CatchWords	Industrial law - Termination of employment - Harsh, oppressive or unfair dismissal and denied contractual benefit - Request for adjournment - Relevant principles as to adjournments - Adjournment refused - Entitlements under contract of employment - Principles applied - Applicants summary dismissal justified - Applicant denied contractual benefit - Work related expenses - Application upheld in part - Order issued - *Industrial Relations Act 1979* (WA), s 29(1)(b)(i), s 29(1)(b)(ii), s 6(c), s 22B, s 26(1)a, s 32.
Result	Order issued
Representation	
Applicant	Mr D Heldsinger of counsel instructed by Williams & Co Lawyers
Respondent	Mr W Rowson

Reasons for Decision

1 These applications concern claims by the applicant pursuant to ss 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 (WA) ("the Act") that on or about 15 August 2006 he was unfairly dismissed by the respondent and also denied certain contractual entitlements. The contractual entitlements initially claimed included unpaid salary; annual leave; reimbursement of expenses; outstanding superannuation contributions; a performance bonus and payment in lieu of salary on termination of employment. Subsequently, the applicant abandoned his claims in respect of unpaid salary, annual leave and outstanding superannuation contribution.

Adjournment Application

2 The applications in these matters were filed on 21 September 2006. Notices of answer and counterproposal were filed on 11 October 2006. The Commission convened a conciliation conference pursuant to s 32 of the Act on 24 October 2006. As a consequence of that conciliation conference, the applicant's claims were not resolved however the parties requested a fourteen day adjournment to enable further discussions to take place and for the parties to exchange relevant documents.

3 By way of a letter from the applicant's solicitors Messrs Williams and Co Lawyers dated 15 November 2006, the applicant's solicitors notified my Associate that the parties had been unable to resolve the matters in dispute and that the applicant intended to pursue his claims. As a consequence, my Associate conferred with the parties as to a suitable hearing date to list the applications for hearing and subsequently, a notice of hearing dated 17 November 2006, listing the matter for hearing on 14 February 2007, was sent to the parties. Nothing further was heard from either party until 12 February 2007 until a letter of the same date marked "urgent" was sent by the applicant's solicitors to my Associate advising that the applicant would be seeking an adjournment of the hearing listed for 14 February 2007. It was said that given the state of preparation of the matter, the applicant was not in a position to proceed. This is despite the fact that the parties had, by that time, almost three months notice of the hearing of the matter by the Commission.

4 At the outset of the hearing on 14 February 2007, the applicant's counsel, Mr Heldsinger, put the applicant's application to adjourn the hearing. It was submitted by counsel that there were a number of matters yet to be resolved by the applicant's solicitors including the obtaining of a number of relevant documents and the identification of relevant witnesses in connection with the applicant's claims. Mr Heldsinger also informed the Commission that he had only been briefed in the matter two days before the hearing. As a consequence, no doubt counsel was placed in a difficult position in having to bring such an application in the present circumstances. The Commission's consideration of this matter is no reflection upon counsel, but is very much a reflection upon his instructing solicitors.

5 Whilst the letter of 12 February 2007 suggested that the respondent did not oppose any proposed adjournment, this was not the case at the time the application was put in the proceedings. Mr Rowson, appearing as one of the proprietors of the respondent, opposed the applicant's application for an adjournment. He submitted that the applicant had had ample time to prepare and the respondent wanted the case to proceed.

6 After having heard from counsel for the applicant and the respondent, the Commission adjourned for a short period to consider the application. The Commission on resuming the proceedings announced its decision to refuse the application to adjourn with its reasons briefly outlined and detailed reasons to be published in due course. These are those reasons.

7 The general principles relevant to applications to adjourn are well known based upon the judgement of the Supreme Court in this State in *Myers v Myers* (1969) WAR 19. *Myers* has been adopted and applied by this Commission over many years. In essence the decision as to whether to grant an adjournment involves the exercise of a discretion in accordance with s 26(1)(a) of the Act and involves consideration of relative prejudice to the parties. Also relevant in this jurisdiction are the objects of the Act in s 6(c) which is *"to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;"*. Also relevant is s 22B of the Act which provides that *"in the performance of its functions the Commission is to act with as much speed as the requirements of this Act and a proper consideration of the matter before it permit."* Additionally, is the well settled principle that in claims of this kind, under s 29(1)(b)(i) of the Act, applicants are required to institute and prosecute their claims with all due expedition.

8 In this case, as at the date of the hearing of the matters, as noted above, the parties have had almost to the day three months notice that the Commission would sit to hear and determine the applicant's claims. This is a lengthy period of notice for the hearing of the matters and indeed, is probably considerably more than many parties receive in matters before this Commission. As counsel's submissions were developed, it became clear, regrettably, that the applicant's solicitors, despite the length of time to prepare the case to be heard, had done little active preparation. Indeed it seemed that it was not until only a few days before the date of the hearing, when Mr Heldsinger informed the Commission that he was briefed to appear, that active consideration was given to the material issues required to be dealt with to properly prepare the applicant's case. No application had been made at any time under the Industrial Relations Commission Regulations 2005 for the production of any relevant documents by the respondent. There was nothing produced by counsel to show that the applicant's solicitors had requested by letter the production of any specific documents of the kind specified in a list headed "Discovery of Respondent's Documents" handed up by counsel in the course of the adjournment application. All of those documents were, one would have thought, able to have been readily ascertainable well before the date listed for the hearing of the matter. Indeed as the Commission has noted above, the initial conciliation conference conducted in November 2006, was adjourned for the specific purpose of enabling the parties to exchange any relevant documents bearing upon the matters in issue.

9 Counsel also made reference to the identification of relevant persons who may be able to give evidence in the matter, who had yet to be contacted. However again, it was readily apparent that no attempts had been made to do so prior to only a few days before the date listed to hear the applicant's claims. As it turns out, counsel later informed the Commission that some of those contacted would not be in a position to give any evidence in any event, relevant to the issues in dispute.

10 It should not be assumed that an application to adjourn a matter, occasioned by apparent neglect in proper preparation by a party's solicitor or agent, gives that party an entitlement to an adjournment. These matters were dealt with by the Full Court of the Supreme Court of Western Australia in two judgements in *Tace Pty Ltd v Coles Myer Ltd* (unreported 27 September 1990 BC 9001095) and *Krygger v Commonwealth of Australia* (unreported 1 February 1994 BC 9401481).

11 In *Tace*, the matter concerned an appeal to the Full Court from a refusal by the Liquor Licensing Court to grant an adjournment of a hearing of an application for a conditional grant of a liquor store licence. The Full Court canvassed relevant authorities in relation to the grant of adjournments in particular in circumstances where a party had inadequately prepared for trial. In this connection, Seaman J said at p4:

> *"In my opinion two threads of authority meet in this appeal: the first is concerned with a balancing of the prejudice to the appellant and the respondent arising out of the application for an adjournment. The second is the public interest in the proper use of the resources provided for the administration of justice. With respect I would adopt the remarks of McGarvie J (with whom Marks J concurred) in Brambles Holdings Ltd v Apex Pallet Hire Pty Ltd an unreported decision of the Full Court of the Supreme Court of Victoria delivered 8 April 1988.*
>
> *His Honour said: "In looking at the rights of the defendant which are the subject of submissions in this application, it is worth remembering that the right of a party to litigation is the right to have a reasonable opportunity to present its case, or its defence. It is not accurate to regard the law as being that if one party, through neglect, is in a position where it is not able properly to present its case, it is automatically entitled to an adjournment."*

Similar observations were made by the Full Court of Supreme Court in *Krygger*.

12 As I have noted above, regrettably for counsel for the applicant, he was placed in the difficult position of making an application to adjourn which in my opinion, was inherently unmeritorious. The failure of the applicant's solicitors to properly prepare the applicant's case is, given the time that was available, quite appalling. Where parties in proceedings before the Commission are represented by experienced industrial agents and solicitors, the Commission is entitled to expect that proper attention and regard will be had to preparation of matters that require to be heard, in order to avoid unnecessary delay and expense to the parties concerned and to the community. The Commission is obliged to ensure that proceedings before it are conducted in a manner which uses as efficiently as possible, public resources. There is clearly an element of public interest involved in matters such as this.

13 For the foregoing reasons, the application to adjourn was refused and the applicant was required to put his case.

Factual Background

14 Ultimately the factual background to this matter is relatively straight forward and in the final analysis, there was little real dispute as to the central contentions. The applicant testified that he had been involved in one way or another in the sign industry for about 20 years. During some of this time he operated a private business described as "Out There Fabrication" by which, he informed the Commission, he did some sign installation work for clients and some other fabrication activity. The applicant first commenced in the respondent's business under a previous owner in 2004. He initially started as a sales representative and during the time of his employment under the previous owner, the applicant testified that he maintained his outside business interest in particular with a major client the University of Western Australia ("UWA"). The applicant gave evidence that in relation to UWA work that his business obtained for signage, he would place an order with the respondent to fabricate the sign and then install it himself under the auspices of his own business. Subsequently the applicant was appointed the Manager of the respondent business under the previous owner on terms and conditions as set out in exhibit A1.

15 In early 2006 the present proprietors took over the respondent's business and acquired the applicant's services as the Manager. Written terms and conditions of employment were agreed between the parties a copy of which was tendered as exhibit A2. The applicant's position was entitled "Business Manager" and according to Schedule C to the contract of employment, as Business Manager the applicant's overall duties were described to include:

> *"The Business Manager will be dedicated to the day to day running, programming and coordination of all aspects of works conducted by Road Safety Shop. It is his dedicated role to ensure client's expectations are met in a manner which delivers both a safe, sound work practices (sic) and returns the commercial expectations of the company.*
>
> *He also carries out process and site audits to ensure compliance with our company and our clients (sic) contractual requirements. He will assist in the production of and manufacture (sic) when required."*

16 Furthermore, under the heading "Primary Functions" a primary function listed is *"Building of client base."*

17 As the Business Manager the applicant was paid an annual salary of $60,000.00 per annum and was provided with a fully maintained vehicle. Additionally, set out in Schedule B, under the heading "Remuneration" was reference to a bonus in the following terms:

> *"As agreed you will be paid an annual performance bonus. This bonus will be based upon a percentage of the annual net profit. This bonus remuneration can be in the form of monies paid to you or redeemed in shares in the company holding. The percentage of remuneration and total redeemed shares will be at the discretion of the Directors."*

18 Other relevant provisions of the contract of employment included under the heading "Duties and Responsibilities" a requirement that "*you shall diligently complete the duties and responsibilities outlined by your Manager, to ensure continued success throughout your employment…" "any duty and responsibility changes, which may occur from time to time, will be in consultation with you and shall be at the sole discretion of the Company."* Further relevantly, under the heading "Expenses Reimbursement" is the following term:

> *"Payments for reimbursement of business related expenses must be at the prior approval of your Manager, who will forward the receipts, invoices or statements through the Road Safety Shop Petty Cash or Accounts Payable Systems.*"

As to notice of termination of employment, the contract provided for termination of employment by the giving of four weeks notice by either party in writing. Such notice was not required in the event of serious misconduct justifying instant dismissal.

19 Furthermore and relevantly for the purposes of the determination of the applicant's claims, is a provision headed "Obligation to Disclose" which was in the following terms:

> *"You are required to obtain written consent prior to working for any other employer, including self employment, whilst you are employed by Road Safety Shop."*

20 The applicant's evidence was that he decided to stay on in his employment under the new owners of the respondent business although he testified he was not entirely happy with the terms of the contract, however he signed it. I pause to observe that having done so and having affixed his signature to the contract of employment the applicant thereby became bound by it regardless of whether he was happy or indeed had even read it: *L'Estrange v F G Graucob Ltd* [1934] 2 KB 394.

21 In relation to the bonus provision in the contract of employment, the applicant seemed to rely upon his expectation of a bonus payment based upon his contract of employment with the previous owner of the business, based upon an express term of that contract entitling the applicant to a 20 per cent profit share. However, the applicant testified that at no time during his employment with the new owners, was a figure for the bonus discussed either in dollar terms or in terms of a percentage or indeed, how any bonus may be worked out. The applicant accepted in his evidence that this was a matter for the discretion of the respondent's proprietors.

22 In relation to the events leading to the summary termination of the applicant's employment, the applicant testified that on 15 August 2006 he attended work as normal. At about lunch time the applicant had a discussion with Messrs Offermann and Rowson about an apparent conflict of interest concerning work that the applicant had been performing under the auspices of his own business, for UWA. In particular, the respondent raised with the applicant a tender for a job for UWA regarding the supply and installation of bike racks. Tendered as exhibits R1, R2 and R4, were emails from the applicant to a person identified as from UWA in relation to a quotation for this work from Out There Fabrication. The contact numbers given were for the applicant although the email address was from "*gary@roadsafetyshop.com"*. Additionally, it seems that the applicant also tendered a quote for the same work on behalf of the respondent under a quotation letter dated 4 August 2006.

23 Exhibit R4 discloses that a purchase order was raised by UWA in favour of Out There Fabrication on 4 July 2006, for the supply of various signs. Attached to the quotation, are two of the respondent's job sheets in respect of the supply of various signage jobs to be completed, one of which had the respondent's logo crossed out and instead hand written was "Out There" with the client being UWA. The second job sheet described the client as Out There Fabrication. Whilst on the evidence the tender to UWA for the bike racks job appears to have gone to another firm, it was very clear that the applicant, in addition to tendering on behalf of the respondent for the work, tendered on behalf of his own business. The applicant's evidence was that he did this because of his relationship with UWA and it was not his intention to keep the work for himself.

24 In the applicant's conversation with Messrs Offermann and Rowson, the applicant was informed that he was employed to manage the respondent's business and that he could not continue in the circumstances given the conflict of interest which existed in him conducting his own business. The applicant left the respondent's premises that day and gave evidence about his endeavours to seek alternative work in the interim.

25 The applicant accepted in his testimony, that at no time did he clearly inform the new owners when they acquired the respondent's business, that he was conducting a business on his own behalf in the same industry performing the same or similar kind of work. Additionally, whilst the applicant initially said that he did all his own work in his own time, when exhibit R1 was put to him, that being the quotation for the UWA bike racks job, he accepted that this was done in the respondent's time using its resources.

26 Also tendered in evidence through the applicant, were various customer statements from the respondent and some of the applicant's bank records, by which the applicant attempted to demonstrate that his business Out There Fabrication, was in effect a customer of the respondent and fabrication work done for his own business was paid for by him. Whilst some of those documents had the name "Gary" on them, the evidence of the respondent's former Administration Assistant Ms Howe was to the effect that at the time as far as she was aware, the respondent had between 60-80 customers. At no time did she bring the fact that the applicant was conducting his own business, to the attention of the owners of the respondent.

27 The applicant also gave some evidence in relation to expenses in the sum of $429.82 which he said he incurred in connection with his employment by the respondent for various items. Receipts in respect of these matters were tendered as exhibit A5. These expense items were for supplies required by the business and cleaning products etc. The applicant said these had not been reimbursed by the respondent as at the time of these proceedings.

28 Mr Offermann, who with Mr Rowson, purchased the respondent business in early 2006, testified that at no time did either he or Mr Rowson have any knowledge of the applicant conducting his own business in the name of Out There Fabrication, or indeed under any other name. He testified that if they did the applicant would never have been appointed as the Business Manager of the respondent. Mr Offermann referred to the provision in the applicant's contract of employment requiring him to disclose any other employment including self employment, which disclosure was never made.

29 Mr Offermann testified that he has a background in road traffic engineering. On 15 August 2006 he said that whilst at the respondent's premises he noticed a sign in the workshop of a kind that he had not seen for many years. When he asked the employee working on the job where it came from, he was told it was from UWA and that the applicant had given it to him to repair as a "rush job". This raised Mr Offermann's curiosity and he rang UWA and spoke to a Mr Buckels, to whom the applicant's email quotation from Out There Fabrication was sent (see exhibit R2). According to Mr Offermann, Mr Buckels informed him that the job was being done by Out There Fabrication. Mr Buckels informed Mr Offerman that the respondent did not do any sign work for UWA.

30 As a result of this inquiry, Mr Offerman testified that he was keen to find the source of this competition for the respondent and did a company search. This company search disclosed that the applicant was a director of Out There Fabrication. Mr Offermann testified that when he became aware of these matters he confronted the applicant with this information. The applicant admitted to him his involvement in Out There Fabrication and that he was doing this work. Mr Offermann's evidence was that he told the applicant it was a clear conflict and that he had been undertaking his own work in the respondent's time and using the respondent's resources. According to Mr Offermann, he told the applicant that he would have to cease the Out There Fabrication business and the applicant refused. In light of this conflict, the applicant's employment was summarily terminated for misconduct.

31 Additionally, Mr Offermann testified that a subsequent review of the respondent's records showed that the applicant had for some time, used the respondent to manufacture product at cost, which was then on sold by the applicant's firm to UWA at a profit. Mr Offermann's evidence was to the effect that the applicant had used the respondent's resources to subsidise the production costs of his own business. I am satisfied that this after acquired information is able to be relied upon by the respondent in this matter, it being in existence at the material time and directly bearing upon the issues arising: *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312.

32 Mr Offermann was emphatic that the first he ever heard of Out There Fabrication and the applicant's involvement in that business, was on the last day of applicant's employment on 15 August 2006.

Consideration

Unfair Dismissal Claim

33 For the following reasons the Commission is not persuaded that the summary dismissal of the applicant was, in all of the circumstances, and having regard to the equity, good conscience and substantial merits of the matter, harsh, oppressive or unfair.

34 It is trite to observe that in ordinary circumstances the relationship between an employer and an employee is a fiduciary relationship: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41. The fiduciary nature of an employee employer relationship was also considered by the High Court in *Concut* where Gleeson CJ, Gaudron and Gummow JJ said at 315-316:

> *"Their critical feature is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense".*

35 For example, the fiduciary duty, otherwise expressed as a duty of fidelity, at common law, would clearly be breached in circumstances where an employee sets up a business in competition with his employer: *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66; *Hospital Products Ltd; Mackintosh International College Pty Ltd v Solao and Anor* (2002) 51 AILR 9-204.

36 Given the applicant's position as the Business Manager of the respondent, responsible for devoting his full time and attention to developing the business, I have no doubt at all that the fiduciary obligation of the applicant to the respondent was breached in this case. It is plain on the evidence and I find, that at no time did the applicant disclose to Messrs Offermann or Rowson that he was conducting a business in the same industry as that engaged in by the respondent. I do not accept that the business undertaken by the applicant was as complimentary to the respondent's business as the applicant would have had the Commission believe. Clearly, in relation to the UWA tender which was in evidence, the applicant tendered for the work through his business, in direct competition with the respondent for which he had overall management responsibility. In my opinion, that was a manifest and plain breach of his duty to his employer. This conduct, and the pattern of conduct that preceded it, was also a manifest breach of the clear and unambiguous term of the applicant's contract of employment with the respondent, to disclose to the respondent any other employment, including self employment. In my opinion, this obligation to disclose was all the more important when the business undertaking conducted by the applicant was in the same industry as that of the respondent and indeed, as subsequent events transpired, was also a competitor.

37 Whilst counsel in his submissions made something of the fact that there was not a detailed investigation conducted by the respondent on the day of the applicant's dismissal, in my opinion little turns on that in this case. The applicant did not deny his conduct. I also accept the respondent's evidence that the applicant was requested but declined to cease the conduct of his own business. Taking the UWA tender alone, apart from the conduct of the business generally, this was in my opinion, grounds for summary dismissal for misconduct. The relevant principles in relation to justification for summary dismissal for misconduct are well known. In *North v Television Corporation Ltd* (1976) 11 ALR 599 Smithers and Evatt JJ said at 609:

"For purposes of the application of the common law principles as to the facts of this case, the remarks of the Master of the Rolls in Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 ALL ER 285 at 287 and 289 are in point. He said –

'…since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service…I…think…that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and …therefore…the disobedience must at least have the quality that it is "wilful"; it does (in other words) connote a deliberate flouting of the essential contractual conditions.'

..Until the terms of the contract are known and identified it is impossible to say whether or not any particular conduct is in breach thereof or is a breach of such gravity or importance as to indicate a rejection or repudiation of the contract.

One cannot begin the inquiry without ascertaining what work...the employee was employed and had undertaken to perform. It is also necessary to ascertain what particular obligations the parties had agreed upon as important or even vital."

38 In my opinion in this case, the applicant's conduct struck at the root of the contract of employment with the respondent. His actions in firstly failing to disclose his business interest, contrary to an express term of the contract, and then to actively pursue it in conflict with his duty to the respondent, provided ample grounds for the respondent to summarily dismiss the applicant for misconduct.

39 There was some attempt to attack the credibility of Mr Offermann's evidence through the tender of the profit and loss statements for the respondent. Whilst I do not consider such an attack was reasonably open given Mr Offermann's evidence as a whole, in particular that it was Mr Rowson and not he that had a better understanding of the financial performance of the respondent, I do not need to consider that matter further. This evidence does not in any way alter the nature of the duty owed by the applicant to the respondent, in the performance of his duties as the Business Manager.

40 Accordingly the applicant's unfair dismissal claim fails.

Contractual Benefit Claims

Bonus

41 The terms of the applicant's contract of employment in relation to the payment of an annual performance bonus are set out above. The first issue to determine is what does the term of the contract mean? The applicant in his evidence suggests that because he was paid a bonus at 20% of profit by the previous owner of the respondent, then logically that should be his entitlement under his new contract of employment. In my opinion, this cannot be sustained. Whilst the written contract of employment is somewhat less than elegantly drafted, read as a whole, the provision as to an annual performance bonus makes it plain that whether or not a bonus will be payable would be a matter solely at the discretion of the directors of the respondent. There is no reference anywhere in the remuneration clause to a set percentage of annual net profit. Moreover, the bonus provision of the contract, even if it could be said to be enforceable in such a fashion, does not entitle the applicant to a monetary payment as an alternative to shares in the company holdings. In my opinion, the textual provisions of this term of the contract, make it quite clear that it is intended that it is the directors only who would determine whether any bonus would be paid in a particular year and if so, presumably in conjunction with the employee, in what form that benefit is provided i.e. in cash or in company shares.

42 In this case, I am not persuaded that the applicant has established on the balance of probabilities that he had a benefit, by way of a contractual entitlement to a bonus: *Hot Copper v Saab* (2001) 81 WAIG 2704.

43 As to the evidence adduced about the financial performance of the respondent, given the Commission's conclusions it is unnecessary to consider that evidence any further in relation to this claim. Furthermore, there was no evidence before the Commission that may have supported the implication of a term as to the payment of a bonus at a particular rate by way of a prior course of dealing. The applicant's bonus claim therefore also fails.

Expenses Claim

44 The evidence led by the applicant as to the expenses he incurred in the sum of $429.82 as set out in exhibit A5, were not disputed by the respondent. I am satisfied that the applicant expended these monies in the performance of his duties as the Business Manager of the respondent and he should be able to recover them.

Pay in Lieu of Notice

45 Given the Commission's conclusion above that the summary dismissal of the applicant was justified, the applicant's claim in relation to payment in lieu of notice falls away.

Conclusion

46 There will be an order that the applicant be paid the sum of $429.82 by way of a denied contractual benefit in respect of work expenses. Otherwise the applications are dismissed.

2007 WAIRC 00249

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY EDWARD FRIEND
	APPLICANT
	-v-
	RAINER OFFERMANN AND WARREN ROWSON DIRECTORS, ROAD SAFETY SHOP
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 14 MARCH 2007
FILE NO/S	U 501 OF 2006, B 501 OF 2006
CITATION NO.	2007 WAIRC 00249

Result	Order Issued
Representation	
Applicant	Mr D Heldsinger of counsel instructed by Willliams & Co Lawyers
Respondent	Mr W Rowson

Order

HAVING heard Mr D Heldsinger of counsel on behalf of the applicant and Mr W Rowson on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

1. THAT the respondent pay to the applicant the sum of $429.82 by way of reimbursement of expenses within 21 days of the date of this order.
2. THAT otherwise the applications be and are hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2006 WAIRC 05428

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GWENDA MAY SMITH
	APPLICANT
	-v-
	ALBANY ESPLANADE PTY LTD T/AS THE ESPLANADE HOTEL
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 15 SEPTEMBER 2006
FILE NO/S	B 164 OF 2006, U 164 OF 2006
CITATION NO.	2006 WAIRC 05428

Result	Interlocutory orders issued
Representation	
Applicant	Ms K Findlay-Grove (of counsel)
Respondent	Mr B Jackson (of counsel)

Order

Having heard Ms Findlay-Grove of counsel on behalf of the Applicant and Mr Jackson of counsel on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that –

1. The hearing of the jurisdictional objection listed for 13 September 2006 be adjourned.

2. The Applicant and the Respondent shall each give discovery on affidavit of documents listed in a schedule within their possession, custody or power by 4 October 2006.

3. The Applicant to file and serve her witness statements on or before 11 October 2006.

4. The Respondent to file and serve its witness statements in reply on or before 25 October 2006.

5. The Applicant to file and serve her witness statements in reply on or before 1 November 2006.

6. The Respondent to file and serve an outline of submissions and any authorities it intends to rely on in relation to the jurisdictional objection on or before 15 November 2006.

7. The Applicant and any interveners to file and serve an outline of submissions and any authorities to be relied on in relation to the jurisdictional objection on or before 29 November 2006.

8. The matter be set down for hearing on 6, 7 and 8 December 2006, with the hearing of the jurisdictional objection to precede on 6 December 2006 before the hearing of the substantive applications.

9. The parties have liberty to apply.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2007 WAIRC 00192

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GWENDA MAY SMITH
	APPLICANT
	-v-
	ALBANY ESPLANADE PTY LTD T/AS THE ESPLANADE HOTEL
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
HEARD	WEDNESDAY, 6 DECEMBER 2006, THURSDAY, 7 DECEMBER 2006, FRIDAY, 8 DECEMBER 2006, TUESDAY, 19 DECEMBER 2006
DELIVERED	FRIDAY, 2 MARCH 2007
FILE NO.	U 164 OF 2006, B 164 OF 2006
CITATION NO.	2007 WAIRC 00192

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal claim - whether Applicant constructively dismissed - no express or implied duty to provide work - claim not made out - turns on own facts - Contractual benefits claim for pay in lieu of notice on termination - claim dismissed as no finding that the employer terminated the Applicant's employment - jurisdictional challenge - obiter pre Work Choices contractual benefits claim within jurisdiction - obiter post Work Choices contractual benefits claims not within jurisdiction - *Industrial Relations Act 1979* (WA) s 23(1), s 26(1)(a), s 26(2), s 27, s 29(1)(b)(i), s 29(1)(b)(ii), s 34, s 35 and s 36; *Workplace Relations Act 1996* (Cth) s 4(1), s 5, s 16(1) and s 16(2); *Judiciary Act 1903* (Cth) s 78B; *Workplace Relations Regulations 2006* (Cth) reg 1.2 of div 2 of pt 1 of ch 2.
Result	Applications dismissed
Representation	
Applicant	Mr D C Heldsinger (of counsel) and Ms K Findlay-Grove (of counsel)
Respondent	Mr A L Drake-Brockman (of counsel) and Mr B Jackson (of counsel)

Reasons for Decision

1 Gwenda May Smith ("the Applicant") filed an application in the Western Australian Industrial Relations Commission ("the Commission") on 2 March 2006 under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the IR Act") claiming on that day she had been unfairly dismissed by Albany Esplanade Pty Ltd trading as the Esplanade Hotel ("the Respondent"). The Applicant resigned without notice. Prior to her resignation the Applicant was employed by the Respondent as the Manager of sales and marketing for the Esplanade Hotel ("the Hotel"). The Applicant also filed an application on 2 March 2006 under s 29(1)(b)(ii) of the IR Act claiming that she was owed contractual benefits by the Respondent. The Applicant contends that she was constructively dismissed as the Respondent had directed her not to undertake sales and marketing duties. She says that the security of her employment was in doubt and she had nothing to do which left her with no alternative but to resign. The

Applicant's claim for contractual benefits arises because she says that she was dismissed. The Applicant contends that the legal effect of her dismissal is that she was entitled to four weeks' pay as compensation for notice pursuant to the express terms of her contract of employment.

2 The Respondent says that the Applicant's claims should be dismissed as she voluntarily resigned. It also says that even if the Commission makes a finding that the Respondent terminated the Applicant's employment, that the Commission does not have jurisdiction to deal with the Applicant's claim for notice as s 16(1) of the *Workplace Relations Act 1996* (Cth) ("the WR Act") ousts the jurisdiction of the Commission to deal with any claim for contractual benefits. It contends that s 16(1) excludes the jurisdiction of the Commission to deal with contractual benefits claims where an employee is employed by a trading corporation. Section 16(1) of the WR Act became operative on 27 March 2006. Pursuant to reg 1.2 of div 2 of pt 1 of ch 2 of the *Workplace Relations Regulations 2006* ("the WRR") certain State laws are not excluded by s 16(1) in respect of an act or omission which occurred before s 16(1) became operative. The Respondent argues that reg 1.2 does not apply and says the Applicant's claim for notice was extinguished when s 16(1) became operative.

The Applicant's Evidence

3 The Applicant commenced employment with the Hotel on 1 September 1996 as its Sales Manager. At all material times the Applicant was employed to work in an office in Perth and her duties required her to occasionally visit the Hotel in Albany several times a year.

4 When the Applicant first commenced employment the Hotel was owned by Joondalup Resorts International and was managed by Accor Asia Pacific Corporation ("the AAPC"). At that time she was required to report to the AAPC Regional Sales and Marketing Manager and worked in consultation with the Hotel General Manager. In July 1998, AAPC ceased to hold the management contract for the Hotel. In mid to late 1999, Mr B K Wee's company, Earth Essence International Ltd, purchased the Hotel from Joondalup Resorts International. Prior to Mr Wee's company purchasing the Hotel, Mr Wee had been a part-owner of Joondalup Resorts International.

5 At the time the Applicant employment came to an end, she was carrying out the roles of Sales and Marketing Manager. The Applicant says that her key responsibilities were:

(a) Maintaining and increasing room revenue across all market segments;

(b) Creating marketing programs which would generate revenue for all outlets of the Hotel, specifically the restaurants, bars and rooms, including the apartments;

(c) Public relations; and

(d) Representing the Hotel at trade and consumer events within Australia and overseas with the objective of achieving placement of the Hotel in international and domestic travel agent programs.

6 The Applicant says that sales and marketing functions were central to her job and her primary focus was on activities designed to increase room activity and revenue for all areas of the Hotel by securing new business and maintaining existing clients. In particular, the Applicant says her role required her to be proactive and there were no activities other than sales and marketing activities which allowed her to achieve her key responsibilities. It is common ground that the express terms and conditions of the Applicant's employment were set out in a letter of appointment and a document titled "Employment Conditions and Entitlements". These documents state:

"Dear Gwenda

LETTER OF APPOINTMENT

On behalf of the Hotel Owner, *Albany Esplanade Pty Limited* ("AEPL"), congratulations on your appointment in the position as Sales Manager for the Esplanade Hotel, Albany based at Accor Asia Pacific Corporation ("AAPC") Regional Sales Office, Perth WA. AAPC is the Hotel Manager.

As you know, this appointment is made on the basis that there is no continuity of service and no leave credits will be transferred. This in view of the fact that you will cease to be an employee of Raffles Perth Pty Limited ("Raffles") and become an employee of AEPL. AAPC is Hotel Manager for these owners and we have not been your employer. All leave and any other entitlements due to you arising from your employment by Raffles at Mercure Hotel Perth will be paid out on your last day at Mercure Hotel Perth.

This letter is a brief summary of the main employment conditions and entitlements to apply when you commence and should be read in conjunction with the provisions of the *Minimum Conditions of Employment Act 1993* (WA). It is confidential and should only be discussed with the signatories.

Your appointment is subject to using your private motor vehicle for business purposes and you are responsible for having adequate cover for motor vehicle insurance and motor vehicle registration and third party personal injury insurance under the *Motor Vehicle (Third Party Insurance) Act 1943* (WA).

If you seek any clarification to this arrangement please contact Graeme Donaldson at AAPC, Perth Office by telephone (09) 321 2311 or by facsimile (09) 481 5797.

For the record, to signify we agree on the terms set out in this letter (turn over for main conditions and entitlements), please sign (front and back) and return the duplicate copy to the Human Resources Department, AAPC, Perth Office at your earliest convenience, and in any event by 26 August 1996 and retain the original for your personal records.

Gwenda, the position should provide challenges for you and we look forward to mutually rewarding times ahead.

Yours sincerely on behalf of *Albany Esplanade Pty Limited*

Ian Simmons

Regional Sales & Marketing Manager – WA/ NT

Accor Asia Pacific

Graeme Donaldson

Regional Human Resources Manager – WA/NT

Accor Asia Pacific

Signed Gwenda Chipp"

(*Exhibit 2 Annexure 1*)

"EMPLOYMENT CONDITIONS AND ENTITLEMENTS

POSITION: Sales Manager – The Esplanade Hotel, Albany, WA.

LOCATION: AAPC Regional Sales Office, Perth

COMMENCEMENT DATE: 1 September, 1996

PROBATION: Appointment is subject to a probation term of up to three months from the Commencement Date. Provided overall performance during probation is evaluated as satisfactory appointment will be confirmed in writing. The extension of the probation term is at the discretion of AEPL based on performance evaluation.

REPORT TO: Position reports directly to AAPC Regional Sales & Marketing Manager – WA/NT; and works in consultation with the Hotel General Manager.

MAIN RESPONSIBILITES: Position duties are agreed to be according to the attached Position Description. Provided statements included in this description are intended to reflect, in general, the duties and responsibilities of the Position and are not to be interpreted as being all inclusive.

HOURS AND DAYS OF WORK are agreed to be as required by the fluctuating demands of the Position.

SALARY is $32,500 gross per annum and is paid fortnightly into your bank account. Your Position is paid a salary and there is no requirement to pay any overtime and any penalty rates in addition to your salary. Performance based salary review is conducted annually and your salary may be adjusted at the discretion of AEPL in January of each year worked.

Motor Vehicle Allowance to assist with vehicle operating expenses incurred on business within the prescribed Perth Metropolitan Area, is $5,000 gross per annum paid fortnightly, on a pro rata basis, into your bank account.

AEPL, at its sole discretion, may arrange and shall pay for any business travel outside the prescribed Perth Metropolitan Area. Provided if required to use your private vehicle for such travel, an additional Motor Vehicle Allowance is paid at the rate of 42 cents per kilometre, subject to you submitting a travel claim.

BENEFITS: Complimentary car park in close proximity to the Location while on duty

LEAVE FOR ILLNESS OR INJURY: Entitlement up to 76 hours during each year worked, accruing pro rata on a weekly basis, accumulating.

ANNUAL LEAVE: Entitlement up to 152 hours during each year worked, excluding holiday loading, accruing pro rata on a weekly basis.

SUPERANNUATION: Six percent statutory superannuation contribution by AEPL under the *Superannuation Guarantee (Administration) Act 1992* (Cth); subject to legislative change.

CONFIDENTIALITY: Except in carrying out your duties for AEPL, you must keep confidential and must not either during the course of your employment or following termination of your employment directly or indirectly disclose, publish or use for your own benefit or for the benefit of others either:

- any of AEPL's or AAPC's information which you acquire knowledge of during your employment with AEPL without first having obtained AEPL's and AAPC's written consent to such disclosure; or
- any information which has been disclosed to AEPL or AAPC by others under an agreement which requires AEPL or AAPC to keep such information confidential.

These confidentiality requirements do not apply to information that has become public knowledge without fault on your part.

TERMINATION OF EMPLOYMENT: During Probation 2 weeks notice and after Probation 4 weeks notice in writing or compensation instead of notice by either party, and should be read in conjunction with the *Industrial Relations Act 1988* (Cth).

Any outstanding debts on your employee ledger account are to be deducted by AEPL from any termination payment and this letter is sufficient authorisation by you for any such deductions.

I have read and agree with the terms set out in this letter and accept the offer of employment therein on that basis.

Signed Gwenda Chipp Date: *19/8/96"*

(*Exhibit 2 Annexure 2*)

7 It is common ground that the Applicant's duties were set out in a position description statement which had been prepared by AAPC. This document provides as follows:

"POSITION DESCRIPTION

SALES MANAGER

MERCURE GRAND HOTEL ESPLANADE ALBANY

Overview:

Responsible for achieving revenue objectives and room night production from all market segments.

Responsible for the preparation of the Sales & Marketing Plan, the Activity Plan and the co-ordination of the activities associated with these plans.

Assist property management in achieving budgeted objectives.

Reporting to:

Directly responsible to the Regional Manager Sales & Marketing WA/NT.

Liaise with, report to and inform the Hotel General Manger on progress and performance of a Sales & Marketing nature.

Responsibilities:

Implement and maintain the Team Accor Platform and the ongoing development of the Platform to reflect the appropriate mix of accounts to achieve the desired measurable results.

Enhance the relationship of the Company's accounts under your management by undertaking brickwalling activities.

Monthly overview of the Sales & Marketing plan with Regional Manager Sales & Marketing, Hotel General Management and Owners on an as required basis.

Sales calls upon The Esplanade Hotel accounts as agreed with the Regional Manager Sales & Marketing.

Provide reports of Platform activities to a predetermined time schedule.

Represent the Hotel as required at business and associated events/functions.

Participate in the development of the property business plan.

Preparation of advertising and promotional activities including all media outlets, shopping centre displays and trade shows, etc.

Implement direct mail campaigns as appropriate for accommodation and food & beverage in the primary markets of Perth and Albany.

Maintain the direct mail database in association with the regional sales office.

Identify and develop products of relevance to the different market segments such as weekend packages, corporate specials, etc.

Undertake public relations activities in Perth and Albany to maximise the exposure and awareness of the hotel.

Close liaison in association with Account Manager Tours & Travel with selected (preferred) travel agency principals who sell clients to Albany and to organisations requiring accommodation of a style offered at The Esplanade, Albany.

Regular visits to the hotel on a basis of no fewer than 2 per month of a duration of no less than 1 night.

Conduct yourself in a professional manner at all times.

Other duties as required."

(*Exhibit 2 Annexure 3*)

8 After Mr Wee's company purchased the Hotel the Applicant attended a meeting with Mr Wee and his wife, Valerie Wee, on 12 November 1999 and other directors. This was the first time that she met Mr and Mrs Wee. Mr and Mrs Wee are residents of Singapore. During that meeting she was asked for recommendations and she was told to prepare for a trip to Singapore to promote the Hotel and meet with the remainder of the Earth Essence International Ltd team.

9 From 1999 to 2005 the Applicant made approximately nine trips to Singapore. When she visited Singapore she usually met with Mr and Mrs Wee and other senior employees to discuss the performance of the Hotel. The Applicant had a good relationship with Mr and Mrs Wee during this period. She was often asked for her input as to possible future opportunities and development of the Hotel and to explain various aspects of the Hotel's operations.

10 The Applicant's work required that she attend trade and consumer events held interstate, intrastate and internationally. The Applicant attended consumer travel fairs NATAS in Singapore and MATTA in Malaysia/Penang twice yearly. The Applicant says that the travel fairs were a key aspect of her sales and marketing functions and of considerable importance to the Hotel revenue as they provided access to the international market, especially within the Asia region. In particular, the fairs provided the opportunity to promote the Hotel to approximately 70,000 to 85,000 people each year. The Applicant says that her attendance at the fairs was reflected in increased bookings from inbound travel agents, contact made directly by email or consumers presenting her business card when checking into the Hotel.

11 The Applicant says that when Mr Wee's company acquired the Hotel she was instructed by Mr Wee and Mr Govidran, who was at that time the Manager of the Hotel, to focus only on carrying out sales and marketing activities. The Applicant was

responsible for all marketing promotions, advertising and public relations, with the exception of the editorial of the local Albany Advertiser which was handled by the General Manager. She undertook sales visits to Albany where she visited potential and current clients. She also attended public relations events and liaised with staff of the Hotel for the purpose of updating promotional activities. In addition, the Applicant negotiated coach company contracts to ensure the Hotel was the preferred supplier of rooms and outlet for large groups and she dealt with Western Australian inbound travel agencies who specialised in international visitors to source clientele and negotiated with them to use the Hotel when their clients visited Albany. The Applicant was also responsible for the preparation and implementation for the annual sales and marketing plan and the annual room revenue budget. She says her goal each year was to exceed her results for the previous year and that her passion for the Hotel and the staff never waned. She enjoyed a wide and varied amount of responsibilities and was very proud to represent the Hotel. Until 2005, the Applicant had a very open relationship with Mr and Mrs Wee.

12 The Applicant also says that she was responsible for human resources issues and that she conducted mediation and dispute resolution of staff grievances. In particular, on occasions she acted as their advocate. This aspect of the Applicant's evidence was strongly challenged by the Respondent. When cross-examined about this the Applicant said that although this aspect of her work was never set out in writing she represented the General Manager when he was away and she interviewed and trained staff. When staff had grievances with management she acted as a mediator between them and the General Manager. The Applicant also said that from time to time during the 10 years she was employed, she consulted the Miscellaneous Workers' Union ("the Union") about changes in regulations. She said, however, that she did not contact the Union on behalf of employees of the Hotel.

13 The Applicant's relationship with the owners of the Hotel changed after she received a telephone call on 12 October 2005 from Mr George Mathoi who was at that time the General Manager of the Hotel. Mr Mathoi told the Applicant that he had some interesting emails from Mr Wee and he would fax some things to her that she needed to answer. The facsimile contained a copy of an email Mr Mathoi had received from Mr Wee on 12 October 2005 and was the first of many emails in which Mr Wee requested information about sales and marketing and an analysis of how the marketing activities of the Applicant translated into revenue. In the email received on 12 October 2005, Mr Wee requested the following information:

> "For marketing - from the yearly marketing plans, how are all those suggestions and action translated into the bottom line
>
> How do you track which action is working and which actions are not?
>
> There must be some benchmarking before we can make any meaningful conclusions
>
> Eg when the plan is to maintain or increase market share for the hotel – how do we know whether these goals are met or not quarterly, half yearly or yearly
>
> Secondly there are so many suggestions mentioned, which are the top 5 or 10 action plans that would bring the most result lie improve the bottom line most significantly
>
> Please submit the results of the various marketing efforts (actual results from various advertisement [sic], travel fairs, acquiring new corporate accounts, etc) over last three years."

(*Exhibit 2 Annexure 6*)

14 After receiving a copy of this email, the Applicant telephoned Mr Mathoi and told him it would take considerable time to collate the information as she did not have the technology to access the data Mr Wee required. She commenced working on the request immediately and contacted the Hotel's front office to source figures to allow her to answer Mr Wee in more detail. However, the information required was not available. The Applicant says that she answered Mr Wee's questions the best she could with the information she had available and sent an email to Mr Mathoi containing that information. Mr Mathoi telephoned her after receiving her email and said words to the effect to her, "Put something together, anything that will keep him (Mr Wee) quiet". The Applicant began preparing a report headed, "Understanding Sales and Marketing Process and Activities" and sent a copy of that document to Mr Mathoi by email on the same day she received Mr Wee's email. On that day she sent an email to Mr Mathoi requesting the total revenue figure for the past three days. On the following day, she sent an updated copy of the document "Understanding Sales and Marketing Processes and Activities". She then spent the next two to three weeks trying to source the information which would allow her to answer Mr Wee's questions in addition to her regular daily duties of negotiating sales and marketing contracts, answering media calls and servicing corporate clients. However, she had difficulty obtaining information as much was held in the archives and at the Hotel in Albany and not at her office in Perth.

15 When cross-examined it was put to the Applicant that she could have visited Albany to obtain the information. She agreed that she could have done so, but said that Mr Mathoi wanted her to work from Perth. She did, however, canvas the possibility of going to Albany but that did not eventuate. The Applicant agreed when cross-examined that the request for information by Mr Wee was reasonable; however, she said that the information required was "huge". It was also put to her that she had run her "own show" and that when the information was required to analyse her work she took umbrage to doing so. She disagreed with that proposition but agreed that she said in an email to Mr Mathoi on 12 October 2005 that she really felt that the Respondents were gearing up to make some big changes. (*Exhibit 2 Annexure 7*) It was also put to the Applicant in cross-examination that she thought the request for information was a waste of time. She disagreed and said that she thought the request was reasonable but it was impossible to obtain all of the information. However, it is apparent from the Applicant's evidence and the documents passed between her and Mr Mathoi in respect to this issue that she did not say that it was impossible to obtain the information. She, however, testified that she approached Mr Mathoi and told him that the information was not available. She also told him she did not have the resources to keep the information requested, nor was it their practice to do so.

16 On 2 November 2005, Mr Mathoi advised the Applicant that Mr Wee was seeking further information when he facsimiled part of an email to her from Mr Wee which stated as follows:

> "E) Sales and Marketing
>
> I am not clear about the actual results of the marketing dollar we have spent over the years.
>
> 1) List of new clients and breakdown of their contribution to hotel revenue over the last 3 years
>
> 2) Results of overseas marketing efforts/trade shows over the last 3 years
>
> (i) list of new contracts and agencies in Singapore/Malaysia/Europe/Australia secured. Details of terms please.
>
> (ii) list of distribution networks and their contribution to hotel revenue
>
> 3) hotel guest profile over last 3 years – detail breakdown by various different travel agents, coach companies, corporate clients
>
> 4) list of new clients month by month contacted and their contribution to hotel revenue ie I want to know the actual results of sales activity
>
> 5) Future sales and marketing reports must reflect the various efforts and the actual results lumping figures into few categories is not very helpful in this instance Also provide YTD figures for last year and present year for every category of rooms sold/market segment
>
> F) Cost Reduction
>
> I would like you to submit a proposal to reduce overall costs by 10% by the end of the month for review and approval."

(*Exhibit 2 Annexure 11*)

17 On 5 November 2005, the Applicant sent Mr Mathoi an email that was headed "Subject: BK's STUFF":

> "Morning George, … I am loving this work from BK amazing looking back through files and reports! Lucky I have little else to do, like you Tony, Ken.
>
> I had a thought about all this, do you think that perhaps they are looking to buy another Hotel but want to make sure they have a full understanding of workings and how to ask for reports and kind of info they need? Perhaps it is one that doesn't have good management of figures? Wish full [sic] thinking I guess, I just think that the request for job descriptions is strange."

(*Exhibit 2 Annexure 12*)

18 It was put to the Applicant that her comments were sarcastic. She denied that to be the case but said that the request made it difficult for her to fulfil her other duties.

19 On 9 November 2005, the Applicant sent an email to the Hotel's accountant, Tony Gaspari, seeking information about the trade shows that she had attended in the past three years as she needed the cost of those for the information wanted by Mr Wee. In an email to dated 9 November 2005 to Mr Gaspari, the Applicant stated, "If it is a time consuming thing for you please do say, I think he is being very unreasonable to come at this for the past three years." Mr Gaspari responded to the Applicant's email on the same day by email and informed the Applicant that he could provide the information either that day or on the following day. On the next day, 10 November 2005, the Applicant sent Mr Gaspari an email stating, "I am in no hurry I think they are being unrealistic and showing no consideration for the other daily tasks we all have. There [sic] 'projects' can wait." When cross-examined it was put to the Applicant that her attitude was that she thought that Mr Wee was being unrealistic and unreasonable. The Applicant again denied that to be the case. She said that Mr Wee was not wasting her time but hindered her in carrying out her other work by having to piece together the information required.

20 On 10 November 2005, the Applicant sent an email to Mr Mathoi attaching a report headed, "Sales & Marketing Results by Client Profile". In her email she informed Mr Mathoi that she would send the actual figures and revenue when she obtained it from Mr Ken Styles, the Hotel's Reservations Officer. She also indicated it was not an easy task and it involved "Fidelio" input and Mr Gaspari's help. Fidelio was the Hotel's computer booking system.

21 On 21 November 2005, the Applicant received an email from Ms Juliet See, Mr Wee's Senior Administration Executive in Singapore. Ms See requested that the Applicant provide a set of marketing materials that she used when marketing the Hotel as they needed them to show a few prospective clients. The Applicant testified that by that time she was angry, unhappy and insulted that she was required to prove all her sales activities when the Hotel had held its occupancy rate over the past three years in a particularly difficult trading market. In her email in reply to Ms See's email she stated:

> "Hi Juliet,
>
> You called me at 6.35pm last night, when I am not working I don't have my phone with me. This is a very interesting question, you see we do not have the things most other Hotels have such as:
>
> More than one person to represent , market ands [sic] sell the Hotel.
>
> Modern ways to do presentations like power point.

> Aside from the simple brochure which I redesigned this year so it could be a more efficient selling tool
>
> All other material is in my head!
>
> I guess this is why I am some what insulted at the "prove this prove that" in regards to sales activities
>
> If I didn't know how to do my job and again I do it on my own the Hotel would not have held occupancy and rate over the last 3 years which are on record in the Australian Tourism Commission as the hardest years in Tourism in this decade.
>
> So in a nut shell Juliet I have nothing to send you except a Hotel brochure and ME!!
>
> Have a great day. I am going to South Australia tomorrow morning to present to 200 UK Travel Agents.
>
> I will have my laptop with me so if you need anything please do email me."

(*Exhibit 2 Annexure 21*)

22 When cross-examined the Applicant agreed that she took the matter personally but she did not regard the request for information by Mr Wee as being a personal attack on anyone and she denied that her email to Ms See was rude. When it was put to her that she was angry about being required to produce information she said she was frustrated about not being able to get the information. When asked why she did not tell them that, she stated that she had had those discussions with Mr Mathoi but she agreed she did not attempt to discuss the matter with Mr Wee.

23 On the same day the Applicant sent Ms See the email she also sent Ms See a copy of the Sales and Marketing Report which Mr Wee asked to be prepared. On that day the Applicant flew from Perth to Adelaide to attend an international trade forum that was attended by travel agents from the United Kingdom, Ireland and the Netherlands. Whilst she was in Adelaide she continued to receive emails from Mr Mathoi about information sought by Mr Wee. One of the emails forwarded to the Applicant contained an email from Mr Wee dated 23 November 2005 in which Mr Wee stated, "What other marketing dollars or activities have we committed? If there is any, give me all the details. Otherwise, all other such activities are to be suspended with immediate effect (eg advertising, trade fairs, etc)" (*Exhibit 2 Annexure 24*).

24 Whilst the Applicant was in Adelaide she spent hours on the telephone with Jurien Broughton, who was the Hotel Functions Coordinator, assisting him with a creation of spreadsheets and data in order to provide additional information in response to further requests from Mr Wee.

25 Prior to the Applicant going to Adelaide, Mr Wee sent an email to Mr Mathoi in which Mr Wee instructed Mr Mathoi to "stop all sales and marketing activities (domestic and international) for the time being with immediate effect." The email then went on to state, "I am still waiting for all the information and documents which I have requested over the last few weeks. I want to review all these things first to determine how effective all the sales and marketing efforts have been (translating into revenues and bottom line). And whether sales and marketing requires more support or whether we need to make any changes in strategy and marketing plans." (*Exhibit 2 Annexure 20*). Mr Wee in his email then went on to ask a number of other questions in relation to marketing. The Applicant did not see a copy of this email until some time in December 2005. On 22 November 2005, Mr Mathoi sent an email to Mr Wee requesting that the Applicant be allowed to visit the major coach operators in Melbourne and attend the trade show in Adelaide. In an email on 22 November 2005, Mr Wee indicated that he would not grant permission and said, "If Gwenda were not able to complete the requested task professionally, why didn't she come back to us at all within the last few weeks?"

26 On 25 November 2005, whilst the Applicant was still at the forum in Adelaide she received an urgent message to call Mr Mathoi. She telephoned him and he told her, "All sales and marketing activities are to stop immediately" and he told her that this was a directive received from Mr Wee. The Applicant asked Mr Mathoi what was happening and why was there an instruction to stop all sales and marketing and what could they hope to achieve from that. She also asked whether she was expected to leave the forum and travel back to Perth. Mr Mathoi instructed her to continue at the forum and to continue as planned. She asked Mr Mathoi what was she to do on her return and he told her there was a lot of information still required to be provided to Mr Wee and that they would have to wait and see what transpired. Throughout her time interstate she was required to source information and respond urgently to requests from Mr Wee via Mr Mathoi. She could not, however, access much of the information requested. Notwithstanding this difficulty, whilst away, the Applicant prepared a written list of Mr Wee's questions together with her answers (*Exhibit 2 Annexure 29*). It was put to the Applicant when cross-examined that this document was inadequate and an unsatisfactory response. The Applicant denied that to be the case. She testified that the document was a document addressed to Mr Mathoi and that Mr Gaspari had access to the data required and it was expedient for the Hotel to prepare the information. In particular, it was appropriate to state that some of the answers to the questions were contained in the monthly reports which Mr Wee was sent each month.

27 The Applicant returned to work in Perth on 30 November 2005. By this time she had become exasperated as she felt there were unwarranted attacks on the quality of her work and the repeated requests for information and documents to be provided within unreasonable time periods. She sent an email to Mr Mathoi on that day stating that she wanted to know why Mr Wee was questioning her work and if there was a problem with her work she wanted to know. She asked Mr Mathoi to ask Mr Wee, "Would you please ask him what the issue is with my work or may I ask?" She says that she continued to source various details requested by Mr Wee which was time consuming as it was in hard copy. She had to review archived information and collate that information in circumstances where she did not have the technology or equipment to do so. She said her daily routine consisted of informing clients and potential clients that she was unable to provide them with rates, contracts and other information and turning down advertising opportunities. She said that her constant refrain to enquiries was,

"No, sorry we will not participating." When she asked Mr Mathoi about important matters to do with the provision of rates he reminded her that the directive was that all sales and marketing activities were to stop.

28 During this period of time the Applicant was required to facsimile and courier reports and contracts to Ms See in Singapore and she continued to receive requests for more information and documents. On 6 December 2005, Mr Mathoi forwarded to the Applicant an email from Mr Wee which he requested further information in relation to sales and marketing and in that email Mr Wee stated, "Stop ALL purchases of the Bottle-Shop with immediate effect until further notice." (*Exhibit 2 Annexure 33*). On 8 December 2005, the Applicant sent an email to Ms See after she had advised Ms See that she was sending some documents to her, in which she said to Ms See,

> "I love all this doubling up of work. Is it possible to have an explanation for the signature when a document has been emailed clearly showing from whom it came?
>
> Also for things that are past? I like to understand process and purpose of actions."

(*Exhibit 2 Annexure 35*)

29 The Applicant received no response to that email. When cross-examined it was put to the Applicant that the contents of her email were sarcastic. She disagreed and she said that she wanted to understand the process and the purpose of the actions. During this period the Applicant continued to provide information containing an analysis of sales and marketing activities to Mr Mathoi. On 8 December 2005, in an email to Mr Mathoi about market segments the Applicant stated that the information they had in the system was incorrect and "There is a serious need for training of F/O staff (front office staff) and the use of the Fidelio. You mentioned my being there for a couple of weeks in the new year, for this very thing. I think that the very positive thing out of all this exercise is the better and more accurate tracking of our market segments." (*Exhibit 2 Annexure 37*). When cross-examined it was put to the Applicant that she was suggesting at that point in time that they expand the sales and marketing team and she agreed.

30 On 12 December 2005, Mr Mathoi conducted the Applicant's performance review. Mr Mathoi commended the Applicant on her performance in all areas and rated her performance as good. As a result she received a salary increase of 7.3 per cent which increased her annual base salary to $44,000 per annum.

31 On 13 December 2005, the Applicant emailed Mr Wee as she was concerned and frustrated about his directive to stop all sales and marketing activities. The email was sent to Mr Wee and his wife. In that email the Applicant stated:

> "Dear BK, Valerie,
>
> Coke Cola has been produced for more than 60 years, NEVER have they stopped advertising. Watsons Singapore has been in business many years they continue to advertise. Only a person who is determined to cause a business to crash and close would stop sales & promotional activities and also stop
>
> The stocking of a department such as a bottle shop.
>
> Clearly there is no understanding of Christmas holidays in Australia a time when sales at the bottleshop are at their optimum.
>
> And a most competitive time for room bookings.
>
> I had been so pleased to work with you and proud to say I worked for the Esplanade Albany, a Hotel that has had excellent owners for some years.
>
> However the recent weeks leave a very different perspective. One which is very sad to see the Hotel an icon in WA being turned into a poorly run and cheapened place with service being cut to nothing. Even Joondalup Resort has not seen such events!
>
> At some point I hope the hotel is able to continue as an icon in the state and that there be reason for these events.
>
> Regards
>
> Gwenda"

(*Exhibit 2 Annexure 40*)

32 When it was put to her in cross-examination that she did not cooperate with the review and that was the reason why the stop on sales and marketing continued, she disagreed. When asked why at that point did she escalate her attack on Mr Wee and his wife, the Applicant said she respected them and did not intend to attack them. It was then put to her that it was an aggressive email. She disagreed and said that it was strong and to the point. The Applicant received no response to the email.

33 The Applicant says that as time went by the morale of the staff dropped dramatically and the strain on Mr Mathoi became more apparent. Questions were being asked by local Albany people and some of the corporate clients which was very distressing. These included statements that "The hotel must be going under" and "The hotel must be going bankrupt" and "Is the hotel going into liquidation" and "Why have the services deteriorated" and "If services keep going the way they are, we won't be coming back". The Applicant felt deeply aggrieved and angered at the apparent disinterest by Mr Wee and the impact of the decisions and changes that were made by Mr Wee. On 14 December 2005, the Applicant received a facsimile from Mr Mathoi containing a document in which Mr Wee had taken issue with her performance review. In the email, Mr Wee stated that he required Mr Mathoi and the Applicant to review the entire sales and marketing plan. In particular, Mr Wee required them to break out all the key revenue generators/sectors and focus on the significant segments with a focused and targeted plan to achieve specific targets which would eventually translate into dollars and cents and not percentages. Mr Wee said in his email,

"All the sales and marketing goals must have a positive impact of the P&L (profit and loss). The sales and marketing plans must show this link clearly." (*Exhibit 2 Annexure 43*). When cross-examined about this direction the Applicant said that Mr Wee required that they do things differently. She said they had no time to carry out the direction before she went on leave as they were too busy responding to endless requests from Singapore. She added that no timeframe was set for this task and she agreed it was something that would have to be done in the New Year. On 16 December 2005, Mr Wee sent an email to Mr Mathoi requiring that he provide two referees for a number of staff including himself and the Applicant. This instruction caused the Applicant great concern. She felt humiliated by this request as she had been with the Hotel since 1996 and it was debilitating to have to prepare a resume and provide two referees. She raised this issue with Ms See and sent her an email on 20 December 2005. In her email the Applicant stated:

"Hi Juliet,

Sorry to contact you on this issue however I note BK has not responded to my earlier emails

And as this matter is of gross importance you are the only available option.

In my role as human resource person I must inform you that under Australian employment laws

Any request for referees are to be made personally to the employee and there must be an explanation for the request this is part of the Australian privacy act

And accordingly employees have the right to be made aware of there [sic] employment circumstances.

On behalf of staff who have approached me on these matters I thank you for your anticipated response

Best regards

Gwenda

(*Exhibit 2 Annexure 46*)

34 When questioned about this email she said she received advice about the Privacy Act from the Union.

35 The Applicant went on annual leave between 23 December 2005 and 9 February 2006. It was put to her that by the time she went on leave she had not provided all of the information requested. She agreed but said she could not do so and she had answered all requests for information to the best of her ability. She testified that during her annual leave she received many telephone calls from members of the staff expressing their concern. She also received numerous telephone calls from Mr Mathoi requesting that she provide further information as a result of further requests from Mr Wee and she was also required to attend the office on many occasions to find information. She said that some of the matters raised by the staff included the departure of staff members, no purchasing for stock in the bars and bottle shop in preparation for the busiest time of the year. She said that there was much speculation among staff members and rumours in Albany began to spread that the Hotel was going broke and this was very distressing. During this period she says she received telephone calls from employees of the Hotel in which they conveyed their concerns to her. In particular, during January 2006, they complained to her about cuts to expenditure and that Mr Leo Tan, the new acting General Manager of the Hotel, was rarely on site.

36 On 11 January 2006, the Hotel announced that Mr Mathoi had resigned. A memorandum was sent to all staff in which the staff were informed of Mr Mathoi's resignation and that Mr Tan would be acting General Manager and Chief Financial Officer, effective immediately. The Applicant was devastated by Mr Mathoi's resignation. She had worked as his offsider at the Hotel for five and a half years and suddenly felt very vulnerable. As she had not received any responses to her emails to Mr Wee, she decided to write to him directly by email that day to vent her hurt, concerns and anger. She testified that she was very emotional when she wrote the email and expressed her concerns in a direct and forthright manner. In the email to Mr Wee the Applicant stated:

"Dear BK,

For more than 6 years I have held the opinion that you were an excellent owner of the Esplanade. One who had made sure the property was maintained and developed.

While clearly having no understanding of Hotels or the Tourism industry you showed diligence and interest to learn.

It has been my pleasure to be the acting GM when George has been on leave as I have been so very proud of the property and to state with enthusiasm the "great" owners we have.

However your recent decisions and actions show deliberate intent to destroy not only the property but the livelihoods of the local staff and their families.

To deny stock to be provided, to cease marketing and sales activities and force the resignation of senior staff are clear breaches of both the responsibilities of a company Director and breach of the business laws which govern business in Australia.

What have the staff and our clients done to deserve this?

Why cant [sic] you inform us what you want? Or is there no goals just disgraceful destruction of one of the best icons in WA?

Is there any reason why the breach's [sic] should not be provided to the relevant authorities and media?

It is very apparent that the supposed "Crystal therapy" you have trialled has been of no benefit as the power of the universe is not for deliberate destruction

Of people and livelihoods.

There is certainly no signs of "harmony, balance and wellness" demonstrated from you in these past 8 weeks.

By the way the word "great" is used in our language when a person has excellent attributes and shows results that are above average!

Why don't you just sell the property instead of causing all this disgraceful downturn in business and the upheaval to staff?

Sincerely

Gwenda

(*Exhibit 2 Annexure 48*)

37 When cross-examined about this email she was asked by what she meant by clear breaches of the responsibilities of her company director. She said that she was provided with information from a lawyer at Australian Securities & Investments Commission ("ASIC") that companies must provide information about their activities. She said that she told the lawyer where she was from but she did not make a complaint to ASIC, as she was simply sourcing information. When asked what she meant by forced the resignation of senior staff, the Applicant said that she was referring to senior staff positions and the situations that had arisen. She disagreed the email contained a threat "to go to the media". She said that it was simply a question to Mr Wee. She testified her intention in sending the email was to obtain a response from Mr Wee. She disagreed that the contents of the email were offensive but said the email was very strident and that she did not intend to offend. She said that if a response meant discipline that she would have expected to have been disciplined for sending the email but no discipline emerged. She then testified that because she wrote the document she did not expect to be disciplined and she agreed that she did not show respect to her employer in this email.

38 In the notification sent to all staff on 11 January 2006, from Mr Wee and Mr Kok, who was also a director of the Respondent, announcing the appointment of Mr Tan as acting General Manager, they stated:

"With the full support of all the staff and the new team, the Management intends to bring the Hotel to its fullest potential. Our goal is to make the Esplanade Hotel 'The Place' and 'The Destination' in Albany through maximising the potential of the Hotel's strategic location. There are plans in place for the growth of our international business in addition to the strong domestic business."

(*Exhibit 2 Annexure 47*)

39 When the Applicant read this document she became concerned about the comment "the new team", so she sent an email to Mr Wee on 13 January 2006, in which she stated she had been informed by Mr Mathoi that they had appointed an acting General Manager and there was a new team in place. She then asked whether she could be informed as to her position. She received a response to this email from Ms See on the same day in which Ms See stated, "I refer to your email to the Chairman. The acting GM will notify you in due course."

40 Mr Tan had no experience as a hotel manager. This also concerned the Applicant, so she sent Mr Wee a further email on 17 January 2006. In that email she stated:

"Dear BK,

Thankyou [sic] for the response via Juliet.

Your statement that the new management will 'make the Esplanade the place to be ……. and the destination in Albany'

Is already achieved it is known as the 'place' in the industry and the world market.

This is not something achieved over night nor is the hold on market segments.

Since your directive of 'NO sales & marketing activities' there has been no rates issued for 06/07, there are no places left at any trade events or consumer shows as applications are all closed. There are no coach company contracts in place.

A [sic] such the Hotel will already be loosing [sic] its 'place' and it will take more than a year to regain the loss of room nights and business.

I am sorely disappointed given the meetings I have had with you and Valerie.

There is no – one [sic] on the staff or in your new team who has the market intelligence and knowledge of the clientele, the industry or the region as I.

I look forward to hearing from the 'acting' GM – especially as he has no Hotel knowledge or marketing expertise for the Tourism industry.

Ms Gwenda Smith"

(*Exhibit 2 Annexure 51*)

41 As the Applicant received no response from Mr Wee, she sent Mr Wee another email on 26 January 2006. The email was titled "Hotel with no leader". In the email she stated:

"BK,

How do you have a profitable business and growing business when the supposed acting GM spends more time running back to Perth than managing the Hotel.

This is a sure fire way of failure and disaster.

So much for taking the Hotel to new heights!!

Ms Gwenda Smith"

(*Exhibit 2 Annexure 52*)

42 None of the Applicant's emails to Mr Wee were responded to. Consequently, the Applicant felt very frustrated that her concerns were not addressed, which in turn exacerbated her concerns. She became very distressed and sent another email to Mr Wee on 5 February 2006, in which she aired her concerns again. In the email the Applicant sent to Mr Wee, she stated:

"Dear BK,

So far it is very apparent that the new 'acting' GM is incompetent in this position and clearly unsuited. Unless of course you are wanting the Hotel to be a dismal failure!?

A GM should not provide a mobile phone number to tell staff he is 'always accessible'. He should manage the property and be there. Unless there is dire need to be absent in which case there be a suitable person present in his absence.

Outsourcing accounts: You were insistent there be a 10% cost cut in all departments.

How can this be achieved when the accounts are to be 'outsourced'. By definition you are therefore paying outsiders for work that has been

Previously done thoroughly and correctly.

If this is a means to make a staff member resign then I warn you of the legal ramifications.

Purchasing officer / Accounts payable:

The Esplanade has always had a very good credit rating with the suppliers. This is changing rapidly with the present incompetency.

No purchasing officer means the supervisors have to source suppliers for their departments and I can assure you none know where to go.

So your costs are going to blow out not reduce. There is currently no control over the purchasing, how do you see this as effective and beneficial to your desired outcome?

It is the GM's responsibility to order supply's [sic] when here [sic] is no purchasing officer, however as this 'acting' GM has no idea of Hotel procedure this will not be possible. Perhaps he could outsource this and create more costs!!

Please note that this role is distinctly different and a totally separate role to accounts payroll and all of the taxation requirements including the monies earned

From the export grant.

Requestions [sic] of supplies: This is the most effective way to provide beverage to the outlets. However as we have lost so much market share in the community and the particular owner of the main outlets now has greater buying power

The costs of our beverage will also increase.

Requisitioning from our own bottleshop is the best and cheapest option for the property.

BK, if there is to be no improvement and the Hotel continues to decline I will have no option but to inform the International wholesale agents with whom I have gained trust and rapport and the certainty of a high standard of Hotel and service.

I will not have my professional integrity and respect in the industry ruined through sheer disgraceful decisions. It is not an easy process to gain placement in the European brochures and maintain position. These agents are very quick to dismiss a person when the product is not up to standard.

Gwenda"

(*Exhibit 2 Annexure 53*)

43 When asked in cross-examination about how was she in a position to say that Mr Tan was incompetent when she was on holidays and not at work, the Applicant said that she had daily telephone calls from staff members. In particular, a receptionist Mr Brendan Thomas telephoned her and she responded to his call by telephoning him. The Applicant said that the reason why she sent the email was because it had taken years to gain the trust and rapport of international wholesale agents who had come to expect a high standard of service from the Hotel and her primary purpose in writing the email was to plead with Mr Wee to take action to lift the ban on sales and marketing. When asked about contacting the international wholesale agents she said that she did not intend to do so but she was, however, obliged to inform them if the Hotel was not meeting all of their obligations. She said that the contract with the international wholesale agents demanded that the international wholesale agents must be informed of any changes in the star rating or changes in service. She said that if they did not do so "they" would be sued. When it was put to her that if she had informed the international wholesale agents that the Hotel was not up to scratch that would have caused damage to the Hotel, the Applicant denied that would occur.

44 The Applicant returned from annual leave on 10 February 2006. She telephoned Mr Tan to introduce herself and informed him of her return. When he answered the telephone he said, "Leo Tan", she introduced herself and he said to her, "Is there something I can do for you?" She says she was taken back by his response as she did not perceive those words to be warm or welcoming. She explained to Mr Tan that she had called to introduce herself and seek direction given the changes which had taken place prior to her going on annual leave. She then told him that she needed to know what she was to do and what he wanted her to do. In response he told her to arrange to visit Albany on Monday, 13 February 2006 until Wednesday, 15 February 2006. The Applicant was unable to obtain a flight for the Monday morning so she booked a flight for Monday evening. When she arrived at the Hotel, one of the receptionists, Ms Bronwyn Elsdon asked the Applicant to authorise a complimentary service for a disgruntled Hotel guest. Whilst at the reception desk Ms Elsdon asked the Applicant about an accommodation package for guests at a conference Mr Tan had asked her to create. The Applicant looked at what Ms Elsdon was working on and said to her, "Oh, so you're doing my job now." The Applicant says that she did not make that statement to Ms Elsdon in a sarcastic or accusatory manner.

45 On Tuesday, 14 February 2006, whilst she was having breakfast Mr Tan came to the Applicant's table and said they should meet in his office if she was available from 9:00 am to 11:00 am. At the beginning of the meeting the Applicant asked Mr Tan if she could record the meeting. She says she did so because she found Mr Tan very difficult to understand. Mr Tan agreed to the meeting being recorded and asked if he could have a copy to which she replied "absolutely". She agreed when cross-examined that the meeting was fairly quiet.

46 The transcript of the meeting was tended as Exhibit 2 Annexure 55. In the transcript it records that Mr Tan told the Applicant that he had run companies for a long time in Singapore but he had very limited experience in hotels. The Applicant told Mr Tan that she could not see how the Hotel could go forward with no sales and marketing activities and no distribution lines being used. She also told him that she was hoping to hear a positive view and where it was going and where she fitted. She then informed Mr Tan that she spoke to staff in her role as human resources and that she had carried out human resources work for the past eight years. Mr Tan pointed out to her that she was not the human resources person as he did not see it on the organisational chart. She said she was but it was not written down. When asked what she did she told him that she mediated, interviewed people, did inductions and trained front office staff. She also told Mr Tan that in 2005 she visited Albany on four occasions for a week or eight days at a time and in 2004 she came down more frequently. Mr Tan expressed some surprise that the Applicant carried out human resource work and asked for the dates that she was at the Hotel, what training was done, who was trained and what human resource work was done. They then had a discussion about her office in Joondalup and what equipment was provided in that office. Mr Tan then requested an updated CV (curriculum vitae). The Applicant told him he had one on file. Mr Tan then asked her if he could request it from her directly. The Applicant told him that the one on file was updated in October 2005. Mr Tan then said to her, "Then you cannot, will not provide CV." The Applicant replied, "No, not will not. Leo, just curious why you need another one that is exactly the same." Mr Tan asked her again for her CV and she agreed to provide it. Mr Tan then told the Applicant that although he had no hotel experience he had management experience and was good with people, had good statistical skills and was good with figures. He then asked the Applicant whether she had any questions of him personally regarding his ability or inability. The Applicant did not ask any questions. He then told her that he reported directly to the chairman and that there was a protocol for the organisation whereby through a line of management everyone in the Hotel reported to him and that she in sales and marketing was to report to him. He asked her if that was acceptable and she told him that was normal. The Applicant then told Mr Tan that she was concerned about the level of cost cutting on the level of service and standard of the property. They then had a discussion about a number of issues which related to cleanliness and standard of service at the Hotel. The Applicant told Mr Tan that the General Manager needed to be on hand. Mr Tan put it to the Applicant, "So the problem with me is that I am absent." The Applicant said that she did not say there was a problem with him. He asked her to comment on what she saw. They then had a discussion about the number of people who had recently resigned. Mr Tan then told the Applicant that he had learnt that aesthetics was important in running the Hotel. He said there are priorities. First he has to talk to her (the Applicant) which takes time, energy and mental stress that he has to understand her. When she questioned him about that statement he said, "I have to prepare to talk to her because I have not met her, she has not met me, you know maybe I should say not mental stress. It takes creative energy to talk to sales people because sale people are another level." (*Exhibit 2 Annexure 55* page 183). He told her cost cutting per se was not going to help. He then told her that there were a number of matters to discuss with her. He wanted information about the Hotel's main customers, he required some background assistance as to what had happened in the past before he could make a decision as to what they could do in the future. He asked her if that was acceptable. The Applicant told him that she had no hesitation in assisting him with that, however, that she needed to know the implications of the changes on her role and her future position. She then asked him to enlighten her about that and he told her he could not, that he would find out from her what she had done in the past, what she could do and what she was willing to do for them in the future. With this information he could decide one way or another how they executed some of these strategies. The Applicant asked whether she would be a part of that. She then told him that she did not see any point in giving her knowledge if she was not going to be a part of that. She told him she had put strategies in place before to attract clients and he told her that he needed to know what had happened in the past. He specifically asked her how had she been able to smooth occupancy during the winter months and she told him that it was by increasing the revenue each room could provide. Mr Tan then said to her that one of the most important indicators in hotel operations is the revenue each room provides. He asked her would she provide information for the past two or three years of how sales and marketing had contributed to revenue. The Applicant responded by saying that she found that an interesting question. She told him the statistics were in the worksheets and that he knew each month's revenue. They then had a further conversation and Mr Tan asked for all the names of companies and persons whom she had seen and when she had seen them. The Applicant told him that they were her clients and said, "So when I know what is happening with my job then I will be

happy to do that." Mr Tan questioned this by saying, "They are your clients so you will not provide them?" She told him, "No, not until what is happening with my job." Mr Tan then said to the Applicant, "You will not provide any information until you are certain of your present position." She responded by saying that she was more than happy to help the Hotel go ahead as she had spent ten years and put her heart and soul into the property with great pride. Mr Tan then told her that he had list of requests for information. The Applicant told him that she would not hand him all of her clients that she had worked for years to gain their business so he could say, "Thank you and now you can leave." Mr Tan then said that he wanted to find out about the hospitality in the Great Southern and South West area and he would email her about the statistical analysis in relation to the Hotel for the past three years so he could obtain a good idea of what had happened in Albany for the past five years including population and demographics.

47 The Applicant testified that during the meeting Mr Tan also made the comment, "There is too much deadwood we must be rid of." These words were not recorded in the transcript but were recorded in her notes of the meeting. She says that the tape did not cover the entire conversation that they had that day. She also says that he asked at some time during the meeting words to the effect of, "Was I familiar with the changes to the industrial relations laws." When asked why her notes of the meeting recorded matters which were not in the transcript she said that the tape had stopped and she took notes of the rest of the meeting by hand. She said on closing the meeting he reminded her that the directive on no sales and marketing activities was still in place and he instructed her to return to Perth that evening.

48 At the conclusion of the meeting Mr Tan handed the Applicant a memorandum which was addressed to her which stated that she was directed to refer all matters relating to the performance of her duties in the sales and marketing department to him directly and that this would enable him to carry out his duties in an efficient and professional manner. He also stated in the memorandum that should she have any issues or concerns, she was to inform him so he could take appropriate action where necessary. (*Exhibit 2 Annexure 54*)

49 The Applicant became very distressed about her conversation with Mr Tan. During her flight back to Perth she cried and when she returned to Perth she was still very distressed, She was also confused and felt sad. She said she found it futile and difficult to be in her office and unable to perform the work she was so passionate about. She says she was placed in a working environment which was very foreign and which caused her much anxiety as she was not accustomed to having no communication with the General Manager. She felt very isolated. The refusal by Mr Tan to provide her with direction and future placement coupled with his comments in relation to "deadwood" and "there is no place for the old team with the new team" distressed and alarmed her.

50 When cross-examined about the conversation she had with Mr Tan, the Applicant agreed that she was obliged to provide Mr Tan with sales and marketing information but she said that she would not do so unless she knew where her future lay with the Respondent. She said that she refused to provide the information because she had not been able to carry out her job and Mr Wee had told her that Mr Tan was going to tell her what her position was. When asked why she regarded the clients of the Respondent as her clients, she said that she was very protective of the work she had done and she referred to them as her clients, as technically they were hers and if she were to move they would move with her.

51 On 16 February 2006, Mr Tan sent the Applicant an urgent email requesting information about two trade fairs. On the following day the Applicant sent Mr Tan an email regarding the NATAS and MATTA fairs and said in the email that she was frustrated with the urgency and tone of Mr Tan's email as she had endeavoured to discuss the trade fairs and the Hotel's commitment to the fairs with him during their meeting on 14 February 2006.

52 On 17 February 2006, the Applicant sent Mr Tan an email in which she stated there was booth space commitment from both NATAS and MATTA fairs, that the assigned delegate was the only person who could attend the fairs and that the commitment to attend was given at the end of September for each year on invitation to preferred suppliers as explained during their meeting on 14 February 2006. She then sent him a copy of the prospectus by facsimile. On the same day she sent a further email to Mr Wee complaining about Mr Tan. In her email she stated:

> "BK,
>
> As you are aware I have met with Leo Tan.
>
> I commented to him as [sic] the state of the hotel and I reiterate to you.
>
> The standard of cleanliness has fallen dramatically.
>
> The staff find it a 'fun' environment' [sic] as there is no – one and anyone running the show!
>
> Both yourself and Leo are interested only in figures, neither of you have any comprehension as to 'HOW' the figures are achieved, how clients come to be at the Esplanade neither of you understand the integral workings of contracts, agents, corporate's [sic] etc. Sourcing business, applications for trade and consumer shows.
>
> Tourism events are not applied for today for tomorrow.
>
> Leo commented 'George should have known Gwenda was the catalyst for the occupancy' I am aware that George tried to explain to both of you that I am responsible for 70% of the occupancy of the hotel, this you both chose to ignore.
>
> So much for 'we are in the process of getting a better understanding of the hotel operations….'
>
> Regards
>
> Gwenda"

(*Exhibit 2 Annexure 59*)

53 On 18 February 2006, the Applicant sent a letter dated 17 February 2006 by email to Mr Tan and Mr Wee seeking clarification about her issues and her concerns. In her letter she requested an urgent meeting. In the letter she stated:

> "Dear Leo, BK,
>
> In reviewing matters discussed during the meeting held on February 14, 2006 between Leo and myself. I address the following issues and raise concerns to you respectively.
>
> In November 2005 BK Wee issued a directive that there was to be NO sales & marketing activities. During our meeting you confirmed this directive was to remain in place.
>
> I have raised my concerns as to the detrimental effects this action will have on the future success of the property. It is of much concern that the result will be that the hotel will not perform as well.
>
> I also asked for clarification as to my position as you have each placed me in a position where I am unable to perform my duties.
>
> At the meeting Leo stated he could not, would not inform me as to my position in present day or the future plans for the property.
>
> Leo, you stated to me "There is too much dead wood, which we need to be rid of for the benefit of the business"
>
> You have also stated; "There is no place for the old Esplanade team at the new Esplanade".
>
> I therefore believe that what you are doing is unlawful and that you are endeavouring to put me in a position to resign.
>
> Furthermore your comment, Leo, as to the timing of the changes to the industrial relations laws of Australia genuinely leads me to believe you are deliberately waiting for the laws to be in effect, thereby allowing you to instigate employment changes with out [sic] repercussion.
>
> I also believe you to be acting unlawfully in respect to this matter.
>
> Under the Common law of Australia there must be fidelity, by way of mutual trust and confidence. In this case there is neither which means you are by definition of the law breaching your duty.
>
> I request an urgent meeting with you for the purpose for discussing these matters.
>
> Unless I receive a satisfactory answer to my concerns and your actions by 5pm Tuesday February 21, 2006, I will commence further action immediately.
>
> Sincerely
>
> Gwenda Smith"

(*Exhibit 2 Annexure 60*)

54 By 22 February 2006, the Applicant had received a response from Mr Tan indicating he was considering matters raised in her letter but she had received no response from Mr Wee. Consequently, the Applicant sent a further letter to Mr Wee and Mr Tan by email. In her letter she stated as follows:

> "Dear BK, Leo
>
> As stated in my letter regarding the concerns as to my position with the Hotel both in present and future time, the 21st of February at 5pm was the time line for a 'satisfactory answer.'
>
> I advise that the response received from Leo Tan 'I am carefully considering the matters raised in your letter' (email [sic] February 21, 4.18pm)
>
> Is not a satisfactory answer as such further action is to commence.
>
> Yours sincerely
>
> Gwenda Smith

(*Exhibit 2 Annexure 62*)

55 When asked in cross-examination why she sent this letter and annexure 59 and 60 she said that she wanted to know where she stood and to get some reaction to what had happened over the past months. She said that she did not have a job to do anymore and her world was crushed. She says she had no clarity. She formed the view that the review of sales and marketing was not a pause but a stop.

56 On 23 February 2006, the Applicant sent Mr Wee another email attaching an email from Jackie Crooks from Tourism Western Australia who had organised a famil in the southwest for retail travel agents in which specific scores and comments were made which were favourable about the Hotel. The Applicant attached this email sent to Mr Wee stating this was feedback from the event that she attended in Adelaide as an example of how important these things are for the prosperity of the Hotel. As she had not had a satisfactory answer to her letter from either him or Mr Tan, she advised that she had commenced legal proceedings. She then concluded by saying, "I hope you are satisfied with what you have done and the ruination of the property. I will also be taking up the legal matters for other staff members." (*Exhibit 2 Annexure 63*)

57 On the following day the Applicant received a letter by email from Mr Tan. In the letter Mr Tan stated:

"Dear Ms Smith,

I refer to your letter of 17 February 2006, my email of 21 February 2006, your further letter of 22 February 2006 and your email of 22 February 2006.

I have carefully considered your letters and emails.

As an employee you owe a duty of good faith and fidelity to your employer. I am of the view that your conduct is in breach of that duty.

As discussed and agreed at the meeting on 14 February 2006 the owners directed that all sales, marketing and promotional expenditure cease from November 2005. Please explain immediately in writing why it is that you have disobeyed that lawful direction.

I hereby again direct you not to engage in sales and marketing activity, as per the directive issued by the Chairman in November 2005.

As an employee you are obliged to follow the lawful directives that are given to you by the employer. If you are not willing to do so this may have consequences for your employment.

Please confirm in writing immediately that you will comply with all Company directives including not to undertake sales and marketing activities.

Please ensure that you carry out only those duties:

1. in your duty statement; and

2. that are and have been assigned to you from time to time.

You have indicated that you handle human resource matters for the Company. I understood that you do not carry out that function and request that you specify when and by whom you were authorised to take on this function. To avoid any doubt you are hereby directed not to handle any human resources matters for the Company. In previous emails you have stated that *'it has been my pleasure to be the acting GM when George has been on leave'*. Please do not represent yourself as the acting general manager in the future.

Despite numerous requests going back to as early as 10 October 2005 , you have not provided me with sales and marketing information relating to the business including statistics, clientele, contact persons, inbound quotes and wholesale quotes. This is in breach of your contract of employment and again I require an immediate explanation as to why you have ignored my requests. Please provide this information to me before close of business on 5:00pm on Monday 27 February 2006.

As per my memorandum on 14 February 2006 I again asked that you report all important and relevant sales and marketing matters to me directly in order that I can carry out my role as acting general manager and chief financial officer.

I completely reject the unfair allegation that I am endeavouring to put you 'in a position' to resign. I have simply been tasked to ensure that the business of the Company remains on track. All that the company requires is that you comply with directives from your employer and carry out the duties that have been assigned to you.

As discussed with you, as a team we need to work together with the managers of the business so that the business is focussed on ongoing profitability and accountability into the future. I look forward to working together with you to achieve these objectives.

However, in view of the matters set out in your correspondence, your employer Albany Esplanade Pty Ltd is obliged to reserve all its rights.

Finally, you have faxed correspondence to me by way of the office facsimile which could have found its way to another employee of the Company.

<u>This matter and all relevant correspondence are confidential and you must not discuss this with other staff members or provide any documentation to them.</u>

Please send all relevant correspondence to my personal email: . Any discussion of these matters with staff members has the potential to seriously undermine the employer's business and you are directed not do so do [sic].

I would be more than happy to discuss the above matter with you should you require clarification.

Yours faithfully

Mr Leo Tan"

(*Exhibit 2 Annexure 64*)

58 The Applicant testified that Mr Tan's letter was a turning point. It confirmed her worst fears. She says she was absolutely floored when she read it as it contained numerous inaccuracies and certain points were patently untrue. She said also that the letter confused her because it contained contradictory directions. In particular, it included both a directive not to engage in sales and marketing and a directive to carry out only those duties in her duty statement, which by definition were sales and

marketing activities. She felt that at that point she had no option but to resign and she did so by letter sent on 2 March 2006. In her letter of resignation she stated that she believed that Mr Tan had left her with no alternative but to resign on the grounds that she had been constructively dismissed. The Applicant says she did not resign voluntarily but she was placed in a position where she was not permitted to do her work as she was sitting in her office being non-productive. Other than one email from Mr Tan on 16 February 2006, requesting information relating to the NATAS and MATTA consumer travel fairs, she had no direct communication with Mr Tan after the meeting on 14 February 2006 to 1 March 2006. During that time, she received approximately four to five telephone calls from Mr Stiles requesting on behalf of Mr Tan, copies of photographs, transparencies and advertisements she had done and contact details for the printer. Mr Stiles also requested information about details of expiry dates of wholesaler contracts and commissions paid.

59 Prior to resigning the Applicant sent an email to the Australian Tourism Exchange informing them that the owners of the hotel saw no merit in trade events and had placed a "stop activities" directive in November 2005. She then went on to say in the email "It was supposed to be for a short time but they have reminded me in a very unpleasant manner that is to remain in place. All those years of ATE's down the drain!" (*Exhibit A*). When cross-examined about this email the Applicant disagreed that the words used by her in the email were unprofessional.

60 On 8 March 2006, Mr Tan responded to the Applicant's letter of resignation and stated that he was disappointed that she had decided to resign and that the Hotel was simply seeking to ensure that she complied with certain specific directions and did not want her to resign from her position. He also said in the letter that the owners directed that all new marketing, sales and promotional expenditure pause from November 2005 until a proper review of these matters could occur and that under this directive any marketing or sales initiatives put in place before November 2005 would stay in place but new marketing, sales and promotional initiatives and expenditure would not occur until the review was completed. (*Exhibit 2 Annexure 66*) He then referred to his previous letter of 23 February 2006, in which he stated that the Hotel simply wanted her to carry out her existing duties other than proceeding with new marketing and sales expenditures. Mr Tan then went on to state that the information that he requested in relation to sales and marketing and her response was inappropriate. He then addressed the fact that she had made unfavourable comments in emails about him to Mr Wee on 26 January 2006 and 5 February 2006. He said that those were unfair and hardly likely to assist the Hotel to improve its profitability and professionalism. He also addressed her comments in the email on 5 February 2006, in which she stated that if the Hotel continued to decline she would inform the international wholesale agents. He said that this sort of language and threatening conduct was inappropriate and the content of her email to Mr Wee on 11 January 2006, in which she stated, "Why don't you just sell the property instead of causing all this disgraceful downturn in business and the upheaval of staff", was inappropriate and condescending. He then went on to say that any comment that he may have made regarding "deadwood in the business" was a reference to the need to ensure that the Hotel functioned at maximum efficiency and profitability bearing in mind the cost structure of the business. Mr Tan stated in the letter that he denied that the Applicant was left with no alternative but to resign and on the contrary the company wanted her to continue to perform her duties save that for the review period new marketing, sales and promotional initiatives would not occur.

61 After the Applicant's employment ceased with the Respondent on 2 March 2006, the Applicant was unemployed until mid December 2006. The Applicant provided in her written statement of evidence details of the positions that she has applied for and persons she has contacted to pursue opportunities in the tourism industry. She completed a course at the Australian Institute of Fitness to become a master personal trainer. The course finished on 3 November 2006. The Applicant has also applied for re-registration as an enrolled nurse. Set out in the Applicant's witness statement are comprehensive details of the applications she has made together with supporting documents. The Applicant was not cross-examined about her efforts to seek alternative employment.

62 The Applicant's annual remuneration at the time her employment was terminated by the Respondent was $47,000 per annum which was a monthly amount of $3,916.67.

63 Brendan Thomas was employed by the Respondent as a receptionist. He commenced employment with the Hotel in February 1997 and became a receptionist in November 1999. His duties included checking hotel guests in and out, taking internal and external telephone inquiries, making reservations, promoting a positive image of the Hotel through customer service and maintaining front of house presentation and managing and maintaining night bookings. At the time of giving evidence Mr Thomas was still employed by the Hotel.

64 Sales and marketing functions were not ordinarily part of Mr Thomas' responsibilities as a receptionist. However, after the departure of the Applicant in March 2006, he assumed some responsibility for receiving and responding to sales and marketing telephone enquiries.

65 Prior to the Applicant's employment ceasing Mr Thomas was approached by Mr Tan to prepare a brochure for a package for guests staying at the hotel. Mr Tan told Mr Thomas that he wanted those staying at the hotel to stay additional nights and he asked Mr Thomas to prepare a three nights for the price of two package. Mr Tan informed Mr Thomas that the brochure should contain the Hotel logo and a photograph of the Hotel. This was not a task that Mr Thomas had undertaken before as it did not form part of his duties as such brochures were ordinarily prepared by the Applicant who prepared the packages and forwarded them to Mr Stiles to enter into the computer system. Mr Thomas told Mr Tan that the Applicant was responsible for sales and marketing and it was her responsibility to prepare the packages. He also told Mr Tan that he would need to discuss the preparation of the brochure and packages with the Applicant in order to find out what packages she had available. Mr Thomas says that Mr Tan told him that the Applicant was no longer responsible for this task and the preparation of the package and brochure could be done from the Hotel. Later that day the Applicant telephoned the hotel and he informed her

that he had been asked to prepare the brochure and packages. Some time after the Applicant's employment came to an end Mr Tan asked Mr Thomas to contact the media print provider and to obtain the original copy so it could be printed from the Hotel. Mr Thomas informed Mr Tan that he did not know who the media print provider was but he would try to find out. Mr Thomas tried unsuccessfully to find the information before the end of his shift but he was not rostered on again until a few days later. When Mr Thomas returned to work Mr Tan informed him that he would ask Mr Stiles to carry any sales and marketing activities from then on. Following the departure of the Applicant Mr Thomas asked Mr Tan who was responsible for sales and marketing. Mr Tan told Mr Thomas that it was being done directly from the Hotel. In mid to late March 2006, Mr Thomas asked Mr Tan again what was happening to sales and marketing position as both he and Mr Stiles were increasingly being asked to field sales and marketing enquiries.

66 When cross-examined Mr Thomas said that he had a reasonable relationship with Mr Tan. He also said that the Hotel never had a problem with occupancy and that it did very well. He then qualified that statement to say that now that they were moving close to the closure date of the hotel that occupancy was declining.

67 Mr Thomas said that he became aware that the Hotel had been sold and was to be demolished a few months prior to December 2006. He said that when the hotel is closed he will receive six months' salary as a redundancy package which will include payments for accrued long service leave.

68 Mr Thomas also said when cross-examination that he recalled that the Applicant telephoned him on one occasion sometime in December 2005 or January 2006 and asked him how he was going and about the changes that were occurring at the Hotel. He said that the only change at that time was Mr Mathoi was leaving and Mr Tan was coming in as acting General Manager. Prior to Mr Mathoi's resignation he assumed that Mr Tan was coming to work at the Hotel as a consultant accountant.

69 Mr George Mathoi was summoned to give evidence on behalf of the Applicant. Mr Mathoi was employed as the General Manager of the Hotel for five and a half years. Mr Mathoi resigned sometime in December 2005 and became the Hotel Manager of the Joondalup City Hotel.

70 Mr Mathoi testified that the Applicant was a very effective sales and marketing manager who had been with the Hotel for 10 years and had worked with him for five years. He said that she was rather headstrong but in the business she was in, sales and marketing required a person to be assertive and pushy to obtain results. He found that she worked well and she produced the figures required.

71 Mr Mathoi testified that he had a very good relationship with Mr Wee until October 2005. Each month the Hotel prepared and sent to Mr Wee on the 15th of each month a management report of profit and loss, payroll and any information on sales and marketing. He said that in September 2005 they had a very good month and exceeded budget but after he sent the September 2005 management report to Mr Wee he received a memorandum from Mr Wee saying, "George, I'm very disappointed. The results are very disappointing. Please explain." (Transcript 116). He checked the results and a couple of days later he received a memorandum from Singapore to make travel arrangements for Mr Sim to fly to Albany to review or overview the Hotel operations. Mr Mathoi was told that Mr Sim would be at the Hotel for the next six to eight months. Mr Sim was an auditor. Mr Sim arrived in October 2005 and conducted a very detailed review of all operations in the Hotel. However, Mr Sim only stayed for a period of six weeks. During that period he worked from 8:00 in the morning until midnight most nights auditing the books of the business. Mr Mathoi said that the financial position of the Hotel over the past five years had been very good and that the Hotel was in a strong position.

72 From October 2005, Mr Mathoi received a number of requests for information and requests of analyses of Hotel activities including sales and marketing. Mr Mathoi testified that these requests were very demanding and some of them were very unreasonable as they required a lot of double work. He said for example each month the management report included a sales and marketing report which contained an overview of the Applicant's visits and the Applicant's activities in respect of corporate clients. Despite these reports he received a request for copies for all sales and marketing reports prepared in the past three years to be sent to Singapore immediately. Mr Mathoi said that even though the documents had been previously sent, Mr Wee wanted them produced again so all the documents were photocopied and sent to Singapore. After they were sent, Mr Wee informed Mr Mathoi that the reports were not in an acceptable form. Mr Wee told Mr Mathoi that the Applicant had to sign and verify every page. So copies of the reports were stamped verified and sent back again. He said that this also happened with accounts and bank reconciliations. They had to send bank statements for the past two years. These statements were also returned as Mr Wee wanted them stamped verified. Mr Mathoi formed the impression that Mr Wee thought there was something wrong with the bank statements. He said that either Mr Wee did not trust them or he thought there must be something wrong with the statements. As a result Mr Sim reviewed the bank statements comprehensively but nothing was found despite Mr Wee's insistence that there was something wrong with the accounts.

73 Mr Mathoi produced in his evidence copies of several reports in respect of sales and marketing which were prepared in Albany with the assistance of the Applicant and sent to Mr Wee.

74 Mr Mathoi testified that in relation to all the requests of information that the Applicant was required to provide, she addressed all of the requests and all of the information requested by Mr Wee was provided to him except in relation to client files which were kept in the Applicant's office in Perth. When Mr Mathoi received the directive to stop all sales and marketing activities (*Exhibit 2 Annexure 20*), Mr Mathoi was surprised. He spoke to Mr Wee about the direction and asked him what the reason was for the direction being given and Mr Wee told him he wanted to reassess the Hotel operations and he wanted to stop all sales and marketing activities as he wanted to go to a different level. Mr Mathoi questioned him further but Mr Wee did not explain what he meant. Mr Mathoi told him that they had ongoing obligations to their clients such as Qantas inbound operators, so it was not possible to immediately stop sales and marketing activities. He also asked Mr Wee if they had to stop

local advertising and Mr Wee's response was, "Stop. George, don't you understand me? It's stop all sales and marketing activities." (*Transcript 118*). On the same day Mr Mathoi spoke to Mr Wee, the Applicant flew to Adelaide to attend the Australian tourist exchange for British tourists and was planning to go onto Melbourne to see other clients and coach companies. The trip had been arranged six months before she left. Mr Mathoi did not see any reason why he should stop the Applicant from going. On the following day he told Mr Wee that the Applicant was in Adelaide. Mr Wee in response sternly asked him what part of the directive did he not understand. Mr Mathoi was also told by Mr Wee that there were to be no more bottle shop purchases. He asked Mr Wee why, but Mr Wee did not provide an answer. Mr Mathoi found this instruction very unusual as the bottle shop provided the Hotel with very good cashflow as it made a profit of approximately nine to eleven per cent each month. In addition, at this time they were approaching Christmas and to get the best specials to compete with Liquorland they usually purchased large quantities of liquor but they were unable to do so. Mr Mathoi could not understand the reason why they were instructed in this way. Mr Mathoi told Mr Wee that people were asking whether the Hotel was in financial strife or whether the Hotel was closing down. Mr Wee told Mr Mathoi that he (Mr Mathoi) was responsible to stamp out the rumours and that the Hotel was not up for sale and they were not in financial strife.

75 At about this time Mr Wee asked to be sent copies of all performance review reports. Mr Mathoi did so. Mr Wee took offence at the Applicant's and Mr Gaspari's performance review reports. Mr Mathoi was asked by Mr Wee how could he give the Applicant such a glorified review when in his opinion it was obvious the Applicant was not doing anything at all. Mr Mathoi told Mr Wee, "How can you say that?" (Transcript 128) "Gwenda did all of this for you." Mr Mathoi told Mr Wee that the occupancy in the Great Southern region of Western Australia roughly is about 49 per cent but they were running at 70 per cent. Mr Wee wanted him to explain how the Applicant was responsible for 70 per cent occupancy.

76 When asked what the impact the review had on the Hotel and the staff Mr Mathoi said that it was very hard on the staff because they had nothing to hide but the fact of the review came across that there was something wrong and they were doing something shifty. When cross-examined Mr Mathoi conceded that Singaporean's are by nature very concerned about corporate governance. He said, however by ceasing all sales and marketing activities it had an impact on the Hotel.

77 Mr Mathoi was also told to reduce costs by 10 per cent within a month. Mr Mathoi said that he tried to explain to Mr Wee that they were running a very cost effective business and that to cut 10 per cent was impossible but Mr Wee told him not to worry about it and to just cut 10 per cent.

78 Mr Mathoi said that he thought he had a very good personal relationship with Mr Wee until October 2005. Mr Mathoi was a director of the Respondent from some time in 2000. He ceased to be a director in December 2005. He said, however, that he was not aware of the direction of the company after October 2005 as he was not invited to the last few directors' meetings. He said that during the review the morale of the staff went down and several staff members left without being replaced. These included the food and beverage manager or assistant manager and the purchasing manager come payroll. He was asked by staff what was happening and he could not tell them. All he could say to them was "We are going to go to another level. We are doing a review. Things will sort out."

79 Mr Mathoi agreed that it was not part of the Applicant's duties to deal with the bottle shop. He said, however, she did deal with human resource issues on behalf of the Respondent. In particular, she assisted him when staff members had problems or when they did not wish to speak directly to him. He agreed, however, when cross-examined that it was not her role to take up the interests of the employees by taking action against the Respondent.

80 Mr Mathoi said that he resigned as General Manager because he thought that his honesty was being questioned. He said that despite all of the reports done by Mr Sim and provided to Mr Wee showed no findings of wrongdoing, he felt his position and honesty was being questioned and when he asked Mr Wee what was going on he was not given a proper answer or the right answer.

81 When cross-examined Mr Mathoi was asked whether he had seen copies of emails the Applicant sent to Mr Wee and he said no. He was then asked whether she was ever prone to exaggeration and he said, "Yes, in an emotional way." Mr Mathoi was then shown a copy of Exhibit 2 Annexure 40 which is a copy of an email sent by the Applicant to Mr Wee on 13 December 2005. After reading the email Mr Mathoi remarked that the contents of the email were totally uncalled for. He was then asked to look at Exhibit 2 Annexure 48 which was also an email from the Applicant to Mr Wee dated 11 January 2006. After reading the email he said that his impression was that the Applicant was totally frustrated and he reluctantly agreed that there was no excuse for sending the email. He also said that he had told her not to contact Mr Wee directly and that everything had to go through him. He also agreed that it would not be helpful to have the issues raised by the Applicant aired in the media.

82 In relation to the Applicant saying in her email to Mr Wee on 5 January 2006 that if there is no improvement in the Hotel and the Hotel continues to decline that she would have not option but to inform the international wholesale agents, Mr Mathoi said that the Hotel had a contract with the operators stating that they were a four and a half star hotel and setting out their particular facilities. Consequently, the Respondent was required via the company sales and marketing manager to advise the international wholesale agents if they did not have all the facilities the Respondent promised in place. He, however, agreed that the Applicant had no authority to provide information to the international wholesale agents without first obtaining his authority to do so.

83 In relation to Mr Tan, Mr Mathoi said that after Mr Sim left he received a telephone call from head office and an email saying that Mr Tan would be arriving at the Hotel to take over from Mr Sim. When Mr Tan arrived in Albany, he found Mr Tan to be a very smooth operator and very pleasant. Mr Mathoi asked Mr Tan questions about what was occurring in Singapore but Mr Tan was unable to comment or was not aware of what was occurring. He said, however, that Mr Tan told him, "George you need a hip hop team down here. That is an upmarket or hip hop team. You've got a lot of deadwood here." Mr Mathoi

said that these comments stuck in his mind. Mr Mathoi did not interpret the comment as Mr Tan intended to sack anyone but he interpreted the comment as Mr Tan wanting young staff at the Hotel.

The Respondent's Evidence

84 Mr Kok Eng Tan is a chartered accountant. He was initially engaged by the Respondent in December 2005 to carry out a review and possibly some accounting work. However, after Mr Mathoi resigned Mr Tan was employed as acting General Manager for a period of six months. His contract was later extended. In August 2006 Mr Tan was informed that the Hotel had been sold and since that time he has continued to work as the acting General Manager and will remain in that position until the Hotel is finally closed for demolition sometime after the last guests check out of the Hotel in January 2007.

85 After becoming qualified as a chartered accountant in 1983, Mr Tan worked in the financial services industry until he came to Perth in 2000. Since that time he worked as an accountant for the Australian Medical Procedures Research Foundation in Perth. Prior to being appointed as acting General Manager of the Hotel, Mr Tan had no experience in hotel management. When Mr Tan was initially engaged as a consultant he drove to Albany and met with Mr Mathoi. Mr Mathoi told him that the Singapore head office was carrying out a review of all areas of hotel operations and was seeking to control the costs of the Hotel and was looking to cut costs by 10 per cent. He also told Mr Tan that the directors in Singapore sought a greater involvement in the running of the Hotel. When asked in cross-examination as to why the Singapore head office was seeking to control costs and to cut costs by 10 per cent, Mr Tan said that the only information that he had was from reading emails sent from Singapore to the Hotel in October and November 2005. He was unable to say whether the review of the Hotel's operations was related to the sale of the Hotel. He was not aware that the Hotel was being sold until he was informed of that fact in August 2006 by Mr Shoong Eng, a banking consultant for the Respondent. At all material times Mr Tan did not have any direct contact with Mr Wee.

86 Mr Tan said that he has no knowledge of when the negotiations started for the sale of the Hotel as he was only the interim acting General Manager and his role was to motivate the Hotel employees and to keep the Hotel going. From the time Mr Tan was employed by the Respondent he dealt solely and exclusively with Ms See, Mr Wee's executive assistant.

87 On 7 January 2006, Mr Tan commenced work as acting General Manager. At that time Mr Mathoi was still serving out his notice period so Mr Tan worked with Mr Mathoi to ensure a smooth transition of duties. Mr Tan typically spent five days a week in Albany and returned to Perth for the weekend except for various occasions when he had to be present at the Hotel. His contract provided that he was employed on a fly-in fly-out arrangement as his family resides in Perth.

88 In the middle of January 2006, Ms See informed him by telephone that the Singapore head office had put in place a directive that marketing and sales expenditure would pause in order to assess the ongoing profitability of the Hotel. Mr Tan said that this was part of a wider review of the Hotel's operations and the review included looking at key performance indicators for staff, performance targets and marketing and sales generally. He understood from Ms See that the Hotel was looking at its current cost structures and how to keep costs down. He said that the review was directed at analysing the current operations of the Hotel based on existing financial information, with a view to making any necessary changes to the operation of the Hotel. Mr Tan says he fully expected all the employees, including the Applicant, to assist in the review process.

89 In January 2006, Mr Tan was sent copies of a number of emails that the Applicant had sent to Mr Wee in which the Applicant was critical of him. (*Exhibit 2 Annexures 48, 51 and 52*) Mr Tan could not understand why the Applicant was being critical of him when she was still on leave and he had not met her. He thought that her comment to Mr Wee that he had no experience in Hotel management or knowledge of marketing or expertise for the tourist industry was unfair as he had been involved in managing businesses for over 20 years. He was also offended by the statement that he had spent more time running back to Perth than managing the Hotel. Mr Tan formed the opinion that the emails were undermining his position as General Manager and his reputation with the Singapore head office. He says he could not understand why the Applicant was trying to make him look foolish when he had only just started to take over the acting General Manager's position from Mr Mathoi.

90 In early February 2006, Mr Tan received a telephone call from the Applicant to say that she was back from leave. Mr Tan told the Applicant to fly to Albany to brief him about the sales and marketing department. In Mr Tan's witness statement he stated that he wanted to meet the Applicant as she had been with the Hotel for almost 10 years and she was an important and critical member of the management team. Mr Tan orally testified, however, that he was not looking forward to meeting the Applicant because he was intimidated by the emails and after working for three years in a drug clinic as an honorary treasurer, this was the first real job for him in Australia which had barely started.

91 Mr Tan testified that he had no intention of dismissing the Applicant or any other employee. He wanted people to stay and help run the Hotel. In particular, he regarded the Applicant's position of sales and marketing as being one of the few critical members that were needed to run a Hotel which included the accountant, the food and beverage manager and the chef.

92 Before Mr Tan met the Applicant he had discussions with Mr Rick Hopkins who is a director or the Respondent and a partner of Barrington Partners who are accountants in Perth and Mr Eng. He said that Mr Hopkins did not give him any advice but that he simply informed Mr Hopkins that he was having a meeting with the sales manager who had been sending emails to the chairman about his (Mr Tan's) incompetence. He did, however, ask Mr Hopkins how he should present himself. Following the meeting Mr Tan was expected to make a recommendation to Mr Wee about what to do with the review, the sales and marketing department and everything about the Hotel. Prior to meeting the Applicant, Mr Tan was aware that the Applicant had sent an email to Mr Wee seeking to know what was her position under the new team. In an email on 13 February 2006 to Mr Eng (who at that time was in London), Mr Tan advised Mr Eng that he had spoken to Mr Hopkins and established some key phrases to use and approach. He also told Mr Eng that he had an "end game" in mind and he was getting the front office

and reservation to be more proactive in sales, in particular they would be doing winter breaks promotions in the next few days with the conference participants. When asked what he meant by the "end game he had in mind", he said that he wanted to say (to the Applicant), "Let's Joondalup and Albany work together." He also wanted to look at whether there could be more interaction between the sales office in Joondalup and the Hotel in Albany. Mr Eng replied to Mr Tan back on the same day by email and asked Mr Tan to email him the key catch phrases and Mr Tan's recommendations post interview. Mr Eng also said, "Shall get you the sign off." Mr Tan said that he did not know what Mr Eng meant by that last sentence. Mr Tan replied to the email to Mr Eng on the same day as follows:

> "1) introduction in civil manner – and not to discuss her emails to HO.
>
> 2) i will ask her to do 2 reports for me;
>
> a) sales and marketing 04/05
>
> b) sales and marketing 05/06
>
> 3) protocol issues that she is to report to me directly and I will attend to her dept's issues- this requires that memo to be signed, eh?
>
> 4) key phrases – "any other concerns", any queries…
>
> 5) will develop a file not for the meeting.
>
> 6) she is here for 2 nights- my thinking is that I will spend 30mins with her tomorrow and remain busy for next 2 days- wot say you?
>
> over"

(*Exhibit 10*)

93 When asked why he only wanted to spend 30 minutes with the Applicant, Mr Tan said that he was intimidated by her.

94 In Mr Tan's written statement, he said that the purpose of the meeting with the Applicant was to understand her role and the work that she did and he wanted to hear the Applicant's ideas in order to lift occupancy rates for the coming winter months when occupancy rates were traditionally lower. When cross-examined he also agreed that one of the purposes of the meeting was to make it clear to the Applicant that he was in charge. It was put to Mr Tan that he was offended by her emails. He agreed but said that he was a "peacemaker" and it was his intention to tell her or ask her to work together and for her to tell him how she could help him get going with the Hotel. When he was asked why he did not discipline her during her employment he said that he did not have a chance to but in any event, he is not a disciplinarian, that he would rather work together as a team with all the staff in the Hotel as it was a great place to work. Mr Tan said that the Applicant played a vital role in the Hotel and he needed to work with her to ensure the Hotel remained profitable.

95 When Mr Tan met with the Applicant she placed a tape recorder on the meeting table. Mr Tan says that he was very shocked and taken aback that the Applicant wanted to record the meeting. He saw this as an adversarial approach. He says that he had never encountered anyone recording a meeting in more than 20 years in business. He thought this was the most inappropriate way of starting the meeting and he considered ending the meeting but he considered that this may have made matters worse so he decided to go ahead. Despite his reservations, the meeting was cordial. When asked in cross-examination whether the Applicant also made notes during that meeting, Mr Tan said that he was so astounded by the tape recorder he did not notice anything else.

96 When Mr Tan said to the Applicant that he needed information in relation to the Hotel's sales and marketing operations and the Applicant refused to supply the information until she was made aware what was happening with her job, Mr Tan says he was shocked that she was not prepared to provide the information that he sought. It appeared to him that they had a stalemate and he was surprised that the Applicant had taken such an aggressive approach. He said that all he was trying to do was ascertain exactly what the Applicant did. Mr Tan also testified that the Applicant told him she would speak to different staff members to determine whether there were any problems, grievances or matters of concern in the Hotel. Mr Tan says that he saw this as an indication from the Applicant that she wanted to cause staff unrest and problems in the workplace. He considered that the Applicant felt that she was under threat. He said, however, that there was no reason for the Applicant to feel this way as he was just trying to learn the business and her role in it. When asked whether he said words in that meeting to the effect, "Always deadwood falls. Best to get rid of deadwood for business to go ahead." Mr Tan says that he could not remember saying that. He was also asked whether he said anything about the timing of the changes to the industrial relations laws of Australia in the meeting but he said that he did not know, he could not remember what he said but he may have said it in passing.

97 After Mr Tan met with the Applicant she returned to Perth. He later sent her an email asking for all relevant information about the NATAS 06 event and the AEPL's commitment (financial and otherwise) to that event. He requested this information on an urgent basis and he noted in the email that the event was timed to occur in March 2006. The email was sent on 16 February 2006 and he asked for all the relevant information to be provided by 18 February 2006. The Applicant responded the following day, 17 February 2006, as follows:

> "Don't send emails on an URGENT basis when I have tried many times to explain how the sales & marketing works in AUSTRALIA
>
> In particular to the Albany Esplanade.

As all of you wish to show or plead ignorance and a determined attitude that I have not proved my value by way of results

The fault lays solely at your's and BK's feet!

As will the downturn of business

Ms Gwen da (sic) Smith"

(*ExhibitB2 Annexure KET12*)

98 On the same day Mr Tan received a letter from the Applicant (*Exhibit 2 Annexure* 60) addressed to him and Mr Wee. In the response sent on 23 February 2006 (*Exhibit 2 Annexure* 64) Mr Tan asked the Applicant to explain immediately why she had disobeyed the lawful direction that all sales and marketing activities cease from November 2005. When asked why he made that statement, Mr Tan said that he could see bills were coming in and he was not sure whether they were in respect of contracts entered into before the directive came into place or after. Mr Tan was also asked to explain why in that letter he directed the Applicant to carry out only those duties in her duty statement. When it was pointed out to him that those duties were sales and marketing duties he was asked how she could she comply and not be in breach of the directive, Mr Tan said, "It is again down to this word 'activity' or 'expenditure'. My mind is always the 'expenditure' part is to be more careful with where we spend our A and P money - - sales and marketing money. It's not to stop talking to people – clients, agents, you know. It's just to - - advertising money." (*Transcript page 40 8/12/2006*)

99 While the Applicant was on leave Mr Tan attended to a number of matters in relation to sales and marketing operations. He said that during this time he received enquiries from wholesale agents in relation to change of seasonal rates. In addition he was eager to increase hotel occupancy and considered the possibility of introducing a "three nights for the price of two" package for the upcoming winter months. As the Applicant was still on leave he asked Mr Thomas and Mr Stiles to investigate the preparation of brochures for a "three nights for two" package. He says he had intended to raise this matter with the Applicant on her return from leave when he raised all other sales and marketing matters. At about that time they had a large mental health conference at the Hotel and he was keen to send a flyer to the people attending the conference to ask them to come and stay during the winter months. Mr Tan was asked how that affected the directive and he said that he thought that marketing could be organised so long as it was free. He said it was all about spending money and in his mind as long as money was not spent then marketing activities could be engaged in.

100 Mr Tan was also asked whether he carried on any sales and marketing activities after the Applicant returned to work on 10 February 2006. In response Mr Tan said it was part of the running of the Hotel that he attend to all reservations or enquiries or delegate to people and if there was an enquiry about an extension for a newspaper advertisement he had to make the decision whether to extend but the decision would have probably been no because they were not to spend any money on advertising. In relation to enquiries about new tariffs. He said that it was the Applicant's duty to deal with these enquiries after she returned from leave as the sales and marketing manager.

101 Mr Tan was also asked what was the outcome of the review. In response, Mr Tan said that all the documents went to Singapore but the review halted when the Applicant resigned in the sense that he could not turn to anyone. He was given all sales and marketing files but he had no idea of what was in them. He also said that because Mr Mathoi and the Applicant had left with all the intelligence about the Hotel business that the review was unable to proceed any further. Mr Tan said that it was up to him to run the Hotel and he had no one with experience to assist him. So he had to rely on everyone around him to do the things that were on his mind. That was to keep the kitchen going, to keep the cafes and restaurant going, to keep the breakfast going and to keep the 60 to 80 people who worked in the Hotel working given that the morale was quite low because both Mr Mathoi and the Applicant had left. He testified that there were still new sales and marketing expenditure but it was threadbare. All approvals for expenditure had to be sent to Ms See who obtained Mr Wee's approval. Mr Tan said that the only aspect of the review that remained was the bank reconciliation process which was still going on as he had engaged the services of two people to come and look at the bank reconciliations again.

102 Bronwyn Elsdon was employed by the Respondent as receptionist. She gave evidence on behalf of the Respondent. She worked for the Hotel for eight and a half years and was still employed when she gave her evidence. Her duties consisted of booking reservations, attending to customers at the front desk and entering guest's details on the computer (the Fidelio system). She also carried out reception work and answered queries from customers. Ms Elsdon said that she always got on reasonable well with the Applicant although she considered that the Applicant had a certain air of superiority about the way she dealt with other staff members. She only saw the Applicant four to five times a year when the Applicant came to Albany. She says that she always felt on tenterhooks when the Applicant was around.

103 Ms Elsdon was on duty on the evening of 13 February 2006 when the Applicant came to the Hotel to meet with Mr Tan. Ms Elsdon was working in reception when the Applicant walked past. At that time Ms Elsdon was working on a document relating to reservations and accommodation at the Hotel. When asked in cross-examination about what document she was working on she said she had a scrap of paper which she was trying to work out how to get more people to come and stay at the Hotel. She said that Mr Tan had asked her to try to find a way to get "walk-ins" to stay. She testified that when the Applicant walked past the Applicant said to her, "So you are doing my job now?" and her tone was sarcastic and accusatory. Ms Elsdon told the Applicant that she was doing what she was asked to do by Mr Tan. Ms Elsdon said the Applicant walked away angrily. Ms Elsdon regarded the Applicant's behaviour as inappropriate as she always referred promotional and advertising matters to the Applicant and did not deal with those matters herself. Ms Elsdon continued to work with the Hotel after the Applicant's employment came to an end. She said that she had a very good working relationship with Mr Tan.

Credibility

104 The Applicant's counsel says that where there is a conflict between the evidence given by the Applicant and Mr Tan, that the Applicant's evidence should be preferred as she was a believable and credible witness whereas Mr Tan was not believable, was unclear and often went off at a tangent.

105 Having heard all of the oral evidence and having read and considered carefully each document tendered as exhibits I have found some aspects of both the Applicant's and Mr Tan's evidence unsatisfactory. In relation to the Applicant, I did not find her evidence that the notes tendered as Exhibit 2 annexure 56 were an accurate record, to be reliable. The notes comprised two pages of handwriting which do not reflect the sequence of what is recorded as said in the transcript (*Exhibit 2 Annexure 55*). On the third page of the transcript it is recorded that the Applicant and Mr Tan had a conversation about the Applicant's curriculum vitae. This conversation is noted near the top of the first page of the notes. It is then recorded in the notes, "Always dead wood best to be rid of dead wood for business to go ahead" and "A Japanese guy says if you put people on they must perform. Past performance – How have I been able to smooth occupancy in winter months." The latter comment about occupancy appears on the ninth page of the transcript but there is no mention in the transcript of a conversation about a "Japanese guy" or "deadwood". The transcript continues. On the top of the notes there is a note about conciliation and arbitration and time frames for matters to be concluded. There is no evidence that the Applicant discussed this issue during the meeting on 14 February. In relation to Mr Tan, whilst I accept that he may not have mentioned anything about "deadwood" at the meeting on 14 February 2006; I accept, however, that he did so at some time as his letter to the Applicant dated 8 March 2006 (*Exhibit 2 Annexure 66*) acknowledges that he may have made a comment about deadwood. Despite these matters I found both the Applicant and Mr Tan credible witnesses. There is little conflict between their recollections of events. The only difference between them is how the events that occurred should be interpreted. In particular, the Applicant clearly lacks insight into her conduct in sending the various emails to Mr Wee, in purporting to act on behalf of employees against the interest of her employer, making enquiries of ASIC about the duties of directors and sending an email to the Australian Tourism Exchange that was critical of her employer. (*Exhibit A*) In relation to the emails the Applicant sent to Mr Wee and Ms See, she denies the contents were offensive and contained threatening comments when plainly any reader can see that they were so.

Was the Applicant Constructively Dismissed?

106 The Applicant contends that her sales and marketing duties comprised the essential duties of her employment which was not only apparent from her job description but from the Applicant's evidence of the nature of the work that she actually did. The Applicant says that when Mr Wee issued the "strange" directive on 22 November 2005 to stop all sales and marketing activities with immediate effect, this started a lengthy process of attrition which culminated in her being forced to resign on 2 March 2006. In particular, the Applicant says that after the directive was issued in late November 2005 she properly endeavoured to find out the reason for the basis for the directive, the effect it had on her employment and whether she had a future with the Respondent. The Applicant contends that her requests for information from the Respondent in the form of emails were reasonable requests to make of her employer. She, however, was met with a deafening wall of silence. Whilst she waited for a response the Applicant provided detailed information about her work. She says the requests for information were incessant, demanding and often required work to be duplicated. The Applicant says that she was forced to work in a vacuum because the Respondent did not provide full and frank disclosure of what its real intentions were and how they would impact on her employment. The Applicant also submits that Mr Tan's contention that the purpose of the review was for the Respondent to gain a better understanding of the business and have greater involvement in the running of the business was a furphy; that the truth was the Hotel was being set up for sale and this is exactly what happened. The Applicant says that she was a casualty of the review process and that when she met with Mr Tan on 14 February 2006 and made repeated requests for information about her job and her future, he refused to provide any information and after a fairly heated exchange of correspondence with Mr Tan, the Applicant formed the view that she had no alternative but to resign and she did so on 2 March 2006. It is contended that these facts form the basis of a finding that the Applicant was constructively dismissed.

107 The Respondent says that there was no constructive dismissal. To the contrary the Applicant was hell-bent on destroying the employment relationship which she did so through her actions and conduct which all started innocently in October 2005 when the Respondent commenced a review of the Hotel's operations and an aspect of that review related to sales and marketing. The Respondent says that it was open to Mr Wee to conduct the review as the operator and owner of the Hotel. The Respondent says the documents show that the Applicant's behaviour was erratic, sarcastic, rude and offensive to Mr Wee and the correspondence shows that it was her mission to try to be dismissed. The Respondent contends that the Applicant from the start of the review perceived the review as a personal attack on her work and position but when all the relevant documents are reviewed it can be seen that all the Respondent was doing was simply requiring her to provide certain documents and a certain level of analysis. It is also contended on behalf of the Respondent that no analysis was provided by the Applicant and that there was work for the Applicant to carry out. In particular, in an email sent by the Applicant to Mr Mathoi on 8 December 2005 (*Exhibit 2 Annexure 37*) the Applicant identified there was a problem with the Fidelio computer system and that work needed to be done in the new year to accurately track market segments and there was still a lot of work to be done in analysing sales and marketing. (*Exhibit 2 Annexure 43*) The Respondent says that the Applicant did have marketing duties to carry out, that part of her sales and marketing duties was to monitor and research the work that she was carrying out. In particular, planning and reviewing was a large part of sales and marketing but she was more interested in the trade fairs and advertising which were not necessarily the only duties of sales and marketing. It says that the Applicant resigned of her own volition and that she was not coerced into leaving. The Applicant jumped she was not pushed.

108 There are usually three circumstances where an employee can be said to be constructively dismissed. These were set out by Cooke J when delivering the judgment of the Court of Appeal of New Zealand in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374 to 375 where his Honour in considering the common law concept of constructive dismissal observed:

> "In New Zealand the Courts are not tied to a statutory definition. It would be undesirable to try to visualise all the kinds of case which the Arbitration Court could properly treat as constructive dismissals, but it is not difficult to list some.
>
> The concept is certainly capable of including cases where an employer gives a worker an option of resigning or being dismissed; or where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign. On the argument in this Court it was made clear that the union does not contend that the present case falls within either of those categories.
>
> A third category consists of cases where a breach of duty by the employer leads a worker to resign."

109 In relation to the first two categories of conduct, Cooke J's dicta was applied by Rowland J (with whom Anderson J agreed) in *Attorney-General v Western Australian Prison Officers' Union of Workers* (1995) 75 WAIG 3166 at 3169. The third category of conduct was considered by the Full Bench in *JL v Haydar Family Restaurants t/a McDonalds* (2003) 83 WAIG 3303 where the Bench observed at 3309 to 3310:

> "… there is an implied term in every contract of employment that an employer must be good and considerate to its employees, or that the employer should not, without reasonable cause, do anything to destroy the relationship of trust and confidence between the employer and the employee. In our opinion, a breach of such a term may amount to a repudiation entitling the employee to treat the contract as at an end (see Macken, O'Grady, Sappideen and Warburton "*Law of Employment*", 5th Edition, at pages 113-117 and *Burazin v Black Town City Guardian Pty Ltd* (1996) 142 ALR 144 and *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370, as well as *Whelan v Waitaki Meats Ltd* (1991) 2 NZLR 74 at 85 and *Brighouse Ltd v Bilderbeck* [1994] 1 NZLR 158 at 164)."

110 In this matter it is not raised on the facts that the Applicant was given an option to resign or be dismissed. However, the issue is squarely raised whether the employer followed a course of conduct with the deliberate and dominant purpose of coercing the Applicant to resign. The key to the answer to that question is whether the directive given on 22 November 2005 to "stop all the sales and marketing activities (domestic and international) for the time being with immediate effect" together with the review of the Applicant's work can be said to be part of a course of conduct carried out with the deliberate and dominant purpose of coercing the Applicant to resign. In my opinion such an inference cannot be drawn. In the directive given on 22 November 2005, Mr Wee stated that he wanted to review how effective all the sales and marketing efforts had translated into revenues and bottom line and whether they needed to make any changes in strategy and marketing plans (*Exhibit 2 Annexure 20*). There is no reliable evidence before me that the statement made by Mr Wee was not correct. Mr Wee asked for Mr Mathoi to provide an analysis of various aspects on sales and marketing (see the email sent on 6 December 2005 (*Exhibit 2 Annexure 33*) and Exhibit 2 Annexure 43 received by the Applicant on 14 December 2005). Shortly after 14 December 2005 the Applicant went on leave. At about that time Mr Tan was appointed to continue the review of Hotel operations that was started by Mr Sim. However, shortly after that occurred Mr Mathoi resigned. Both the Applicant and Mr Mathoi testified that the requests for analysis and requests for documents made by Mr Wee were unreasonable in that compliance required an enormous amount of effort which was demanding and required an analysis of information not kept. In addition they say that many of the requests for information required a lot of double work. However, both the Applicant and Mr Mathoi conceded that Mr Wee, as the owner of the Hotel was entitled to review all operations of the Hotel. The review was not confined to the Applicant's work. Mr Mathoi in particular conceded that on the face of it there was not much wrong with the directive given on 22 December 2005. (*Transcript page 138*) Why the review of Hotel operations was conducted is not known. In addition, when the decision was made by the owners of the Respondent to sell the Hotel is not clear. The only evidence about when the decision was made to sell is the evidence of Mr Tan which establishes that a decision was made sometime during or before August 2006. There is no evidence before the Commission on which a reliable inference can be drawn that the review or the directive was to force the resignation of the Applicant.

111 However, that is not the end of the Applicant's case as it is argued on behalf of the Applicant that the Respondent without reasonable and proper cause conducted itself in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence. The Applicant's counsel, Mr Heldsinger, explained the Applicant's case as follows:

> "SMITH C: What is the fundamental term that you say that the employer breached in this case? It has to be so serious to amount to a repudiatory breach.
>
> MR HELDSINGER: I would argue, Senior Commissioner, that there's been a breach of both the express term as well as implied term. The term that I say would be breached would be the actual nature of the applicant's work; the directive went to the right of that. As I put it to Mr Tan, the scope of his work essentially was financial operations. He was given the directive that he was to stop doing that. That would go right to the heart of this work. The implied issue is the breach of the mutual duty of trust and confidence in the decision.
>
> SMITH C: So that I'm absolutely clear about this: you say that the breach is the directive?
>
> MR HELDSINGER: Perhaps I can put it this way more elegantly; that the effect of the directive meant that the applicant was unable to perform her job and that job was sales and marketing manager which was an agreed term and the agreed position that she carried out for the respondent and that the direct effect of the directive was to prevent her from actually carrying out her job.

SMITH C: When you say that it is also a breach of the mutual duty of trust and confidence, what do you rely upon in relation to that?

MR HELDSINGER: I say there that – perhaps it is a slightly more complex argument but, put it this way: that the respondent acted in a manner which was calculated to damage that relationship. I say there that the request by the applicant for clarity as to what was happening with the position was a reasonable request and that the implied duty of law in my submission is that the employer ought to provide that clarity, that information or, at least, give an indication as to what is happening and what effects the review of the directive will have on the applicant in the longer term. That didn't happen in this case."

(*Transcript page 8 19/12/06*)

"SMITH C: Just coming back to this one point again. Just coming back to when you say that there was a breach of a fundamental term. When do you say that breach occurred? Do you say it was when the directive was given, or was it in February after the meeting that Ms Smith had with Mr Tan and Mr Tan sent her the letter which directed her to do certain things?

MR HELDSINGER: Senior Commissioner, I think that's a difficult one to answer. I'll try to answer it as best I can. In my submission – I started off in my opening address by saying that this is a dismissal by process of attrition. In developing that theme this isn't a case where you have a classic – how can I say – homogenous, singular breach on a particular day. It's my submission that the directive in itself constituted the breach of the fundamental term. But the applicant endeavoured to respond as best she could. In other words provide the information on documents. At the same time she was saying throughout that period from the end of November through the end of February – and of course keep in mind that she took annual leave during that period – I think she was consistent in saying, 'I need to know what the effect of this is.' She was challenging her employer to say, 'Come clean. Tell me what's happening.'

That I guess led to the meeting on 14 February where the applicant was under that impression Mr Tan would tell her what's happening with her position. In fact had been led to believe that Juliette See. Again at that meeting she asked, 'Can you please clarify? Can you let me know what's happening?' and Mr Tan couldn't or wouldn't. That letter of 25 February I say is the catalyst that put the applicant in a position where she believed she had no choice, because that letter makes it very clear that the directive to stop all sales and marketing activities is not only reinforced but it's put to her very starkly that there will be consequences if she continues to do any of that particular activity, and the consequences in relation to her employment"

(*Transcript page 10-11 19/12/06*)

"MR HELDSINGER: I would like to, if I can very briefly, apply what I understand to be these legal principles to the facts in this particular case. It's my submission that the applicant was forced to resign from her employment in circumstances where the respondent had for all intents and purposes terminated the contract by refusing to allow Ms Smith to perform the job that she was contracted to do. The directive to stop all sales and marketing activity struck very much at the core - the heart - of what she did; the heart of her job. To use some of the language employed in JL v Haydar Family, the applicant reasonably inferred from the acts and the words of the respondent - the conduct of the respondent - an absence of readiness or willingness to perform its contractual obligations.

It's my submission also that the conduct of the respondent in refusing to allow the applicant to perform her duties for as long as it did without providing real information or consulting with her, was plainly inimical to the continuance of the employment relationship. That's from both the expressed terms and the implied terms."

(*Transcript page 11 19/12/06*)

112 It is clear from the submissions made on behalf of the Applicant that the breach of trust and confidence is contended to be the failure of the Respondent to allow the Applicant to carry out her sales and marketing duties or the direction given to her not to do so and it is contended that when she was informed by Mr Tan on 14 February 2006 that he could not let her know what was happening with her role that left her in the position that she had no choice but to resign.

113 This submission, however, contemplates that there is an express or implied duty to provide work. However, there is nothing in the Applicant's contract of employment (*Exhibit 2 Annexures 1, 2 and 3*) which expressly obligates the Respondent to provide work. At law courts in Australia are reluctant to imply such a term. The duty to provide work is exceptional (see the discussion in Macken, O'Grady, Sappideen, Warburton, *Law of Employment* (5th ed, 2002) at page 127).

114 In *Mann v Capital Territory Health Commission* (1981) 54 FLR 23 Fox and Kelly JJ held that a term could not be implied into a senior general surgeon's contract that he be furnished with suitable surgical work. At pages 29 and 30 their Honours observed:

"The question in this case is whether the particular term alleged should be implied. In some employment situations, it may be correct to imply a similar term. There are a number of cases dealing with actors and producers to whom actual performance was regarded as vital: see, for example, *Marbe v. George Edwardes (Daly's Theatre) Ltd.* [1928] 1 K.B. 269; *White v. Australian and New Zealand Theatres Ltd.* (1943) 67 C.L.R. 266. In *Collier v. Sunday Referee Publishing Co. Ltd.* [1940] 2 K.B. 647 in a passage often referred to, Asquith J. said: "It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out. In some exceptional cases there is an obligation to provide work. For instance, where the servant is remunerated by commission, or where (as in the case of an

actor or singer) the servant bargains, among other things, for publicity, and the master, by withholding work, also withholds the stipulated publicity: see, for instance, *Marbe v. George Edwardes (Daly's Theatre) Ltd.*; but such cases are anomalous, and the normal rule is illustrated by authorities such as *Lagerwall v. Wilkinson, Henderson & Clarke Ltd.* (1899) 80 L.T. 55 and *Turner v. Sawdon & Co.* [1901] 2 Q.B. 653, where the plaintiffs (a commercial traveller and a salesman respectively, retained for a fixed period and remunerated by salary) were held to have no legal complaint so long as the salary continued to be paid, notwithstanding that owing to their employers' action they were left with nothing to do. The employers were not bound to supply work to enable the employee, as the phrase goes, to 'keep his hand in', or to avoid the reproach of idleness, or even to make a profit out of a travelling allowance. In such a case there is no breach of contract, but the result is much the same as if there had been, because in either event the plaintiff is entitled to a sum or sums which are measured prima facie by the amount of salary in respect of the unexpired period of service" [1940] 2 KB at pp 650-651. (See also *Halsbury's Laws of England* (4th ed.), vol. 16, par. 557; 53 *American Jurisprudence* (2d), par. 133; Fridman, *The Modern Law of Employment* (1963), pp. 82-85.)"

115 As Dixon J observed in *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 466 wages are "incident to the subsisting relationship of master and servant" and that "They also serve who only stand and wait". The case of the Applicant cannot be said to be exceptional. Consequently, I am not satisfied that such a term should be implied.

116 Even if such a term could be implied in this matter I am not satisfied that the Applicant had no work to do. The Applicant testified that prior to going on leave on 23 December 2005, she had no time to review the sales and marketing plan and that she would have to attend to the task sometime in the New Year. The Applicant also testified that work needed to be done in the New Year to the Fidelio system to ensure accurate data was collected about market segments. Neither of these tasks was undertaken by the Applicant after she returned to work on 10 February 2006. In addition, in the meeting on 14 February 2006, Mr Tan sought information from her which she refused to provide. Clearly she had work to do but she chose not to participate further in the review. For these reasons the Applicant is unable to make out a case to the requisite standard that she was unfairly dismissed.

Is there Jurisdiction to deal with the Applicant's Contractual Benefits Claim?

117 As I have made a finding that the Applicant has not proved that she was constructively dismissed, the Applicant's claim for pay in lieu of notice falls away. Consequently, it is not necessary for me to finally determine whether s 16(1) of the WR Act precludes the Commission from dealing with the Applicant's claim for contractual benefits as the Respondent is a trading corporation, or whether reg 1.2(2) of div 2 of pat 1 of ch 2 of the WRR preserves the Applicant's claim. However, as the matter was comprehensively argued before me following the service of notices to each of the Attorneys General in Australia, issued pursuant to s 78B of the *Judiciary Act 1903* (Cth), and the issue is one of some importance, I intend to express a view.

118 Having carefully considered the arguments put by counsel and the authorities that follow I am of the opinion that applications for enforcement of or damages in lieu of contractual benefits made by an employee where the employer is a constitutional corporation are ousted by the provisions of s 16(1) of the WR Act but where a contractual benefit arises prior to the coming into operation of s 16(1) the jurisdiction of the Commission to deal with the claim is preserved by reg 1.2(2) of the WRR.

119 Section 16(1) and (2) of the WR Act provides:

> "(1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
>
> (a) a State or Territory industrial law;
>
> (b) a law that applies to employment generally and deals with leave other than long service leave;
>
> (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);
>
> (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
>
> (e) a law that entitles a representative of a trade union to enter premises.
>
> Note: Subsection 4(1) defines *applies to employment generally*.
>
> State and Territory laws that are not excluded
>
> (2) However, subsection (1) does not apply to a law of a State or Territory so far as:
>
> (a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or
>
> (b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or
>
> (c) the law deals with any of the matters (the ***non-excluded matters***) described in subsection (3)."

120 Section 16(1)(a) is the sub-section which is relevant to this matter. Section s 4(1) of the WR Act defines a State industrial law to mean among others the *Industrial Relations Act 1979* of Western of Australia and:

> "(b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:

(i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);

(ii) providing for the determination of terms and conditions of employment;

(iii) providing for the making and enforcement of agreements determining terms and conditions of employment;

(vi) providing for rights and remedies connected with the termination of employment;

(v) prohibiting conduct that relates to the fact that a person either is, or is not, a member of an industrial association (as defined in section 779); or

(c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or

(d) a law that:

(i) is a law of a State or Territory; and

(ii) is prescribed by regulations for the purposes of this paragraph."

121 An employee is defined in s 5(1) of the WR Act as an individual employed, or usually employed, by an employer as defined in s 6(1) of the WR Act. Section 6(1) defines an employer to mean among others a constitutional corporation so far as it employs an individual.

122 The validity of s 16(1) was recently considered by the High Court in *New South Wales v The Commonwealth* (2006) 156 IR 1. One of the issues raised by the State of Western Australia in that matter was that s 16(1) was invalid because it sought to exclude the operation of State laws on matters in relation to which the Commonwealth had not attempted to legislate. One example of matters Western Australia identified as a matter that the WR Act does not regulate is the enforcement of contractual entitlements. At [367] of the judgement of Gleeson CJ, Gummow, Hayne, Haydon and Crennan JJ, their Honours set out the argument as follows:

> "Western Australia also contended that in numerous respects s 16 attempts to invalidate State laws despite having failed to enact any corresponding federal law. Western Australia said, for example, that s 16(1)(d) provides that the new Act is intended to apply to the exclusion of a State or Territory law providing for the variation or setting aside of rights and obligations arising under a contract of, or arrangement for, employment that a court or tribunal finds to be unfair. The only provisions in the new Act dealing with unfair contracts are ss 832-834, and they only deal with contracts binding on independent contractors, not employees. Hence s 16(1)(d) applies to the exclusion of Pt 9 of Ch 2 of the Industrial Relations Act 1996 (NSW), dealing with unfair contracts of employment. The State law is excluded, but no federal law applies. Western Australia contended that there were various other examples of this. One was said to relate to s 16(1)(e) which, read with s 16(3)(c), indicates an intention to apply the new Act to the exclusion of State laws dealing with the exercise of rights by a representative of any trade union to enter premises for any purpose other than occupational health and safety; yet the new Act only deals with the exercise of rights of entry pursuant to Divs 4, 5 and 6 of Pt 15 by officials of organisations registered under the new Act for certain purposes. Attention was drawn to the fact that 'trade union' is defined in s 4(1) to include organisations of employees whether or not registered under the new Act. Another example related to State Acts of the kind referred to in par (b) of the definition of State or Territory industrial law in s 4(1), so far as they deal with matters for purposes other than one of the 'main purposes' specified in that part of the definition. Western Australia submitted that those State Acts are excluded by s 16(1)(a) without any substantive regulation of the subject in the new Act itself. Other examples, developed in considerable detail, related to the making of regulations under s 16(4) in relation to discrimination legislation, matters listed in s 16(3), redundancy provisions, and the enforcement of contractual entitlements."

123 The majority of the High Court then went on to consider the arguments put on behalf of the Commonwealth at [369] where they stated:

> "*The Commonwealth's arguments.* The Commonwealth specifically declined to contend that if a Commonwealth law simply sought to exclude State law in a field and made no provision whatever on the same subject-matter it was within power. The Commonwealth contended rather that it was open to the Commonwealth Parliament to indicate the relevant field it intended to cover to the exclusion of State law, that s 109 would then operate even though the Commonwealth had not made its own detailed provisions about every matter within that field which State law dealt with, and that it sufficed for the Commonwealth to have some provisions dealing with aspects of the field, leaving others unregulated. The Commonwealth submitted that the relevant field was to be identified, not by reference to the areas regulated by State law, but by reference to the terms of the Commonwealth law. It was concluded above that the Commonwealth has power to regulate the relationships between employees and employers as defined in ss 5(1) and 6(1) by reliance on the heads of power referred to in paras (a), (e) and (f) of the definition of 'employer' in s 6(1). The Commonwealth submitted that it was open to the Parliament to identify the rights and obligations arising out of those relationships of employees and employers as a field, and to indicate an intention to cover that field (or, as here, part of it, because of the limitations to s 16(1) and the operation of s 16(2) and (3)). On the construction of s 16(1) accepted above, (at [353]-[359]) the Commonwealth chose to exclude State law only in respect of the relations of employees and employers as defined in ss 5(1) and 6(1)."

124 The majority then held at [370] that the Commonwealth submissions were to be preferred and that the Commonwealth was not precluded from defining a field of relationships between s 5(1) employees and s 6(1) employers, and only occupying parts of that field. The effect of the decision of the High Court is that it determined that s 16(1) was a valid law of the Commonwealth.

125 The Court, however, did not expressly make any findings about what aspects of the field created by s 16 were occupied and whether there were any parts of the relationship between an employee and an employer who is a constitutional corporation that were left unregulated. It is clear that s 16(2) expressly provides for parts of the employment relationship that are unregulated but the question arises whether there is any part of the field within s 16(1) itself and in particular s 16(1)(a) that restricts the field of employment relationships between employers and employees to that which is not regulated by the provisions of the WR Act. The rules that govern statutory interpretation may provide some assistance in resolving this question. One well established principle of statutory construction is that all words in a statute must be given meaning and effect (see DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed) at [2.22] and the cases cited therein). The opening words of s 16(1) of the WR Act are "This Act is intended to apply to the exclusion of all the following laws …" By the use of the words "This Act" it could be argued that the provisions of the following laws which include the provisions of the IR Act that are excluded are those restricted to the subject matters found in the provisions of the WR Act which are outside s 16 itself as s 16(1) of WR Act does not say "The provisions of the following laws of a State … are excluded." The difficulty with that argument is that s 16(1)(d) of the WR Act squarely raises a statutory area of an employment relationship that exists in New South Wales in respect of the setting aside of unfair contracts which is otherwise unregulated by the WR Act. If it is the case that the ousted subject matter is to be construed as outside s 16(1) generally, s 16(1)(d) of the WR Act would have no scope for operation.

126 For these reasons it is my opinion that s 16(1)(a) of the WR Act excludes the jurisdiction of the Commission to deal with claims for contractual benefits as the provisions of the IR Act have been rendered inoperative in respect of persons employed by constitutional corporations by the operation of s16(1).

127 It was also raised as an issue in this matter whether reg 1.2 of the WRR preserved the right of the Applicant to bring a claim for contractual benefits where the entitlement claimed occurred prior to the commencement of s 16 of the WR Act. Regulations 1.2(1), (2) and (4) of the WRR provide:

> "(1) For paragraph 16 (2) (b) of the Act, subsection 16 (1) of the Act does not apply to a law of a State or Territory of a kind that is mentioned in this regulation.
>
> *Note* Under subsection 16 (1) of the Act, the Act is intended to apply to the exclusion of specified laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer. The subsection lists the kinds of laws that are excluded.
>
> However, subsection 16 (1) does not apply to a law of a State or Territory so far as the law is prescribed by the regulations as a law to which the subsection does not apply.
>
> Rights and obligations — general
>
> (2) Subsection 16 (1) does not apply to a law of a State or Territory (including a law relating to appeals) to the extent to which it relates to compliance with an obligation:
>
> (a) under:
>
> (i) that law; or
>
> (ii) another law of a State or Territory;
>
> which would otherwise be excluded by subsection 16 (1) of the Act; and
>
> (b) in respect of an act or omission which occurred prior to the reform commencement.
>
> …
>
> Termination of employment
>
> (4) Subsection 16 (1) does not apply to a law of a State or Territory (including a law relating to appeals) to the extent to which it relates to a termination of employment that occurred before the reform commencement."

128 In *Gary Phillips v TR7 Pty Ltd* (2006) 86 WAIG 2646 Wood C held that reg 1.2 did not apply so as to preserve the right of an employee to bring a contractual benefits claim against a constitutional corporation. At [24] to [26] Wood C found:

> "The Regulation requires also that Work Choices does not apply to a law of a State, 'to the extent to which it relates to compliance with an obligation' under that law or another law of the State. The obligation is the obligation to pay the benefit arising from the contract of employment. The parties agree on this. The jurisdiction exercised by the Commission is pursuant to s.23(1) (see *HotCopper v SAAB* (op cit); *Matthews v Cool or Cosy Pty Ltd* 84 WAIG 199). The applicant has a right to seek a remedy under s.29(1)(b)(ii). There is no aspect of the Act, as far as this application is concerned, which causes an obligation to pay. Both parties agree on this point.
>
> The point of difference is that the applicant submits that the obligation arises under 'another law'. Counsel for the applicant submits that the obligation arises under 'another law of a State', being the common law of the State. The respondent says, 'The IR Act does not confer a general jurisdiction on the Commission to hear and determine common law claims'.

> The jurisdiction is a limited jurisdiction to hear and determine denied contractual benefit claims within prescribed limits. The applicant submits, 'the common law was a Colonial law and became State law when the Constitution was enacted'. The applicant then went on to explain why he says, 'the common law is not beyond the scope of Regulation 1.2(2)'. Within the context of Work Choices, I do not agree with this submission. In my view, when one looks at the construction of s.16 and Regulation 1.2(2) of Work Choices, and the legislation as a whole, a reference to a State law in Work Choices is a reference to a statute of the State, not the common law."

129 With respect to Wood C, I do not agree. Whilst it is correct to say that s 29(1)(b)(ii) of the IR Act only creates a right of an employee to refer a claim of a money entitlement provided for in a contract of employment or the denial of an entitlement in a contract for which an award of compensation is sought, the jurisdiction of the Commission to deal with the matter arises under s 23(1) of the IR Act (see *Matthews v Cool or Cosy Pty Ltd* (2004) 84 WAIG 199 per Steytler J at [14] and the cases cited therein and Pullin J at [42]).

130 Section 29(1)(b)(ii) of the IR Act provides:

> "(1) An industrial matter may be referred to the Commission —
>
> (b) in the case of a claim by an employee —
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
>
> by the employee."

131 Section 23(1) of the IR ACT provides:

> "Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter."

132 Pursuant to s 23(1) the Commission has power to do that which is necessary to deal with the matter before it, in relation to which it is directed by s 26(1)(a) to "act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms". Further, that the Commission is not restricted to making orders of particular or defined types (see s 26(2) of the IR Act).

133 In *Matthews v Cool or Cosy Pty Ltd* (op cit) Pullin J at [49] described the Commission's power to deal with contractual benefit claims as follows:

> "In the language of s 29(1)(b)(ii), an employee dismissed without notice in breach of contract, may refer to the Commission a claim 'that he [had] not been allowed by his employer a benefit … to which he [was] entitled under his contract of service'. Once the claim has been referred, the authority or jurisdiction of the Commission to grant remedies, is to be found in s 23. The section is extraordinary in its brevity. As I have already said, it simply confers jurisdiction on the Commission to enquire into and 'deal with' the claim. In my opinion, this provision confers jurisdiction on the Commission to order damages for the non-allowance of a benefit if the non-allowance amounts to a breach of contract. The principal objects of the Act are set out in s 6, and they include a statement that the objects of the Act are to provide a means for conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes, and to provide means for 'settling industrial disputes not resolved by amicable agreement'. If there were no power to award damages, then the Commission would not be able to settle this type of dispute."

134 Whilst the claims are founded in contract the origin of the remedy is statutory which does not extend to the Commission being empowered to deal with all contractual disputes that arise between an employer and employee. The dispute must be an "industrial matter" to invoke the jurisdiction of the Commission. In *HotCopper v Saab* (2002) 82 WAIG 2020, Anderson J, with whom Parker and Hasluck JJ agreed, observed at [26] to [27].

> "It must be recognised that there is a limit to what is and what is not an industrial matter in the master/servant context for the purposes of the *Industrial Relations Act 1979* even although the definition of the term in s 7 would appear to be far-reaching in that context. Parliament cannot be taken to have intended that *any* matter relating in *any* way to the duties of employers as regards contractual benefits is a matter that may be dealt with by the Commission as an industrial matter, although it is possible to read the definition of industrial matter as expansively as that. Notwithstanding the enactment of s 7(1)(1a), the definition must be read down by reference to the scope and purpose of the Act as a whole 'and so read, must be confined to [matters] of an industrial nature': *Slonin v Fellows* (1984) 154 CLR 505. Otherwise, as Kennedy J pointed out in *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia (Pepler's Case)* (*supra*) at page 18, a vast range of powers would be available to the Commission which it could never have been thought appropriate to confer on it. Take, for example, a reference by an employee of a dispute with respect to a safety matter. The employee may fairly allege that his implied contractual entitlements include providing him with a reasonably safe workplace, and safe and suitable equipment, and that the failure to do so, being a matter relating to a benefit under the contract of service within the general words of the definition of industrial matter in s 7, is an industrial matter. Subject to s 7(3), it would be difficult to deny the employee's standing to refer the matter to the Commission under s 29(1)(b)(ii) and, again subject to s 7(3), it would be difficult to deny the Commission's power to deal with the matter by making appropriate orders in order to settle the dispute. But supposing the employee's reference included a claim that, because he had been denied the benefit of a safe workplace in breach of the implied agreement, he had suffered loss through injury. To my knowledge, it has not been suggested that a claim by an employee for damages for injuries sustained in the course of his employment, in consequence of a breach of the employer's obligation under the

> contract of employment to provide a safe working environment, is a matter which can be dealt with by the Commission, even although it would be within the reach of the literal words of the definition of industrial matter.
>
> I think it is impossible to attribute to parliament an intention that the Commission should be a tribunal with power to deal with the full range of conflicts and causes of action that might possibly arise between master and servant, including between corporations and their highly-paid executives and top management. In my opinion, a line must be drawn at some point to mark out the boundary beyond which it was never intended that the Commission's powers to settle disputes should be exercised and I think that the line must be drawn by reference to the intrinsic nature and circumstances of the particular dispute, the question being whether it is or is not really and truly a dispute of an industrial nature, susceptible of just resolution under the Act. "

135 Given that s 29(1)(b)(ii) of the IR Act confers standing on an employee to bring an application for a claim of denied contractual benefits and that although the claim itself must be founded in the common law, the remedy or remedies which the Commission can provide are statutory and differ in part from common law remedies. Consequently it cannot be said that the Commission's jurisdiction to deal with such claims, is that the Commission is vested with the common law to hear and determine such claims.

136 Although the Commission is empowered to deal with a claim made under s 29(1)(b)(ii) when doing so it exercises its power under s 32 (by referring industrial matters for conciliation). Further, it is to act according to equity and good conscience (s 26(1)) and is not restricted to the specific claim made or to the subject matter of the claim (s 26(2)). In dealing with the process of determining a matter brought under s 29(1)(b)(ii) the Commission is empowered to exercise procedural steps and make substantive orders under s 27 and any orders made must be in the form of an award, order or declaration and follow the process prescribed in ss 34, 35 and 36 of the IR Act.

137 The relevant part of reg 1.2 of the WRR provides s 16(1) does not apply to a law of a State to the extent to which it relates to compliance with an obligation under that law and in respect of an act or omission which occurred prior to the reform commencement. The issue in this matter is whether a claim for contractual benefits brought under s 29(1)(b)(ii) of the IR Act relates to compliance with an obligation under the IR Act. Immediately following the filing of the claim under s 29(1)(b)(ii) but for the operation of s 16(1) of the WR Act, the Commission is seized with jurisdiction to exercise its powers under s 23(1) and s 27 to deal with the claim pursuant to s 28 and is required to act with due speed pursuant to s 22B.

138 The expression "relates to" connotes a wide connection between two subject matters. The breadth of the expression is considered by DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (6th ed) at [12.7]. At page 360 the learned authors consider a number of authorities in which the expression has been considered. They then state:

> "Nonetheless the expression is 'of broad import': per Toohey and Gaudron JJ in *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374; 92 ALR 213 at 226. In the same case, McHugh J said (at 376; 228) the phrase 'requires no more than a relationship, whether direct or indirect, between two subject matters'. The words are 'among the broadest which could be used to denote a relationship between one subject matter and another': per Lehane J in *Nordland Papier AG v Anti-Dumping Authority* (1999) 93 FCR 454 at 461; 161 ALR 120 at 126. However, the relationship must be between distinct subjects or subject matters. Accordingly, the words will not usually be apt to refer to a relationship or connection between the same person, albeit that he or she is acting in different capacities: *Harris v FCT* (2001) 189 ALR 611 at 617."

139 Although the words "relates to" usually refers to different subjects, these words when used in reg 1.2(2) refer to a connection between the provisions of the IR Act generally and compliance with a provision that creates or raises an obligation under the IR Act.

140 In my opinion where an application is made under s 29(1)(b)(ii) of the IR Act, a direct relationship is raised between this provision which prima facie creates a right for an individual to have the application dealt with and the obligation on the Commission to deal with the application (being a duty) pursuant to the provisions referred to in paragraphs [132] and [136] of these reasons.

141 The additional requirement of reg 1.2(2) which must be invoked to save a contractual benefit claim being excluded by s 16(2) of the WR Act is that the obligation must be "in respect of" an act or omission which occurred prior to the reform commencement. The learned authors of *Statutory Interpretation in Australia* (6th ed) point out at [12.7] at page 359 that the words "in respect of" have a like effect to "in relation to", "relating to", "related to" and "with respect to". In this matter the obligation on the Commission to deal with the Applicant's claim has a direct relationship with an act or omission which occurred prior to the reform commencement. The act or omission in this matter is the act of the Applicant's employment coming to an end on 2 March 2006. The reform referred to in reg 1.2(2) commenced on 27 March 2006.

142 I am also of the opinion that reg 1.2(4) could also be applied to save the jurisdiction of the Commission to deal with the Applicant's claim for pay in lieu of notice in this matter if there was a finding by this Commission that the Applicant's employment was terminated by the Respondent as the Applicant's claim for denied contractual benefits squarely relates to the termination of her employment. However as no finding has been made that her employment was terminated by the Respondent orders will be made that each claim be dismissed.

2007 WAIRC 00191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GWENDA MAY SMITH

APPLICANT

-v-

ALBANY ESPLANADE PTY LTD T/AS THE ESPLANADE HOTEL

RESPONDENT

CORAM	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 2 MARCH 2007
FILE NO/S	U 164 OF 2006
CITATION NO.	2007 WAIRC 00191

Result	Dismissed
Representation	
Applicant	Mr D C Heldsinger (of counsel) and Ms K Findlay-Grove (of counsel)
Respondent	Mr A L Drake-Brockman (of counsel) and Mr B Jackson (of counsel)

Order

Having heard Mr Heldsinger of counsel and Ms Findlay-Grove of counsel on behalf of the Applicant and Mr Drake-Brockman of counsel and Mr Jackson of counsel on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby —

ORDERS that the application is hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

2007 WAIRC 00190

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GWENDA MAY SMITH

APPLICANT

-v-

ALBANY ESPLANADE PTY LTD T/AS THE ESPLANADE HOTEL

RESPONDENT

CORAM	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 2 MARCH 2007
FILE NO/S	B 164 OF 2006
CITATION NO.	2007 WAIRC 00190

Result	Dismissed
Representation	
Applicant	Mr D C Heldsinger (of counsel) and Ms K Findlay-Grove (of counsel)
Respondent	Mr A L Drake-Brockman (of counsel) and Mr B Jackson (of counsel)

Order

Having heard Mr Heldsinger of counsel and Ms Findlay-Grove of counsel on behalf of the Applicant and Mr Drake-Brockman of counsel and Mr Jackson of counsel on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby —

ORDERS that the application is hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

2007 WAIRC 00247

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY TAMPALINI
	APPLICANT
	-v-
	OUR LADY OF ASSUMPTION SCHOOL
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	24 OCTOBER 2006, 25 OCTOBER 2006, 16 NOVEMBER 2006
DELIVERED	WEDNESDAY, 14 MARCH 2007
FILE NO.	B 351 OF 2005
CITATION NO.	2007 WAIRC 00247

Catchwords	Contractual benefits claim - Entitlements under contract of employment - Claim for payment of Senior Teacher 2 allowance - Enforcement of an order of the Commission - Commission lacks jurisdication - Application dismissed - Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)
Result	Dismissed
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms K Wroughton (of counsel)

Reasons for Decision

1 This is an application by Mary Tampalini ("the applicant") pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") seeking benefits due to her under her contract of employment with Our Lady of Assumption School ("the respondent") ("the School"). The respondent denies that the applicant is owed the benefit she is claiming.

The Claim

2 The applicant claims that the respondent owes her the payment of a Senior Teacher 2 ("ST2") or Exemplary Teacher (Catholic School) ("ET(CS)") allowance from 31 December 2004 onwards which she maintains was agreed to be paid to her under her contact of employment with the respondent and was unilaterally and unfairly removed from her on 31 December 2004.

3 On 27 July 2006 the applicant filed particulars of her claim which (as amended at hearing) is as follows:

"1. In 1970, the Applicant commenced in a teaching position in a primary school within the catholic education service (the Service) having satisfied all pre requisites for appointment to the position.

2. In or about 1989, the Applicant was one of the teachers who was given exemption from Accreditation (the Exemption)

   a. The Accreditation related to the teaching of religious education within the Service

   b. The Exemption was given to the Applicant in recognition of prior continuous service

   c. All Teachers subsequently appointed to the Service were required to hold the Accreditation

   d. The Exemption was not qualified and applied to all schools within the Service.

   e. In light of the Exemption, the Applicant was not required to undertake the study components of Accreditation as a condition precedent to being appointed to senior teaching positions.

   f. The Applicant did participate in school based in-service conducted by the Service

3. Within the Service two additional incremental points were provided

   a. Progression to both points required Accreditation

   b. The first point – Senior Teacher 1 – was portable between schools

   c. The second point – Senior Teacher 2 – was not portable between schools

4. In June 1992, the Applicant was appointed Senior Teacher 1 whilst teaching at Trinity College

5. In 1993 the applicant accepted a position at the Queen of Apostles School at Riverton

   a. From the commencement of the appointment the Applicant held Senior Teacher 1 status as it was portable between schools

b. Subsequently, the Applicant successfully completed the assessment requirements and was appointed to Senior Teacher 2 status and retained that status until leaving the school at the end of 1999.

6. In 2001 the Applicant commenced at Our Lady of Assumption School in Dianella (the new School)

7. The Applicant entered into a contract of employment with the new School incorporating the existing payment structures and the Exemption.

   a. The Applicant commenced as a Senior Teacher 1

   b. The Applicant was not appointed to teach religious education nor, at any time, was she required to teach religious education at the new School

   c. The Applicant was appointed to Senior Teacher 2 at the new School (after successful completion of the assessment requirements) from the commencement of 2001

   d. The appointment was not made subject to a finite term or any other condition

   e. The Applicant retained the status of Senior Teacher 2 until the middle of 2004 when the position was redefined as Exemplary Teacher.

   f. The Applicant held the position of Exemplary Teacher until the end of 2004 when it was unilaterally revoked.

8. In a letter dated March 2004 and addressed to the Principal of the new School, the Service wrongly maintained that newly introduced accreditation prerequisites (in religious eduction) (sic) for appointment to senior teaching status applied to the Applicant's appointment.

   a. The Applicant's Exemption had not been revoked on notice or otherwise

   b. In any event, the Applicant was not and had not been a teacher of religious education at the new School

   c. Prior to March 2004, there had not been any discussion or direct notification of the change to the Applicant

   d. From the time of the initial advice, the Applicant has informed the Respondent both verbally and in writing that the proposed changes were not accepted.

   e. The revocation was a breach of a term of the contract of employment.

9. Notwithstanding the revocation advice, the new School continued to require the Applicant to perform the duties and to accept the same responsibilities.

10. The Applicant has made it clear to the Respondent that the change to the contract of employment has not at any time been accepted.

11. The Applicant claims

   a. the difference between the rate paid to her from the commencement of 2005 and the combined rate for the Exemplary Teacher and ST(CS)2 for the period based on the following

	1.7.04	1.7.05	1.7.06
ST(CS)2	$2 651	$2731	$2812
	1.2.04	1.2.05	1.2.06
ET(CS)	$3 947	$4 077	$4 212
			$7 024

   b. a declaration that the Applicant is exempt from the Accreditation

   c. a declaration that the Applicant's position is Exemplary Teacher"

4 On 6 September 2006 the respondent filed a response to the applicant's particulars of claim which is as follows:

"The respondent denies paragraphs 1 to 11 of the Applicant's Particulars of Claim and says the following:

1. The Applicant, Mrs Mary Tampalini is employed as a teacher at Our Lady's Assumption, Dianella in accordance with the terms and conditions of the Western Australian Catholic Schools (Enterprise Bargaining Agreement) of 2004 (sic) (the EBA) and the policies of the Catholic Education Commission of Western Australia.

2. The EBA provides for all conditions to the exclusion of those contained within the Independent Schools' Teachers (sic) Award 1976.

   i. The Senior Teacher 2 Classification was replaced in the EBA of 2004 by the Exemplary Teacher Allowance see Clause 11.–Salaries paragraph 4 Exemplary Teacher.

   ii. The Applicant was only entitled to the Exemplary Teacher Allowance if she held and maintained the Accreditation to Teach in a Catholic School qualification.

   iii. The Applicant does not hold the Accreditation to Teach in a Catholic School qualification.

3. The Applicant was advised on 12 November 2004 by letter from the Principal, Mrs Helen Brennan that:
    i. her Senior Teacher 2 Classification expired on 31 December 2004 and
    ii. that as she did not hold Accreditation to Teach in a Catholic School Allowance she was ineligible to receive the new Senior Teacher (Catholic Schools) Allowances and the Exemplary Teacher Allowance.
4. The Applicant alleges that she has an Exemption from the requirement to hold Accreditation to Teach in a Catholic School.
    i. The Exemption only relates to the requirements of Accreditation for the purpose of maintaining her employment within Catholic schools in Western Australia.
    ii. The Exemption does not entitle the Applicant to the allowances that the Accreditation to Teach in Catholic School attracts.
5. The applicant at paragraph 3 of the Particular's (sic) of Claim alleges that two additional incremental points were provided and that progression to both points required Accreditation.
    i. The respondent denies that Accreditation was required for the attainment of Senior Teacher 1 or Senior Teacher 2 classification in accordance with the Independent Teachers (sic) Award 1976 or the Western Australian Catholic Schools (Enterprise Bargaining) Agreement 2000 (sic).
    ii. It was not until the introduction of the replacement Western Australian Catholic Schools (Enterprise Bargaining) Agreement 2004 (sic) that the Senior Teacher 1 and Senior Teacher 2 classifications were replaced by the Senior Teacher (Catholic Schools) Allowances and the Exemplary Teacher Allowance, that Accreditation became a requirement for the gaining and holding of the Senior Teacher (Catholic Schools) and the Exemplary Teacher Allowances.
6. The applicant at paragraph 7(d) alleges that the appointment to Senior Teacher 2 was not subject to a finite term or any other condition.
    i. The respondent says that the appointment was subject to a 3 year term which expired on 31 December 2004.
    ii. The Independent Schools' Teachers' Award 1976 (the Award) Appendix 1 Clause 3–***Progresion (sic) to a Higher Classification*** paragraph 6 provides that "*provided the criteria for appointment are maintained, the period of appointment to the position of Senior Teacher at any level shall not be less than three years.*"
    iii. In accordance with the Award a teacher applying for Senior Teacher status must do so in accordance with the provisions for of (sic) the Award. In particular, the respondent says that the Summative Appraisal process in the Appendix of the Award determines the professional competence of a teacher for promotional purposes.
    iv. In accordance with Appendix 1 Clause 1–***Teacher Appraisal*** paragraph 2 (b) (i) the employer determines the form and conduct of the appraisal.
    v. The Catholic Education Office on behalf of the Roman Catholic Archbishop of Perth (the Employer) issues a booklet, '***Senior Teacher – A Factbook for Principals and Teacher***'.
    vi. This booklet provides all the information about the form and conduct of the appraisal process for appointment to the Senior Teacher classification. The booklet provides that Senior Teacher 2 classification is not portable between Catholic schools and is subject to a three year appointment.
7. The respondent objects to the declarations sought by the applicant that is, that the applicant's position is Exemplary Teacher and that the applicant is exempt from Accreditation."

Applicant's evidence

5 The applicant commenced teaching in the Western Australian Catholic system on 1 January 1970. The applicant gave evidence that whilst teaching at Trinity College in the late 1980s she was given an exemption from accreditation. The applicant gave the following evidence about this exemption:

> "… ---The exemption was offered to teachers who had been - - had had 10 years' continuous service in the Catholic Education Office. They introduced what they called "accreditation" which was the undertaking of units of study in religious education and the exemption to do those courses/study was given to teachers who had 10 years' continuous service in the Catholic education.
>
> MR TRAINER: Just so the Commissioner understands the picture as clearly as we can give it to her, you've given evidence that it was (sic) exemption from religious studies?---Yes.
>
> Can you tell the Commissioner where those studies were undertaken?---They were undertaken at Notre Dame University at that stage and I believe later on at the Catholic Education Office.
>
> Now, can you tell the Commissioner what you were given exemption from - -?---I was - -
>
> - - just lastly?---I was given exemption from having to do the course, the units of study in religious education.

When you were given the exemption, was it time limited?---No.

Was it in any other way qualified as to how it could apply?---No.

Now, from - - and as I understand your evidence, that was in about 1989. Where were you teaching then?---I was teaching at Trinity College."

(Transcript page 13-14)

6 The applicant stated that she applied for and was granted Senior Teacher 1 ("ST1") status when she was at Trinity College and she stated that as this promotional position was portable she kept this status when she moved to the Queen of Apostles School in 1992. The applicant later applied for and was granted the status of Senior Teacher 2 ("ST2") in 1993 which was only applicable to her employment at this school. The applicant stated that when she was appointed as ST1 and ST2 teacher she was not required to be accredited.

7 The applicant stated that she applied for a teaching position with the respondent at the end of 2000 and was interviewed by the then Principal Ms Helen Brennan and two Assistant Principals. By letter dated 9 October 2000 Ms Brennan then offered the applicant a position with the respondent.

8 Following is the offer of employment given to the applicant by the respondent, which the applicant accepted (formal parts omitted):

"After consultation with Dianella Catholic School Board, and on behalf of the Bishop, I invite you to become a member of the staff of Our Lady's Assumption School under the terms of the "**Conditions of Employment, Teachers in Catholic Schools in WA (1994)", "Independent Schools' Teachers' Award 1976",** and the enclosed **'**(sic) **The Western Australian Catholic Schools (Enterprise Bargaining) Agreement No 1 1998**".

The position offered is Primary Teacher, Permanent/Full Time.

Your classification is currently 4 year trained and your level on this scale is Step 4 Level 13. Commencing salary at the rate of $48,264 per annum.

Superannuation: As provided by the Catholic Schools (WA) Superannuation Fund.

Status: Permanent Full Time.

You are requested to sign and send to me by return, the Letter of Acceptance which I am enclosing."

(Exhibit A4)

9 The applicant stated that during her employment interview with the respondent there was no discussion about her ST1 status but as this was transferable from her previous position she continued being paid at this level when she commenced employment at the School.

10 The applicant stated that because she wanted to apply for a position as ST2 at the School towards the end of 2001 she was given a Senior Teacher Fact Book ("Fact Book") detailing the criteria and process for progression to ST2 level (see Exhibit A5). The applicant stated that as part of this process she had a meeting with Ms Brennan and Ms Mary Ciccarelli who was a consultant appointed to assist with assessing the applicant to be a ST2 teacher and she stated that at this meeting there were no discussions about accreditation requirements to be a ST2 teacher. The applicant stated that after she was appointed as a ST2 teacher she undertook an extensive range of additional duties and tasks which she continued to undertake after the ST2 status was removed from her at the end of 2004. The applicant stated that she continues to undertake these additional duties and she gave evidence that during 2006 her duties have expanded.

11 The applicant stated that she only became aware at the end of 2004 that her appointment to a ST2 status was only for a period of three years.

12 The applicant stated that she was aware that the accreditation of teachers in the Catholic school system had been reviewed at some point but she believed that as she was exempt from any accreditation requirements this did not impact on her and she advised Ms Brennan of this.

13 The applicant gave evidence that in February 2004 she was given a letter by Ms Brennan about taking a course for current ST2 teachers to make the transition to the new Senior Teacher levels, Senior Teacher (Catholic Schools) 1 and 2 ("ST(CS)1" and "ST(CS)2"), as detailed in the Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 1 of 2004 ("the 2004 Agreement"). The applicant stated that in March 2004 she received another letter from Ms Brennan advising her that she did not hold the required accreditation to continue to hold ST2 status (renamed ET(CS)) under the 2004 Agreement.

14 These letters are as follows (formal parts omitted):

"**Details of the course for teachers with required prerequisites to progress to Senior Teacher 1 and 2 (Catholic School).**

Please ensure that the appropriate staff receive this information.

There will be an intensive course for those teachers who currently are ST1 and 2 holders who also hold Accreditation A. A one-off 5 day course in the mid-semester one break, will provide those attending with *Accreditation to Teach in a Catholic School*.

Those teachers who meet the criteria need to register by completing the attached application and returning it to Jennifer Rose on fax 9212 9298.

Details of the course are as follows

April 14-16 Liturgy and Prayer Presenter Sr Kerry Willison RSM **and**

April 19-20 The Human Person Presenter Dr Peter Black

Participants will be required to attend all five days and complete the assessment task."

(Exhibit A7)

"**TRANSITION ARRANGEMENTS FOR SENIOR TEACHERS 1 AND 2 TO SENIOR TEACHER (CATHOLIC SCHOOLS) 1 AND 2 AND EXEMPLARY TEACHER (CATHOLIC SCHOOL)**

Please refer to my bulk mail letter dated 26 February (copy attached with Registration Form).

Our records indicate that the following staff who do not currently hold an Accreditation A certificate, but have been employed in the system since pre-1984 would be permitted to attend this course if they were to commit to completing their Accreditation A this year. They would need to contact Jennifer Rose on 9212 9331 if they would like to take this option. If they do not choose to complete their Accreditation A, they are not eligible to attend this course and their registration cannot be accepted. Successful completion of three Accreditation A modules, this course and the required assessment task will satisfy the requirements for Accreditation to Teach in a Catholic school.

Mary Tampalini

You may perhaps like to check if they are interested in attending this intensive course and completing three Accreditation A modules, and the required assessment task to obtain *Accreditation to Teach in a Catholic School* in which case they should send in their registrations as soon as possible."

(Exhibit A6)

15 The applicant stated that after receiving the letter dated 30 March 2004 she rang the Catholic Education Office ("the CEO") to discuss her accreditation and to obtain information about the exemption from accreditation given to her in 1989. In September 2004 the CEO sent the applicant a copy of a letter written to teachers in the Catholic school system in 1997 about an exemption from accreditation which the applicant claimed she did not receive (Exhibit A1). The applicant stated that she responded to the CEO on 29 November 2004 reiterating her view that she had previously been granted an exemption from accreditation and therefore should retain her ST2 status as the reversal of the exemption only applied to teachers of religious education (Exhibit A8).

16 The applicant stated that she has not taught religious education at the School nor did she teach it at the Queen of Apostles School.

17 The applicant stated that from the second half of 2004 onwards until the end of 2004 she was classified as an ET(CS) on her payslip and the applicant stated that in November 2004 Ms Brennan sent her a letter advising her that her ST2 status was to cease at the end of 2004.

18 Under cross-examination the applicant stated that she believed that she did not have to be accredited to hold the status of ET(CS) under the 2004 Agreement because she was granted an exemption from accreditation in 1989.

19 The applicant was asked to comment on the respondent's current Accreditation Framework (see Exhibit R1). The applicant argued that this document did not apply to her as she has an exemption from accreditation and she believed that it only applies to staff who are new to the Western Australian Catholic school system. The applicant confirmed that she does not hold the 'Accreditation to Teach in a Catholic School' qualification set out in the document and the applicant believed that teachers who are currently employed within Catholic schools are not required to complete this accreditation (see Exhibit R1 page 4).

20 The applicant agreed that she did not have any documentation confirming details about the exemption she had been given in 1989.

21 The applicant maintained that when she was appointed as a ST2 teacher at the School she was not advised at the time about the length of this appointment.

22 The applicant stated that in early 2004 she may have had a discussion with Ms Brennan about losing her ST2 status and allowance and she conceded that Ms Brennan told her that she had to undertake additional courses in order to become accredited. The applicant understood that she lost her classification as an ET(CS) teacher at the end of December 2004 because she did not hold the required accreditation for this position.

23 The applicant stated that she was confused when she received a letter from the CEO dated 31 March 2005 explaining the introduction of the new classifications of ST(CS)1 and ST(CS)2 in the 2004 Agreement because when she had raised the issue of her exemption in 2004 she was told that it no longer applied and yet this letter refers to her exemption remaining. This letter is as follows (formal parts omitted):

"Thank you for your email of 23 March 2005.

I have spoken with Terry Wilson, the Assistant Director for School Personnel, and he has informed me that pre-1986 teachers were given an exemption from having to do Accreditation. They were not given Accreditation.

> The whole purpose of introducing Senior Teacher (Catholic Schools) 1 and Senior Teacher (Catholic Schools) 2 was to encourage those people who have not done Accreditation to do Accreditation, especially pre-1986 teachers.
>
> Many have done Accreditation as a result and now receive the allowance. Unless you do *Accreditation to Teach in a Catholic School*, you will not be eligible to become a Senior Teacher (Catholic Schools) 1 or 2 under the Teacher's Enterprise Bargaining Agreement and, therefore, you will not receive the allowance.
>
> You can continue to hold your pre-1986 exemption from having to do Accreditation, but while you do so you will not receive Senior Teacher (Catholic Schools) status or the attendant allowance."
>
> (Exhibit R4)

24 The applicant agreed that there was no requirement under the Award to have accreditation for ST1 and ST2 status and that accreditation requirements for these positions changed under the 2004 Agreement.

Respondent's evidence

25 Ms Brennan is currently a consultant with the CEO and she holds a number of educational qualifications. Ms Brennan was the School's Principal from mid 1997 to the end of 2004.

26 Ms Brennan stated that after the applicant applied to be a ST2 a review process was held in Terms 2 and 3, 2001. Ms Brennan stated that as the applicant's application was successful she was appointed as a ST2 teacher from the beginning of 2002. Ms Brennan stated that the procedures and requirements for this appointment were governed by the *Independent Schools' Teachers' Award 1976 (No R27 of 1976)* ("the Award") and the requirements contained in the Fact Book.

27 Ms Brennan stated that the applicant was appointed as a ST2 for three years and that when her appointment came to an end she wrote to the applicant by letter dated 12 November 2004 confirming this. This letter is as follows (formal part omitted):

> "As you are aware you Senior Teacher 2 classification that commenced on 1/1/2002 ceases on 31/12/2004.
>
> Since you do not have the study component of Accreditation B you will not be entitled to receive the Senior Teacher (Catholic School) 1 or 2 allowance and will revert to the normal incremental salary scale. When you have completed the study component of Accreditation B you will be eligible to receive the Senior Teacher (Catholic School) 1 allowance and after a further year of full time equivalent experience you will be entitled to receive the Senior Teacher (Catholic School) 2 allowance."
>
> (Exhibit R3)

28 Ms Brennan stated that prior to and after she wrote this letter to the applicant she had a discussion with her about not being accredited and the impact of the 2004 Agreement accreditation requirements on her. Ms Brennan stated that when she told the applicant that she was no longer entitled to be paid the ST2 allowance because of her lack of accreditation the applicant responded by saying that she would not undertake the required training to become accredited because she already had an exemption from this requirement as she was employed within the Catholic school system prior to 1986. Ms Brennan gave evidence that she understood the exemption that the applicant was referring to meant that the applicant did not have to undertake any accreditation to become a Senior Teacher or to teach in the Western Australian Catholic school system. Ms Brennan stated that because she was concerned that the applicant would be disadvantaged by not becoming accredited she asked one of the School's Assistant Principals to speak to her about this issue.

29 Ms Brennan stated that when the 2004 Agreement was ratified the old ST1 and ST2 classifications ceased. Ms Brennan understood that to access the new ST(CS)1, ST(CS)2 and ET(CS) classifications contained in the 2004 Agreement the applicant would need to obtain the qualification of 'Accreditation to Teach in a Catholic School'. Ms Brennan stated that when she received a memorandum from the CEO dated 26 February 2004 about accreditation requirements with respect to this qualification, which applied to senior staff as a result of the changed accreditation requirements included in the 2004 Agreement, she distributed this information to all staff. Ms Brennan stated that she could not recall specifically speaking to the applicant about this memorandum (Exhibit A7). Ms Brennan stated that she gave the applicant a copy of the letter from the CEO dated 30 March 2004 about courses to be completed for accreditation and she stated that she had a discussion with the applicant about this letter (Exhibit A6). Ms Brennan stated that she encouraged the applicant to undertake the accreditation courses and she stated that when the applicant told her that she was not going to undertake these courses she advised her to contact Mr Eric Chidlow at the CEO.

30 Under cross-examination Ms Brennan gave evidence that she sought advice from the CEO about whether or not the applicant was eligible to be an ET(CS) teacher under the 2004 Agreement without the required accreditation and she was advised that she was not.

31 Ms Brennan stated that she did not speak to the applicant about being given a special responsibility allowance as provided for in the 2004 Agreement, in lieu of an ET(CS) allowance (see Clause 12(2)(b)).

32 Ms Brennan stated that she was aware that the applicant would be applying for a ST2 position at the School at the time she applied for a position with the School and Ms Brennan gave evidence that when the applicant commenced at the School and also when she was appointed as a ST2 she was aware that the applicant did not have any accreditation as the applicant advised Ms Brennan that she had an exemption from accreditation.

33 Ms Brennan stated that the current duties undertaken by the applicant were those that were in line with what would be required of a person holding a ST2 (ET(CS)) position.

34 Ms Brennan stated that when the applicant was appointed to a ST2 position in 2001, this was not confirmed in writing. When asked if she had a discussion with the applicant about the term of her appointment Ms Brennan stated that she believed that a timeframe for the applicant's appointment as a ST2 teacher would have been given to the applicant at the time she was appointed. Ms Brennan stated that the applicant would have continued in her role as an ET(CS) teacher after 2004 if she held the required accreditation.

35 In re-examination Ms Brennan stated that at the time the applicant was granted her ST2 status Ms Brennan was not aware of the accreditation changes contemplated by the 2004 Agreement. Ms Brennan again restated that she understood that the applicant had to be accredited to be an ET(CS) teacher under the 2004 Agreement and Ms Brennan stated that the applicant was the only teacher at the School who had ET(CS) status in 2004.

Submissions

Applicant's submissions

36 As I understand the applicant's submissions she claims that the Commission has jurisdiction to deal with this application as this claim arises from a benefit due to the applicant under a contractual arrangement between the applicant and the respondent which sits outside of the 2004 Agreement and the Award and the applicant argues that as she had an exemption from accreditation she is therefore entitled to be paid the ET(CS) allowance (previously ST2) that she is seeking.

37 The applicant argues that the ET(CS) status and thus the allowance attached to it, was incorrectly removed from the applicant at the end of 2004 because the respondent wrongly claimed that she was not accredited. The applicant argues that she was appointed to a ST2 status without holding any accreditation in 2002 and claims that she should have continued in the role of ST2, or ET(CS) as it became on 1 July 2004 and should have been paid this allowance after the end of 2004 notwithstanding her lack of accreditation as provided for under the 2004 Agreement. The applicant argues that the exemption from accreditation given to her was an express and over award term of her contract of employment with the various schools at which she taught within the Catholic school system and the applicant argues that as this arrangement stood outside of the Award and/or the 2004 Agreement because the applicant was exempted by the CEO from accreditation in the late 1980s this claim does not involve the enforcement of an award or order of the Commission.

38 The applicant argues that the exemption she was granted was acknowledged at each of the schools at which she taught and was well known as part of her contract of employment and this exemption applied in practice when the applicant progressed to Senior Teacher status at Trinity College, the Queen of Apostles School and the School.

39 The applicant argues that as the exemption given to her in or about 1989 was not qualified or time limited the applicant did not and does not currently require accreditation in any form to hold the position of ST2 or ET(CS) within the Catholic school system. The applicant argues that as she was given an exemption from requiring any form of accreditation to teach in a Catholic school or to progress to a higher level this exemption allowed the applicant to access and progress through the classification levels within applicable industrial instruments without the necessity to meet further accreditation standards. The applicant claims that even though there may have been a change of policy with respect to accreditation requirements to be an ET(CS) teacher within Catholic schools as contained in the 2004 Agreement, this change did not alter the applicant's existing contract with the respondent as she had a pre-existing and unlimited exemption from accreditation. The applicant argues that because the Accreditation Framework document is an administrative tool it sits outside the Award and the 2004 Agreement and the issue of accreditation requirements as provided for in the 2004 Agreement therefore should not be taken into account when determining this application.

40 The applicant also claims that as the 2004 Agreement and the Award are minimum rates instruments this allowance can be paid to the applicant as an over-award payment. The applicant argues that in any event she would have retained her ET(CS) status if the issue of accreditation did not arise as set out in the 2004 Agreement and she is therefore entitled to be paid the monies that she is claiming as the applicant was required to and continued to undertake the ET(CS) duties after December 2004.

41 The applicant argues that because she continued to be paid as an ET(CS) teacher after mid 2004 this reflected an agreement between the parties which stood outside of the 2004 Agreement.

42 The applicant argues that there was no evidence that the applicant had a three year fixed term contract as a ST2 teacher and the Fact Book confirms that this is only the minimum duration of a contract at this level. The applicant also argues that Ms Brennan's letter dated November 2004 advising the applicant that she was no longer a ST2 was an administrative decision and the applicant claims that it was improper for Ms Brennan to unilaterally repudiate the existing contractual arrangement between the applicant and the respondent.

43 The applicant argues that as the 2004 Agreement does not refer to any exemption to progress to higher levels it is open to the Commission to find that the terms of the 2004 Agreement does not govern the applicant's contract of employment in relation to pre-requisites to access higher levels within the 2004 Agreement. The applicant also claims that Clause 11(4) of the 2004 Agreement, which replaces the ST2 status with the ET(CS) classification, has no transitional provisions which the applicant argues supports her position.

44 The applicant argues that the exemption is only terminable by reasonable notice which has not been given to the applicant.

Respondent's submissions

45 The respondent maintains that the Commission has no jurisdiction to deal with this application as the applicant has not demonstrated that she is entitled to a benefit arising out of a contractual arrangement between the applicant and the respondent

over and above that which is contained in the 2004 Agreement. The respondent argues in the alternative that if the Commission finds that there is jurisdiction to deal with this application the applicant is not entitled to the payment of the allowance she is seeking because she does not hold the necessary accreditation to be designated as an ET(CS) teacher.

46 The respondent argues that no contract was entered into between Ms Brennan on behalf of the respondent and the applicant when the applicant applied for a position with the respondent that the applicant would be given and retain the status of ST2 notwithstanding any changes to accreditation requirements.

47 The respondent denies that any contract existed between the parties to provide a benefit over and above the entitlements provided under the 2004 Agreement. Specifically, there was no agreement that the applicant could be classified as an ET(CS) teacher under the 2004 Agreement and be paid the applicable allowance even though the applicant did not hold and maintain the accreditation qualification required by Clause 11(4)(c) of the 2004 Agreement. The respondent also denies that the applicant had an agreement as part of her contract of employment with the respondent to waive the requirements of holding 'Accreditation to Teach in a Catholic School'. In support of this claim the respondent relies on Ms Brennan's evidence that the applicant was encouraged several times in 2004 to acquire accreditation and as the applicant did not gain the accreditation qualifications in accordance with Clause 11(4)(c) of the 2004 Agreement she was therefore not appointed to the classification of ET(CS) in accordance with Clause 11(4).

48 As the accreditation requirements for appointment to a ST1 and ST2 status were altered by the 2004 Agreement, the respondent argues that the applicant is not entitled to the benefit of the ET(CS) classification and allowance as the applicant does not hold the requisite accreditation qualifications (see Clause 11(4)(c) of the 2004 Agreement). The respondent relies on Clauses 11(3) of the 2004 Agreement which confirms that the new ST(CS)1 and ST(CS)2 status require accreditation and the status of ET(CS) requires the maintenance of this accreditation (see Clause 11(4)(c) of the 2004 Agreement). The respondent argues that as the applicant was not accredited in line with the requirements contained in these clauses she cannot hold the status of ET(CS) teacher and therefore cannot be paid the monies she is claiming.

49 The respondent argues that Ms Brennan's evidence was truthful and the Commission should accept that she had a discussion with the applicant about her term as a ST2 lasting three years. The respondent argues that in any event the letter from Ms Brennan to the applicant dated 12 November 2004 revoking the applicant's ET(CS) status should be taken into account as well as the requirement in the Fact Book where a Principal is to notify a Senior Teacher when their appointment is about to cease (see Exhibit R5 page 9). Additionally Ms Brennan told the applicant that she was required to obtain the relevant qualifications to become accredited in order to retain her ET(CS) status.

50 The respondent argues that even though the applicant was designated as an ET(CS) teacher on her payslips from 1 July 2004 she was not appointed as an ET(CS) teacher in accordance with the provisions of the 2004 Agreement. The respondent argues that the applicant's ST2 classification was merely renamed at this date in accordance with the advice contained in the Work Matters attachment from the CEO (see Exhibit A8). The respondent also argues that the applicant no longer has an entitlement to the ET(CS) status after this date as the pre-existing ST2 classification was abolished by the 2004 Agreement and replaced by the ET(CS) classification and the applicant only had a contract as a ST2 for a period of three years which ceased at 31 December 2004.

51 The respondent argues that there was no oral or documentary evidence to support the applicant's claim that she had an entitlement to a benefit under her contract of employment with the respondent over and above the 2004 Agreement to pay her the ET(CS) allowance contained in the 2004 Agreement without satisfying the accreditation requirements of the allowance.

Findings and conclusions

Credibility

52 I listened carefully to the evidence given by both witnesses and closely observed their demeanour. In my view both witnesses gave their evidence in a clear and considered manner and it is also my view that they gave their evidence to the best of their recollection. On this basis I accept the evidence given by both witnesses. The only issue of any substance that was in dispute with respect to the evidence given by the applicant and Ms Brennan was whether Ms Brennan told the applicant that her term of appointment to a ST2 status was for a period of three years at the time of her appointment to this level. There was nothing confirming this timeframe in writing and even though Ms Brennan indicated that she would have advised the applicant of this timeframe when she was appointed to the ST2 status I am not convinced that this did in fact happen. I have reached this conclusion as it is my view that Ms Brennan's evidence about whether or not the applicant was appointed as an ST2/ET(CS) teacher for a period of three years was not as emphatic as the evidence given by the applicant. In any event, however, there was no dispute that Ms Brennan advised the applicant that her appointment as an ST2/ET(CS) teacher was to cease as at 31 December 2004 in a letter to the applicant dated 12 November 2004 and that this notification was in line with the protocols outlined in the Fact Book detailing relevant policies and procedures for appointment as a ST2 teacher and the cessation of this status (see Exhibit R3).

53 The claim before the Commission is one for an alleged denial of a contractual benefit. The law in relation to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to an industrial matter pursuant to s7 of the Act and the claimant must be an employee; the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service; the relevant contract must be a contract of service; the benefit claimed must not arise under an award or order of this Commission; and the benefit must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79

WAIG 1867. The meaning of "benefit" has been interpreted widely in this jurisdiction: *Balfour v Travel Strength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.

54 There is no issue in this matter that at all material times the applicant was an employee of the respondent and that she was employed under a contract of service. I find that this claim is an industrial matter for the purposes of s7 of the Act as the claim relates to payments the applicant claims are due to her which arise out of her employment with the respondent. However, as the parties are in dispute about whether or not the benefit being claimed by the applicant arises under an award or order of this Commission the first issue to be determined is whether or not the applicant is seeking the enforcement of an award or order of this Commission in order to invoke the Commission's jurisdiction to deal with this application.

The Claim

55 The applicant is claiming the payment of the ET(CS) allowance as provided for in the 2004 Agreement from January 2005 onwards when the respondent ceased paying her this allowance. The applicant maintains that she is entitled to this payment as she has undertaken the duties of an ET(CS) teacher since January 2005 and because she satisfies all of the requirements to hold this position as detailed in the 2004 Agreement except for the accreditation requirements outlined in Clause 11(4)(c) of the 2004 Agreement for which she claims she has an exemption. The applicant also argues that she should have remained as an ET(CS) teacher after 2004 and continued to be paid this allowance after December 2004, because she reached an agreement with Ms Brennan in 2001, that was not time limited, to retain her ST2 status on an ongoing basis.

56 It was not in dispute that the applicant commenced employment within the Catholic school system in January 1970 and she has continued to teach within the Catholic school system in a variety of positions since that time and that prior to the applicant commencing employment at the School in 2001 she held the promotional positions of ST1 and ST2 at other Catholic schools. When the applicant started teaching at the School she transferred her ST1 status across from her previous school as provided for in the Award and the applicant retained the status of ST1 until she was appointed as a ST2 teacher at the School in January 2002 in line with the requirements contained in the Fact Book (see Exhibit A5) (see paragraph 3). It was also not in dispute that from January 2002 onwards the applicant has continued to undertake the duties normally expected of an ET(CS)/ST2 teacher at the School and that she was the only ET(CS) teacher working at the School from July 2004 onwards when her pay slip described her as holding this position for administrative purposes as a result of the abolition of the then ST2 teacher status under the 2004 Agreement.

57 When the applicant commenced employment at the School her terms and conditions of employment were governed by the "Conditions of Employment, Teachers in Catholic Schools in WA (1994)", the Award and the Western Australian Catholic Schools (Enterprise Bargaining) Agreement No 1 of 1998 (AG 146 of 1998) which was replaced by the Western Australian Catholic Schools (Enterprise Bargaining) Agreement No 1 of 2000 (AG 161 of 2000) and then the 2004 Agreement (see Exhibit A4).

58 The 2004 Agreement provides that subject to a number of conditions a teacher in a Catholic school can be classified as an ET(CS) teacher and that from 1 July 2004 the ET(CS) classification replaced the pre-existing ST2 classification. The relevant provisions of the 2004 Agreement with respect to a teacher being classified as an ET(CS) and being paid the ET(CS) allowance, operative from 1 July 2004, are contained in Clause 11. – Salaries and are as follows:

"(4) Exemplary Teacher (Catholic School)

(a) From 1 July 2004 the Senior Teacher 2 classification is replaced by Exemplary Teacher (Catholic School).

(b) Appointment

Subject to

(i) a successful appraisal conducted by the Principal and

(ii) a limit of no more than one (1) Exemplary Teacher (Catholic School) per 500 students in any one school and

Enrolment	ET(CS)s
≤500	1
501 – 1,000	2
1,001- 1,500	3
1,501+	4

(iii) the applicant having held Senior Teacher (Catholic School) 2 for one (1) year prior to taking up the proposed appointment or being a Senior Teacher 2 at the time of registration of this Agreement

a teacher may be appointed by the Principal of a school to the position of Exemplary Teacher (Catholic School).

(c) Tenure

The appointment to an Exemplary Teacher (Catholic School) position in a school shall be for a period of three (3) years, provided that during the period of tenure, to maintain the Exemplary Teacher (Catholic Schools) classification a teacher must maintain his/her Accreditation to Teach in a Catholic School.

(d) Portability

The Exemplary Teacher (Catholic Schools) classification is not portable between Catholic Schools in Western Australia.

(e) Allowance

Allowances	Operative dates		
per annum	*Date of registration*	*1 Feb 2005*	*1 Feb 2006*
ET(CS)	$3,947	$4,077	$4,212

In addition to an Exemplary Teacher (Catholic School) allowance, an ET(CS) holder is also entitled to receive a Senior Teacher (Catholic Schools) allowance where eligible.

(f) Duties

The duties for an Exemplary Teacher (Catholic School) shall be determined by the Principal of that school and shall be made known to the applicant prior to the applicant accepting the particular appointment in the school."

59 Clause 11(4)(b) of the 2004 Agreement provides that a teacher who was classified as a ST2 teacher as at 1 July 2004 could be appointed as an ET(CS) teacher if they had been a ST2 teacher for one year prior to 1 July 2004, they had been appraised by the Principal as being appropriate for appointment as an ET(CS) teacher and the number of ET(CS) teachers to be appointed at a school depended on the number of students enrolled at the school. Additionally, Clause 11(4)(c) requires that a teacher must maintain 'Accreditation to Teach in a Catholic School' in order to retain the ET(CS) status and the requirements detailing how a teacher could achieve this accreditation are contained in the CEO's Accreditation Framework document and the CEO's policy statement on accreditation, which was last updated in 2003, which formed part of the applicant's contract of employment with the respondent (see Exhibits A4, R1 and R2).

60 After reviewing the evidence and relevant documentation and industrial instruments I conclude that the Commission lacks jurisdiction to deal with this application as it is my view that the benefit the applicant is claiming arises out of the enforcement of the terms of an order of this Commission which was registered in this Commission on 17 March 2005, specifically Clause 11(4)(e) of the 2004 Agreement.

61 By this application the applicant is seeking the payment of the ET(CS) allowance from January 2005 onwards which is an allowances provided for under Clause 11(4)(e) in the 2004 Agreement when a teacher is appointed to be an ET(CS) teacher pursuant to Clause 11(4)(b) of this agreement and undertakes the duties of an ET(CS) teacher. I find that as this claim seeks the payment of an allowance which arises pursuant to the terms of Clause 11(4)(e) of the 2004 Agreement then this claim constitutes the enforcement of Clause 11(4)(e) of the 2004 Agreement. In the circumstances I find that the Commission lacks jurisdiction to deal with this claim and the application will be dismissed. In reaching this view I reject the applicant's claim that the Commission has jurisdiction to deal with this application on the basis that this application does not constitute the enforcement of an order of this Commission because the applicant had an over award agreement with the CEO in 1989 that she be exempted from all and any future accreditation relevant to holding any position at a Catholic school and that this agreement sits outside of the terms of the 2004 Agreement. Even if I accept that this agreement was in place in the terms claimed by the applicant, which I dispute, and the applicant had an agreement with the School and the CEO to this effect which constituted part of her ongoing contract of employment with the School which stood outside the terms of the 2004 Agreement, it is my view that any monies the Commission ordered to be paid to the applicant as a result of accepting the applicant's claim that she was entitled to be paid the ET(CS) allowance would in any event constitute an enforcement of the terms of Clause 11(4)(e) of the 2004 Agreement and any order for payment for this allowance is therefore outside of the Commission's jurisdiction.

62 Furthermore, I find on the evidence that the applicant was not granted an unqualified and unlimited exemption from all future accreditation requirements in 1989 including an exemption from the accreditation requirements arising under the 2004 Agreement.

63 I accept that in 1989 the applicant was granted an exemption from the necessity to hold accreditation to continue to undertake her existing duties and there was no evidence given in these proceedings that there was a time limit placed on this exemption. However, after closely reviewing the applicant's evidence about the 1989 exemption, the particulars of claim she filed in relation to this issue and the letter from Ms Temby, who was a Director of the CEO, to teachers of religious education, Assistant Principals and Principals in the Catholic school system in 1997 which was the only correspondence that the parties could locate relevant to an exemption granted to teachers working in Catholic schools in the 1980s, I conclude that the exemption the applicant was granted in 1989 related to an exemption from accreditation required to teach religious education and to be promoted to the positions of Acting Principal and Principal for teachers who had at least 10 years service within the Catholic system as opposed to an exemption from all and any future accreditation requirements as claimed by the applicant.

64 In the applicant's particulars of claim she maintains that when she was granted an exemption from accreditation in 1989 it was an exemption given to teachers who had over 10 years of service within the Catholic school system for teachers of religious education (see paragraph 3). The applicant also gave the following evidence about the 1989 exemption at the hearing where she specifically refers to an exemption from undertaking units of study with respect to religious education:

"---The exemption was offered to teachers who had been - - had had 10 years' continuous service in the Catholic Education Office. They introduced what they called "accreditation" which was the undertaking of units of study in

religious education and the exemption to do those courses/study was given to teachers who had 10 years' continuous service in the (sic) Catholic education."

(Transcript pages 13-14)

Relevantly, in my view, the applicant refers to units of study with respect to religious education and she also does not refer to the exemption from accreditation being an exemption from all future accreditation requirements across the board. I also note that the letter from Ms Temby dated 14 August 1997 was sent to teachers of religious education, Principals and Assistant Principals and refers to the reversal of an exemption from accreditation given to pre-1986 teachers of religious education, Principals and Assistant Principals (see Exhibit A1). Even though the applicant was unaware of the letter from Ms Temby, when taking into account the above evidence it is my view that the exemption the applicant was granted in 1989 related to teachers of religious education and teachers holding certain promotional positions in schools and I find that this exemption was reversed by the terms of this letter.

65 There is no mention in the CEO's current accreditation framework concerning teachers who were given an exemption from accreditation in the 1980s however, I note that the CEO was aware that there were some teachers who were in the applicant's situation who lacked the necessary accreditation requirements to obtain the status of ET(CS) because the CEO provided a process for these teachers to achieve the necessary accreditation during 2004 so that they could retain their existing promotional positions (see Exhibits A6 and A7).

66 I am unaware of all of the industrial instruments which have covered the applicant's employment within the Catholic school system from the time she commenced employment within the Catholic school system in 1970 and the specific accreditation requirements in order to be able to teach in a Catholic school up to 1994, however, from a review of the industrial instruments covering the applicant's employment within the Catholic school system from 16 September 1998 onwards and the CEO's accreditation requirements as detailed in the Accreditation Framework document (Exhibit R1) and the CEO's policy statement on accreditation (Exhibit R2) it is clear that there was and is no requirement on the applicant to hold any accreditation in order to remain as a teacher within the Catholic school system. However, when the 2004 Agreement was registered the applicant was then required to hold accreditation if she wanted to hold the position of an ET(CS) teacher at a Catholic school (see Clause 11(4)(c) of this agreement).

67 Even if the applicant was granted an unlimited exemption from all future accreditation requirements in 1989, including the necessity to hold an 'Accreditation to Teach in a Catholic School', I find that she is not entitled to be paid the ET(CS) allowance that she is claiming as I am of the view that if the applicant was given an exemption from accreditation prior to the 2004 agreement being registered it was varied by the terms of the 2004 Agreement. The 2004 Agreement sets out the terms and conditions of the applicant's contract of employment with the respondent and is to be read in conjunction with the CEO's policy document on accreditation and Accreditation Framework document which sets out what is required to hold an 'Accreditation to Teach in a Catholic School' including units of study (Exhibits R1 page 4 and R2). The 2004 Agreement is by consent and was negotiated by the parties to that agreement on behalf of teachers employed at the School and applies to those teachers employed at the School. The requirements of holding and maintaining accreditation to hold the new status of ET(CS) are clear and it is also clear from Clause 11(4)(c) that the 2004 Agreement contemplates that teachers who hold the status of ET(CS) will be and are required to hold and maintain relevant accreditation in order to be appointed to and retain this status and the applicant was reminded of these requirements by Ms Brennan during 2004 and the CEO gave her the opportunity to gain the necessary accreditation prior to the end of 2004 in order to retain her ET(CS) status. As the applicant does not hold the required accreditation to be an ET(CS) teacher pursuant to the terms of Clause 11(4) of the 2004 Agreement I therefore find that the applicant is not entitled to the ET(CS) payment that she is claiming. I also find that when the applicant's position was renamed as an ET(CS) in July 2004 in line with the changes included in the 2004 Agreement that this was an administrative arrangement to allow the applicant the opportunity to finish her ST2 appointment at the School and that this nomenclature changed did not alter the substance of the applicant's status at the time.

68 I reject the applicant's claim that she had an expectation of remaining as a ST2 teacher or its equivalent for the duration of her employment at the School however long that may be as a result of an agreement she had with Ms Brennan and that she has not been given notice that her ST2/ET(CS) status has ceased. I have found that whilst in all likelihood a specific timeframe was not discussed between the applicant and Ms Brennan when the applicant was offered the position of ST2 in 2002, it is my view that the absence of any timeframe for the applicant's appointment to ST2 status being discussed between the applicant and Ms Brennan does not mean that the applicant's appointment at this level would have continued indefinitely. It is clear that the Fact Book, which is provided for under Appendix 1 of the Award, allowed for the appointment of a teacher to a ST2 position for a period of at least three years and for a ST2 appointment to cease on advice from the Principal after three years which is what occurred when Ms Brennan wrote to the applicant on 12 November 2004 indicating that her current ST2 status (renamed ET(CS)) would cease at the end of December 2004. In my view Ms Brennan's notification to the applicant to this effect therefore brought the applicant's appointment as a ST2 teacher to an end (see Exhibit R3).

69 Putting aside the issue of whether or not the applicant satisfied the accreditation requirements to hold an ET(CS) position I find that the applicant is not entitled to be paid the ET(CS) allowance from 2005 onwards, even though she has continued to undertake the duties of an ST2 (ET(CS)) teacher, because she has not fulfilled all of the requirements for appointment to an ET(CS) position required under Clause 11(4)(b) of the 2004 Agreement. Clause 11(4)(b) of the 2004 Agreement states that appointment to ET(CS) status is subject to a successful appraisal by the Principal, there is a limit on the number of ET(CS) teachers to be appointed to a school and the teacher applying for this position must have held the ST2 status for one year prior to applying to become an ET(CS) teacher. There was no dispute that the applicant complies with the requirements of

Clause (11)(4)(b)(ii) and (iii) of the 2004 Agreement however, the applicant did not apply and was not assessed to be an ET(CS) teacher by the Principal pursuant to the terms of Clause 11(4)(b)(i) of this agreement. As the applicant was not assessed by the Principal to determine whether or not she met the requirements to be an ET(CS) teacher she therefore could not be appointed as an ET(CS) teacher and she is not entitled to be paid the allowance attached to this status.

70 The applicant's extensive Curriculum Vitae demonstrates that she is a highly experienced and committed teacher who has been an asset to the schools where she has taught for over 30 years including her current school. Additionally, the applicant has continued to undertake the same duties she undertook as an ET(CS) teacher after the ET(CS)/ST2 allowance was removed from her and she has since expanded these duties and the School has not asked the applicant to cease these duties and has in effect expected the applicant to continue to undertake her expanded duties without recompense. As the applicant has continued to undertake these duties and the respondent and its students have benefited by the applicant continuing to undertake the role of an ET(CS) teacher it is my view that the parties should review the applicant's situation with a view to reaching an amicable agreement about compensation to be paid to the applicant on a without prejudice basis for the additional ET(CS) duties that the applicant has been undertaking since the beginning of the 2005 school year.

71 An order will now issue dismissing this application.

2007 WAIRC 00248

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY TAMPALINI
	APPLICANT
	-v-
	OUR LADY OF ASSUMPTION SCHOOL
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 14 MARCH 2007
FILE NO/S	B 351 OF 2005
CITATION NO.	2007 WAIRC 00248

Result Dismissed

Order

HAVING HEARD Mr K Trainer as agent on behalf of the applicant and Ms K Wroughton of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2007 WAIRC 00150

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUZANNE AMELIA TINGLEY
	APPLICANT
	-v-
	HURSON PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 21 FEBRUARY 2007
FILE NO/S	B 180 OF 2006
CITATION NO.	2007 WAIRC 00150

Result	Order Issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the applicant on her own behalf and there having been no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

1. THAT the respondent pay to the applicant the sum of $13,330.00 gross less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid.

2. THAT the respondent pay to the applicant the sum of $1,000.00 net.

3. THAT the sums payable in pars (1) and (2) of this order be and are hereby payable forthwith.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Angelina Steckelberg	Murray River North Pty Ltd	U 396/2006	Commissioner J L Harrison	Discontinued
Charan Jit Singh	Belmont Counselling Clinic Pty Ltd	B 466/2006	Commissioner P E Scott	Application Dismissed
Cynthia Elizabeth Johnson	Good Samaritan Industries	U 560/2006	Commissioner P E Scott	Application Withdrawn by Leave
John Muir	Fernhall Pty Ltd, T/A Hillary's The Great Escape,Director-Douglas G Campbell	U 123/2006	Commissioner J L Harrison	Dismissed
Kristine Roslyn Teakle	Roccella Estates T/As Timeconti	B 19/2007	Commissioner S J Kenner	Discontinued by leave
Peter Paul Orlando	Hickey's Cini Cellars Tavern	U 507/2006	Commissioner J L Harrison	Discontinued
Stephen Louis Fletcher	Sandvik Mining & Construction Pty Ltd	U 220/2006	Commissioner S Wood	Application discontinued

CONFERENCES—Matters arising out of—

2006 WAIRC 05305

DISPUTE IN RELATION TO THE CLASSIFICATION OF EDUCATION ASSISTANTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 21 AUGUST 2006
FILE NO/S	C 157 OF 2004
CITATION NO.	2006 WAIRC 05305

Result	Order issued

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act, 1979* ("the Act"); and

WHEREAS the parties have been negotiating for some time to resolve outstanding issues between the parties; and

WHEREAS on 18 August 2006 the respondent advised the Commission that some of the applicant's members were to commence industrial action on 21 August 2006 and after enquires were made the Commission was advised by the applicant that no industrial action was to take place on 21 August 2006; and

WHEREAS the Commission convened a conference on 21 August 2006 to hear further from the parties; and

WHEREAS at this conference the respondent advised the Commission that some of the applicant's members had taken industrial action that day and its members intended to undertake further industrial action in support of its position concerning assessments under an agreed appeal process for approximately 160 Education Assistants (Special Needs) working in the respondent's schools across Western Australia; and

WHEREAS the applicant advised the Commission about a media release put out by the applicant dated 21 August 2006 indicating that rolling stoppages had commenced that day and could escalate to all Western Australian Government schools because the parties could not agree on the assessment process; and

FURTHER the applicant understood that as part of this industrial action Education Assistants (Special Needs) would not care for students with special needs during lunch time; and

WHEREAS the respondent argued that the students affected by these rolling stoppages, who are profoundly physically and mentally disabled, are at risk if this industrial action continues and argued that it was part of an Education Assistant's role to supervise disabled students during their lunch break; and

WHEREAS the respondent advised the Commission that there will be deleterious ramifications for the workloads of other employees if the industrial action continues; and

WHEREAS the applicant argued that the balance of convenience in relation to this issue was with the applicant's members as the respondent had not been diligent in negotiating the assessment and appeal process and its members have therefore not been able to access back pay which may be due to them, for some months; and

FURTHER the applicant maintained that there is little or no inconvenience to the students affected by this action and the students are not at risk if the industrial action continues as the respondent is able to put in place arrangements to provide appropriate care for these students; and

FURTHER the applicant argued that the industrial action is low level and is essentially a work to rule campaign; and

WHEREAS having heard from the applicant and the respondent the Commission has formed the view that the industrial action which is occurring and is foreshadowed to escalate is contrary to the public interest;

NOW THEREFORE the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations of the matters in question, pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(i) and (ii) and s44(6)(bb), hereby orders:

1. THAT Education Assistants (Special Needs) working in the respondent's schools are to cease all industrial action including bans on undertaking yard duty and supervision during recess and lunch breaks.

2. THAT the applicant and each of its officials ensure that work resumes immediately in accordance with the terms of point 1 of this order.

3. THAT the applicant, its officers, employees and members are not to take any further industrial action whilst this order remains in force.

4. THAT the parties are to hold discussions prior to a report back conference at the Commission on 24 August 2006, with a view to resolving the issues in dispute.

5. THAT this order is to remain in force until 2.00pm Thursday 24 August 2006 when a report back conference will be held in the Commission.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

CONFERENCES—Matters referred—

2007 WAIRC 00089

A DISPUTE REGARDING CLAIMS ABOUT ACTIONS OF UNION DELEGATES.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES
	APPLICANT
	-v-
	CORPUS CHRISTI COLLEGE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	THURSDAY, 19 OCTOBER 2006, FRIDAY, 20 OCTOBER 2006, FRIDAY 17 NOVEMBER 2006
DELIVERED	MONDAY, 12 FEBRUARY 2007
FILE NO.	CR 188 OF 2005
CITATION NO.	2007 WAIRC 00089

Catchwords	Industrial Law (WA) - Dispute regarding complaint about union delegates and subsequent distress - Claim for order that respondent retract comments and/or apologise - Application upheld - *Industrial Relations Act 1979* s 26, s 27 and s 44
Result	Upheld and Order issued
Representation	
Applicant	Mr G Stubbs (of counsel)
Respondent	Ms K Wroughton (of counsel)

Reasons for Decision

1 On 2 November 2005 the Independent Education Union of Western Australia, Union of Employees ("the applicant") ("the union") (formerly the ISSOA) lodged an application in the Commission pursuant to s44 of the *Industrial Relations Act 1979* ("the Act") in relation to a dispute between the union and some of its members with Corpus Christi College ("the respondent") ("the College"). As conciliation proceedings did not resolve the dispute the matter was referred for hearing and determination.

2 At the commencement of the proceedings the applicant sought leave to amend the respondent's name. Given the respondent's consent to this course of action and the Commission's powers under s27(1) of the Act, and having formed the view that it was appropriate in the circumstances to grant the amendment, I will issue an order that Corpus Christi College be deleted as the named respondent to this application and be substituted with the Roman Catholic Archbishop of Perth.

3 The schedule of the memorandum of matters referred for hearing and determination is as follows:

"1. The applicant claims that on behalf of the respondent, the respondent's Acting Principal Mr Barry Harvie published untrue comments calling into question the industrial behaviour and reputation of the applicant and delegates employed by the respondent. Specifically the applicant and its delegates maintain that Mr Harvie's claims that the applicant's delegates bullied and harassed other members of the respondent's staff when performing their role as the applicant's delegates were untrue.

2. The applicant seeks an order that the respondent retracts the comments made by Mr Harvie about the applicant's delegates or apologise to the applicant and its delegates for Mr Harvie's unwarranted actions towards the applicant's delegates.

3. The respondent denies the claim and opposes the order sought."

Background

4 The following details are not in dispute. At the relevant time the applicant had seven delegates at the College - Mr Philip Petale, Ms Kerry Kowald, Mr Paul Ross, Ms Mary Oliver, Mr Derek Bickford, Ms Ann Nisbet and Mr Russell Scanlon. Mr Scanlon was on long service leave during Term 3, 2004 when the dispute, which is the subject of this application, between the applicant, its delegates and the respondent arose.

5 Part of the dispute involved the attendance of a representative from the union at the College on 26 August 2004 to discuss the issue of workloads with teachers and an attempt by the College's Acting Principal, Mr Barry Harvie, to move this meeting from the College's staff room to another venue.

6 Relevant emails are as follows:

"**From:** Phil Petale

To: Ann Cook; …. [and other Staff at the College]

Date: Wednesday – August 25, 2004 9:04 AM

Subject: ISSOA Visit

Dear Colleagues,

An officer of the ISSOA will be visiting the College tomorrow (Wednesday) to talk to us about the Workloads Survey being carried out as part of the EBA agreement. The talk will be in the Staff Room at lunchtime.

Bring your lunch and questions. All welcome.

Regards

Phil, on behalf of your Delegates

From: Vaughan Sadler (sic)

To: Phil Petale

Date: Wednesday – August 25, 2004 9:37 AM

Subject: Re: ISSOA Visit

Phil, the staff room is not an appropriate place as it imposes on those who do not want to take part. Can you change to a classroom please. Also I have heard nothing from the ISSOA as yet, which would be proper protocol.

Cheers

Barry

Vaughan Sadler

Principal, Corpus Christi College

vsadler@corpus.wa.edu.au"

(Exhibit A3)

"To: Kerry Kowald

Date: 26/08/2004 10:17:34 am

Subject: Re: Thursday's ISSOA visit

Kerry, Not (sic) all staff wish their lunch to be disturbed by a large meeting. Two staff have requested that the meeting be in another venue. It seems a little inconsiderate to them that their colleagues insist on holding the meeting in the staff room when there are perfectly satisfactory alternatives. If other groups wanted to use the staff room at lunch time I suspect that you might feel it to be an invasion on staff rights to have a relaxing lunch break and rightly so. I hope that you will reconsider.

Cheers

Barry

Principal, Corpus Christi College

>>> Kerry Kowald 26/08/2004 9:02:04 am >>>

Dear Barry

Staff wish to be addressed by the ISSOA Representative in the Staff Room today at lunch time.

Please contact the ISSOA if you wish to discuss this further.

Staff Representatives"

(Exhibit A4)

7 On 26 August 2004 Mr Harvie sent the following email to College staff, Terry Wilson at the Catholic Education Commission and the union, about the union meeting scheduled for that day:

"**From**: Di Fisher (sic)

To: Admin & Support Staff@corpus.wa.edu.au; Teaching Staff; Terry Wilson; unity@ISSOA.asn.au (sic)

Date: 26/08/2004 11:05:16 am

Subject: ISSOA Meeting

As I have had 2 staff members ask that the ISSOA meeting scheduled for today not be held in the staff room as it is an intrusion into their lunch time, I have requested that they use any other room in the College and offered to set it up with tea/coffee making facilities. It is my hope that they will respect the wishes of some of their colleagues and transfer the meeting elsewhere. A copy of my e-mail to the representatives is attached.

Cheers

Barry"

(Exhibit R5)

8 A representative of the union attended the College on 26 August 2004 at lunch time and spoke to College staff in the staff room notwithstanding Mr Harvie's request that the discussion be held at another venue.

9 After this meeting took place emails were exchanged between Mr Harvie and Mr Petale about improving the relationship between the College's administration and the delegates:

"**From**: Vaughan Sadler (sic)

To: Phil Petale

Date: 30/08/2004 2:02:11pm

Subject: Getting together

Phil, I would like to discuss how we can progress the working relationship between Leadership and ISSOA reps here at Corpus. Would you make a time with Di to see me sometime soon.

Cheers

Barry

Vaughan Sadler

Principal, Corpus Christi College

vsadler@corpus.wa.edu.au

From: Vaughan Sadler (sic)

To: Phil Petale

Date: 31/08/2004 3:41:21pm

Subject: Re: Getting together

Phil, As (sic) I have just 5 and a bit weeks left I was wanting to explore informally with you ways in which the college can progress what has obviously been a difficult period for all. In doing so I am presuming that the reps are looking for ways to improve the working relationship between Leaders and ISSOA and I had hoped some informal discussion might lead to suggestions for improvements. I am not keen to take time away from students in class. If that is not suitable to you or the other reps, then I will have to leave it to others after I have finished.

Cheers

Barry

Vaughan Sadler

Principal, Corpus Christi College

vsadler@corpus.wa.edu.au

>>> Phil Petale 31/08/2004 1:26:01 pm >>>

Barry,

Corpus ISSOA Representatives are happy to meet with you during teaching time to discuss issues relevant to the working relationship between Leadership and ourselves.

Before we make an appointment through Di, could you please provide us with an agenda for this meeting, including any specific questions or proposals you may have, so that we can prepare ourselves and decide if we require an ISSOA Officer to be present.

Also, we would require that that (sic) the meeting be recorded and minuted.

Regards,

ISSOA Representatives"

(Exhibit R2)

10 Mr Harvie, who was Acting Principal at the College from the last week of Term 2, 2004 through to the end of the first week of Term 4, 2004, sent the following email with a letter attached ("the email and letter") dated 31 August 2004 and addressed to Ms Theresa Howe Secretary of the ISSOA and he distributed the email and letter to all College staff, including teaching and non-teaching staff:

"From: Di Fisher [dfisher@corpus.wa.edu.au] (sic)

Sent: Thursday 2 September 2004 8:36 AM

To:..Ann Cook; … [and other Staff at the College]

Subject: Correspondence with the ISSOA

On the interests of keeping everybody advised of my action regarding last Thursday's ISSOA visit to the College, (sic)

I have attached a copy of my letter to the Secretary of the Association.

I welcome your comments either by e-mail or by discussing with me any concern you have.

Cheers

Barry"

(Exhibit A1)

The letter attached to the email reads as follows (formal parts omitted):

"Dear Theresa

Re: ISSOA visit to Corpus Christi College, 26 August 2004

I write to report my concerns regarding the organization of the visit by ISSOA representatives to Corpus Christi last Thursday. The order of events was (sic)

1. An e-mail was sent by Phil Petale to all staff on Wednesday at 9.06am advising staff of the visit and that it would be in the staffroom at lunchtime the following day. I had not been advised by either those representatives or the ISSOA of the visit.
2. I responded by e-mail to Phil advising that the staff room was not an appropriate place as it imposed on staff who did not wish their lunchtime to be interrupted by a meeting and also to advise that appropriate protocol had not been followed in that I had not been advised by ISSOA. I received no response to that e-mail.
3. At 12.02 I received an e-mail advice from Nigel Briggs of the visit at lunchtime the following day. I was later advised that this only happened as a result of my prompt to Phil.
4. A little later Phil was passing my office so I asked to speak with him as he had not replied to my e-mail. I told him that 2 staff that I know of had particularly requested through me that an alterative (sic) venue for the visit be organised as they wanted to enjoy their lunch in the staffroom without interruption of a large meeting. I took the opportunity to inform him also of the harassment some staff felt by some staff representatives of the ISSOA. One in particular who had given, as one of her reasons for leaving the College was the "bullying" she experienced by the staff.

I asked again for the venue to be changed and offered any other room in the College, all of which were vacant at lunchtime, and offered to set up with tea/coffee and any other requirements. He advised the (sic) he needed to discuss this with his colleagues and would get a response to me by the end of the day (sic) He checked that I would be late in leaving as he had Parent/Teacher interviews. I was at the College until later than this as I was interviewing prospective families until 7.30pm. When I had not heard from Phil by 5.30 I went to the place of the Parent (sic) Teacher interviews to find out that he had left.

5. It was not until the following morning (9.02a.m.) that I received an e-mail from Kerry Kowald which said "Staff wish to be addressed by the ISSOA in the Staff Room today at lunchtime. Please contact the ISSOA if you wish to discuss this further (sic).

6. My response to Kerry at 10.17 was again to repeat that not all staff wished the meeting in the staffroom and I asked her to reconsider. You have a full copy of my response. I received no reply despite the fact that this e-mail was opened at 10.33am.

7. As I had received no response I felt it necessary to advise staff of the request and e-mail the details to them. You have a copy of this e-mail.

8. When Katheryn Barnes arrived, I advised her of the staff request for a change of venue and gave her copies of the e-mail. As time was short for her, we agreed to discuss it after the meeting. The meeting went ahead in the staffroom.

9. It has since been reported to me that a number of staff did not go to the staffroom for lunch and felt disappointed that their request was not respected by their colleagues in the ISSOA.

I appreciate that this has been a little long-winded. However, my concerns in summary are:

(i) the lack of courtesy of local representatives to discuss this matter with me and in fact even to get back to me when they said they would;

(ii) the harassment and "bullying" felt by staff from the local representatives. This occasion serves as an example of this.

(iii) the lateness of the advice of the visit and the fact that I would have received no advice had I not taken the action I did. This is the second occasion in my 7 weeks here at Corpus Christi this has occurred. To her credit, Katheryn has apologised on both occasions.

Theresa, it is in the interest of trying to create an environment in which all parties can work together on the important issues, that I write to you. I have been disappointed with the manner in which the ISSOA and its representative had (sic) handled this recent situation. This has not only been a lack of protocol but an extreme lack of courtesy and professionalism.

I would be very pleased to discuss this matter with you, should you desire. I would be happy to attend any meeting or invite you to meet me at the College."

(Exhibit A1)

11 After reading this email Mr Petale, Ms Kowald, Mr Ross, Ms Oliver, Mr Bickford and Ms Nisbet sent the following letter to Mr Harvie on 7 September 2004 (formal parts omitted):

"We write in relation to your letter of 31 August 2004 regarding the ISSOA visit to the College on 26 August 2004.

In your summary of concerns you state at (i) that there was a "….lack of courtesy of local representatives.…". Could you please specify exactly which staff members you are referring to and what their particular lack of courtesy was so that they can respond to the accusation?

At (ii) you refer to "the harassment and 'bullying' felt by staff from local representatives." (sic) Could you please specify exactly to which representatives you refer? As this is a very serious matter we wish to avail ourselves of the facts so that we can respond in a more informed manner and take the appropriate action. Delegates are unaware of any claims having been made against them by other staff members. This is of major concern as the College's HARASSMENT POLICY states very clearly in PART B: COMPLAINTS PROCEDURES that the "alleged harasser" will be informed of the complaint in both informal and formal complaint procedures. Indeed, point 2 (d) clearly sets out the procedure for the documentation of a complaint and the information and opportunities that are to be given to the alleged harasser. Point 3 (b) specifies that "the rights of the individuals will be respected and confidentiality maintained wherever possible." (sic) Publishing your letter to all Corpus Staff appears to have gone against this and does not seem (sic) allow for the application of the principles of natural justice. We note that in PART A: PRINCIPLES, point 5 urges that all staff have a responsibility to maintain complete confidentiality and warns that the "spreading of gossip or rumours may expose them to a defamation action." (sic)

Could you please supply us with the requested information as soon as possible so that we can decide on how to best respond to the allegations."

(Exhibit A2)

12 The union's secretary Ms Howe also responded to Mr Harvie's letter of 31 August 2004 on 7 September 2004 as follows (formal parts omitted):

"The ISSOA maintains a protocol in relation to notifying schools of union visits. It is a matter of courtesy, rather than a legal requirement, that the ISSOA office provides more than 24 hours notice to the employer. Unfortunately on the dates concerned our system failed and as you note, Ms Barnes apologised.

The use of the staffroom has been fully explored in an ISSOA case before the Western Australian Industrial Relations Commission. Members do not agree that they should be inconvenienced if they wish to hear from their union during their meal breaks. There is no requirement that other staff participate if they do not wish to do so.

I must say that I was astounded to hear that your allegations of harassment and bullying by ISSOA Delegates have been distributed by you to all staff. Surely it would have been fair to wait for my response, quite apart from breaching the Catholic Education Office policy regarding allegations of harassment and bullying.

I can only conclude that there is no substance to your allegations; rather, they might be construed as an attempt to damage the reputations of well respected members of the profession rather than a genuine complaint.

The Industrial Relations Act (sic) and Equal Opportunity legislation make specific provision regarding discrimination because of membership of a union. This may be particularly pertinent given your comments to Ms Barnes regarding the political ramifications of Delegates' actions.

Accordingly, the ISSOA seeks a public retraction of your claims against the ISSOA Delegates and a formal apology to them.

Barry, I too would hope for a professional relationship between Delegates and yourself at the school. However for this to occur, ISSOA Delegates must be treated with respect as they carry out their legitimate activities on behalf of their colleagues.

I look forward to your response."

(Exhibit A5)

13 On 16 September 2004 Mr Harvie responded to Ms Howe as follows (formal parts omitted):

"In relation to your letter of 7th September 2004, I write to repeat my offer to discuss the situation at Corpus Christi College, during the final weeks of my position as Acting Principal.

The two issues I have previously raised are that of access to College facilities for ISSOA meetings and of the harassment felt by some of the staff here at Corpus Christi by the ISSOA delegates.

In reference to your statement that "the use of the staffroom has been fully explored before the Western Australian Industrial Relations Commission" my understanding of the matter is that if a staff member objects to discussions taking place in the staffroom during recess or lunch breaks then the ISSOA should not hold the discussion in the staffroom. Otherwise they risk a situation where discussions are being held with employees who do not wish to participate.

On that basis once the staff members have made an objection to the holding of discussions between union representatives and staff in the staffroom during recess and lunch breaks then I consider it is reasonable to provide a suitable alternative venue for the holding of discussions during recess and lunch breaks.

The issue of harassment is always a difficult one, as victims insist that I not reveal their identities for fear of further harassment. It was my intent during these final weeks to provide an opportunity for you and the delegates to hear of other staff perceptions, in order to find ways to address these concerns. Further examples have been described to me since I wrote to you, and again I have been asked to not reveal their identity.

It is my belief that some frank discussion regarding staff concerns might be of help in creating a less divisive and more positive working environment for all of the staff at the College. The delegates have not been prepared to discuss any of these matters with me unless they are released from classes. This is clearly disruptive to the students so I am hoping a more mutually satisfactory time can be found.

While time is now short in my role at Corpus Christi there could still be benefit in our meeting."

(Exhibit A7)

14 The following email was sent from Mr Petale to Mr Harvie on 17 September 2004:

"**From:** Phil Petale

To: Vaughan Sadler (sic)

Date: Friday – September 17, 2004 1:21 PM

Subject: Attention: Barry Harvie

Dear Barry,

Since we have received no response from you to our repeated requests for more information about the alleged bullying and harassment of staff by ISSOA Delegates, we inform you of our intention to take up the matter formally with the Director of Catholic Education and the ISSOA.

Corpus Christi College ISSOA Delegates"

(Exhibit A1)

15 On Tuesday 28 September 2004 Mr Harvie addressed some of the College's staff prior to classes commencing that day and a briefing note titled 'Principal's Briefing – Tuesday 28th September 2004-09-28 (sic)' was prepared of the issues dealt with by Mr Harvie at this meeting. Following is an extract from this document:

"**Re copy of letter sent to ISSOA re use of staff room for ISSOA meetings**

In this letter Barry mentioned the discomfort felt by some staff in the use of the staff room as a venue for ISSOA meetings and also that some staff had felt harassed by ISSOA delegates. CCC ISSOA delegates felt that by making this public it

did some damage to their reputation personally. Barry apologised if his actions caused any distress to any delegates. The reason for circulating the letter was so that all staff could be fully informed."

(extract from Exhibit R8)

Applicant's evidence

16 Four of the seven delegates at the College gave evidence.

17 Ms Nisbet is a laboratory technician and has worked in the College's science department since 1991. Ms Nisbet is a member of the union and became a delegate towards the end of 2002. Ms Nisbet remains a delegate for non-teaching staff. Ms Nisbet said that as a delegate she helps non-teaching staff with queries and obtaining information. Ms Nisbet stated that she had a passive role as a delegate and staff knew that she was available to assist if they had any issues about the union.

18 Ms Nisbet stated that she worked with a former staff member at the College, Ms Kerinne Hindle, who was a science teacher who resigned at the end of Term 2, 2004. Ms Nisbet stated that she had no discussions with Ms Hindle about her behaviour as a delegate and Ms Nisbet stated that Ms Hindle did not raise any issues with her about the behaviour of any of the other delegates at the College. Ms Nisbet stated that when Ms Hindle left she praised her. Ms Nisbet stated that Ms Hindle told her that she was leaving the College because of problems managing students and because she was not being given sufficient help to deal with problem students and she stated that Ms Hindle told her that the College's administrative staff were not supporting her.

19 Ms Nisbet commented on the email and letter sent by Mr Harvie to all staff at the College on 2 September 2004 (Exhibit A1). Ms Nisbet gave evidence that she initially dismissed the contents of the email and letter but after rereading it she formed the view that it was not appropriate for Mr Harvie to have acted this way as Principal of the College. Ms Nisbet then met with other delegates to discuss the email and letter.

20 Ms Nisbet stated that no staff member at the College had told her that they had felt harassed or bullied by any of the delegates at the College and Ms Nisbet stated that she had not harassed or bullied any staff member. Ms Nisbet was also unaware of any staff complaining that the union meeting on 26 August 2006 constituted bullying and/or harassment by delegates. Ms Nisbet stated that after the email and letter was sent by Mr Harvie to all staff some staff members gave her funny looks and that when she was having coffee in the staff room with other delegates, staff members would not sit with them. Ms Nisbet said this was a change to their previous behaviour.

21 Ms Nisbet stated that after Mr Harvie circulated the email and letter some delegates had a meeting with him to try to find out which staff members had been bullied and harassed so that the delegates could apologise to them. Ms Nisbet stated that delegates were also concerned that the College's harassment policy had not been followed by Mr Harvie. Ms Nisbet stated that at one meeting she attended with Mr Harvie, Ms Howe and other delegates, Mr Harvie stated that he would apologise to the delegates at a staff briefing which was usually held every Monday.

22 Ms Nisbet was of the view that at the staff briefing held on 28 September 2004 Mr Harvie did not apologise for his actions towards the delegates when he addressed staff and Ms Nisbet maintained that Mr Harvie did not give a proper, sincere apology and she maintained that he did not retract his claim that the delegates had been bullying and harassing staff members. Ms Nisbet did not therefore believe that Mr Harvie had given a full apology to the delegates.

23 Ms Nisbet stated that no details of who had been bullied and harassed by the delegates were given to her even though the delegates requested this information.

24 Ms Nisbet believed that the accusations made by Mr Harvie in the email and letter sent to staff had damaged her reputation because she believed that she was viewed differently by some staff members and she believed that her integrity had been brought into question after the email and letter was distributed.

25 Under cross-examination Ms Nisbet confirmed that teacher workloads was an ongoing issue at the College from the beginning of 2004.

26 Ms Nisbet stated that union meetings were held in the staff room for all interested staff at lunch time. Ms Nisbet maintained that she did not actively promote the union at the College and she stated that she was not the sort of person who would 'cold sell'.

27 Ms Nisbet stated that at the meeting attended by Ms Howe and Mr Harvie and the delegates after Mr Harvie circulated the email and letter to staff the delegates asked Mr Harvie for an apology and for clarification about which staff members had been bullied and harassed. Ms Nisbet stated that if this information was forthcoming delegates would have apologised to any staff member who was upset by the delegates' actions. Ms Nisbet stated that she could understand why staff members who had complained about the delegates may have wanted to keep their identity confidential however she said that this was unfair to the delegates. Ms Nisbet again reiterated that Mr Harvie's statement to staff on 28 September 2004 was not an apology, Ms Nisbet stated that not all staff were in attendance at this briefing and that the Principal's briefing note of 28 September 2004 makes it appear that he apologised but she recalled that the actual words he used at the briefing were not an apology. Ms Nisbet stated that the delegates had also asked that Mr Harvie provide a written apology to the delegates.

28 Mr Petale taught at the College between 1991 and July 2006 and from 1994 to 2000 he was head of year 12. Mr Petale stated that his role as a delegate in 2004 was to distribute information from the union's office to members and give advice to members and non-members. Mr Petale stated that he also promoted the union.

29 Mr Petale stated that there was a long standing arrangement at the College for both union and non-union staff members to be addressed about union issues at regular staff meetings as there was a segment in the agenda for union business.

30 Mr Petale stated that discussions were held in early 2004 between delegates and the College administration about the issue of staff workloads and Mr Petale stated that he believed that this issue was resolved in May or June 2004.

31 Mr Petale said that he had not had a complaint about his behaviour as a union delegate until Mr Harvie sent the email and letter to staff and Mr Petale stated that Ms Hindle never told him that he had bullied or harassed her.

32 Mr Petale understood that the email and letter was sent to all teaching and non-teaching staff at the College.

33 Mr Petale stated that union meetings were normally held in the College's staff room and he stated that other meetings were also held in the staff room when visitors came to the College. Mr Petale stated that after he became aware that the union official who was visiting the College on 26 August 2004 had not notified Mr Harvie of their visit he rang the union and asked them to contact Mr Harvie and he understood that this then occurred. Mr Petale stated that during a brief discussion with Mr Harvie on 25 August 2004 he was told that it was inappropriate to use the staff room for the union's visit to the College and Mr Harvie asked for the venue to be changed. Mr Petale told Mr Harvie that it would be difficult to change the venue of the meeting at short notice and he stated that he was unsure why the change of venue was needed. Mr Petale also gave evidence that Mr Harvie told him at the time that some staff found the delegate's actions as harassing. Mr Petale told Mr Harvie that he had not had any complaints to this effect and he stated that Mr Harvie then told him that Ms Hindle had said that one of the reasons she had left the College was because of bullying and harassment by the delegates. Mr Petale stated that he attended parent/teacher interviews later that afternoon and he stated that because he remained at the College until around 8.00pm that day there was no time to speak to the other delegates about Mr Harvie's request to change the venue of the union meeting.

34 Mr Petale stated that when a union official visited the College on 26 August 2004 the meeting lasted approximately 10 minutes. Mr Petale stated that a discussion took place about a workload survey during the meeting and he stated that no staff member at the meeting raised the issue of the meeting being held in the staff room.

35 Mr Petale stated that he was shocked, surprised and bewildered when he read the email and letter. Mr Petale had an issue with the tone of Mr Harvie's letter to Ms Howe and he found parts offensive in particular the reference to the delegates being discourteous and bullying and harassing staff and the reference to delegates lacking professionalism. Mr Petale stated that he had never harassed or bullied any staff member.

36 Mr Petale stated that some College staff reacted negatively to him after they read Mr Harvie's email and letter and Mr Petale stated that the day after the email and letter were sent colleagues confronted him with snide remarks and sarcastic jokes about his behaviour. Mr Petale stated that he did not find these comments funny. A number of staff also approached Mr Petale asking what the issue was about and Mr Petale stated that he believed some newer members of staff who did not know him well avoided him and kept their distance from him. Mr Petale stated that the accusations made by Mr Harvie affected his physical and emotional health and Mr Petale stated that as a result he changed his approach as a delegate when dealing with colleagues. Mr Petale believed that the email and letter also had a negative impact on the union's reputation as it suggested that the union used bullying and harassing tactics. Mr Petale stated that his long term colleagues did not change their attitude towards him.

37 Mr Petale stated that he had never been accused of being a bully or of harassing staff members and the first he had heard of these words being used in relation to his actions was on 25 August 2004 when Mr Harvie mentioned that some staff had felt harassed by delegates at the College.

38 Mr Petale stated that despite requesting that Mr Harvie respond to the delegate's letter dated 7 September 2004 on a number of occasions, he did not do so. As a result the delegates then contacted the union for advice and this led to Ms Howe attending the College to have a meeting with Mr Harvie and the delegates. Mr Petale stated that at this meeting an agreement was reached that Mr Harvie would give a written apology to the delegates and retract the statements he had made about the delegates, but this did not eventuate.

39 Mr Petale stated that at the Principal's briefing held on 28 September 2004 Mr Harvie gave a qualified apology to the delegates however he maintained that he did not retract his comments about the delegates bullying and harassing staff. Mr Petale stated that he made notes at the Principal's briefing of what Mr Harvie stated to the meeting (Exhibit R1). Mr Petale stated that he and Ms Kowald visited Mr Harvie in his office after this briefing and told him that that his apology was ineffective and inappropriate and what he told staff was not what had been agreed to at the meeting with Ms Howe. In response Mr Harvie told them that he found it difficult to come up with an apology and he stated that he would not retract his statement. Mr Petale asked Mr Harvie if Ms Hindle mentioned the delegates in her letter of resignation and he responded in the affirmative. Mr Petale stated that Mr Harvie would not show him this letter and that he then told Mr Petale that he had copies of emails and letters from staff containing complaints about the delegates and Mr Harvie told Mr Petale that he would give him copies of the correspondence that he had received after the email and letter were sent to all staff which he did later (Exhibit A8). Mr Petale stated that he had another meeting with Mr Harvie in late September 2004 to discuss the written apology but Mr Harvie told him that it was difficult to write one and asked the delegates to provide him with an indication of the wording the delegates were seeking in the apology. Mr Petale stated that he has never received a written apology or a retraction of the comments Mr Harvie made about the delegates from Mr Harvie or the College.

40 Mr Petale stated that when Mr Harvie left the College in October 2004 he made comments about the activities of the delegates at the College during his final address to staff and warned staff about the militant behaviour of the delegates.

41 Under cross-examination Mr Petale stated that industrial action took place at the College in the first half of 2004 about the issue of work loads. Mr Petale stated that this was an issue for all teaching staff (approximately eighty) and that it existed prior to Mr Harvie commencing work at the College.

42 Mr Petale stated that he corresponded with union members by email and he stated that some of this communication was sent to non-members. Mr Petale could not recall being told by any non-union members about not wanting to be involved in the workloads dispute. Mr Petale recalled Mr Terry Wilson from the Catholic Education Office attending some meetings between the union and management at the College on the issue of workloads and Mr Petale stated that before the end of Semester 1, 2004 a petition was generated about the workloads issue and that a survey of staff workloads was also conducted at some point. Mr Petale stated that a workload survey, which was the subject of the union meeting held on 26 August 2004, arose out of the 2004 agreement.

43 Mr Petale gave evidence that he considered Mr Harvie's request on 25 August 2004 not to hold the union meeting in the staff room but he stated that he was unable to deal with this issue as there was no time to change the meeting and he was aware that Ms Kowald had told Mr Harvie to take the issue up with the union. Mr Petale stated that when he met with Mr Harvie on 25 August 2004 he was surprised when Mr Harvie told him that Ms Hindle said that she had been harassed by delegates at the College. Mr Petale also disagreed that Mr Harvie raised the issue of delegates putting pressure on non-union members to join the union.

44 Mr Petale stated that he had no discussions in 2004 with staff members who disagreed with the way in which the union's dispute with management was being handled and he stated that some staff members did not join in the industrial action which took place.

45 Mr Petale stated that he believed that Mr Harvie's address to staff members on 28 September 2004 was not an apology even though he used the word 'apologise' and Mr Petale also stated that only approximately 40 staff members were present at this address out of approximately 114 staff members all of whom had received the email and letter. Mr Petale stated that the delegates wanted a written apology from him as well as a retraction of his comments. Mr Petale denied that he refused to meet Mr Harvie after receiving his email dated 30 August 2004 and Mr Petale stated that he did not bully Ms Hindle nor had he harassed or bullied any of the College staff.

46 Mr Scanlon has been a teacher for 23 years and has been a member of the union since 1989. Mr Scanlon has taught at the College since 2000 and he was a union delegate in 2002 and 2004.

47 Mr Scanlon stated that when he was away from the College on long service leave during Term 3, 2004 he was informed about the email and letter via an email sent to his home by Mr Petale. Mr Scanlon stated that he was disappointed that the email and letter had been sent to all staff and he was taken aback by the accusations of bullying and harassment and he could not understand where these accusations came from. Mr Scanlon stated that he was well known by both teaching and non-teaching staff and he was concerned about his reputation given the content of the letter. Mr Scanlon stated he was a fair and reasonable person and that people could view him differently in light of Mr Harvie's comments. Mr Scanlon was also concerned that the union's reputation could be seen in a poor light as he believed that the union had built up a reputation for being supportive and encouraging of staff. Mr Scanlon stated that on the first day that he returned to the College at the beginning of Term 4, 2004 a staff member asked him who he had been bullying and harassing and because of these comments Mr Scanlon stated that he believed the issue had become out of hand. Mr Scanlon stated that later that day at lunchtime a male colleague made a joke that he better not to sit with Mr Scanlon but Mr Scanlon did not regard this comment as being funny. Mr Scanlon believed that his reputation had been damaged by the email and letter.

48 Mr Scanlon stated that he had not received any complaints from either teaching or non-teaching staff or College management about him bullying and harassing staff members and Mr Scanlon stated that he had never bullied or harassed a staff member.

49 Mr Scanlon stated that he had not received a written apology or retraction from Mr Harvie in relation to the email and letter.

50 Under cross-examination Mr Scanlon was asked about staff relationships in Semester 1, 2004 at the College. Mr Scanlon stated that the relationship between staff and management was not harmonious. Mr Scanlon could not recall any industrial action taking place during this period. Mr Scanlon stated that morale had been low at the College for many years and it was his view that there was disharmony between staff and the College's leadership team. Mr Scanlon believed that the relationship between staff was harmonious but there were difficulties between middle management and senior management and between staff and the leadership team.

51 Mr Scanlon stated that when he returned to the College in Term 4, 2004 he was told by other delegates that a retraction from Mr Harvie was being sought with respect to his comments and Mr Scanlon stated that he was aware that delegates were negotiating with Mr Harvie to agree on a written apology and Mr Scanlon believed that Mr Harvie's statement to staff on 28 September 2004 was not a real apology. Mr Scanlon believed that this was a conditional apology and that it was also not given to as many staff as possible. Mr Scanlon stated that he has worked hard to regain his reputation after this incident and he did not see the comments made by other staff to him about this issue as being funny at all.

52 Ms Kowald has taught English since 1981 and worked full time at the College from 1998 to the end of 2005. In 2004 and 2005 she was a union delegate at the College.

53 Ms Kowald stated that in the first half of 2004 she had a close personal relationship with Ms Hindle, who was a union member, and Ms Kowald stated that she had discussions with her after they undertook recess duty together. Ms Kowald stated that they discussed the lack of support being given to Ms Hindle with respect to discipline problems with students and Ms Kowald

stated that she was not surprised that Ms Hindle resigned because she had been distressed and unhappy at the College. Ms Kowald stated that Ms Hindle told Ms Kowald that she had resigned because of a lack of support from the middle leadership group at the College with respect to disciplinary issues and Ms Kowald stated that she did not have any discussions with Ms Hindle about her being bullied and harassed by the union delegates at the College.

54 Ms Kowald stated that she was stunned when she received the email and letter sent by Mr Harvie. Ms Kowald stated that when she attended the staff room that day for lunch some staff members made comments to her about the delegates being bullies and Ms Kowald stated that she felt distressed and disturbed by the comments even though some were made in jest. Ms Kowald stated that she has never been accused of bullying or harassing any staff member, student or parent and Ms Kowald complained that Mr Harvie should have used the College's harassment procedures if complaints had been made about the delegates bullying and harassing staff.

55 Ms Kowald stated that at a meeting she attended with Mr Harvie, Ms Howe and some of the delegates on 24 September 2004 Mr Harvie told the delegates that he would give them an apology at the Principal's briefing on 28 September 2004 and that he would draft an apology and provide a copy of it to the delegates before distributing it. Mr Harvie also told the delegates that he would not retract his comments. Ms Kowald stated that non-teaching staff did not attend the Principal's briefing held on 28 September 2004 and that not all teaching staff were in attendance for various reasons. Ms Kowald stated that at the Principal's briefing Mr Harvie did not apologise for sending the email and letter and when he stated that he was sorry if delegates felt any distress about what he had done Ms Kowald believed that he was reinforcing the points he was making in the email and letter.

56 Ms Kowald stated that straight after the Principal's briefing she and Mr Petale had a meeting with Mr Harvie to tell him that the delegates were not satisfied with the apology he had given earlier that day. Ms Kowald stated that Mr Harvie told them that he could not go as far as the delegates wanted because of the complaints about the delegates made by Ms Hindle and others. Ms Kowald stated that at this meeting they asked for the notes of the exit interview he had with Ms Hindle and her resignation letter and for copies of the other complaints he had received from staff and Mr Harvie told them that because he needed to protect the confidentiality of the complainants he would not provide these details. Mr Harvie also refused to give the delegates a copy of Ms Hindle's resignation letter.

57 Ms Kowald stated that at a meeting she and other delegates attended with Mr Harvie on 30 September 2004 Mr Harvie told the delegates that he was still having difficulty writing an apology and he also gave the delegates a document he had created from staff complaints emailed to him that did not contain the details of names and dates (Exhibit A8). Ms Kowald stated that this document gave the delegates the impression that Mr Harvie had received many different emails complaining about the delegates as they understood each statement in the document was a separate complaint. When the delegates asked for the names and dates of these complainants Mr Harvie refused to provide them but he did confirm these complaints were received after the email and letter were sent to staff. Ms Kowald stated that Mr Harvie mentioned that he had had conversations with staff complaining about the delegates prior to the email and letter being sent to all staff but he had not recorded these conversations and Ms Kowald stated that Mr Harvie reiterated that Ms Hindle had complained that she had been harassed and bullied by the delegates. Mr Harvie again stated that at this meeting he was finding it difficult to write an apology and he also admitted that he did not follow the College harassment policy and may have been in error in not doing so.

58 Ms Kowald believed that the email and letter sent by Mr Harvie to all staff damaged the reputation of both the union and the delegates and Ms Kowald believed that Mr Harvie had tried to divide staff and to ostracise the delegates. Ms Kowald stated that when Mr Harvie gave his final address at the College before he left he described the delegates' actions as being militant and divisive and he stated that as a result of their actions it would be difficult to attract quality staff to the College and staff would find it difficult to obtain employment elsewhere.

59 Under cross-examination Ms Kowald stated that she was not aware that Ms Hindle was going to resign prior to her resignation and she stated that she was not surprised that she resigned given the problems that she was experiencing because of a lack of support from management.

60 Ms Kowald stated that the email and letter written by Mr Harvie was a surprise and a shock as she and the other delegates denied bullying or harassing any staff members and it was also a shock because it had been distributed to so many people. Ms Kowald stated that she was shocked and surprised that Mr Harvie referred to the delegates displaying a lack of courtesy and professionalism to all staff in the email and letter and that these comments had been circulated so widely.

61 Ms Kowald stated that it was appropriate that the union conduct its meeting in the staff room on 26 August 2004 because the majority of staff wanted to hold the meeting there and Ms Kowald stated that she was not advised of the names of the two staff members who did not want the meeting to be held in the staff room.

62 Ms Kowald disagreed that she had been discourteous to Mr Harvie by not changing the meeting venue or notifying him that the venue would not be changed and Ms Kowald stated that there was not time for a face to face meeting with Mr Harvie about this issue given her full time work load and parent/teacher interviews being held on the afternoon of 25 August 2004. Ms Kowald stated that Mr Harvie did not express any concern at the time about any lack of courtesy on her part. Ms Kowald agreed that Mr Harvie mentioned to her in passing the issue of Ms Hindle being harassed and bullied before sending the email and letter to staff.

63 Ms Kowald stated that even though the staff room was available for all College staff to use not all staff used the staff room at lunch time including gardeners, canteen workers and clerical workers and she stated that it was mainly the teaching staff who used the staff room during the lunch break.

64 Ms Kowald stated that she had never received an apology from Mr Harvie for distributing the email and letter nor for the accusations he made about the delegates bullying and harassing staff and Ms Kowald did not accept that the statement made by Mr Harvie at the Principal's briefing on 28 September 2004 was a satisfactory apology.

65 Under re-examination Ms Kowald stated that she did not respond any further to Mr Harvie after emailing him on 26 August 2004 because she was busy with her teaching duties and she had told Mr Harvie to contact the union. Ms Kowald stated that she had a discussion with Ms Hindle after she resigned and asked her about the accusation of bullying. Ms Kowald stated that Ms Hindle was shocked and surprised about the accusation that she had been bullied and harassed by the delegates and she told Ms Kowald that she did not feel bullied or harassed by the delegates and that she saw some of the delegates as people she could confide in because of the problems she was having at the College.

66 Ms Kowald stated that over 50 per cent of eligible staff members at the College were union members.

Respondent's evidence

67 Mr Harvie is a qualified teacher, has a Masters in Education Leadership and has worked in education for many years and the last 19 years as a Principal. Mr Harvie is currently retired and undertakes private consulting.

68 Mr Harvie commenced employment at the College in the last week of Term 2, 2004 and remained there until the end of week 1 of Term 4, 2004. Mr Harvie stated that during his brief changeover with the substantive Principal, Mr Vaughan Sadler, one of the issues he discussed was the staff being divided and he understood this related at that time to the structure of the school's timetable and the issue of workloads at the College.

69 Mr Harvie stated that from his off the record discussions with staff members he believed that some staff members were being intimidated by others and Mr Harvie could not recall the words bullying and harassment being used in these discussions. Mr Harvie stated that he also formed this view from personal observations in the staff room. Mr Harvie stated that there were divisions at the College between staff and there were also divisions between staff and management.

70 Mr Harvie stated that during an exit interview he had with Ms Hindle when she resigned she raised her discomfort with some staff and a lack of support from some staff and management and Mr Harvie was told that at times this lack of support was aggressive and that she felt intimidated by some staff. Mr Harvie stated that one staff member in particular that Ms Hindle felt intimidated by was her head of department Ms Oliver who was also a delegate of the union at the time. Mr Harvie stated that he could not recall Ms Hindle using the words bullying and harassment at the time.

71 Mr Harvie stated that in the first weeks of Term 3, 2004 some staff raised concerns with him about the working environment at the College.

72 Mr Harvie stated that when he was advised by Ms Kowald to contact the union about changing the venue of the union meeting to be held on 26 August 2004 he recalled contacting the union and he stated that there was no response to his call. Mr Harvie stated that as a result he spoke to the union representative when they attended the College prior to the meeting taking place on 26 August 2004.

73 Mr Harvie stated that he sent a copy of the email and letter to all staff to keep them informed as the issue of the meeting affected all staff. Mr Harvie stated that after he sent the email and letter to staff he had some verbal feedback from staff as well as written responses including a letter and some emails. Mr Harvie stated that he did not recall receiving anything in writing from the delegates about the email and letter but he stated that one or two of the delegates may have spoken to him. Mr Harvie later recalled having a meeting with Ms Howe and some of the delegates but he could not recall the specifics of the meeting however he did recall that the delegates wanted an apology from him. Mr Harvie stated that he did not use the College's formal harassment policy to deal with concerns raised by staff as no formal complaints had been made and Mr Harvie stated that it was a perception of harassment by staff not a complaint.

74 Mr Harvie believed that he provided an apology to the delegates at the Principal's briefing on 28 September 2004 where all teaching staff are required to attend and Mr Harvie believed that the staff room was fairly full at the time. Mr Harvie stated that all staff were given a copy of the notes of this meeting which were taken by his secretary and reviewed by him prior to its dissemination. Mr Harvie believed that the notes of the meeting were accurate. After reading Mr Petale's summary of what he said Mr Harvie stated at the Principal's briefing, Mr Harvie stated that he did not believe that they were the exact words he used but if Mr Petale took them down word for word then he had to accept they were accurate but he could not be certain.

75 Mr Harvie could not recall telling the delegates that he would retract the statements he made about the delegates in his letter to Ms Howe and he then stated that he could not retract the statements because that was what he had been told by staff.

76 Mr Harvie stated that the collage of written complaints that he had generated was given to delegates at the meeting held with Ms Howe and the delegates. Mr Harvie stated that the document was an extract of correspondence received subsequent to disseminating the email and letter and was deliberately structured so as not to reveal the identity of the persons who made the complaints because they did not want to be identified for fear of reprisals.

77 Under cross-examination Mr Harvie stated that the only delegate specifically named as bullying and harassing a staff member was Ms Oliver. Mr Harvie stated that some staff told him that they felt intimidated and/or harassed by the delegates but they did not specify any particular delegate or group of delegates. Mr Harvie gave evidence that no staff member approached him about being bullied by a group of delegates and Mr Harvie could not recall the names of those staff members who claimed that the delegates harassed them but he stated that approximately five staff members felt pressured to join the union and felt intimidated about expressing their opinions. Mr Harvie stated that he did not take any notes about these complaints and he

agreed that he did not raise these issues with the union or its delegates at the time. Mr Harvie stated that in all instances he was told not to take the issues further and he agreed not to do so.

78 Mr Harvie stated that he distributed the email and letter to all staff to give them an awareness of what was happening and he believed that it was appropriate to refer to the bullying and harassment by delegates in the email and letter. Mr Harvie stated that he had already spoken to Mr Petale about these issues when he told him that Ms Hindle had been intimidated by Ms Oliver both as head of department and as a delegate although he did not mention any names at the time.

79 Mr Harvie stated that the collage of complaints he constructed was put together from responses that he had received after the email and letter was sent to all staff and Mr Harvie stated that he put the collage together to give the delegates a sense of the complaints being made by staff members. Mr Harvie conceded that there was no mention of bullying or harassment in these complaints, however Mr Harvie claimed that the staff members concerned felt pressured. When it was put to Mr Harvie that only two letters were included in the collage he agreed that was the case and he denied that he sought to deceive the delegates about the way in which he presented these comments. Mr Harvie stated that he moved the complaints around to give anonymity to the complainants and to give a sense of what was being given to him so as to generate meaningful discussion. Mr Harvie stated that these were the only written complaints he had received.

80 Mr Harvie stated that he was first notified on 25 August 2004 at approximately 9.04am by email from Mr Petale that a union meeting was to take place and he also received an email from Mr Nigel Briggs, a union representative, notifying him of the meeting 24 hours before the meeting was to be held and he agreed that this constituted proper notification of a union meeting. Mr Harvie stated that he did not initially contact the union about the venue for the meeting as this was an internal matter and that when he was requested to do so by Ms Kowald it was too late. Mr Harvie then stated that may have attempted to contact the union before the meeting but he could not recall doing this.

81 When asked why he sent a copy of his email to the Catholic Education Office on 26 August 2004 about the meeting venue Mr Harvie stated that he did so to keep them apprised about the union's activities given the possibility of future conflict.

82 Mr Harvie stated that he received two complaints about the union meeting being held in the staff room, one from a teacher and one from a non-teacher and Mr Harvie stated that he received a few complaints from staff after the union meeting went ahead in the staff room.

83 Mr Harvie stated that his discussion with Mr Petale about Ms Hindle on 25 August 2004 was a casual conversation and he stated that this discussion lasted only a few moments.

84 Mr Harvie stated that he was aware that the College had an harassment policy which gives staff members the right to be advised of allegations against them and to respond to a complaint. Mr Harvie stated that he did not speak to individual delegates about complaints of harassment and bullying from staff prior to writing his letter to Ms Howe on 31 August 2004 because the complaints had been made against a group of delegates and not individuals. Mr Harvie stated that he believed that the delegates were acting in concert as a group and therefore he chose to treat them as a single group. Mr Harvie believed that he had already given Mr Petale the opportunity to respond to the allegations when he spoke to him on 25 August 2004 about Ms Hindle.

85 Mr Harvie maintained that he had verbal feedback from staff about harassment and bullying at the College by the delegates and he maintained his statements in the letter to Ms Howe on 31 August 2004 reflected what staff had told him.

86 Mr Harvie claimed that the Principal's briefing note that he generated on 28 September 2004 constituted a written apology and Mr Harvie agreed that at a meeting he attended with Ms Howe after sending the email and letter he agreed to provide a written apology to the delegates but he did not agree to retract his comments as they reflected the complaints that had been made against the delegates.

87 Mr Harvie stated that he did not keep any notes of Ms Hindle's exit interview and Mr Harvie said that Ms Hindle did not tell him that she had been bullied by any delegate but he gave evidence that she had said that she had been intimidated by Ms Oliver as head of department and as a delegate and he stated that Ms Hindle told him that she felt that the delegates had contributed to a culture of intimidation amongst staff. Mr Harvie then stated that Ms Hindle would have used the word bullied if he had quoted that in his letter to Ms Howe. Mr Harvie agreed that the allegations contained in his letter to Ms Howe were serious and he stated that he had no intention of impugning the reputations of the delegates.

Applicant's submissions

88 The applicant submits that the Commission has jurisdiction to deal with this application because it is an industrial matter and the applicant argues that this issue affects both the applicant and its delegates as the delegates were acting on behalf of the applicant whilst carrying out their union related duties at the College.

89 The applicant maintains that it had no issue with the letter dated 31 August 2004 being sent by Mr Harvie to Ms Howe however once Mr Harvie published this letter to both teaching and non-teaching staff at the College, many of whom had little interest in the issue, this led to substantial issues being raised. The allegations raised by Mr Harvie about the delegates in his letter were serious both for the applicant and its delegates and Mr Harvie also claimed that the delegates had bullied a staff member into leaving the College.

90 The applicant argues that Mr Harvie's evidence about staff complaints about the delegates should be treated with caution as his evidence was vague. Even though Mr Harvie gave evidence that he was approached by some staff members detailing concerns about some of the activities of the delegates he did not take any action to pursue these concerns nor was any specific staff member who made complaints of this nature identified by him during the proceedings. The applicant argues that Mr Harvie's

evidence lacked credibility as he did not identify any specific delegate against whom the bullying and harassment claims had been made except for Ms Oliver and the applicant argues that Mr Harvie was being deceitful when he constructed the collage of the two letters sent after he had invited staff to complain with respect to the issues he raised in his letter to Ms Howe dated 31 August 2004. Additionally, the notes made by Mr Petale of the events surrounding 28 September 2004 reinforces this as his notes refer to Mr Harvie telling Mr Petale at a meeting following the Principal's briefing that Ms Hindle made a written complaint about the delegates which was not the case and despite undertaking to do so he did not keep Ms Hindle's complaint confidential. Furthermore, Ms Hindle did not mention the delegates in her letter of resignation nor was there any reference to them harassing or bullying her. The only mention made by Ms Hindle about the delegates, according to Mr Harvie, was in relation to her head of department Ms Oliver and the applicant claims that Mr Harvie referred to Ms Oliver being a delegate as an afterthought in his evidence. Both Ms Nisbet and Ms Kowald also had a good relationship with Ms Hindle who was a union member.

91 Mr Harvie was aware that the College had an harassment policy but did not follow these procedures which included an employee's right to natural justice and confidentiality and the applicant argues that the publication of Ms Howe's letter to staff with the allegations included in it was contrary to the complaints procedure in the harassment policy. Additionally, the complaints made by two staff members subsequent to the email and letter being sent to all staff were made after Mr Harvie had already sent the email and letter. The applicant also argues that these complaints did not make any suggestions that the staff member had been harassed, intimidated or bullied as this correspondence expresses dissatisfaction about the union holding meetings in the staff room and refers to being approached to join the union on a number of occasions which does not constitute harassment or bullying.

92 The applicant argues that the delegates are of good standing, they were never counselled or received complaints about harassing or bullying staff members nor were they given any opportunity to answer the complaints and there was no evidence that any of the delegates had bullied or harassed any staff member apart from the reference to Ms Oliver by Ms Hindle.

93 The applicant argues that the respondent must demonstrate that the delegates had bullied and harassed staff and has failed to do so. The applicant argues that none of the actions raised by Mr Harvie constituted bullying or harassment as defined in the Macquarie Dictionary and the applicant claims that Mr Harvie's evidence was weak in this regard as he gave no specific details about the alleged harassment or bullying.

94 The applicant rejects the respondent's claim that Mr Harvie apologised to the delegates on 28 September 2004 and claims that the apology he gave to staff on this date did not constitute a proper apology.

95 The applicant maintains that the Commission has jurisdiction to issue the apology sought as the Commission's powers when issuing orders are broad. The applicant argues that in the circumstances the Commission should order that the respondent apologise to the delegates and order that the statements made by Mr Harvie be retracted. The applicant provided a copy of an apology and retraction for the Commission to consider and the applicant requested that this apology be sent to all staff members who received the email and letter sent by Mr Harvie on 2 September 2004.

Respondent's submissions

96 The respondent argues that this application should be dismissed.

97 The respondent argues that an industrial issue about teacher workloads, which started in February 2004 and continued through to September 2004, created divisiveness amongst the staff and led to a number of complaints being made by staff members about the delegates and the way in which they conducted themselves in relation to this dispute. Other issues included the venue of where meetings were held and some staff members being pressured to join the union. The respondent argues that Mr Harvie's reference to bullying and harassment by the delegates within this context was justified. Additionally, the respondent argues that Mr Petale agreed that his behaviour constituted bullying and harassment (see transcript page 40).

98 The respondent argues that Mr Harvie gave an apology to the delegates on 28 September 2004 at a staff meeting held that morning and the minutes of this meeting, which was circulated to all staff at the College confirm that his apology was also in writing. Mr Harvie had previously told the delegates that he would give them an apology and did so on this date. The respondent argues that Mr Harvie never undertook to retract the comments he made about the delegates in his letter to Ms Howe and some of the evidence given in the proceedings supports this claim.

99 The respondent maintains that the behaviour of the delegates complained about by some staff members constituted bullying as defined in the document "Violence, Aggression and Bullying at Work: a code of practice for prevention and management" which was developed to provide guidance on meeting the requirements in the *Occupational Safety and Health Act 1984* ("the OS&H Act") (Exhibit R9). The respondent argues that the Commission should accept Mr Harvie's evidence that at Ms Hindle's exit interview she told him that she was bullied and harassed by delegates and the respondent claims that the complaints about the delegates made subsequent to Mr Harvie sending the email and letter to all staff members fits within the definition of bullying.

100 The respondent also argues that Mr Harvie's letter to Ms Howe did not specify that the delegates had harassed and bullied staff, only that some staff felt bullied and harassed by the delegates.

101 The respondent maintains that the evidence that the delegates were distressed as a result of Mr Harvie's letter was weak. Mr Scanlon was not working at the time the email and letter was sent to staff, Ms Nisbet initially disregarded the email and letter, none of the delegates took sick leave after the email and letter was distributed and comments made by staff members after the email and letter was distributed by Mr Harvie were in a joking manner. Additionally Mr Petale and Ms Kowald had

already been told about the claims in the letter of 31 August 2004 by Mr Harvie prior to the letter being sent to Ms Howe. The respondent also argues that delegates did not suffer any detriment as a result of the email and letter being sent as the delegates continued to remain working either at the College or were employed elsewhere.

102 The respondent argues that there is no necessity for the Commission to order that an apology be made to the delegates because a written apology had already been given to them by Mr Harvie and distributed to the College's staff members. The respondent also argues that the Commission does not have the power to order the apology sought as an order of this nature is not contemplated by the Act.

Findings and conclusions

Credibility

103 I listened carefully to the evidence given by each of the four delegates – Ms Nisbet, Mr Petale, Mr Scanlon and Ms Kowald and closely observed each witness. I find each of the delegates to be impressive witnesses. In my view each witness gave their evidence honestly and in a considered and forthright manner and to the best of their recollection. Furthermore, when each of the delegates commented about the impact of Mr Harvie sending the email and letter to all staff on their relationships with colleagues I formed the view that their reactions in response to this correspondence were genuine. On this basis I have no hesitation in accepting the evidence given by the delegates.

104 I do not have the same confidence in the evidence given by Mr Harvie. In my view parts of Mr Harvie's evidence was inconsistent and vague and I found that some of Mr Harvie's evidence was unconvincing at times. For example when Mr Harvie gave evidence about complaints made about the delegates prior to him generating his letter to Ms Howe he was unable to give any specific evidence about these complaints or the name of the complainants yet he was able to recall some of the detail of his exit interview with Ms Hindle which was favourable to the respondent's case. I find that Mr Harvie's evidence about the composite document that he generated from two complaints that he received after distributing the email and letter to all staff seeking feedback about the issues he raised in his letter to be disingenuous and I reject Mr Harvie's claim that he generated this document in order to disguise the authors of the two documents. In my view this document was deliberately structured by Mr Harvie to give delegates the impression that a number of different complaints had been received by him from staff as confirmed by the evidence of Ms Kowald. In the circumstances I doubt the credibility of the evidence given by Mr Harvie as a whole and where there is any inconsistency in the evidence given in these proceedings I prefer the evidence given by the delegates to the evidence given by Mr Harvie.

105 Paragraphs 4 to 15 set out the background and documents relevant to this dispute.

106 I have already found that the substance of this application relates to an industrial matter (see *Independent Education Union of Western Australia, Union of Employees v Corpus Christi College* [2006] 86 WAIG 1416).

107 In this instance the Commission is required to determine whether or not the comments made by Mr Harvie about the delegates in the letter he sent to Ms Howe on 31 August 2004 were true with respect to the delegates bullying and harassing other staff members whilst undertaking their role as delegates at the College. If the Commission finds that Mr Harvie's comments lacked substance the Commission is then required to determine whether or not an order should issue that the respondent retract the comments made by Mr Harvie and/or apologise to the applicant and its delegates for Mr Harvie's behaviour towards the applicant's delegates.

108 After reviewing the evidence given in these proceedings and when taking into account my views on witness credit I find that none of the seven delegates who were at the College during the relevant period were involved in bullying and harassing any other staff member at the College whilst undertaking their role as union delegates and I find that Mr Harvie had no basis for claiming that the delegates had bullied and harassed other staff members as detailed in his letter to Ms Howe.

109 The respondent argued that the comments made by Mr Harvie in his letter to Ms Howe did not claim that the delegates had bullied and harassed staff as Mr Harvie's comments merely referred to some staff members feeling that they had been harassed and bullied by the delegates.

110 Mr Harvie made the following comments about the delegates in his letter to Ms Howe dated 31 August 2004, which was then distributed to all staff at the College (approximately 144) on 2 September 2004:

> "4. A little later Phil was passing my office so I asked to speak with him as he had not replied to my e-mail. I told him that 2 staff that I know of had particularly requested through me that an alterative (sic) venue for the visit be organised as they wanted to enjoy their lunch in the staffroom without interruption of a large meeting. I took the opportunity to inform him also of the harassment some staff felt by some staff representatives of the ISSOA. One in particular who had given, as one of her reasons for leaving the College was the "bullying" she experienced by the staff."

and

> "(ii) the harassment and "bullying" felt by staff from the local representatives. This occasion serves as an example of this."

(extracts from Exhibit A1)

I conclude that the claims made by Mr Harvie that the delegates bullied and harassed staff members at the College were serious and clearly brought into question their behaviour and professionalism for a number of reasons. When Mr Harvie referred to staff feeling that they had been bullied and harassed by some delegates he did not qualify this in any way and Mr Harvie did

not specify the nature of the harassment and bullying he claimed had occurred which left open a range of possibilities. When Mr Harvie claimed that a staff member had left the College as a result of the actions of the delegates this in my view constituted a claim that delegates had bullied a colleague which is a serious accusation. Mr Harvie also did not specify which delegates had been involved in harassing and bullying staff and as a result all delegates were implicated in bullying and harassing staff.

111 I find that the comments made by Mr Harvie in his letter to Ms Howe about the delegates bullying and harassing staff members at the College lack substance for a number of reasons. I accept without reservation the evidence given by the delegates that they had not bullied and harassed staff members nor had any complaints been made to them or the delegates who did not give evidence in the proceedings about any delegate at the College bullying or harassing other staff members. I have already indicated that I have doubts about the veracity of Mr Harvie's evidence as a whole and given Mr Harvie's inability to give any details about the complaints he claimed he was advised of and the inappropriate behaviour of delegates that he had observed I do not give any weight to his claims that he observed the delegates bullying and harassing staff members at the College and that some staff had complained to him about the delegates behaviour. Furthermore, Mr Harvie's claims about the delegates were unsubstantiated and uncorroborated. I am sceptical about Mr Harvie's claim that Ms Oliver had bullied and harassed Ms Hindle in her role as delegate as there was no direct evidence confirming that any of the delegates, including the delegates who did not give evidence in these proceedings, had bullied and harassed any staff member in their role as delegates at the College.

112 I reject Mr Harvie's claim that Ms Hindle told him that the actions of the delegates influenced her decision to resign. Ms Hindle's resignation letter makes no mention of any complaint about the delegates and furthermore Ms Hindle was not called by the respondent to verify Mr Harvie's claim in this regard. I take into account Ms Kowald's evidence that Ms Hindle, who was a union member, never complained to her about the actions of the delegates and that Ms Hindle had a good relationship with Ms Kowald and Ms Nisbet. I accept that Ms Hindle may have raised an issue of concern about her Head of Department Ms Oliver during her exit interview with Mr Harvie and that Ms Oliver was a delegate at the time, however, given the nature of the issues raised in Ms Hindle's exit letter and her discussions with Ms Kowald about a lack of management support I am of the view that Ms Hindle's reference to Ms Oliver would have been in relation to her role as Ms Hindle's Head of Department not as a delegate. In my view Mr Harvie's evidence about the nature of his discussions with Ms Hindle is further undermined because Mr Petale's notes of his discussions with Mr Harvie on 28 September 2004, which Mr Harvie did not contest, state that Mr Harvie advised Mr Petale and Ms Kowald that Ms Hindle's letter of resignation referred to the delegates as a reason for her resignation however this was not the case as there is no mention in this letter about the delegates influencing her resignation (see Exhibit R3).

113 The respondent tried to paint a picture of the staff at the College being divided over the issue of workloads in 2004 and claimed that the way in which this issue had been handled by the delegates had, by August 2004, led to conflict between staff which had a negative impact on the relationship between some staff and delegates. I find that there was no evidence confirming this contention. Mr Harvie gave evidence that there were some issues arising out of timetabling problems at the College but Mr Petale gave evidence, which I accept, that these problems were no longer an issue by Term 3, 2004.

114 Mr Harvie gave evidence that prior to writing his letter to Ms Howe that he received complaints from a number of staff that they generally felt harassed and bullied by the delegates and he stated that he observed staff members being bullied and harassed by delegates. As no individual complainant was identified by Mr Harvie to confirm these complaints and as I have doubts about the evidence given by Mr Harvie as a whole I reject Mr Harvie's evidence in this regard. Even though I accept that two staff members may have been concerned about the holding of the union meeting in the College's staffroom on 26 August 2004 and raised this as a problem with Mr Harvie prior to the meeting taking place on 26 August 2004 it is my view however that the holding of a union meeting in the staff room and a refusal to change the venue of a meeting did not constitute bullying and harassment of staff by the delegates. Given that there were only two complaints from staff about this issue out of a total staff of approximately 114 and as I accept Ms Kowald's evidence that a substantial proportion of staff at the College were happy to have a union meeting in the staff room it is my view that this was only a very minor issue that Mr Harvie of his own volition made into a bigger issue than it warranted. Further, only two staff member responded in writing to Mr Harvie about concerns about the way in which delegates at the College were undertaking their role after he circulated the email and letter to all staff seeking feedback from them if they had any concerns which in my view reflects the fact that this issue was not a major concern to staff at the College (see Exhibits R6 and R7). In any event I find that once the issue of the meeting being held in the staffroom was raised by Mr Harvie with Mr Petale and Ms Kowald, both delegates dealt with this issue in a professional manner and I accept that given the timeframe involved there was good reason why the meeting took place in the staffroom and an alternative venue was not explored. Further, Mr Harvie confirmed that he was given the requisite notice of this meeting.

115 I do not accept the respondent's claim that the complaints made in writing to Mr Harvie by staff members after he had sent the email and letter to all staff constituted harassing and bullying behaviour on the part of the delegates and reflected an ongoing pattern of behaviour by the delegates. The complaints are as follows (formal parts omitted):

> "**RESPONSE TO YOUR EMAIL REGARDS (sic) THE RECENT ISSOA VISIT**
>
> 'Tis (sic) a sad day when common courtesies no longer exist.
>
> Firstly, I would like to say that as a non-teaching staff member, I was very surprised and thought the email advice that the ISSOA meeting would be held in the Staffroom during lunchtime was confrontational to say the least. ISSOA Staff Representatives have been told on numerous occasions by Principal Mr Vaughan Sadler that the staffroom is not

appropriate and other venues are available, and that not all staff wish their lunchtime to be interrupted by a union meeting, nor should they have this forced upon them. I see this action by the Representatives as confrontational and deliberate.

Secondly, I think anyone arriving at any organisation to hold a union meeting without the consent of persons in charge is discourteous and displaying a blatant snub of protocol – in this case by the ISSOA Union person and CCC Representatives. To me, it was a total disregard of your position.

I thought your offer of supplying tea/coffee facilities together with another venue was very hospitable and one that would have been accepted.

I walked into the staffroom during lunch on the day to make a cup of tea and felt like I shouldn't have been there, nor allowed to socialise (speak) to a teacher who was standing next to me whilst making my tea. In fact, we were whispering. I then left the staffroom and came back to my office.

I believe choice was taken away from us that day.

I appreciate that persons may feel there are issues to be addressed and need the help of their Union, but there is also a way certain things should be conducted. Confrontation and total disregard of those in authority are not one of them.

Barry, as I have many teacher friends here and have built up a good report (sic) with them all, I would appreciate not having my name mentioned as replying to your email, although you are more than welcome to add it to your numbers as voicing disapproval."

(Exhibit R6)

"I have been approached on a number of occasions re my joining the union. I have felt pressured. I do object to the union holding meetings in the staff room. I was privy to a conversation in the staff room where ISSOA CCC representatives where (sic) being briefed on 'targeting' non members to join the union by the ISSOA rep.

I have been told that not being a member of the union means that I will benefit from any thing gained by the union without financially supporting the organisation. I have also been told that in the event that the school does not do the right thing by me, that the union will not be able to help me.

I feel like I am in a position of not wanting to choose sides, rather just wanting to get on with enjoying and doing my job. Simply put, if possible I want to be able to choose neutral ground."

(Exhibit R7)

116 Bully is defined in the Australian Concise Oxford Dictionary (2nd edition) to mean, amongst other things, "a person who uses strength or power to coerce others by fear' and harass is defined as "trouble and annoy continually or repeatedly ... make repeated attacks on (an enemy or opponent)".

117 The first complaint relied upon by Mr Harvie as bullying and harassing behaviour relates to problems with union meetings being held in the staff room and there is no mention in this letter of any behaviour which in my view would constitute bullying and harassment as defined. The other staff member complains about being approached to join the union on a number of occasions and as a result feeling pressured. In my view this also does not constitute bullying and harassment as defined. Additionally, there is no reference in this latter complaint as to when these actions were alleged to have occurred and whether these approaches were made by any of the delegates the subject of this application.

118 I reject the respondent's claim that the delegates actions toward staff constituted bullying as defined in the OS&H Act's code of practice titled "Violence, Aggression and Bullying at Work: a code of practice for prevention and management". I have reviewed examples of bullying behaviour detailed in this document and it is my view that none of the complaints made against the delegates as claimed by Mr Harvie and the two staff members who complained in writing to Mr Harvie would come within this definition. Additionally, I find no substance to the respondent's claim that Mr Petale conceded that he had bullied any staff member.

119 Mr Harvie claimed he did not pursue the formal complaints process using the College's harassment policy because the complainants did not wish to make formal complaints about the delegates. It is my view that if a staff member raises complaints about a colleague or colleagues with the Principal and they did not want their complaint taken any further then this should be the end of the matter. If complaints were made by staff to Mr Harvie about the actions of the delegates that had any substance and if they were to be investigated and taken further by Mr Harvie in his role as Principal then it is my view that Mr Harvie should have dealt with these complaints using the College's harassment policy complaints procedure, which details a process to safeguard the rights of all participants involved in the dispute and that this process should have been completed prior to raising any issues with Ms Howe. It is my view that when Mr Harvie decided not to invoke the College's harassment policy against the delegates and raised the issues with Ms Howe instead he denied the delegates natural justice and the right to confidentiality.

120 I reject Mr Harvie's claim that as he had previously raised the complaints referred to in his letter to Ms Howe relating to Ms Hindle, with Mr Petale and Ms Kowald he therefore had a right to then raise these issues with Ms Howe and all staff members. As Mr Harvie only had a very brief discussion with Mr Petale and Ms Kowald about Ms Hindle on 25 August 2004 when discussing the venue of the union meeting and about staff generally feeling that they were being harassed it is in my view that this could not be regarded as an counselling session where issues of a serious nature were discussed as claimed by Mr Harvie. I therefore conclude that Mr Harvie cannot rely on this discussion as a basis to raise his concerns elsewhere. Even

though I find that it was acceptable for Mr Harvie to raise general concerns about union and delegate issues with Ms Howe in my view he chose not to do this in an appropriate manner by distributing Ms Howe's letter to all staff at the College.

121 I accept the applicant's claim that when Mr Harvie distributed his letter to Ms Howe to all staff wrongly accusing the delegates of bullying and harassing other staff whilst carrying out their role as delegates that Mr Harvie brought into question the professionalism and reputation of not only the delegates but also the union as the delegates were undertaking their duties as representatives of the union. After observing the four delegates giving evidence in the hearing I formed the view that none of the delegates went about their role as delegates in an aggressive and untoward manner and I am of the view that they undertook their roles as delegates in a professional, sensitive and thoughtful manner. In my view these conclusions add weight to my finding that the delegates did not harass or bully colleagues at the College. I am also of the view and I find that when Mr Harvie falsely accused the delegates of bullying and harassing colleagues this had a serious negative impact on the well being and professional standing of the four delegates who gave evidence in these proceedings and on their relationships with some of their colleagues.

122 I find that when Mr Harvie sent his letter to Ms Howe and when his email and letter was circulated to all staff members that given the nature of his actions he did this in his role as Acting Principal of the College. In reaching this view I also take into account that Mr Harvie's letter to Ms Howe was over his signature as Acting Principal and that when Mr Harvie claimed he apologised to the delegates it was at the Principal's briefing held on 28 September 2004. I therefore find that when Mr Harvie sent his letter to Ms Howe and the letter and email to all staff he did so on behalf of the respondent and not as an individual.

123 I reject the respondent's claim that Mr Harvie undertook and formally apologised to the delegates about the comments he made in the letter to Ms Howe about the delegates, during his address to the staff on 28 September 2004 and that this apology satisfied Mr Harvie's undertaking to give a written apology to the delegates.

124 I find that Mr Harvie's statements during this meeting as detailed in the minutes of this meeting did not constitute a proper apology nor did it constitute an apology acceptable to the delegates. According to Mr Petale's notes of the Principal's briefing, Mr Harvie stated as follows:

> "The other thing that was talked about on the day was my letter that went out to Theresa Howe that describes, I guess, the discomfort that was felt by some staff in regards to the use of the StaffRoom (sic) for, um, the ISSOA meeting a week or so before that and also the fact that some staff had felt harassed by members of the, ah, Delegates of the ISSOA. The concerns of the staff, or of the Delegates particularly were that by generating that to staff in a public way um…it perhaps did some damage to their reputations personally, and so I apologise if that's the way they feel and that's what happened concerning the actions of the umm…they were my actions causing distress to members and I'm certainly deeply apologetic (my emphasis). But the reason for my doing so was to express some concerns of staff members about what happened on that day and what had happened previously and to let you all know that's what I was doing ; (sic) I didn't want to do that behind your backs so that was the reason for my publishing it in that way."
>
> (extract from Exhibit R1)

Mr Harvie's briefing note, as checked by Mr Harvie, states the following:

> "**Re copy of letter sent to ISSOA re use of staff room for ISSOA meetings**
>
> In this letter Barry mentioned the discomfort felt by some staff in the use of the staff room as a venue for ISSOA meetings and also that some staff had felt harassed by ISSOA delegates. CCC ISSOA delegates felt that by making this public it did some damage to their reputation personally. Barry apologised if his actions caused any distress to any delegates. The reason for circulating the letter was so that all staff could be fully informed."
>
> (extract from Exhibit R8)

In both summaries Mr Harvie qualifies his apology by stating that if the delegates felt upset about his comments and if they felt that perhaps his comments did some damage to their personal reputations then he apologised. In my view Mr Harvie did not give an unreserved apology to the delegates for bringing their reputations into disrepute or wrongly accusing them of bullying and harassing their colleagues as he made the apology conditional on how the delegates felt about his accusations. I also find that when Mr Harvie made this apology in the way he did Mr Harvie was effectively maintaining his claim that all delegates had bullied and harassed members of staff despite previously undertaking to give an apology to the delegates about his comments about the delegates. It was also the case that this statement was not given at a meeting at which all staff usually attended.

125 I have found that Mr Harvie published and widely circulated untrue comments about the delegates in his role as the College's Acting Principal whilst acting on behalf of the respondent, which unfairly called into question the behaviour and reputation and professionalism of both the union and its delegates and I have found no substance to Mr Harvie's claim that the applicant's delegates bullied and harassed other staff members when performing their role as delegates. In the circumstances it is my view that the respondent should be ordered to retract these comments and issue an apology to the union and the delegates. In the circumstances I am of the view that because Mr Harvie's actions had a negative impact on the standing and professionalism of the delegates and the union that an apology and retraction should be issued by the respondent to the delegates and the union.

126 I reject the respondent's argument that the Commission does not have the power to require the respondent to retract Mr Harvie's comments or require the respondent to issue an apology to the delegates and the union as it is my view that the Commission's powers under s26 of the Act are wide enough to order that the respondent retracts the comments made by Mr Harvie and issue an apology, in particular s26(1)(a) and (c).

127 I have reviewed the apology tendered by the applicant in these proceedings and I have taken into account what the applicant has suggested when formulating an apology.

128 I propose to make the following orders:

1. That the respondent write to the union and the delegates unreservedly retracting the comments made by Mr Harvie about the applicant's delegates contained in the letter to Ms Howe dated 31 August 2004.

2. That the respondent apologise in writing to the applicant and its delegates for Mr Harvie's unwarranted actions towards the applicant's delegates in the following form:

> "On 2 September 2004 the then Acting Principal Mr Barry Harvie published as an attachment to an email to teaching and non-teaching staff of Corpus Christi College, a copy of a letter he had sent to the Secretary of the ISSOA, now the Independent Education Union of Western Australia, Union of Employees ("the IEUWA"), on 31 August 2004. The letter expressed his concerns about the activities of the ISSOA and its delegates at the College
>
> The letter suggested that delegates of the ISSOA at the College had bullied and harassed some staff at the College. The letter also stated that a staff member had left the employ of the College giving as one of her reasons for leaving "bullying" she experienced from other staff. The imputation arising from that statement was that delegates of the ISSOA had bullied her and were a factor in her leaving.
>
> College staff were well aware that Philip Petale, Kerry Kowald, Ann Nisbet and Russell Scanlon were delegates of the ISSOA at the time along with three other delegates.
>
> The publication of the letter caused distress to the delegates and damaged the reputations of the delegates and the ISSOA in that it implied that the delegates in their role as delegates of the ISSOA had bullied and harassed other staff at the College. This imputation damaged the delegates' relationships with other college staff and the reputation of the ISSOA.
>
> The College regrets that the publication of the letter has caused distress to the delegates and damaged the reputation of the delegates and the ISSOA.
>
> The College unreservedly retracts the allegation that the delegates bullied and harassed other staff at the College and apologises for the hurt and damage the publication of the letter has caused."

3. That a copy of the letter contained in order 2 above be mailed to all staff members that received the email and letter on 2 September 2004 within 14 days of the date of this order.

129 A minute of proposed order will now issue.

2007 WAIRC 00130

A DISPUTE REGARDING CLAIMS ABOUT ACTIONS OF UNION DELEGATES.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA,UNION OF EMPLOYEES
	APPLICANT
	-v-
	ROMAN CATHOLIC ARCHBISHOP OF PERTH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 16 FEBRUARY 2007
FILE NO/S	CR 188 OF 2005
CITATION NO.	2007 WAIRC 00130
Result	Upheld and Order issued

Order

Having heard Mr G Stubbs of counsel on behalf of the applicant and Ms K Wroughton of counsel on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. ORDERS THAT the name of the respondent be deleted and that the Roman Catholic Archbishop of Perth be substituted in lieu thereof.

2. DECLARES THAT none of the seven delegates who were at the College during the relevant period were involved in bullying and harassing any other staff member at the College whilst undertaking their role as union delegates and that Mr Harvie had no basis for claiming that the delegates had bullied and harassed other staff members as detailed in his letter to Ms Howe dated 31 August 2004.

3. DECLARES THAT when Mr Harvie distributed his letter to Ms Howe to all staff wrongly accusing the delegates of bullying and harassing other staff whilst carrying out their role as delegates Mr Harvie brought into question the professionalism and reputation of not only the delegates but also the union.

4. ORDERS THAT the respondent write to the union and the delegates unreservedly retracting the comments made by Mr Harvie about the applicant's delegates contained in the letter to Ms Howe dated 31 August 2004.

5. ORDERS THAT the respondent apologise in writing to the applicant and its delegates for Mr Harvie's unwarranted actions towards the applicant's delegates in the following form:

> "On 2 September 2004 the then Acting Principal Mr Barry Harvie published as an attachment to an email to teaching and non-teaching staff of Corpus Christi College, a copy of a letter he had sent to the Secretary of the ISSOA, now the Independent Education Union of Western Australia, Union of Employees ("the IEUWA"), on 31 August 2004. The letter expressed his concerns about the activities of the ISSOA and its delegates at the College.
>
> The letter suggested that delegates of the ISSOA at the College had bullied and harassed some staff at the College. The letter also stated that a staff member had left the employ of the College giving as one of her reasons for leaving "bullying" she experienced from other staff. The imputation arising from that statement was that delegates of the ISSOA had bullied her and were a factor in her leaving.
>
> College staff were well aware that Philip Petale, Kerry Kowald, Ann Nisbet and Russell Scanlon were delegates of the ISSOA at the time along with three other delegates.
>
> The publication of the letter caused distress to the delegates and damaged the reputations of the delegates and the ISSOA in that it implied that the delegates in their role as delegates of the ISSOA had bullied and harassed other staff at the College. This imputation damaged the delegates' relationships with other college staff and the reputation of the ISSOA.
>
> The College regrets that the publication of the letter has caused distress to the delegates and damaged the reputation of the delegates and the ISSOA.
>
> The College unreservedly retracts the allegation that the delegates bullied and harassed other staff at the College and apologises for the hurt and damage the publication of the letter has caused."

6. ORDERS THAT a copy of the letter contained in order 5 above be mailed to all staff members that received the email and letter on 2 September 2004 within 14 days of the date of this order.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Div.	Western Australian Mint	Kenner C	C 6/2007	7/02/2007	Dispute regarding employees shift changes	Discontinued
Director General, Department of Education and Training	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Harrison C	C 73/2006	N/A	Dispute regarding assessment of levels	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
Independent Education Union of Western Australia, Union of Employees	Corpus Christi College	Harrison C	C 188/2005	23/11/2005 24/01/2006 9/03/2006 18/05/2006	A dispute regarding complaint about union delegates and sub	Referred
Silvana Gaspar	Mr Brett Warhurst Metcash Trading Limited	Scott C	C 102/2006	N/A	Dispute regarding long service leave entitlements	Concluded
The Civil Service Association of Western Australia Incorporated	Ms. Sharyn O'Neill, A/Director General, The Department of Education and Training	Kenner C	PSAC 8/2007	N/A	Dispute regarding proposed transfer of a union member	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Agriculture and Food	Scott C	PSAC 2/2007	24/01/2007	Dispute regarding transfer of position	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	Personal Contracting Pty Ltd T/As Tricord Personnel		C 154/2004	25/08/2004	Regarding the dismissal of a worker	Discontinued

CORRECTIONS—

2007 WAIRC 00132

CLEANERS AND CARETAKERS AWARD, 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

COCA COLA BOTTLERS (PERTH) PTY LTD & OTHERS

RESPONDENTS

CORAM COMMISSIONER S WOOD

DATE FRIDAY, 16 FEBRUARY 2007

FILE NO. APPL 74 OF 2006

CITATION NO. 2007 WAIRC 00132

Result Correction order

Correction Order

WHEREAS an error occurred in the Order dated 14 February 2007 issued in application 74 of 2006 Citation Number [2007] WAIRC 00111, the Commission, in order to correct the error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Cleaners and Caretakers Award, 1969 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 13. – Overtime: Delete paragraph (a) of subclause (4) of this clause and insert the following in lieu thereof:

(4) (a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $8.25 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.65 for each meal so required.

2. Clause 20. – Special Rates and Conditions:

(A) Delete paragraphs (a) and (b) of subclause (8) of this clause and insert the following in lieu thereof:

(a) Washing towels, 34 cents each.

(b) Washing dusters, 26 cents each.

(B) Delete subclause (10) of this clause and insert the following in lieu thereof:

(10) (a) Where it is necessary to go wholly outside a building to clean windows an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $2.55 per day.

(b) Where an employee is required to clean windows from a swinging scaffold or similar device he/she shall be paid 43 cents per hour extra for every hour or part thereof so worked.

(C) Delete subclause (11) of this clause and insert the following in lieu thereof:

(11) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than three hours, an allowance of $2.85 per day shall be paid. This allowance shall not apply to caretakers.

(D) Delete subclause (15) of this clause and insert the following in lieu thereof:

(15) All employees called upon to clean closets connected with septic tanks and sewerage shall receive an allowance as follows:

		Per Week $
(a)	five closets or greater but less than ten closets per day	4.05
(b)	ten closets or greater but less than 30 closets per day	11.95
(c)	30 closets or greater but less than 50 closets per day	23.70
(d)	50 closets or greater per day	29.80

For the purpose of this clause one metre of urinal shall count as one closet and three urinal stalls shall count as one closet

(E) Delete paragraph (c) of subclause (17) of this clause and insert the following in lieu thereof:

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area Details	Engine Displacement (in cubic centimetres) Over 2600cc	OVER 1600CC - & 2600CC	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	81.7	71.1	62.8
South West Land Division	84.0	72.9	64.8
North of 23.5o South Latitude	92.1	80.3	71.5
Rest of the State	86.7	75.3	66.8

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

Schedule 2 - Motor Cycle Allowance

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	28.2

3. Clause 22. – Wages: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Leading Hands: Any employee in charge of other employees shall be paid in addition to the appropriate wage prescribed, the following:

		$
(a)	if placed in charge of not less than three and not more than six other employees	12.95
(b)	if placed in charge of not less than six and not more than ten other employees	23.05
(c)	if placed in charge of not less than ten and not more than 15 other employees	28.75
(d)	if placed in charge of not less than 15 and not more than 20 other employees	34.95
(e)	if placed in charge of more than 20 other employees	45.10

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Caretaker.

2. For Work Related Allowances – the percentage increase in:

   - Clause 20 – Specials Rates and Conditions
   - Clause 22 – Wages

   is derived from $17 divided by $499.20 equals 3.41% (2005) and $20 divided by $516.20 equals 3.87% (2006) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

   - Clause 13 – Overtime has been varied for the CPI Take Away Foods - Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

     June 2006 171.5 X 100 = 6.19%

     December 2004 161.5 1

     CPI Meals Out and Take Away Food – Perth

   - Clause 20 – Special Rates and Conditions – subclause (17) has been varied for the CPI Private Motoring – Perth for the period December 2004 to June 2006 giving the percentage of 8.50%

     June 2006 157.0 X 100 = 8.50%

     December 2004 144.7 1

     CPI Private Motoring – Motor Vehicles – Perth

   For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

   The union uses Catalogue 6455.0.40.001

WORK RELATED ALLOWANCES

Key Minimum Classification - Caretaker

Clause		A	B	C
Clause 20. – Special Rates and Conditions	8(a)	$0.32	$0.34	
	8(b)	$0.24	$0.26	
	10(a)	$2.35	$2.54	$2.55
	10(b)	$0.40	$0.43	
	11	$2.65	$2.85	$2.85
	15(a)	$3.75	$4.05	$4.05
	15(b)	$11.10	$11.95	
	15(c)	$22.05	$23.68	$23.70
	15(d)	$27.75	$29.81	$29.80
Clause 22. – Wages	3(a)	$12.05	$12.93	$12.95
	3(b)	$21.45	$23.06	$23.05
	3(c)	$26.80	$28.77	$28.75
	3(d)	$32.55	$34.95	$34.95
	3(e)	$41.95	$45.13	$45.10

EXPENSE RELATED ALLOWANCES

Clause		A	B	C
Clause 13. – Overtime	4(a)	$7.75 $5.30	$8.23 $5.63	$8.25 $5.65

2007 WAIRC 00199

CORRIGENDUM

Whereas a printing error occurred in the publication of *paragraph (6) of Clause 22. – District Allowance* of Order No. Appl 1295 of 2004 at 85 WAIG 872 at pages 885-886 with respect to the **Miscellaneous Government Conditions and Allowances Award No. A 4 of 1992**, *Clause 22. – District Allowance* of the order is republished hereunder.

Dated at Perth this 6th day of March 2007.

(Sgd.) J.A. SPURLING,
Registrar.

MISCELLANEOUS GOVERNMENT CONDITIONS AND ALLOWANCES AWARD NO A 4 OF 1992

22. – DISTRICT ALLOWANCE

(1) For the purposes of this clause the following terms shall have the following meaning:

(a) "Dependant" in relation to an employee means:

(i) a spouse; or

(ii) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support;

who does not receive a district or location allowance of any kind.

(b) "Partial Dependant" in relation to an employee means:

(i) a spouse; or

(ii) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support;

who receives a district or location allowance of any kind less than that applicable to an employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant.

(c) "Spouse" means an employee's spouse including de facto partner.

(2) For the purposes of this clause, the boundaries of the various districts shall be as described below and as delineated in subclause (6) of this clause.

District:

1. The area within a line commencing on coast; thence east along latitude 28 to a point north of Tallering Peak; thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of latitude 32 and longitude 119; thence south along longitude 119 to coast.

2. That area within a line commencing on the south coast at longitude 119; thence east along the coast to longitude 123; thence north along longitude 123 to a point on latitude 30; thence west along latitude 30 to the boundary of No. 1 District.

3. The area within a line commencing on coast at latitude 26; thence along latitude 26 to longitude 123; thence south along longitude 123 to the boundary of No. 2 District.

4. The area within a line commencing on the coast at latitude 24; thence east to the South Australian border; thence south to the coast; thence along the coast to longitude 123; thence north to the intersection of latitude 26; thence west along latitude 26 to the coast.

5. That area of the State situated between the latitude 24 and a line running east from Carnot Bay to the Northern Territory border.

6. That area of the State north of a line running east from Carnot Bay to the Northern Territory border.

(3) An employee shall be paid a district allowance at the standard rate prescribed in Column II of subclause (6) of this clause for the district in which the employee's headquarters is located. Provided that where the employee's headquarters is situated in a town or place specified in Column III of subclause (6) of this clause, the employee shall be paid a district allowance at the rate appropriate to that town or place as prescribed in Column IV of subclause (6) of this clause.

(4) An employee who has a dependant shall be paid double the district allowance prescribed by subclause (3) of this clause for the district, town or place in which the employee's headquarters is located.

(5) Where an employee has a partial dependant the total district allowance payable to the employee shall be the district allowance prescribed by subclause (3) of this clause, plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if they were employed in a full time capacity under the award, agreement or other provision regulating the employment of the partial dependant.

(6) The weekly rate of district allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I	COLUMN II	COLUMN III	COLUMN IV
DISTRICT	STANDARD RATE	EXCEPTIONS TO STANDARD RATE	RATE
	$ per week	Town or place	$ per week
6	66.23	Nil	Nil
5	54.14	Fitzroy Crossing	72.84
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	67.80
		Marble Bar	
		Wittenoom	
		Karratha	63.84
		Port Hedland	59.24
4	27.26	Warburton Mission	73.49
		Carnarvon	25.63
3	17.23	Meekatharra	27.26
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	12.19	Kalgoorlie	4.06
		Boulder	
		Ravensthorpe	16.26
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(Note: In accordance with subclause (4) of this clause, employees with dependants shall be entitled to double the rate of district allowance shown.)

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after December 21 2004.

(7) When an employee is on approved annual recreation leave, the employee shall, for the period of such leave, be paid the district allowance to which the employee would ordinarily be entitled.

(8) When an employee is on long service leave or other approved leave with pay (other than annual recreation leave), the employee shall only be paid district allowance for the period of such leave if the employee, dependants or partial dependants remain in the district in which the employee's headquarters is situated.

(9) When an employee leaves their district on duty, payment of any district allowance to which the employee would ordinarily be entitled shall cease after the expiration of two weeks unless the employee's dependant/s or partial dependant/s remain in the district or as otherwise approved by the employer.

(10) Except as provided in subclause (9) of this clause, a district allowance shall be paid to any employee ordinarily entitled thereto in addition to reimbursement of any travelling transfer or relieving expenses or camping allowance.

(11) Where an employee, whose headquarters is located in a district in respect of which no allowance is prescribed in subclause (6) of this clause, is required to travel or temporarily reside for any period in excess of one month in any district or districts in respect of which such allowance is so payable, the employee shall be paid for the whole of such period a district allowance at the appropriate rate pursuant to subclauses (3), (4) or (5) of this clause, for the district in which the employee spends the greater period of time.

(12) When an employee is provided with free board and lodging by the employer or a public authority the allowance shall be reduced to two-thirds of the allowance the employee would ordinarily be entitled to under this clause.

(13) An employee who is employed on a part-time basis shall be entitled to district allowance on a pro-rata basis. The allowance shall be determined by calculating the hours worked by the employee as a proportion of the full-time hours prescribed by the award under which the employee is employed. That proportion of the appropriate district allowance shall be payable to the employee.

(14) The rates expressed in subclause (6) of this clause shall be adjusted every twelve (12) months ending on December 31 in accordance with the official "Consumer Price Index" for Perth as published by the Australian Bureau of Statistics (Cat. No. 6401.0).

The adjustment of rates shall be effective from the beginning of the first pay period to commence on or after the first day of January each year.

2007 WAIRC 00207

CORRIGENDUM

Whereas an error occurred in the Publication of the "Variation Schedule" at 86 WAIG 2431-32 following the General Order which issued on 4 July 2006 in application 957 of 2005, the "Variation Schedule" with respect to the "Training Assistants' and Community Support Staff (Cerebral Palsy Association) Award 1987 No. A 16 of 1986" is hereby republished.

Dated at Perth this 7th day of March 2007.

(Sgd.) J.A. SPURLING,
Registrar.

Training Assistants' and Community Support Staff (Cerebral Palsy Association)

Award 1987 No. A 16 of 1986

1B. - MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(2) The minimum adult award wage for full time adult employees is $504.40 per week payable on and from 7 July 2006.

(3) The minimum adult award wage is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(4) Unless otherwise provided in this clause adults employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

(6)

(a) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the minimum adult award wage.

(7) Subject to this clause the minimum adult award wage shall:

(a) apply to all work in ordinary hours.

(b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2006 General Order Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

(9) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $421.70 per week.

(b) The rate paid in paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.

(c) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

(d) Nothing in this clause shall operate to reduce the rate of pay fixed by this award for an adult apprentice in force immediately prior to 5 June 2003.

14. - WAGES

(1) (a) TRAINING ASSISTANTS AND SUPPORT STAFF:

	Base Rate Per Week $	- Arbitrated Safety Net Adjustments Per Week $	Total Rate Per Week $
1st year of employment	395.90	179.00	574.90
2nd year of employment	407.30	179.00	586.30
3rd year of employment	422.20	181.00	603.20
4th year of employment	434.50	181.00	615.50

(b) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(2) Senior Community Support Staff:

Employees who are required to co-ordinate the activities of Community Support Staff shall be designated as Senior Community Support Staff and they shall be paid an in-charge allowance of $797.50 per annum in addition to the rates of pay specified in subclause (1) of this clause.

(3) Junior Training Assistants and Community Support Staff:

A Junior Training Assistant or Community Support Assistant shall be paid the following percentage of the rate prescribed for a Training Assistant in their first year of employment.

	%
At or under 17 years of age	70
At 18 years of age	80
At 19 years of age	90
At 20 years of age	Adult Rates

(4) An employee who has had previous experience relevant to employment covered by this award may have that experience taken into account in determining the year of employment at which an employee is appointed and paid.

(5) A casual employee shall be paid 20% in addition to the rates prescribed in this clause.

(6) Where the term "year of employment" is used in this clause, it shall mean all service whether full-time or part-time and regardless of the class of work with that employer. Such service shall be calculated in periods of calendar years from the date of commencement of work with the employer and by automatic progression subject to satisfactory service. Provided

that in determining the rate of wage of an employee 19 years of age and over, service prior to attaining the age of 19 years shall not be counted in determining the total service of an employee for the purpose of this clause.

(7) The hourly rate for an employee working an average of 38 hours per week shall be calculated by dividing the weekly rate herein expressed by 40.

(8) The hourly rate for an employee actually working 38 hours shall be calculated by dividing the weekly rate herein expressed by 38.

NOTICES—Appointments—

2007 WAIRC 00179

Industrial Relations Act 1979

I, the undersigned, the HONOURABLE WAYNE STEWART MARTIN, Chief Justice of Western Australia, in exercise of the powers conferred on me by section 85(3) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE RENE LUCIEN LE MIERE, a Judge of the Supreme Court of Western Australia, to be an Ordinary Member of the Western Australian Industrial Appeal Court from 27 February 2007.

As witness my hand this 23rd day of February 2007.

Wayne Martin

CHIEF JUSTICE OF WESTERN AUSTRALIA

PUBLIC SERVICE APPEAL BOARD—

2007 WAIRC 00203

AGAINST THE DECISION TO TERMINATE CONTRACT OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEANNE MARIE MANSFIELD
	APPELLANT
	-v-
	CHIEF EXECUTIVE OFFICER, WESTERN AUSTRALIAN SPORTS CENTRE TRUST
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR C FLOATE - BOARD MEMBER
	MR S LAWRENCE - BOARD MEMBER
DATE	WEDNESDAY, 7 MARCH 2007
FILE NO	PSAB 7 OF 2006
CITATION NO.	2007 WAIRC 00203

Result Appeal to the Public Service Appeal Board Dismissed

Order

WHEREAS this is an appeal pursuant to section 80I of the Industrial Relations Act 1979; and

WHEREAS on Wednesday, the 20th day of December 2006, the Public Service Appeal Board convened a conference for the purpose of scheduling; and

WHEREAS the appeal was listed for hearing on Wednesday and Thursday, the 7th and 8th days of March 2007; and

WHEREAS on Tuesday, the 6th day of March 2007, the Appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2007 WAIRC 00172

AGAINST THE DECISION TO DISMISS MADE ON 13/7/2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ARTHUR LEWIS NINYETTE
	APPELLANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR B HEWSON - BOARD MEMBER
	MR T RYNN - BOARD MEMBER
DATE	TUESDAY, 27 FEBRUARY 2007
FILE NO	PSAB 6 OF 2006
CITATION NO.	2007 WAIRC 00172

Result Appeal accepted out of time

Order

WHEREAS this is an appeal pursuant to the Industrial Relations Act 1979 filed beyond the 21 days allowed by the Act; and

WHEREAS at a conference convened on Tuesday, the 27th day of February 2007 the Respondent did not object to the appeal being accepted out of time; and

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act 1979 hereby orders:

THAT the appeal be accepted out of time

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2007 WAIRC 00196

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFF MCKENZIE
	APPELLANT
	-v-
	PUBLIC TRUST OFFICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 6 MARCH 2007
FILE NO	PSA 22 OF 2005
CITATION NO.	2007 WAIRC 00196
Result	Recommendation Issued

Recommendation

WHEREAS this is a reclassification appeal made pursuant to the Industrial Relations Act 1979; and

WHEREAS on Wednesday, the 26th day of July 2006 and Friday, the 2nd day of March 2007, the Public Service Arbitrator convened conferences for the purpose of conciliation between the parties; and

WHEREAS at the latter conference the Public Service Arbitrator issued a recommendation that the reclassification be recognised retrospectively,

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby recommends:

THAT the Wills Officer Level 2 position, the subject of the appeal, be reclassified effective from the 26th day of July 2005.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 50/2004	Anthony James Shaw	Minister for Health in right of the Metropolitan Health Service	Scott C	Reclassification Appeal Dismissed	14/03/2007
PSA 51/2004	Glen Sanders	Minister for Health in right of the Metropolitan Health Service, North Metropolitan Health Service, Royal Perth Hospital	Scott C	Reclassification Appeal Dismissed	14/03/2007

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 52/2004	Michael Richard Beech	Minister for Health in right of the Metropolitan Health Service, North Metropolitan Health Service, Royal Perth Hospital	Scott C	Reclassification Appeal Dismissed	14/03/2007
PSA 53/2004	Michael Jeffrey Hill	Minister for Health in right of the Metropolitan Health Service, North Metropolitan Health SErvice, Royal Perth Hospital	Scott C	Reclassification Appeal Dismissed	14/03/2007
PSA 54/2004	Montgomery John Brydon	Minister for Health in right of the Metropolitan Health Service, North Metropolitan Health Service, Royal Perth Hospital	Scott C	Reclassification Appeal Dismissed	14/03/2007
PSA 111/2004	Bradley Guelf	Minister for Health in right of the Metropolitan Health Service, North Metropolitan Health Service, Royal Perth Hospital	Scott C	Reclassification Appeal Dismissed	14/03/2007
PSA 112/2004	Peter Tuan Ngoc Tran	Minister for Health in right of the Metropolitan Health Service, North Metropolitan Health Service, Royal Perth Hospital	Scott C	Reclassification Appeal Dismissed	14/03/2007